DRN-5181933

The complaint

Mrs M complains that Pathlines Pensions UK Limited allowed her to transfer out of her defined-benefit ('DB') occupational pension scheme into a Self-Invested Personal Pension ('SIPP') and to invest in Store First Limited ('Store First').

Pathlines Pensions UK Limited was formerly known as London & Colonial Services Limited ('L&C'), so for ease of reference, I'll simply be referring to L&C throughout.

Mrs M complains about the due diligence L&C undertook and says that L&C didn't point out issues that were likely to cause her detriment and paid little attention to her best interests. But for L&C's actions, Mrs M says she would still enjoy the security of her previous pension arrangements.

What happened

I've outlined the key parties involved in Mrs M's complaint below.

<u>Involved parties</u>

Pathlines Pensions UK Limited (L&C)

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

The Pensions Office Limited ('TPO')

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

Store First

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

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

In May 2014, the Self Storage Association of the UK ('SSA UK') issued a press release (amended in January 2015), detailing the outcome of a review it had commissioned

Deloitte LLP to undertake of the marketing material made available to potential investors by Store First.

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

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

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

"SSA UK's investigations indicate that these storage units are being rented to the general public at approximately £18 - £21 per square foot including insurance. Normally the rent paid by a self-storage operator would be at most half of the income per square foot earned through storage fees. Presuming the Store First sites were at industry average occupancy levels, SSA UK believe that they would have to be earning £23.95 per square foot just to pay the guaranteed rent to investors, excluding operating costs such as insurance, staff, business rates, utilities, marketing and management fees for Store First. Furthermore, this does not factor in the losses incurred by each site as it takes some years to reach a mature occupancy level. During this time, Store First is obliged to pay the guaranteed returns to investors, yet there does not appear to be sufficient income from the operations of the business to fund these returns.

In addition, the analysis SSA UK has seen indicates that the purchase price being paid per square foot by investors to Store First for these self-storage units taken together equates to a much higher value than they would be worth if the whole sites were sold as stand-alone self-storage stores…

…a very serious question arises over how Store First is funding the guaranteed returns to existing investors, considering the absence of bank funding and the likely level of losses that require funding in each new store. It may yet prove to be the case that the rental returns being paid to investors are in fact being funded from the sale proceeds of new units, and not the operation of the self-storage business."

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

Following this the freehold, associated assets and goodwill of 15 storage centres were sold by the Official Receiver to a company called Store First Freeholds Limited. As I understand it, the self-storage units continued to be rented to end users and a company called Pay Store now manages the storage sites trading as Store First. The Official Receiver and Store First Freeholds Limited agreed that the latter would accept any requests from investors to surrender their pods. Store First Freeholds Limited would cover its own costs of the surrender, but investors wouldn't receive any payment.

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

Jackson Francis Ltd ('Jackson Francis')

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

"Jackson Francis's free, unique and no-obligation Pension Transfer Service means you can quickly understand what switching your pension means for you – and whether or not it's worth it.

One of our dedicated account managers will discuss the relevant information with you, and will collate details of charges from your existing provider, helping you to track old policies and understand the process.

We will then introduce you to either traditional schemes or alternative investments that might match or surpass your existing provider. Where you invest is your choice, we are unbiased and simply give you the facts."

It was also explained that:

"As you'd expect, deciding whether it's a good idea to switch your pension begins with looking at your existing arrangements. More often than not it does not take a great deal of detective work to realise just how badly most pensions are performing but if in doubt its always best to take advice.

If you would like to speak to a financial advisor we will arrange one to call you with no obligation. Assessing the market for your options can be difficult but our unbiased 'just the facts' approach will help you to identify the right choice for your future. There are no up-front costs and of course, you will be under no obligation to transfer with us."

In 2015 the British Broadcasting Corporation reported that:

"The Liverpool sales company Jackson Francis Ltd was paid through an intermediary by Store First to cold call people with "dormant pensions" - savings they had accrued under previous employers.

From 2011, more than 1,000 people were persuaded by Jackson Francis staff to move these pensions into the Store First scheme…

Over two years, Store First owner [Mr N] *paid £33m commission to Transeuro Worldwide Holdings Ltd, which funded Jackson Francis."*

What happened here?

Mrs M says that she received a cold-call from a party (which she believes was L&C) and was told that if she remained in her existing pension arrangement it would stay at the same value. She says she was told she could instead transfer out of that arrangement and the value would increase. Mrs M doesn't recall dealing with Jackson Francis or TPO.

Based on what I know about similar cases, the evidence I've seen in this case and the background information I've set out above, I think Mrs M was most likely cold-called by Jackson Francis. And then Jackson Francis most likely arranged for Mrs M to receive advice from TPO.

We've been provided with a report that TPO prepared for Mrs M dated 8 August 2012 (which I'll refer to as a suitability report). Amongst other things, the report said that:

- The pension plan it was reviewing was a 'salary-related' pension scheme (a DB scheme) which had a transfer value of just over £30,000 and was guaranteed until 17 October 2012.
- Mrs M's acceptance of risk was *"medium to high"* and Mrs M's pension benefits did not represent a major proportion of her financial wealth.
- TPO did not recommend that she transfer the value of her pension benefits from the DB scheme because the rate of growth required to match her projected benefits at age 65 was highly unlikely to be achieved.
- TPO had been advised by Jackson Francis that Mrs M wished to effect the transfer in order to make a specific alternative investment that wasn't permitted within her current pension arrangements.
- Alternative investments represented a higher risk than appeared appropriate for Mrs M's risk profile.
- If Mrs M still wished to go ahead, TPO would be happy to assist.
- TPO recommended L&C as a SIPP provider if a transfer was effected and suggested a transfer be directed in the first instance to a cash deposit account.
- TPO didn't mention the Store First investment and it said that Mrs M must take professional advice before proceeding with any further investments.

I've seen a Storepod reservation form which was completed for Mrs M. This mentioned "*Storefirst.com self storage",* recorded Mrs M's details and said that the agent was Jackson Francis. The location of the Storepods was noted and two plot numbers were shown, the total value of the units was £30,000. Mrs M signed the form on 17 August 2012, the form was also signed by Jackson Francis on the same date.

On 28 August 2012, TPO sent Mrs M's SIPP application form to L&C, including the 'Transfer Request Form' confirming Mrs M wished to transfer out of her DB scheme to the L&C SIPP. The Independent Financial Adviser ('IFA') details are on page three of the application form. The name of the IFA firm was recorded as TPO and Mr P is the named TPO contact. In the section immediately below these details there are two boxes, one of which reads, *"Advice given at point of sale to client"* and the other reads, "*Advice not given at point of sale to client"*. In the copy of the SIPP application form that's been provided to us, neither of these boxes has been ticked. Elsewhere in the form a box has been ticked to confirm that Mrs M wished to manage the fund herself. Mrs M signed the SIPP application form and the transfer request form on 17 August 2012.

We've been provided with an L&C Investment Purchase Request form that Mrs M signed on 6 September 2012. It was noted, amongst other things, in this form that:

- The Investment Company name was Jackson Francis.
- The investment Name provided was Store First.
- The Investment Amount was £30,000.
- A box had been ticked to confirm that Mrs M wasn't a certified (or self-certified) Sophisticated Investor.
- A box had been ticked to confirm that, *"I have received no advice on the merits of my proposed investment and the investment decision is solely my responsibility"*.
- The section to be completed by a financial adviser if advice had been given on the investment was left blank.
- Mrs M signed the typed member declaration section towards the end of the form to confirm, amongst other things, that L&C hadn't provided advice on the investment, that the consumer had carried out their own due diligence into the investment and that the investment **may** be high risk and that there **may** not be an established market for selling the proposed holding. It was also stated that the responsibility for assessing the risks and merits of the investment rested with the consumer and any investment adviser they'd appointed, unregulated investments may not be protected by the FSCS and that the consumer indemnified L&C against any liabilities arising from the investment (bold my emphasis).

We've also been provided with an L&C Open Pension Self Storage Commercial Property investment form that Mrs M signed on 6 September 2012. A declaration at the end of the form confirmed, amongst other things that the investment may proceed and that Mrs M had instructed surveyors, valuers and solicitors accordingly.

L&C wrote to Mrs M confirming her SIPP had been established on 18 September 2012 and enclosed a transaction statement which showed the transfer value of Mrs M's DB scheme had been received into the SIPP on 30 August 2012.

On 9 October 2012 L&C wrote to Mrs M confirming receipt of the Storepod reservation form, and setting out the fees that would be payable to The Hetherington Partnership, which were the solicitors appointed to deal with the investment purchase. It also explained that valuation reports had been obtained for the sites to confirm the open market value of the units and it provided samples of these. It also provided a declaration Mrs M was required to sign for The Hetherington Partnership, authorising it to exchange contracts for the Storepod investment without undertaking searches and confirming she understood the risks of doing so. L&C asked Mrs M to confirm she'd reviewed these reports and that she was happy to proceed.

Mrs M wrote to L&C to confirm she wished to proceed on 19 October 2012.

On 22 October 2012 Mrs M signed the declaration for The Hetherington Partnership.

L&C wrote to Mrs M in November 2012 with an amended version of her reservation form. This showed the location of the units had changed and gave two new plot numbers; the total value of the units had also been reduced to £26,250. L&C required Mrs M to confirm she wished to proceed. Mrs M confirmed she was happy to proceed on 11 December 2012.

The investment completed in April 2013. Mrs M's SIPP transaction statement shows that around £26,900 was sent to The Hetherington Partnership on 4 April 2013.

L&C wrote to Mrs M on 4 November 2013 and it confirmed that TPO was no longer authorised to act as the financial adviser on her SIPP and that TPO had been removed from her SIPP.

Mrs M received regular income of around £500 per quarter from her investment until January 2015, when the income received reduced and became more sporadic.

The Store First investment ultimately failed.

Mrs M made a complaint to the FSCS about the advice she received from TPO. The FSCS investigated that complaint and paid Mrs M £50,000 in total, this was by way of an initial interim payment in October 2016 followed by a later payment in February 2018. In its decision letter of 7 February 2018, the FSCS explained that its compensation limits didn't permit it to pay more than this but it had calculated Mrs M's total loss to be £54,583.71.

The FSCS subsequently gave Mrs M a reassignment of rights in which, amongst other things, the FSCS explained it was transferring back to Mrs M any legal rights it held against L&C.

Mrs M's representatives complained to L&C on 12 December 2018 and, amongst other things, said that:

- On 8 August 2012 a report was prepared by TPO, advising Mrs M not to transfer her DB pension to a SIPP. However it included the relevant forms to enable her to transfer, in effect inviting her to become an insistent client.
- Mrs M says that, at the time of the transfer, her knowledge and understanding of investments and pensions was *"very low"* and her attitude to risk was *"low-medium",* but TPO recorded it as *"medium to high".*
- The high-risk nature of the unregulated illiquid investments that the transfer was being made to effect wasn't properly explained to Mrs M.
- L&C should have recognised that the investment purchased within the SIPP was an unregulated collective investment scheme ('UCIS') or similar to a UCIS. And L&C should have ensured Mrs M had received adequate warnings.
- It appears that L&C didn't request and obtain a copy of TPO's suitability report, or confirm that a report was presented and explained to Mrs M.
- Had L&C requested a copy of the suitability report, it would've known the FCA alert of January 2013 had been breached. The alert confirmed the FCA's view that financial advisers must assess the advantages and disadvantages of the proposed (SIPP) investments when considering a pension transfer or pension switch, which hadn't happened here.
- It was L&C's duty to point out issues that were likely to cause detriment to Mrs M.
- It was L&C's duty to ensure Mrs M received adequate warnings about the proposed investment.
- L&C hadn't complied with Principle 6 of the Principles for Businesses and didn't pay any regard to Mrs M's interests.
- Annual SIPP fees will continue while there are assets remaining in Mrs M's L&C SIPP. With illiquid investments this means that Mrs M could be forced to pay SIPP fees for many years to come.
- With regards to due diligence, L&C played a significant role in Mrs M's losses. L&C was overenthusiastic in its drive for high volume business at all costs and paid little or no attention to Mrs M's best interests.
- There appears to have been a lack of independent valuation of the assets Mrs M purchased.
- L&C was complicit in allowing the transfer into the SIPP. But for L&C's involvement Mrs M would still enjoy the security of her previous pension arrangements.

Solicitors on behalf of L&C responded to Mrs M's representative in a letter dated 16 January 2019, which contained an offer to resolve Mrs M's complaint. The letter said that L&C offered to pay Mrs M her remaining loss of £4,583.71.

Mrs M's representative declined this offer and referred the complaint to the Financial Ombudsman Service.

Additional background information

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

We have already considered complaints about L&C involving Jackson Francis, TPO and Store First. In those cases, and in response to requests for information about this complaint, L&C has said to us, amongst other things, that:

- L&C's role is to act as sole trustee and administrator of the SIPP.
- Under the rules of the trust, it's the member who has the power to choose investments, following investment advice from their financial adviser. The trustee has only limited powers of veto of any chosen investment.
- L&C's responsibilities in connection with SIPP investments are to satisfy itself that investments are allowed within the trust rules and that they don't breach HMRC regulations.
- L&C establishes what liabilities and responsibilities it would be required to take on as the owner of the asset.
- L&C also maintains records of the pension arrangement including all transactions.
- TPO was an FCA regulated financial advisory firm with specific specialist pension transfer advice permissions.
- L&C entered into an introducer agreement with TPO on 2 August 2012 and the first client was introduced to L&C on 13 August 2012.
- L&C's understanding was that clients would approach TPO for advice about whether a transfer from a DB Scheme was suitable.
- There were no set expectations of the number of introductions L&C would receive from TPO each month.
- L&C received 42 introductions from TPO and about 60% of these involved transfers in from DB Schemes.
- From a sample of 24 introductions, over 80% of consumers introduced by TPO invested in Store First.
- TPO's introductions constituted 2.6% of L&C's new business between the dates of the first and last introduction received from TPO.
- Mrs M was the 10th client introduced to L&C by TPO.
- Following a system migration, and despite a substantial interrogation of its electronic records, L&C has been unable to retrieve evidence of checks it undertook on TPO. But L&C can confirm it would have checked the FCA register.
- L&C is also unable to provide any records of any discussions it had with TPO about the client process or the business that TPO was referring.
- L&C says that a terms of business was in place when L&C accepted TPO as an introducer on 6 August 2012, but we've not been provided with a copy of this.
- As an execution-only SIPP Provider, L&C doesn't have permissions to advise or comment on the suitability of a transaction.
- L&C didn't request copies of suitability reports TPO provided to clients.

- Mrs M appointed TPO to provide holistic advice, which included advice on the establishment of the SIPP, the pension transfer and the investment.
- L&C understood that TPO would advise on the underlying investments.
- L&C carried out due diligence checks into the Store First investment – this included a report from a firm named Enhanced Support Solutions Limited, which I discuss in more detail later in this decision.
- L&C said MK SIPP Trustees UK Limited carried out its own due diligence review of the commercial property investment to ensure it was able to be held within a UK registered pension scheme and did not rely on third-party reports.
- The investment was a direct investment in UK commercial property where the SIPP owned full title and it was registered at the Land Registry.
- L&C was satisfied that the properties could be fairly valued by appointing a RICS qualified surveyor. However, L&C could not arrange this without the express permission of the member purchasing the property as the cost of such a valuation would be at the cost of the member's pension scheme. L&C did not have permission to order such a valuation as it is an execution only provider who does not have permission to provide advice or act in such a discretionary manner.

An Investigator reviewed Mrs M's complaint and concluded it should be upheld. The Investigator said that the introductions from TPO carried a high risk of consumer detriment, particularly given the involvement of Jackson Francis, an unregulated party, which was likely undertaking regulated activities. The Investigator thought L&C would've been aware of this had it carried out appropriate checks before accepting the introduction of Mrs M's business.

The Investigator also said in light of the Store First marketing literature, L&C should have been concerned that consumers were being misled about the returns and risks associated with the Store First investment, which increased the risk of consumer detriment. Further, that L&C didn't act in a fair and reasonable manner in accepting the Store First investment within Mrs M's SIPP. The Investigator thought that had L&C acted fairly and reasonably, it shouldn't have accepted Mrs M's application to open a SIPP with it in the first place. As such, the Investigator recommended Mrs M should be put back in to the position she would've been in if she hadn't transferred out of her DB scheme and that L&C should pay her £500 for the distress and inconvenience caused by its failings.

L&C's representative initially responded by reiterating its offer to settle Mrs M's complaint by paying the remaining loss identified by the FSCS in 2018. Mrs M did not accept this.

Representatives for L&C later rejected the Investigator's view, stating that TPO's suitability report showed Mrs M was advised not to transfer out of her DB scheme and that it advised her to seek further financial advice if she wished to make an alternative investment, which carried a higher risk than would appear appropriate for her. So, L&C said this demonstrated Mrs M wanted to go ahead with the transfer of her pension and the investment despite the advice not to and the warning about the risks associated with the investment. As such, contrary to the Investigator's findings, L&C believed Mrs M would've transferred her pension and invested in Store First regardless.

The representative cited the case of 'Gestmin v Credit Suisse':

"The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events.

In light of these considerations, the best approach for a judge to adopt…is to place little if any reliance at all on witnesses' recollections of what was said in meetings and *conversations and to base factual findings on inferences drawn from documentary evidence."*

It said the case clearly demonstrates that the documentary evidence should take precedence over the member's recollections when considering her awareness of the risk warnings provided at the time of the advice.

L&C's representative added that there was no logical basis for the Investigator to conclude that Mrs M would not have gone ahead with her application had L&C refused this. It said our Service was aware that a large number of SIPP providers were accepting Store First investments in 2012 and (regardless of whether or not we believe it was right for them to do so) its highly likely that another provider would have accepted the investment.

L&C has also made the following representations in response to opinions issued by Investigators and provisional decisions issued by Ombudsmen on cases involving similar circumstances to Mrs M's complaint. So, for completeness, I've included a summary of these points here as follows.

- The consumer wanted L&C to act on instructions from their adviser.
- The consumer agreed to be responsible for any claims, losses, costs, charges or expenses resulting from L&C acting on their adviser's instructions.
- The consumer understood that L&C wasn't authorised to give advice. And they had confirmed they'd obtained the necessary reports, legal and other advice required about the investment.
- The facts in this complaint are broadly similar to those in the *Adams v Options* case, but the Investigator's view doesn't explain why we've reached a different conclusion to that arrived at in *Adams.*
- The Investigator's view imposes a duty on L&C to decide whether to accept or reject business brought to it by a customer requesting an execution-only service.
- The Investigator's view extends the scope of the duty owed by L&C beyond what was envisaged by the parties.
- A breach of the Principles cannot, of itself, give rise to any cause of action at law.
- The ambit and application of the Principles, and such duties as may be imposed on L&C by these, fall to be construed in light of the COBS rules applicable to L&C, L&C's regulatory permissions, L&C's contractual arrangements and the statutory objective that consumers should take responsibility for their decisions.
- It was said in *Adams* that reports, guidance and correspondence issued after the events at issue couldn't be applied to Options' conduct at the time. So, publications issued after the transactions in this case shouldn't have a bearing on the complaint.
- Even if the 2009 Thematic Review Report had been statutory guidance made under FSMA S.139A (which it wasn't), the breach of such statutory guidance wouldn't give rise to a claim for damages under FSMA S.138D.
- The FCA's Enforcement Guide says that *"Guidance is not binding on those to whom the FCA's rules apply. Nor are the variety of materials (such as case studies showing good or bad practice, FCA speeches and generic letters written by the FCA to Chief Executives in particular sectors) published to support the rules and guidance in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules."*
- Regulatory publications can't alter the meaning, or the scope, of the obligations imposed by the Principles.
- *Adams* held that duties imposed by COBS can't all apply to all firms in all circumstances.
- Neither the obligations under COBS 14.2.3R and COBS 14.3 to provide clients with product information, nor the obligation under COBS 19.1.2R to provide clients with

pension product information, apply to execution-only SIPP providers.

- The consumer was aware that L&C would act on an execution-only basis and wouldn't accept responsibility for the quality of the investment business.
- If L&C really had the obligations of due diligence set out in the Investigator's view and had acted in accordance with them then it would have been required to advise on investments, which was contrary to its regulatory permissions.
- The relationships in this case are similar to those in *Adams*, the distinguishing factor is that TPO wasn't an unauthorised introducer.
- There was no reason for L&C to have concerns about accepting business from TPO.
- TPO was an FCA regulated entity and L&C was able to take comfort from that.
- With an execution-only service, it would be unfair if the SIPP provider couldn't rely on representations made by the consumer when signing the contractual documentation.
- Amongst other things, the judge in *Adams* held that in order to identify the extent of the regulatory duties imposed on Carey, "*one has to identify the relevant factual context"* and that *"the key fact ... in the context is the agreement into which the parties entered, which defined their roles in the transaction"*.
- The judge also said that *"there is a very plain inconsistency between the contract which was entered into between it and the claimant and the duties [under COBS 2.1.1R] which the claimant now suggests that the defendant owed to him."*
- And that *"there was… [no] duty on [Carey]… to consider the suitability or appropriateness of a SIPP or the underlying investment. The contract between [the parties] makes that clear."*
- Further, that *"a duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed...as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed."*
- In *Adams* the FCA agreed that the function of a firm, as determined by contract, would govern what it had to do to comply with its duties under the FCA Handbook.
- Insufficient weight has been given to contractual arrangements and the demarcation of roles and responsibilities. The documents setting out the contractual relationship between the parties make it clear that L&C was acting on an execution-only basis.
- The Investigator's view runs contrary to *Adams* by suggesting that, notwithstanding the clear contractual terms, L&C owed due diligence obligations under the Principles.
- The Financial Ombudsman Service is attempting to use the Principles to circumvent the *Adams* decision.
- The Financial Ombudsman Service must take into account the relevant case law and, if this is deviated from, must set out why – *R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017] EWHC 352 (Admin) and Jay J's comments at paragraph 73 of that judgment were referenced.
- Had proper regard been given to the contractual arrangements between the parties then the Investigator's view should have found that L&C's duties to the consumer extended no further than those owed to the claimant in *Adams.*
- It's not fair or reasonable to determine the complaint by reference to the FCA publications and to do so only exacerbates the problem referred to by Jay J in *Aviva*.
- At the time of the transaction complained of there was no obligation on a customer to take advice on the transfer of a pension.
- It's not fair or reasonable to use the Principles to impose a duty that goes beyond that accepted and agreed by the parties.
- The Principles can't give rise to a cause of action if breached, and consideration of the Principles must be via the appropriate COBS rules applying to the transaction.
- The Investigator's view fails to have regard to the general principle that consumers should take responsibility for their decisions, the fundamental principle of freedom of

contract and to the authority of *Adams* and *Kerrigan v Elevate Credit International Ltd* [2020] C.T.L.C. 161.

- The Investigator's view enables the consumer to recover against L&C for losses flowing from non-contractual obligations which were inconsistent with, and contrary to, the express obligations in the parties' contractual arrangements.
- In *Adams* the Store First investment being high risk didn't make it manifestly unsuitable.
- The level of due diligence imposed by the Financial Ombudsman Service goes far beyond what was agreed between the parties.
- No fair or reasonable reading of the Principles could require L&C to conduct due diligence of the nature suggested by the Financial Ombudsman Service – it is creating new due diligence obligations in a way that is contrary to the FCA's publications at the time.
- The suitability of a high risk investment depends on the particular financial circumstances of the particular customer and their attitude to risk.
- The Store First investments are illiquid, this was understood by the consumer when they made the investments, but many units have continued to provide a return. These investments are exactly as advertised.
- No further due diligence would have unearthed any information about these investments that the consumer was unaware of.
- The investment only provided for a guaranteed income for the first two years on the basis there was a two-year break clause in the lease.
- Any responsibility to complete wider due diligence on the investments fell to TPO.
- There is nothing to indicate that the consumer wouldn't still have gone ahead had L&C refused the business.
- There is a real unfairness if an execution-only SIPP provider is liable for the poor investment choices of consumers.
- An execution-only SIPP provider's fees and charges are based on the provision of execution-only services. And its business is structured on the basis that:
    - it isn't investigating the suitability of the underlying investments (other than to ascertain that they are capable of being held within a UK registered pension scheme such as a SIPP).
    - it isn't warning or advising clients as to whether a SIPP or the underlying investment is suitable or appropriate for the client (as to do so would put it in breach of its own regulatory permissions).
- Where a consumer chooses an execution-only service, it would be unfair if the SIPP provider wasn't able to rely on express representations made by the consumer when signing the contractual documentation, and further to hold L&C responsible in circumstances where the failure is that of TPO.

As no agreement could be reached, the complaint was passed to me to make a decision.

I issued a provisional decision on 14 November 2024, explaining that I thought Mrs M had made her complaint in time and that I was minded to uphold it. I said I didn't think L&C should have accepted the introduction of Mrs M's SIPP business from TPO and it also shouldn't have accepted the Store First investments into her SIPP. I recommended that L&C should compensate Mrs M on the basis of her having remained in her DB scheme and that it should also pay her £500 for the distress and inconvenience caused.

Mrs M accepted my provisional findings. L&C didn't accept my provisional decision and made the following points:

- The conclusions I'd reached about L&C's obligations were entirely inconsistent with the terms of the contract between the parties, the relevant COBS Rules and the restrictions on L&C's permissions.
- No fair or reasonable reading of the Principles could require L&C to conduct due
- diligence of the nature suggested by the Ombudsman.
- I had failed to take account of the law (as I am required to do under DISP 3.6.4) and had departed from legal precedent which affirmed the importance of the contract between the customer and SIPP provider and the scope of an execution-only SIPP provider's due diligence obligations.
- My reliance on various FCA publications was misplaced and if anything supports L&C's position.
- There is a real unfairness if an execution-only SIPP provider is liable for the poor investment choices of consumers and the failures of other regulated entities.

What I've decided – and why

Preliminary point – jurisdiction

L&C did not make any comments in response to my provisional decision about our jurisdiction to consider this complaint. But, for completeness, I've reconsidered whether Mrs M's complaint was made outside our time limits set out in the Dispute Resolution ('DISP') Rules – found in the FCA's handbook – and DISP 2.8.2R in particular.

Mrs M's complaint was made more than six years after the events she complains of. But I haven't seen anything that makes me think Mrs M knew, or ought to have known, that she had cause for complaint and that L&C was or might be responsible for this more than three years before she complained to it. So I'm satisfied this complaint was referred within the time limits and I've gone on to consider the merits of the complaint.

Merits of the Complaint

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

When considering what's fair and reasonable in the circumstances, I need to take account of relevant law and regulations, Regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

Relevant considerations

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

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

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

Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."

I've carefully considered the relevant law and what this says about the application of the FCA's Principles. And I've taken into account L&C's comments in response to my provisional decision about this.

In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) ('BBA') Ouseley J said at paragraph 162:

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

And at paragraph 77 of BBA Ouseley J said:

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

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

Jacobs J, having set out some paragraphs of *BBA* including paragraph 162 set out above, said (at paragraph 104 of *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 considers section 228 of the FSMA and the approach an Ombudsman is to take when deciding a complaint. The judgment of Jacobs J in *BBSAL* upheld the lawfulness of the approach taken by the Ombudsman in that complaint, which I've described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

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

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

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

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

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

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

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

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

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

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

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

However, I think it's important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I'm required to take into account relevant considerations which include: law and regulations; Regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in *Adams v Options SIPP*. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

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

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

<u>The regulatory publications</u>

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

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

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

The 2009 Thematic Review Report

The 2009 Report included the following statement:

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

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

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

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

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

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

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

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

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

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

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

The later publications

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

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

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

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

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

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un-authorised business warnings.*

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

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

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

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

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

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

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

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

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

*"**Due diligence***

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

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

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

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

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

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

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

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

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

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

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

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

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

At its introduction the 2009 Thematic Review Report says:

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

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

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

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

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

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

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

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

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

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

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

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

The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes."

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

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

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

Furthermore, it's important to keep in mind the judge in *Adams* 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 Mrs M's applications to establish a SIPP and to invest in Store First, L&C complied with its regulatory obligations: to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and treat them fairly; and to act honestly, fairly and professionally. In doing that, I'm looking to the Principles and the publications listed above to provide an indication of what L&C should have done to comply with its regulatory obligations and duties.

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

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

Ultimately, what I'll be looking at here is whether L&C took reasonable care, acted with due diligence and treated Mrs M fairly, in accordance with her best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mrs M's complaint is whether it was fair and reasonable for L&C to have accepted Mrs M's SIPP application and Store First application in the first place. So, I need to consider whether L&C carried out appropriate due diligence checks on TPO and the Store First investment before deciding to accept Mrs M's applications.

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

<u>The contract between L&C and Mrs M</u>

My decision is made on the understanding that L&C acted purely as a SIPP operator. I don't say L&C should (or could) have given advice to Mrs M or otherwise have ensured the suitability of the SIPP or Store First investment for her. I accept that L&C made it clear to Mrs M that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in her SIPP investments. And that forms Mrs M signed confirmed, amongst other things, that losses arising as a result of L&C acting on her instructions were her responsibility.

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 Mrs M's case is made with all of this in mind. So, I've proceeded on the understanding that L&C wasn't obliged – and wasn't able – to give advice to Mrs M on the suitability of the SIPP or Store First investment.

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

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

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

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

L&C's due diligence on TPO

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

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

L&C also told us in that case that its directors from the relevant period had confirmed that its policy was that applicants effecting a pension transfer had to have had advice made available to them. And that it was then for the applicant to choose whether to take up the intermediary's offer of advice. L&C hasn't told us in response to my provisional decision that its policy on this point had changed before it received Mrs M's applications, so I've proceeded on this understanding.

L&C has provided us with evidence to show that it checked TPO's entry on the FSA register on 30 August 2012. And I can see that TPO's permissions included advising on Pension Transfers and Pension Opt-Outs.

As I understand it, L&C also entered into an intermediary agreement with TPO and L&C provided a copy of this following a recent request for information on this complaint.

The agreement asks for basic contact details, trading status and then asks the following question:

'Are you authorised by the UK FSA or by a regulator in another jurisdiction?
(Please note that we will only accept insurance business from you if you are authorised)'

The ‘yes’ box was ticked and TPO’s FSA authorisation number was provided in the space given.

A section asking for bank details was then completed and L&C required the Firm’s signatory to sign underneath the following statement:

‘I/We confirm that I/We have read and agree to be bound by the terms of the Intermediary Agreement for Non-Insured Contracts and the Intermediary Agreement for Insured Contracts as appropriate.

I understand you will only accept business in relation to your insured contracts from us if we are regulated by the UK FSA.’

An administrator signed this on behalf of TPO on 2 August 2012.

As part of an agreement process, it was open to L&C to mention to TPO any policy requirements it had for full regulated advice to be made available to applicants where introduced business involved pension transfers. But the agreement referred to above doesn’t make that distinction. L&C hasn’t provided copies of the Intermediary Agreement for Non-Insured Contracts or the Intermediary Agreement for Insured Contracts. But I’m aware that the Intermediary Agreement for Non-Insured Contracts has been provided in another complaint involving a different introducer, and this also doesn’t specify that requirement. And I haven’t seen any other correspondence between L&C and TPO that mentioned this.

As part of our investigation, L&C was asked a series of detailed questions about the due diligence it undertook into the introducer (which was TPO for the SIPP). This included information about, amongst other things, what L&C understood TPO’s business model/client process to involve, how introductions were made, whether TPO was advising on the transfer and/or the underlying investments, whether L&C’s understanding was advice would be given by TPO and whether L&C had asked to see any suitability reports/pension transfer reports provided to clients TPO was introducing, details about the volume of business TPO introduced to L&C, the period this occurred over, the percentage of the introductions that involved occupational pension transfers and the percentage of the introductions where applicants were to invest in non-mainstream investments.

As I understand it, L&C has provided us with as much information as it is able to about its relationship with TPO. That’s because L&C hasn’t been able to find the contemporaneous records due to system migrations over the years. However, from the information which has been provided, I’m satisfied that L&C did take *some* steps towards meeting its regulatory obligations and good industry practice. However, I don’t think those steps we’ve seen evidence of went far enough, or were sufficient, to meet L&C’s regulatory obligations and good industry practice.

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

- The SIPP business introduced by TPO had anomalous features – it appears to have been high risk business, including a number of DB Scheme transfers where monies were ending up invested in unregulated and esoteric investments post-transfer.
- Neither TPO (nor any other regulated party) was offering the consumers being introduced full regulated advice (that is, advice on the pension transfer or switch to the SIPP, the establishment of the SIPP and the intended Store First investment).

- Further, even though TPO had the necessary permissions to give full advice on the business it was introducing, it was restricting its advice and it wasn't offering advice on the suitability of the intended Store First investment.
- An unregulated firm, Jackson Francis, was promoting and potentially arranging the Store First investments.
- L&C should have taken steps to address these risks (or, given these risks, have simply declined to deal further with TPO). Such steps should have involved getting a fuller understanding of TPO's business model – through requesting information from TPO and through independent checks.
- Such understanding would have revealed there *was* a significant risk of consumer detriment associated with introductions of business from TPO.
- In the alternative, TPO would have been unwilling to answer or fully answer the questions about its business model.
- In either event L&C should have concluded it shouldn't accept introductions from TPO.

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

<u>Anomalous features</u>

The type of investments being made by TPO-introduced consumers

We asked L&C about the percentage of introductions it received from TPO where applicants were to invest in non-mainstream investments. In response to this question L&C said that, based on a sample of consumers introduced by TPO it had checked, over 80% of the consumers in the sample had invested into Store First.

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

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

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

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

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

Volume and nature of business introduced

L&C has confirmed that it received 42 introductions from TPO and that Mrs M was number 10 of the consumers introduced to it by TPO.

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

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

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

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

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

The SIPP application form wasn't the only form L&C was receiving from TPO-introduced consumers like Mrs M. As I've mentioned above, I've also seen a copy of the Investment Purchase Request form that Mrs M signed on 6 September 2012. In that form, the Store First investment was named and Mrs M was asked to tick the investment advice box which applied to her. The following three options were given:

1. I have received advice that the investment is suitable and the investment is being made in accordance with that advice; or
2. I have received advice that the investment is not or may not be suitable under my circumstances but nevertheless I wish to proceed with the investment; or
3. I have received no advice on the merits of my proposed investment and the investment decision is solely my responsibility

Mrs M ticked the box next to statement number three and the financial adviser details were left blank. The section for a financial adviser to complete if advice had been given being left blank is consistent with some other Investment Purchase Request forms that we've received on different complaints for other TPO-introduced consumers who also invested L&C SIPP monies in Store First. In none of the forms I've seen was the section to be completed by an adviser, if advice had been given, completed.

So, from the point in time it first started receiving Investment Purchase Request forms from TPO-introduced consumers for Store First investments, I think L&C was on notice from the content of those forms that TPO might not have given consumers *any* advice on Store First investments. And that was certainly the case for Mrs M. L&C has told us that its understanding was that TPO would advise on the underlying investments. So, as I explain further below, if L&C had undertaken appropriate checks, I think it ought to have identified, amongst other things, that TPO wasn't offering consumers it was introducing to L&C (like Mrs M) advice on the suitability, or otherwise, of the high risk unregulated Store First investment that their L&C SIPPs were being established, and that their monies were being transferred to L&C, to effect.

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

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

L&C has said that TPO mentioned in Mrs M's suitability report that alternative investments represent a higher risk than appeared appropriate for her personal risk profile. However, this is not the same as giving advice on the suitability of the specific Store First investment.

I think the fact TPO wasn't advising consumers (like Mrs M) on the underlying investment(s) ought to have been a clear red flag for L&C in its dealings with TPO. And I think L&C ought to have recognised that there was a risk that TPO might be choosing to introduce consumers without their having been offered regulated advice by TPO on the unregulated investments that their transfers to L&C were being effected to make. I think L&C ought to have viewed this as a serious cause for concern – this was a clear and obvious potential risk of consumer detriment in this case.

I think this concern ought to have been even greater in light of the volume of cases involving DB transfers L&C says it received from TPO. At the relevant date COBS 19.1.6G stated:

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

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

The involvement of an unregulated business

As I've mentioned above, from the point in time it first started receiving Investment Purchase Request forms from TPO-introduced consumers for Store First investments, I think L&C was on notice from the content of those forms that TPO *might* not have given consumers any advice on Store First investments. And on receipt of Mrs M's form, L&C could be in no doubt about this.

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

If L&C believed that TPO *was* advising consumers on the Store First investment, which is what L&C has told us, I think L&C ought to have questioned this anomaly in the Investment Purchase Request forms it was receiving. And I think it ought to have done this from the earliest point in time that it first received such a form from a TPO-introduced consumer. That would have been a fair and reasonable step for L&C to take in the circumstances. And, had L&C done so, I think it's more likely than not that TPO would have confirmed what it was already clearly stating in consumers' suitability reports about the fact that it was giving no advice on the specific alternative investments that some consumers' (like Mrs M's) pension monies were being transferred to L&C to effect.

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

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

Mrs M says that she was contacted by way of a cold call from L&C, although as I've said above I think this was more likely than not to be a representative of Jackson Francis. Mrs M says that she was talked into investing her pension monies into Store First investments by that party (Jackson Francis) and that she was promised her pension would grow at a better rate if she did so.

It's apparent that a Storepod reservation form was signed by both Mrs M and Jackson Francis on 17 August 2012, and in TPO's suitability report it's explained that TPO had been advised by Jackson Francis that Mrs M was planning to invest in alternative investments. TPO then said that Mrs M must take professional advice before making investments and that TPO wasn't able to assist with advice of this nature.

On balance, and having carefully considered all of the available evidence, I think it's more likely than not that it was Jackson Francis who promoted the Store First investment to Mrs M and who then introduced Mrs M's business to TPO. Even if the promotion of Store First wasn't a regulated activity, this was nonetheless another clear and obvious potential risk of consumer detriment – particularly where pension investors were being targeted, as appears to be the case here.

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

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

<u>What fair and reasonable steps should L&C have taken, in the circumstances?</u>

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

Requesting information directly from TPO

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

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

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

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

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

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

And, on balance, I think it's more likely than not that if L&C had checked with TPO and asked the type of questions I've mentioned above that TPO would have provided a full response to the information sought.

In the alternative, if TPO had been unwilling to answer such questions if they'd been put to it by L&C, I think L&C should simply then have declined to accept introductions from TPO.

Making independent checks

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

The 2009 Thematic Review Report said that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I also think L&C should have concluded that consumers introduced by TPO who were investing in Store First might have been 'sold' on the Store First investments by an unregulated third party. And I think, if asked, Mrs M would have explained how her Store First application came about – which, as I mention, was likely the result of the involvement of an unregulated business.

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

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

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

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

<u>L&C's due diligence on Store First</u>

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

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

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

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

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

Based on evidence I've seen that was obtained on a similar complaint considered by this Service, on 23 August 2012 an L&C employee (an investment support manager) emailed several colleagues at L&C, including L&C's Director & Head of Compliance. The email was titled *"Store First – Review"* and stated that:

"Following the receipt of the SIP Member Update which mentioned that [Mr N's] *firm faces tax investigation' we immediately imposed a temporary suspension on all Store First investments pending further investigation. I advised all three IFA introducers by telephone that we have a technical issue and have imposed a temporary suspension until we resolve.*

I have carried out an investigation and based on the information obtained my findings follow:

Findings

1) The tax investigation is into Harley Scott Group of companies and this does not currently extend to Store first or its parent Group First. We have received written confirmation of this from Pierce Accountants.

2) It is not apparent that Harley Scott is linked to Store First or Group First in anyway other than that [Mr N] *is a director and shareholder in all.*

[there is no 3]

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

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

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

Recommendation

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

Please confirm if you are all in agreement."

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

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

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

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

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

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

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

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

It had asked Store First for the following:

"The present sites that we have accepted are Barnsley, Liverpool, Rochdale and Blackburn. Please can you confirm if the units have been built and are ready for leasing.

If any of the sites have been built can you confirm if any of the units we have purchased have been rented out or if they are still working under the guaranteed rental agreement set out in the contracts.

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

The report continued noting that:

- Members are provided with an outline of costs and sample legal documents by L&C before entering into any obligation to purchase. Purchases only proceed once members have confirmed that they're happy with the documents and fees.
- It insists on a valuation for each site from an appropriately qualified valuer, and its property team obtain valuations on a six-monthly basis for each site.
- All Storepod purchases are made via scheme appointed lawyers and have clear title and are registered individually at HM Land Registry.
- L&C's property team had advised that rent was coming in as expected with no issues. All of the Storepods were (then) within the rent guarantee period.
- Store First appeared to have made all of their annual returns and submitted accounts as required.
- A SIPP Investment Platform ('SIP') Review was carried out by SIP's precursor Enhance Support Solutions in 2011 (as I understand it this is the Enhance Support Solutions Limited report I've referred to elsewhere in this decision).
- Store First had provided L&C with the information it had requested.
- L&C hadn't verified information and commentary provided by Store First regarding timescales, achievable rent, resale values, and market research. However, the valuations provided appear to support Store First's claims.
- It's appropriate that L&C carry out checks from time to time to ensure that the investment is operating as promised by the investment provider.
- It appears that Storepods are being sold constructed and let out as promised. Rent is

being received, and the purchases are all being made as expected. The Hetherington Partnership had no cause for concern and legal title was being registered at HM Land Registry.

- There didn't appear to be cause for concern at this stage, but due to the unregulated nature of the investment and large sums of money already invested L&C should exercise continued caution.
- The recommendation was to continue ongoing monitoring and to lift the suspension immediately. Further, that any new sites from the same corporate entities with an identical set up to those L&C had already invested in wouldn't need to pass through SIP.

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

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

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

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

"The property is likely to enjoy a fair level of occupational demand by virtue of its site, general characteristics and condition.
…
We consider there are unlikely to be any significant fluctuations in the general levels of both rental and capital values.
…
The individual store pods are held on a 250 year Long leasehold basis with a ground rent of £12.50 per sq ft payable. There is a service charge of £1.95 per sq ft payable. A management fee of 15% of the rent receivable is charged by Store First.

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

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

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

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

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

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

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

[L&C colleague] *please put this in the Storefirst file.”*

Having carefully considered all of the information that’s been made available to us, I don’t think L&C’s actions went far enough. As I explain in more detail below, I’m not satisfied that L&C undertook sufficient due diligence on the Store First investment *before* it decided to accept that investment into its SIPPs. As such, in my view, L&C didn’t comply with its regulatory obligations and good practice, and it didn’t act fairly and reasonably in its dealings with Mrs M, by not undertaking sufficient due diligence on the Store First investment *before* it accepted Mrs M’s application to invest in Store First.

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

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

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

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

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

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

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

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

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

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

"You will receive guaranteed returns from a 6 year lease already in place upon completion, making this a high yielding, hassle-free investment which has been specifically designed to meet the needs of today's astute investor."

"You will receive a 6 year lease in place upon completion. The lease produces an excellent return of 8% (guaranteed for the first 2 years) rising to over 12% in years 5 and 6. The lease contains upward-only rental reviews and break clauses for both parties every two years."

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

"What rental income can I expect?

Storepod rental starts at £17 per Sq/Ft per annum (+ VAT). The 6 year tenancy/lease in place on your Storepod has fixed upwards only rental reviews and break clauses (for both parties) every 2 years. This produces an 8% yield on your investment within the first two years, this then is predicted to rise to over 10% return in years 3&4 and then surpass 12% return in years 5&6.

Can I easily re-sell my Storepod?

Yes, you can re-sell your Storepod at any time and selling your Storepod couldn't be simpler. Store First Ltd can market your Storepod upon your request. We believe that because Storepods are so competitively priced when new, they will make a very attractive sale proposition in the future. We also expect that many tenants will wish to purchase the Storepod they are using. For example, other self storage PLCs usually achieve rent of between £20.00 - £25.00 per square foot. Our Storepods are costed at a rent of only £17.00 per square foot; once higher rents are achieved the capital value of the Storepod will increase.

Guaranteed exit route?

In year 5, investors have the option to enter the guaranteed buy-back scheme. In this scheme, Store First Management Ltd will guarantee to buy the Storepod back off the investor for the original price paid within the next 5 years. This is a unique offer in the market place and we are happy to be able to offer this exit route to our investors.

Most investors are driven to keep the property investment they have purchased and carry on receiving the rental yield produced for years to come, this means only a very limited number of Storepods per centre will ever come onto the resale market, this creates a high sale value and demand for the future."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"… it still remains to be seen whether the sites will "mature" as Storefirst describe it, to the point that rentals start coming in and a secondary market for sales evolves.

I do think that their website is misleading on a number of fronts. I have an email in drafting to bring this to their attention."

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

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

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

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

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

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

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

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

I think the fair and reasonable conclusion based on the evidence available is that L&C shouldn't have accepted Mrs M's application to invest in Store First. In my opinion, it ought to have concluded that it would not be consistent with its obligations to do so. To my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant time, and allowed Mrs M to be put at significant risk of detriment as a result.

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

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

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

<u>Was it fair and reasonable in all the circumstances for L&C to proceed with Mrs M's application?</u>

For the reasons given above, I don't think L&C should've accepted Mrs M's business from TPO and I also don't think it should've accepted the Store First investment into her SIPP. So things shouldn't have got beyond that.

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

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

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

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

<u>COBS 11.2.19R</u>

L&C has made the point that it complied with COBS 11.2.19R in executing Mrs M's instructions.

However, in the circumstances it's my view that the crux of the issue in this complaint is whether L&C should have accepted Mrs M's applications in the first place.

An argument about having to execute the transaction as a result of COBS 11.2.19R was considered and rejected by the judge in *BBSAL*. In that case Jacobs J said:

"The heading to COBS 11.2.1R shows that it is concerned with the manner in which orders are to be executed: i.e. on terms most favourable to the client. This is consistent with the heading to COBS 11.2 as a whole, namely: "Best execution". The text of COBS 11.2.1R is to

the same effect. The expression "when executing orders" indicates that it is looking at the moment when the firm comes to execute the order, and the way in which the firm must then conduct itself. It is concerned with the "mechanics" of execution; a conclusion reached, albeit in a different context, in Bailey & Anr v Barclays Bank [2014] EWHC 2882 (QB), paras [34] – [35]. It is not addressing an anterior question, namely whether a particular order should be executed at all. I agree with the FCA's submission that COBS 11.2 is a section of the Handbook concerned with the method of execution of client orders, and is designed to achieve a high quality of execution. It presupposes that there is an order being executed, and refers to the factors that must be taken into account when deciding how best to execute the order. It has nothing to do with the question of whether or not the order should be accepted in the first place."

And I don't think that L&C's argument on this point is relevant to its obligations under the Principles to decide whether to accept Mrs M's applications in the first place.

<u>Is it fair to ask L&C to pay Mrs M compensation in the circumstances?</u>

The involvement of other parties

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

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

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

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

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

I accept that other parties, including TPO and/or Jackson Francis, might have some responsibility for initiating the course of action that led to Mrs M'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 Mrs M wouldn't have come about in the first place, and the loss she's suffered could have been avoided.

I want to make clear that I've taken everything L&C has said into consideration. And it's my view that it's appropriate and fair in the circumstances for L&C to compensate Mrs M to the full extent of the financial losses she's suffered due to L&C's failings. And, having carefully considered everything, I don't think that it would be appropriate or fair in the circumstances to reduce the compensation amount that L&C is liable to pay to Mrs M.

Mrs M taking responsibility for her own investment decisions

In reaching my conclusions in this case I've thought about section 5(2)(d) of the FSMA (now section 1C). This section requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions. I've also considered what L&C has said about Mrs M being advised by TPO not to transfer her DB pension, that she was warned about the risks of alternative investments and that she chose to do so against that advice.

I've considered these points carefully and I'm satisfied that it wouldn't be fair or reasonable to say Mrs M's actions mean she 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 Mrs M's business from TPO or accepted her application to invest in Store First *at all*. That should have been the end of the matter – if either of those things had happened, I'm satisfied the arrangement for Mrs M wouldn't have come about in the first place, and the loss she's suffered could have been avoided.

As I've made clear, L&C needed to carry out appropriate initial and ongoing due diligence on TPO and the Store First investment and reach the right conclusions. I think it failed to do this. And just having Mrs M 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.

I've carefully considered what L&C has said about Mrs M being aware of the risks, including its citation of 'Gestmin v Credit Suisse' and the findings of the judge in that case. For clarity, the full case reference is *Gestmin SGPS S.A. v Credit Suisse* [2013] EWCA 3560 (Comm). As I explain below, I don't agree that the evidence we've seen to date supports the contention that it's more likely than not that Mrs M *understood* the Store First investment was high risk. But, in any eventuality, whether or not Mrs M was aware of and understood the risks of making the investment is a secondary point because, as mentioned above, if L&C had acted in accordance with its regulatory obligations and good industry practice I'm satisfied the arrangement for Mrs M wouldn't have come about in the first place.

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

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

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

From the correspondence I've seen, I think that Mrs M's pension monies were transferred to L&C to make the Store First investment. That position seems to be supported by the contents of TPO's suitability report, which explained that TPO had been advised by Jackson Francis that Mrs M wished to invest into alternative investments that weren't permitted within her current pension arrangements and that to achieve this objective Mrs M would need to transfer her pension monies into a SIPP.

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

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

Furthermore, I don't think that if L&C had refused to accept the introduction from TPO that Mrs M would've gone on to seek out advice from another firm. I say this because Mrs M was cold-called and wasn't previously interested in changing her pension arrangements. But even if I thought she would've approached another adviser (which I don't), I don't think it's likely that adviser would've advised her to transfer out of her DB pension in order to invest in Store First, given the Regulator's guidance on DB pension transfers and Mrs M's circumstances.

As such, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mrs M's application from TPO and/or hadn't permitted the Store First investment in its SIPPs, the transactions wouldn't still have gone ahead.

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

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

Mrs M says the adviser she spoke to promised her a better return than if she left it where it was and she wasn't told about any risks. L&C says that Mrs M was aware of the risks and decided to proceed and has pointed to the contents of the Investment Purchase Request form that Mrs M signed.

The Investment Purchase Request form Mrs M signed on 6 September 2012 simply said that the investment *may* be high risk, it doesn't say the investment *is* high risk. Further, the form appears to be generic, by which I mean it appears to be a form that could be used for a number of investments so it isn't a form that's bespoke to the Store First investment. I can see why the term *may* might have been used because of this, but I don't agree the contents of that form support the contention that Mrs M *understood* the Store First investment was high risk.

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

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

Having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mrs M's application from TPO and/or to permit

Store First investments in its SIPPs, the transactions this complaint concerns wouldn't still have gone ahead.

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

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

As such, I'm not asking L&C to account for loss that goes beyond the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. The key point here is that but for L&C's failings, Mrs M wouldn't have suffered the loss she's suffered. As such, I'm of the opinion that it's appropriate and fair in the circumstances for L&C to compensate Mrs M to the full extent of the financial losses she's suffered due to its failings, and notwithstanding any failings by other firms involved in the transactions.

<u>In conclusion</u>

Taking all of the above into consideration, I think that in the circumstances of this case it's fair and reasonable for me to conclude that L&C should have decided not to accept business from TPO and/or to accept the Store First investment to be held in its SIPPs *before* it accepted Mrs M's business.

I also conclude that if L&C hadn't accepted Mrs M's introduction from TPO and/or the Store First investment to be held in its SIPPs, Mrs M wouldn't have established a L&C SIPP, transferred out of her DB scheme into it or invested in Store First.

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

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

Putting things right

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

I consider Mrs M would have most likely remained in the occupational pension scheme but for L&C's failings.

What should L&C do?

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

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

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

1. Take ownership of any Store First investments that remain in Mrs M's SIPP if possible.

   Based on the evidence I've seen, Mrs M's SIPP remains open and still holds her Store First investments. But if there are no Store First investments remaining in Mrs M's SIPP then L&C should proceed straight to step 2.

   If there are Store First investments remaining in Mrs M's SIPP then in order for the SIPP to be closed and further SIPP fees to be prevented, any Store First investments remaining in Mrs M's SIPP need to be removed. To do this, and before proceeding to step 2, L&C should calculate an amount it's willing to accept for any Store First investments remaining in Mrs M's SIPP and pay that sum into Mrs M's SIPP and take ownership of the Store First investments. Any sums paid into the SIPP to purchase the Store First investments will then make up part of the current actual value of the SIPP.

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

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

   In the event the Store First investments remain in the SIPP as L&C is unable to purchase them, and Mrs M decides not to transfer them to the freeholder, Mrs M should be aware that she will be liable for all future costs associated with the investment such as the ongoing SIPP fees, business rates, ground rent and any other charges. She should also be aware it's unlikely she will be able to make a further complaint about these costs.

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

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

https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

As I understand it, Mrs M has not yet retired, and she has no plans to do so at present. So, compensation should be based on her DB scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

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

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

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

I acknowledge that Mrs M has received a sum of compensation from the FSCS, and that she has had the use of the monies received from the FSCS. The terms of Mrs M's reassignment of rights require her to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required.

So, I think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the compensation Mrs M received from the FSCS. And it will be for Mrs M to make the arrangements to make any repayments she needs to make to the FSCS. However, I do think it's fair and reasonable for some allowance to be made for the sums Mrs M actually received from the FSCS and has had the use of for a period of the time covered by the calculation.

As such, for the purposes of the calculation that's being carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4, if it wishes, L&C *may* notionally, for the period from the point of their payments through until the valuation date (as per the DISP App 4 definition of that term), allow for the payments Mrs M received from the FSCS following the claim about TPO, as a notional deduction (while not an income withdrawal payment, for the purposes of the calculation it may be treated as a notional income withdrawal payment). Where such an allowance is made then L&C must also, at the end of the calculation, allow for a notional addition to the overall calculated loss that's equivalent to the payments Mrs M received from the FSCS following the claim about TPO. The effect of this notional addition will be to increase the overall loss calculated using the most recent financial assumptions in line with PS22/13 and DISP App 4, by a sum that's equivalent to the payments Mrs M received from the FSCS.

Redress paid directly to Mrs M as a cash lump sum in respect of a future loss includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4.3.31G(3), L&C may make a notional deduction to allow for income tax that would otherwise have been paid. Mrs M's likely income tax rate in retirement is presumed to be 20%. In line with DISP App 4.3.31G(1) this notional reduction may not be applied to any element of lost tax-free cash.

3. *Distress and inconvenience*

In addition to the financial loss that Mrs M has suffered as a result of the problems with her pension, I think that the loss has caused her distress. As a result of L&C's failings, Mrs M lost the benefit of a guaranteed pension in retirement, which will have a significant impact on her retirement plans. As such, I think that L&C should pay her £500 to compensate her for this as well.

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

My final decision

For the reasons given, it's my final decision that Mrs M's complaint should be upheld and that Pathlines Pensions UK Limited must pay fair redress as set out above.

Where I uphold a complaint, I can award fair compensation of up to £150,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £150,000, I may recommend that the business pays the balance.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My final decision is that Pathlines Pensions UK Limited must pay the amount produced by that calculation up to the maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Pathlines Pensions UK Limited pay Mrs M the balance plus any interest on the balance as set out above.

The recommendation isn't part of my determination or award. Pathlines Pensions UK Limited doesn't have to do what I recommend. It's unlikely that Mrs M could accept a decision and go to court to ask for the balance and Mrs M may want to get independent legal advice before deciding whether to accept my final decision.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs M to accept or reject my decision before 2 January 2025.

Hannah Wise
Ombudsman