DRN-5292906

The complaint

Mr T complains the Yorsipp Limited ('Yorsipp') Self-Invested Personal Pension ('SIPP') that was opened for him in 2013, and the investments made within it, were unsuitable for him. And that Yorsipp didn't carry out adequate due diligence on the adviser that introduced his business to Yorsipp or on the investments.

Mr T is represented by a claims management company ('CMC'), but for simplicity I'll refer only to Mr T.

What happened

I've outlined the key parties involved in Mr T's complaint below.

Yorsipp

Yorsipp is a SIPP provider and administrator. At the time of these events, Yorsipp was regulated by the Financial Services Authority ('FSA'), later becoming the Financial Conduct Authority ('FCA'). Yorsipp was authorised in relation to SIPPs, to arrange (bring about) deals in investments, to deal in investments as principal, to establish, operate or wind-up a pension scheme, and to make arrangements with a view to transactions in investments.

Douglas Baillie Ltd/The Pension Specialist

The Pension Specialist ('TPS') was an appointed representative of Douglas Baillie Ltd ('DBL') from 24 May 2011 to 13 November 2013. At the time of TPS's involvement, DBL was an FCA regulated financial adviser.

In October 2013 DBL suspended its pension switching business 'The Pension Specialist', following the FCA's concerns about the standard of the advice it was giving.

In 2016 DBL went into Financial Services Compensation Scheme ('FSCS') default.

For ease, I'll now refer to all actions of TPS as being that of DBL, except where I'm referencing a direct quotation or where I think it's appropriate to differentiate.

Based on the evidence provided to our Service, the key relevant events during the relationship between Yorsipp and DBL were as follows:

- October 2012 – A 'Professional Client Agreement' between Yorsipp and DBL was signed. This set out Yorsipp's terms of business and the conduct it expected of DBL.
- 1 February 2013 – Yorsipp received its first client from DBL.
- 28 February 2013 – Yorsipp received its second, and final, client from DBL – Mr T.

'Firm S'

Firm S is an unregulated business based in the UK. A person I'll call 'Mr S' was appointed as a director of Firm S in August 2013. Mr T retained Firm S to provide *"wealth administration services*".

'Firm Q'

Firm Q was an unregulated business based in the UK. Mr T retained Firm Q to provide *"wealth administration services".* Firm Q dissolved in December 2014.

'Investment K'

This investment was provided by an unregulated business based in the UK. It seems that the nature of its business was the construction of domestic buildings, that funding for this was by way of 'loan notes' issued to investors, and that the assets underlying the loan notes were UK property developments.

This business was dissolved in December 2014. In 2024, one of its directors was sentenced to jail after pleading guilty to fraud in relation to 'siphoning off' an investment in Investment K in late 2013, breaching a bankruptcy order, and disregarding a director disqualification.

Yorsipp hasn't provided any details or documentary evidence of the due diligence it carried out in relation to Investment K, except to say that it carried out due diligence on it, that the investment was permitted under the SIPP trust deed, wasn't prohibited from being held in the SIPP by HMRC or the FCA, and was verified as a UK limited company. And that the investment was not a scam or pensions liberation.

'Investment C'

It appears that this was a carbon investment, and was unregulated, illiquid and non-mainstream.

Yorsipp hasn't provided any details or documentary evidence of the due diligence it carried out in relation to Investment C, except to say that it carried out due diligence on it, that the investment was permitted under the SIPP trust deed, wasn't prohibited from being held in the SIPP by HMRC or the FCA, and was verified as a UK limited company. And that the investment was not a scam or pensions liberation.

Mr T's dealings with Firm S, TPS, DBL and Yorsipp

Mr T says he was 'cold-called' by Mr S of Firm S for a pension review, and Mr S told him about the SIPP and the investments. Mr T doesn't recall any dealings with DBL - he says he only ever dealt with Mr S.

It appears that Firm S passed Mr T's business to TPS for some regulated advice, as I understand TPS prepared a 'Pension Transfer Report' for Mr T. But I've not been provided with a copy of this report.

On 22 February 2013, Mr T signed what appears to be a pre-printed 'SIPP Disclaimer' letter which said, *"I can confirm that I have read and understood the SIPP Disclaimer in my Pension Transfer Report.*

I am happy with the risks involved with SIPP investments a [sic] wish to proceed with the establishment of a SIPP.

I am aware that the HMRC rules prevent me from receiving any inducements or incentives,

such as commission sharing, from my pension plan or from the investments within the plan.

I can confirm that The Pension Specialist has not made such an offer, and that should I be made such an offer from a third party that I will advise you immediately."

Mr T signed a Yorsipp SIPP application form on 22 February 2013. This included three 'Transfer In' forms which set out the details of Mr T's three transferring pensions, which had a total estimated value of over £82,000. It also included a 'Financial Adviser Details' section, which recorded DBL's details. And it included Mr T's signed agreement to waive his cancellation rights.

On the same date, Mr T signed what looks to be a pre-printed letter to TPS which said, *"I understand that once my transfer has been completed, that you will arrange for my plan to be orphaned, which means that your agency will be removed from my plan.*

I understand that I will not receive any further advice from your firm and that I can make any further investment instructions directly to my SIPP provider or appoint a new advisor in the future."

On 27 February 2013, DBL signed an 'Identity Verification Certificate' regarding Mr T, in which DBL was recorded as the 'Introducing Firm'.

On 27 February 2013 TPS sent Mr T's SIPP application to Yorsipp, and included the ceding pension schemes discharge forms, and a copy of the SIPP disclaimer letter.

Mr T's Yorsipp SIPP was established on 28 February 2013. The benefits from Mr T's three pensions (totalling over £89,000, having increased slightly from the previous estimate) were transferred into his SIPP in March 2013.

Mr T's three transferring pensions were defined contribution pensions. But the provider of one of these, which I'll call Pension A, wrote to Yorsipp on 5 March 2013 and this letter suggested Pension A may have provided Mr T with protected tax-free cash, because it included that,

"In proceeding with this transfer, the Policyholder has lost their entitlement to a protected cash lump sum.

In proceeding with this transfer, the Policyholder has lost their entitlement to Primary Protection.

In proceeding with this transfer, the Policyholder has lost their entitlement to Enhanced Protection."

On 19 March 2013 TPS wrote to Yorsipp to ask that TPS be removed as the servicing agent on his SIPP, and it enclosed the 22 February 2013 letter Mr T had signed regarding this.

Mr T signed an undated, unaddressed and seemingly pre-printed letter giving his authority for Firm S and Firm Q to discuss his SIPP and to give instructions on his behalf. This letter went on to say, *"Both [Firm S] and [Firm Q] are retained to provide wealth administration services and as such I would appreciate you provide the necessary information as requested, as well as process my investment requests when made via themselves with the appropriate supporting documentation."*

By late March 2013, Mr S of Firm S was actively arranging Mr T's investments. Yorsipp was aware of this, as it copied Mr S into its 27 March 2013 email to Investment C about arranging

Mr T's investment. And Mr S copied Yorsipp into his 28 March 2013 email to Investment K about Mr T's investment.

On 27 March 2013, Mr T signed a form (witnessed by Mr S) instructing Yorsipp to invest some of his SIPP monies in Investment K. This form included the following pre-printed statements:

- *"I confirm that I have sought professional advice from the qualified and authorised adviser regarding the suitability of this Investment compared to my attitude to risk."*
- *"I am fully aware that Yorsipp (Trustees) Limited act on an Execution Only Basis as directed by me as scheme member and that Yorsipp (Trustees) Limited company has not provided any advice whatsoever in respect of this Investment or the SIPP."*
- *"I indemnify Yorsipp (Trustees) Limited against any and all liability arising from this investment."*

About £10,000 of Mr T's Yorsipp SIPP monies were invested in Investment C in April 2013. As part of this, Mr T signed a 'SSIP [sic] Client profile and identification form' in relation to Investment C. This said, amongst other things, that:

- This investment was for 'speculative reasons', rather than for retirement.
- His total net worth was £200,000, his liquid net worth was £1,200, and his monthly income was £2,300. The form included a statement here that Mr T should *"bear in mind that you have to be capable to bear and absorb a potential financial loss which does not effect [sic] your actual living standard".*

In June 2013, a 'Pension Trader Account' was set up for Mr T with another firm. It appears there were some initial difficulties with this, and I note that an email forwarded from Mr S to Mr T and then on to Yorsipp said, *"As you can appreciate I remain disappointed this has taken so long but I ma* [sic] *relieved I can finally proceed to use the SIPP as I intended. Meaning using* [Mr S] *to introduce investments for my consideration and not an IFA who I feel doesn't add the value that justifies paying them fees."*

£77,000 of Mr T's SIPP monies were moved to the Pension Trader Account in June 2013. It appears that £60,000 of this was later moved back into Mr T's SIPP and invested in Investment K in September 2013.

In March 2014, Mr T withdrew £22,476.22 of tax-free cash from his SIPP.

Over the years, Yorsipp sent Mr T annual SIPP statements. The one sent in 2016 said Yorsipp had valued his holding in Investment K as £0 because the business was in liquidation, and the liquidator had confirmed there would not be a distribution of monies. And the one sent in 2018 said Investment C was currently suspended, so Yorsipp hadn't produced the full review for Mr T's SIPP or invoiced him its annual administration fee.

In April 2018, Mr C contacted his CMC. In June 2018, Mr T submitted a claim to the FSCS regarding DBL's advice. In September 2018, the FSCS calculated Mr T's total loss as over £119,000 and paid him its maximum of £50,000 in compensation. Later, the FSCS provided Mr T with a reassignment of rights to enable him to pursue a complaint against Yorsipp.

In November 2018, Mr T complained to Yorsipp. In summary, he said that a SIPP and Investment K and Investment C hadn't been suitable for him. That he was a retail investor with a low risk profile, not a 'sophisticated' investor. That Yorsipp failed to carry out sufficient due diligence on the investments, and also on the adviser introducing business to it. And had it done so, it should have rejected his business and therefore his transfers and investments wouldn't have gone ahead. So Mr T said Yorsipp played a fundamental role in the financial loss he'd suffered.

Yorsipp issued its final response to Mr T's complaint in December 2018, rejecting it. In summary, it said it would only have rejected these investments if they were not capable of being held in the SIPP or if it suspected they were fraudulent or non-existent. It hadn't questioned Mr T's reasons for transferring to a SIPP or making high-risk investments, as this could be seen as offering advice or interfering in the advice process – and Yorsipp did not, and was not authorised to, provide advice. And it's not responsible for the performance of investments. The decisions to transfer and invest were matters for Mr T and his 'advisers'. Yorsipp only received a total of two introductions from DBL, so it couldn't have identified any 'formula selling', as Mr T had suggested.

Submissions from Mr T

Mr T was unhappy with Yorsipp's final response to his complaint, so he referred it to the Financial Ombudsman Service in May 2019. Mr T provided us with some documents from the time of the events. And he told us, amongst other things, that:

- Mr S of Firm S had 'cold-called' him for a pension review. Mr S visited several times and told him about the investments. Mr S did all the paperwork, filled out all the forms, and presented paperwork for Mr T's signature. Mr T didn't recall any dealings with DBL - he only ever dealt with Mr S, who was the driver behind everything.

- Mr S was very knowledgeable and personable. Investment K was sold as one Mr T couldn't lose with, and that he'd kick himself if he didn't invest in it. He was led to believe each of the investments were designed to give growth of up to 8% - so not implausibly high. Mr S said his new pension would outperform his existing pensions without taking any degree of risk. So Mr T thought his pension monies would be safe.

- Mr T's existing pensions were all he had for retirement and he couldn't afford to lose any of it.

- He'd not received any payment when he transferred his pensions.

- He'd not been interested in changing his pensions prior to being cold-called by Mr S. And if he'd not received that cold-call, he would never have transferred his pensions.

- He doesn't recall Firm Q. He only recalls dealing with Mr S of Firm S throughout the process. And he notes most of the instructions/communications came from Mr S. Despite Mr S not being FCA authorised, he drove the transactions and Yorsipp never questioned this.

- Yorsipp said Mr T had appointed Firm S as his investment manager following the transfer. But Firm S was never regulated by the FCA, so Yorsipp had allowed an unregulated firm to provide Mr T with investment and pensions advice, and taken instructions from it.

- If Yorsipp had followed the regulator's guidance and contacted Mr T to confirm the situation, it would have known he'd been dealing with an unregulated investment adviser from the start (Firm S) and he had no awareness of Douglas Bailie Ltd.

- The views expressed in the 6 June 2013 email (about Mr T using the SIPP as he'd always intended) weren't Mr T's. Mr S appears to have written this and emailed it to Mr T, who then forwarded it to Yorsipp. Mr T saw Mr S as very knowledgeable and thought he was offering a long-term investment relationship to help and guide Mr T with his

pension/investments, and had trusted Mr S. But it now appeared Mr S had only looked to earn commission on the investments he persuaded Mr T to make.

- Mr T's financial circumstances at that time showed he had no investment knowledge or experience other than his existing mainstream pensions.

- Regarding DBL being recorded on his SIPP application form, Mr T signed this along with many other documents that were presented for his signature and not left for reading or consideration. Mr T hadn't been aware of DBL or its involvement – this was discovered when his CMC obtained more information from Yorsipp.

Submissions from Yorsipp

Yorsipp has made the following submissions regarding Mr T's complaint:

- DBL introduced Mr T's SIPP business to Yorsipp and advised him on transferring in his three existing pensions.

- At the time, DBL was a regulated adviser and Yorsipp was not aware of any issues with it. Yorsipp followed industry best-practice at the time. DBL signed Yorsipp's 'Professional Client Agreement', and Yorsipp checked the FCA Register for its permissions and any other relevant information such as FCA disciplinaries. But there was no cause for concern.

- It carried out due diligence on the investments. The investments were not scams or pensions liberation – they were high risk investments. They were permitted under the SIPP trust deed, and weren't prohibited from being held in the SIPP by HMRC or the FCA. And they were verified as UK limited companies. Yorsipp would only have rejected these investments if they were not capable of being held in the SIPP - i.e. they were prohibited by the FCA, or if holding them would result in HMRC tax penalties, or Yorsipp suspected the investments were fraudulent or non-existent.

- The investments were made as instructed by Mr T. He signed documentation to confirm he wanted to make the investments and that he'd sought advice on the suitability of the investment.

- Yorsipp was not involved in the advice or in assessing whether the SIPP or investments were suitable for Mr T. And it was not involved in the sourcing, promotion or selection of particular investments.

- To question the investments without concerns about their legitimacy could be seen as advising Mr T. And Yorsipp does not (and is not permitted to) provide financial advice. Yorsipp's role is as pension scheme administrator and trustee.

- Some of Mr T's investments have suffered losses, but Yorsipp aren't responsible for the performance of investments.

- Yorsipp carried out checks appropriate to its role and any losses can be attributed to the advice Mr T received and the decisions made by him. Not to any failing by Yorsipp.

- Yorsipp doesn't have a copy of the fact find or suitability report prepared regarding Mr T.

- Yorsipp provided copies of what it said were *"FCA directives that were sent to advisers which is where if they're advising on the pension transfer/switch they are by default giving advice on the assets the pension is to hold."*

- Mr T appeared to be complaining to Yorsipp about alleged failures by the adviser, which Yorsipp wasn't responsible for. Unfortunately the adviser is no longer trading, as otherwise this would be a complaint for the adviser *"under 1.7.1 of COBS".*

One of our Investigator's thought Mr T's complaint should be upheld. In summary, she said that even if Yorsipp had provided evidence of the due diligence it had carried out on Investment K and Investment C (and it hadn't provided this), Yorsipp still ought to have been aware that an unregulated firm was giving Mr T investment advice, given Principle 2 of the FCA's Principles for Businesses and section 27 of the Financial Services and Markets Act ('FSMA'). She thought Yorsipp ought to have been concerned this risked consumer detriment, and rejected Mr T's business. So, it was fair and reasonable for Yorsipp to compensate Mr T for his financial loss and also pay him £500 compensation for the distress and inconvenience it had caused him.

Yorsipp disagreed with our Investigator's view. A solicitor representing Yorsipp provided further comments. Its key points were, in summary, that:

- In Adams, the Court of Appeal highlighted that an objective of financial services regulation is consumer protection even where that involves protecting consumers from the consequences of their bad investment decisions. But that principle had limits, and the Investigator's view went beyond them.

- Yorsipp had a very limited remit in its dealings with Mr T – the judgment in *Adams* doesn't extend to suggesting that a firm in any respect involved in a customer's activities effectively holds the customer harmless against any losses they might suffer as a result of their own decisions.

- It was concerned our Service's approach was to hold the SIPP provider liable without proper consideration of the merits of the individual complaint.

- The Investigator suggested Mr S was Mr T's investment adviser, but hadn't queried why Mr T's SIPP application recorded DBL as his investment adviser.

- When Mr T completed his SIPP application and his funds were transferred he was, as far as Yorsipp was concerned and Mr T had asserted, advised by DBL.

- Yorsipp and DBL's 'Professional Client Agreement' was made in October 2012, though Yorsipp only started accepting its business in 2013. No pattern of professional behaviour with DBL had been established. And there were no reasons for concern and no FCA issues had arisen at this point.

- Mr T retained Firm S to provide wealth administration services, which is not a regulated activity – he did not appoint Firm S as his financial adviser. And there was no indication that Firm S did advise Mr T.

- So section 27 of FSMA wasn't relevant here. Mr T entered a relationship with Yorsipp because of DBL, which was appropriately authorised to both advise and to enter into arrangements that might result in investments being put into a SIPP. Mr S's wealth administration services were intended to have effect after the investment was made - they couldn't have caused Mr T's relationship with Yorsipp.

- But even if Mr T was introduced to Yorsipp by Mr S and the elements of section 27 were made out, a judge wouldn't consider it just and equitable to enforce the agreement. Because Yorsipp had no relations with Mr S other than in his later capacity as Mr T's agent. Mr S was not a recognised introducer to Yorsipp. And Yorsipp acted appropriately and on its understanding that it was dealing with DBL as the introducing adviser.

- If Mr T had told Yorsipp that his adviser and introducer was Mr S of Firm S, Yorsipp wouldn't have opened his SIPP or placed his investments.

- Either Mr T made a false statement in his SIPP application form (in which case a court's discretion would not be exercised in his favour) or he told the truth (in which case section 27 has no application because DBL are authorised).

- In *Adams*, the Court of Appeal considered various factors when assessing whether it should exercise its discretion under section 28 of FSMA. Thinking about the application of those factors to this case:
  - Yorsipp didn't know Mr S was breaching the general prohibition. And it had no reason to know this, as it believed Mr T's assertion that regulated firm DBL was his adviser. In any event, Mr S's role as being authorised to give and receive information and instructions explains his role in Mr T's investment.
  - SIPP providers aren't barred from accepting introductions from unregulated introducers, but this isn't relevant as Mr S was not an introducer to Yorsipp.
  - Unlike the position in *Adams*, there was at that time no reason for Yorsipp to have any doubts about the introducer here, DBL. Yorsipp had no way of knowing Mr S was giving Mr T advice, if indeed he was (which Yorsipp disputes).
  - In *Adams*, Options was deserving of criticism (for allowing 'pipeline' cases). But that's not the case with Yorsipp. Yorsipp behaved properly in its dealing with Mr T. It wasn't aware of any commission/fee arrangements between Mr T and Mr S (assuming there were any) because it didn't know Mr S was an adviser and/or introducer (if indeed he was).
  - So in the circumstances, it would be just and equitable to allow the agreement to be enforced.

- Yorsipp carried out appropriate due diligence on the investments. It checked they were valid legal entities and appropriately registered at Companies House, and it established that the investments could lawfully be accepted into the Yorsipp SIPP.

In addition, I'm aware that in another complaint brought to us against Yorsipp involving DBL and Mr S of Firm S, Yorsipp has also provided submissions which included the following:

- Given the FSCS found DBL liable, our Service should consider whether it's consistent to find Yorsipp responsible for the consumer's loss.

- It may or may not be correct that Mr S advised the client to invest his money. Yorsipp did not know about this. And Yorsipp was not aware of Mr S being the initial introducer. The client's SIPP application form recorded that the introducing firm was DBL. This suggests the client was prepared to sign a document he knew to be false and that he was very motivated to make the investment regardless of the controls Yorsipp put in place. In any event, Yorsipp couldn't reasonably have appreciated that Mr S advised the client to make the investments, if this was the case.

- Yorsipp disagreed that it should've have been concerned about nature of the business it was receiving from DBL, that it should've obtained a copy of the suitability report, or that it should have been cognisant of COBS 19.1.6G which is directed at financial advisers.

- Yorsipp would have thought it highly likely that DBL had advised on the investments, and there's no reason for it to assume otherwise. It's not reasonable to say a SIPP operator must second guess a client's declarations.

- In *Adams*, HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R, but the Investigator's view ignores the factual context when it doesn't favour the consumer.

- It was wrong to suggest that, even without a red flag, Yorsipp should have asked for a copy of the suitability report. The FCA's 2009 Thematic Review suggested SIPP operators should request copies of suitability reports, but the FCA's later publications didn't – clearly because the FCA didn't think such an approach was good practice. And there's no reason to ask for the suitability report unless it's to review suitability – and that's not the SIPP operator's role.

- Even if not asking for a copy of the suitability report was a failure (which it wasn't), it isn't a failure that could've caused the client's loss. Because the client didn't tell Yorsipp the truth about the circumstances of his investment. If Yorsipp had asked the client for a copy of the suitability report, he would have said there wasn't one. And if that was the case then the client would simply have declared himself to be a self-directed execution-only client. And although Yorsipp and the client would have proceeded down a different route, the client would still have made the investments in a manner that was beyond criticism, aided behind the scenes by Mr S. A lack of suitability report would not have deterred the client.

- The client sent Yorsipp a letter stating Firm S and Firm Q would provide him with *"wealth administration services"*, a phrase intended to convey that neither Firm S nor Firm Q would provide investment advice.

- Either the client isn't telling the truth and he wasn't advised by Mr S. Or, the client is telling the truth and signed a document that contained false information. So the client was very determined to have a SIPP with his desired investments in it.

- If the client had identified Mr S as his introducer, Yorsipp wouldn't have accepted the client's business in line with its internal controls. Because neither Mr S nor Firm S were authorised and Yorsipp had no existing relationship with them.

- Had Yorsipp rejected the client's SIPP application, the client would, perhaps in collusion with Mr S, have completed the SIPP application with different falsehoods and pushed the applications through, either with Yorsipp or with another SIPP provider.

- Yorsipp acted fairly towards the client and in his best interest, given the information he chose to disclose in his SIPP application. And even if Yorsipp hadn't acted fairly, if the client had told the truth then Yorsipp wouldn't have opened his SIPP and placed his investments.

As agreement couldn't be reached, this complaint was passed to me.

I issued a provisional decision in which I explained why I thought Mr T's complaint should be upheld. In summary, I said Yorsipp hadn't carried out adequate due diligence and that if it

had, it should have rejected introductions from DBL before it accepted Mr T's business. And that Mr T wouldn't have established the SIPP, transferred monies in from existing pensions, or invested in Investment C and Investment K if it hadn't been for Yorsipp's failings. So I said Yorsipp should calculate Mr T's financial loss and compensate him for it, and also pay him a further £500 compensation for the distress it had caused him.

Mr H acknowledged receipt of the provisional decision and added that he was a basic rate taxpayer.

Yorsipp didn't accept the provisional decision and provided further comments. In summary, these included that:

- The provisional decision said 'Pension A provided Mr T with protected tax-free cash'. But it's unlikely Mr T would've had a pension scheme with safeguarded benefits. Such benefits are typically afforded to individuals with sizeable pension provisions to protect them from the consequences of reductions to the lifetime allowance.

- The provisional decision said 'these three pensions were the entirety of Mr T's pension provision' and his total pension provision on establishment of his SIPP was over £89,000. Unless Mr T has another pension(s) he's not disclosed, it's highly unlikely his pension provision will be impacted by the lifetime allowance, so it's unlikely he would have protected/enhanced benefits. So Mr T should be asked to provide further evidence of Pension A having safeguarded/enhanced benefits, and to confirm that he's disclosed details of all his pensions. If he hasn't disclosed all his pensions, he should provide details of them.

- Mr T's total pension provision and financial circumstances are important, as they go to his understanding of the SIPP's intended purpose (i.e. whether it was a sum of money he was willing to take risks with). So it's important this information is provided before a final decision is issued, as it goes to Mr T's credibility and also his appetite for risk. And Yorsipp reserves the right to make further submissions on these issues.

- Our Service relies on the pensions transferred to the Yorsipp SIPP being Mr T's only pension provision. If this is incorrect, the provisional decision is premised on an incorrect factual assumption.

- Yorsipp asked for a copy of the suitability report DBL prepared for Mr T.

- Yorsipp didn't have any liability to Mr T. It always acted reasonably, responsibly and fairly towards him.

- Mr T's SIPP application form stated his financial adviser was DBL. Mr T was the first of only two introductions Yorsipp received from DBL, so there was no pattern of business or suspicious level of activity. And there was nothing about Mr T's application to warrant further enquiry by Yorsipp.

- Yorsipp's checks of the FCA Register showed the DBL adviser held the permissions needed to give pension transfer and investment advice.

- Yorsipp questioned the accuracy of Mr T's recollection. It said he'd suggested he had no contact with DBL as he'd said he only ever dealt with Mr S, yet his FSCS claim about DBL's advice was successful. The FSCS only pays compensation where it considers the firm liable, so it's difficult to understand why it compensated Mr T without DBL's substantive involvement. Therefore Yorsipp asked for Mr T to explain

why he was able to make a successful FSCS claim about DBL, and asked for a copy of his FSCS claim file including his reassignment of rights.

- Even if Yorsipp had contacted Mr T to ask questions, he wouldn't have provided Yorsipp with the investment details. Or if he did, incorrect information would have been provided. So Yorsipp wouldn't have been able to conduct the level of due diligence the provisional decision suggested was necessary.

- The provisional decision suggests DBL had a new advice model and Yorsipp should have raised questions about this. However, presumably the advice model would need to have been registered with the FCA. So if the FCA considered the advice model to be of high risk to consumers, it wouldn't have given DBL the required regulatory approvals. If the FCA didn't deem the advice model to be a risk, our Service can't reasonably conclude that any questions Yorsipp would've asked would have led it to identify DBL's model as high risk.

- Our Service is required to follow the law or explain why we haven't. The Civil Liability (Contribution) Act 1978 says that where more than one party is responsible for a loss, a contributory claim can be brought against another party. As such, our Service should also consider the role of DBL. The FSCS has already found DBL at fault and so it's not open to our Service to find Yorsipp wholly responsible for the loss given the finding already made. Instead, the amount received by Mr T from the FSCS should be deducted in full from any redress calculation together with any return on that money, on the basis it's DBL's contribution to Mr T's loss. Further, the FSCS compensation was paid directly to Mr T so the £50,000 should be grossed up to account for tax. This means that in fact Mr T has already received approximately £58,820 and it's this figure plus a return that should be deducted from total redress if the complaint is upheld.

- Overall, Yorsipp thought there were various outstanding points which required a response from Mr T, and which required Yorsipp to have the opportunity to consider and respond to his answers before a final decision is issued. It said these issues were material to the complaint, so it wouldn't be fair and reasonable for a final decision to be issued yet. This information was required in order for Yorsipp to properly respond to the provisional decision so it would be procedurally incorrect to proceed to a final decision without Yorsipp being provided with this information, along with sufficient time to consider it.

- Yorsipp reserved the right to comment further if required, and reserved the right to respond in respect of quantum once a final decision was provided.

I provided Yorsipp with a copy of Mr T's FSCS reassignment of rights, amongst other FSCS documentation. I also explained to Yorsipp that our Service hadn't been provided with a copy of the suitability report, and that I didn't think it was necessary for me to obtain a copy in order to reach a fair and reasonable outcome to this complaint. But I asked Yorsipp if it had any further documentation relating to Pension A.

In addition, I asked Mr T if he had any documentation relating to Pension A and any other pensions he held apart from the ones already mentioned in this complaint. Mr T provided some further documentary evidence in relation to Pension A, including a letter from Pension A's provider saying that there were no guaranteed annuity rates or similar benefits applicable to Pension A. Also, Mr T told us that other than his state pension, the only pensions he has are three pensions which provide him with monthly income totalling about £320, with £240 of this coming from the FSCS compensation he'd received and put into a pension fund. Mr T's

CMC added that Yorsipp was aware DBL had introduced Mr T's business to it, and the process adopted by many non-regulated and regulated parties meant it wasn't unusual for the unregulated party to complete all the paperwork and for there to be no contact from the regulated firm.

I contacted both parties to say that even if the three pensions Mr T transferred into the SIPP were not the entirety of his pension provision at that time, I was satisfied they had been the greater part of his pension provision. And that, having considered all the comments and evidence both parties have provided about Pension A, as well as what the website of Pension A's provider said about stand-alone lump sums, I now thought that while it was possible Pension A may have provided Mr T with some sort of entitlement to take his fund as tax-free cash, this was far from certain and I wasn't persuaded Mr T would have met any attached conditions for doing so in any case.

Mr A accepted what I'd said about Pension A.

Yorsipp didn't accept the findings in the provisional decision and reiterated some of the points it had previously made. Nonetheless, Yorsipp made a settlement offer to Mr T. But Mr T rejected its offer, as he didn't agree with Yorsipp's choice to use the ARC Private Client Cautious Index in its settlement offer redress calculation.

I'm now in a position to make my final decision.

What I've decided – and why

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

Firstly, I'd like to reassure Mr T and Yorsipp that I've carefully considered all the comments and evidence they have provided to our Service. But my decision won't address everything they've provided. I mean no discourtesy by this, it's simply that my decision will only address what I see to be relevant to reaching a fair and reasonable outcome to this complaint.

I note Yorsipp's argument that there are various outstanding material points which Mr T should answer and that Yorsipp should have the opportunity to consider and respond to these answers before a final decision is issued. Yorsipp also says it reserves the right to comment further later and to respond on quantum once a final decision is issued.

I must be clear that it's for me to decide what information and evidence I think is required in order to make a fair and reasonable decision in the particular circumstances of Mr T's complaint. And I don't think I require any further comments or evidence in order to do that.

Further, I've previously shared my thoughts with both parties by issuing a provisional decision and they have both had the opportunity to provide any further comments or evidence they'd like me to consider. And as I made clear in my provisional decision, it isn't possible to amend my understanding or the redress I've set out after a final decision has been made - a final decision is the end of our investigation process and if accepted by Mr T, becomes legally binding on Yorsipp.

Relevant considerations

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

Before I set out the reasoning for my decision, it's important for me to say that in

considering what is fair and reasonable in all the circumstances of this complaint, I have taken into account relevant 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.

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

Jacobs J, having set out some paragraphs of *BBA* including paragraph 162 set out above, said (at paragraph 104 of *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'm therefore satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

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

I've considered whether *Adams* means that the Principles should not be taken into account in deciding this case. 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 Mr T'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 Mr T's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened *after* the contract was entered into. And he wasn't asked to consider the question of due diligence *before* Options SIPP agreed to accept the Storepods investment into its SIPP.

In Mr T's complaint, amongst other things, I'm considering whether Yorsipp ought to have identified that accepting introductions of business from DBL involved a significant risk of consumer detriment and, if so, whether it ought to have declined to accept introductions of business from DBL *before* it received Mr T's application. And the same applied to Yorsipp deciding whether to accept applications to invest in Investment C and Investment K.

The facts of Mr Adams' and Mr T's cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Mr T's case. And I need to construe the duties Yorsipp owed to Mr T under COBS 2.1.1R in light of the specific facts of Mr T's case.

So I've considered COBS 2.1.1R – alongside the remainder of the relevant considerations, and within the factual context of Mr T's case, including Yorsipp'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 Yorsipp was under any obligation to advise Mr T on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mr T on the merits of the SIPP and/or the underlying investments. But I am satisfied Yorsipp's obligations included deciding whether to accept an introduction from a firm and whether to accept particular investments into its SIPP. And I don't accept that it couldn't make such an assessment without straying into giving the member advice.

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 Mr T's case.

Yorsipp may point out that a contravention of the Principles cannot in itself give rise to any cause of action at law. That may be true. However, I am dealing with a complaint, not a cause of action, and what I am seeking to identify here is what is relevant to my consideration of what is fair and reasonable in the circumstances of this case. And I'm satisfied that the FCA's Principles are a relevant consideration that I must take into account when deciding this complaint.

The regulatory publications

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

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

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

The 2009 Thematic Review Report

The 2009 Report included the following statement:

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

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

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

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

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

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

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

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

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

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

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

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

I acknowledge that the 2009 and 2012 Thematic Review Reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 finalised guidance is). However, the fact that the reports and *"Dear CEO"* letter didn't constitute formal guidance doesn't mean their importance should be underestimated. They provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is 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.

Yorsipp suggests that many of the matters which the Report invites firms to consider are directed at firms providing advisory services. But, to be clear, I think the Report is also directed at firms like Yorsipp 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 therefore remain satisfied it's appropriate to take them into account too.

Like the Ombudsman in the *BBSAL* case, I don't think the fact the publications (other than the 2009 and 2012 Thematic Review Reports) post-date the events that took place in relation to Mr T'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 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 Yorsipp'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. And so I disagree with Yorsipp's view that the FCA's later publications meant it no longer thought it was good practice for SIPP operators to request copies of suitability reports.

As Yorsipp points out, 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 Yorsipp to ensure the transactions were suitable for Mr T. It's accepted Yorsipp wasn't required to give advice to Mr T, 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 the FCA's Enforcement Guide says, 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.

Yorsipp may argue that any publications or guidance that post-dated the events subject of this complaint don't help to clarify the type of good industry practice that existed at the relevant time. But 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 Yorsipp could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting Mr T's application.

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

And in determining this complaint, I need to consider whether, in accepting Mr T's applications to establish a SIPP and transfer his pension scheme benefits into it, and to invest in Investment C and Investment K, Yorsipp 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 Yorsipp should have done to comply with its regulatory obligations and duties.

Taking account of the factual context of this case, it's my view that in order for Yorsipp to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into DBL/the business DBL was introducing and Investment C and Investment K *before* deciding to accept Mr T's applications.

Yorsipp is concerned our Service's approach is to hold the SIPP provider liable without proper consideration of the merits of the individual complaint. But, ultimately, what I'll be looking at here is whether Yorsipp took reasonable care, acted with due diligence and treated Mr T fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mr T's complaint is whether it was fair and reasonable for Yorsipp to have accepted his SIPP application and Investment C and Investment K applications in the first place. So, I need to consider whether Yorsipp carried out appropriate due diligence checks on DBL and on these investments before deciding to accept Mr T's applications.

And the questions I need to consider include whether Yorsipp ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by DBL and/or investing in Investment C and Investment K were being put at significant risk of detriment. And, if so, whether Yorsipp should therefore not have accepted Mr T's application for the Yorsipp SIPP and/or these investments.

The contract between Yorsipp and Mr T

For clarity, my decision is made on the understanding that Yorsipp acted purely as a SIPP operator. I don't say Yorsipp should (or could) have given advice to Mr T or otherwise have ensured the suitability of the SIPP or Investment C and Investment K for him. I accept that Yorsipp made it clear to Mr T that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investments. And that forms it appears Mr T signed confirmed, amongst other things, that he indemnified Yorsipp against liability arising from his investment.

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

What did Yorsipp's obligations mean in practice?

In this case, the business Yorsipp was conducting was its operation of SIPPs. I'm satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business. The regulators' reports and guidance provided some examples of good practice observed by the FSA and FCA during its work with SIPP operators. This included being satisfied that a particular introducer/investment is appropriate to deal with/accept. That involves conducting

checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.

Yorsipp says it carried out checks on DBL, including FCA Register and Companies House searches. In addition, a 'Professional Client Agreement' was signed. So Yorsipp did take some steps towards meeting its regulatory obligations and good industry practice.

However, I don't think those steps that we've seen evidence of went far enough, or were sufficient, to meet Yorsipp's regulatory obligations and good industry practice. As set out earlier, to comply with the Principles, Yorsipp needed to conduct its business with due skill, care and diligence; organise and control its affairs responsibly and effectively; and pay due regard to the interests of its clients (including Mr T) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

And I think that Yorsipp understood this at the time too, as it did more than just check the FCA Register and Companies House. It also entered into a Professional Client Agreement with DBL. And it's apparent that Yorsipp had access to some information about the two introductions it received from DBL, as it's been able to provide us with information about this when requested.

So, and well before the time of Mr T's application in 2013, I think that Yorsipp ought to have understood that its obligations meant that it had a responsibility to carry out appropriate checks on DBL to ensure the quality of the business it was introducing.

What due diligence did Yorsipp carry out on DBL?

I acknowledge that Mr T says he only ever dealt with Mr S of Firm S – and I'll return to this point.

But for clarity, I'm satisfied that it was DBL who introduced Mr T's SIPP business to Yorsipp. I say this because DBL was recorded as Mr T's 'Financial Adviser on his SIPP application and as the 'Introducing Firm' on Mr T's 'Identity Verification Certificate'. Further, it was DBL that sent Mr T's SIPP application and other documents to Yorsipp. And I note Yorsipp itself says Mr T's business was introduced to it by DBL.

Yorsipp had a duty to conduct due diligence and give thought to whether to accept introductions from DBL.

Yorsipp says it followed industry best-practice at the time. That it signed a 'Professional Client Agreement' with DBL, and searched Companies House and the FCA Register for its permissions and any other relevant information such as FCA disciplinaries. But it found no cause for concern.

Yorsipp has not provided our Service with any evidence of the FCA Register or Companies House searches it says it completed in relation to DBL. But Yorsipp has provided our Service with a copy of the 'Professional Client Agreement' signed between Yorsipp and DBL in October 2012.

Amongst other things, the Professional Client Agreement says:

- Douglas Ballie Ltd is *"…authorised to enter into and advise on investment business under the FSMA Act 2000…"*
- Yorsipp *"…shall refuse Business from [DBL] if it ceases to be authorised, and reserves the right to cease to accept Business from, or to refuse any particular business proposed by [DBL] without giving reason."*

Was this sufficient due diligence in the circumstances?

From the information that Yorsipp has provided about its relationship with DBL, I'm satisfied Yorsipp did take *some* steps towards meeting its regulatory obligations and good industry practice. However, I don't think those steps our Service has seen evidence of went far enough or were sufficient to meet Yorsipp's regulatory obligations and good industry practice.

I think Yorsipp was aware of, or should have identified potential risks of, consumer detriment associated with business introduced by DBL, including the following, before it accepted Mr T's application:

- The SIPP business introduced by DBL had anomalous features – it appears to have been high risk business, where monies were ending up invested in unregulated and esoteric investments post-transfer.

- How DBL was able to meet its regulatory standards, particularly given that it was a small IFA firm who was a new introducer for Yorsipp.

- The risk that DBL wasn't offering or providing the consumers it was introducing to Yorsipp (like Mr T) full regulated advice on the suitability of the high risk, non-standard and unregulated investments that their Yorsipp SIPPs were being established in order to effect.

- The risk of a business that wasn't authorised by the FCA to give pension transfer or investment advice being involved in the transfer and investment process.

Yorsipp knew all of this, or else ought to have known it from the information available, but it didn't then make further appropriate checks of DBL's business model.

Yorsipp should have taken steps to address these risks (or, given these risks, have simply declined to deal further with DBL). Such steps should have involved getting a full understanding of DBL's business model – through requesting information from DBL and through independent checks. Such understanding would have revealed there *was* a significant risk of consumer detriment associated with introductions of business from DBL.

In the alternative, DBL may not have been willing to provide the required information, or fully answer the questions about its business model. In either event Yorsipp should have concluded it shouldn't accept introductions from DBL.

I've set out below some more detail on the potential risks of consumer detriment I think Yorsipp either knew about or ought to have known about *before* it accepted Mr T's SIPP application. These points overlap, to a degree, and should have been considered by Yorsipp cumulatively.

<u>The nature of the business introduced by DBL</u>

Based on the evidence provided so far, I've not seen that Yorsipp asked DBL any questions about its business model, either at the start of the relationship or on an ongoing basis. I don't think this was in line with the expectations set out in the 2009 Thematic Review Report, which made clear that "*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.",* and that SIPP operators were expected *"… 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."

And given that this was a new relationship, I think it's reasonable to expect that Yorsipp should have been particularly cautious and asked DBL questions, including about the kind of clients it would be introducing to Yorsipp, the expected nature of those clients' business, and how the quality and suitability of the advice it gave would be ensured.

Yorsipp says it couldn't advise Mr T, that to question the investments without concerns about their legitimacy could be seen as advising Mr T, and Yorsipp does not (and is not permitted to) provide financial advice. That it didn't have a copy of the suitability report and that there's no reason to ask for it unless it's to review suitability, and that's not the SIPP operator's role.

Pension transfers are complex transactions. They also involve many risks, and potentially the loss of safeguarded benefits. For this reason, advice on such transactions is regulated in the UK and there are standards of good practice that those giving the advice are expected to follow. This means several steps need to be taken as part of the advice process, and documentation such as fact-finds and suitability reports generally feature in the advice process. The purpose is to ensure any advice given takes into account all relevant factors, is suitable, and the recipient of the advice is in a fully informed position, where they understand the benefits they are giving up and the risks associated with the transfer.

I think Yorsipp, acting fairly and reasonably, should have satisfied itself that a similar process was being followed here by DBL. There was a clear risk of consumer detriment if consumers were not in a fully informed position and therefore not able to understand the risks associated with such transfers.

Yorsipp may argue that DBL's introductions represented only a small percentage of Yorsipp's total business at that time. That may be the case, but this didn't absolve Yorsipp from needing to meet the expectations set out in the regulatory publications, or from taking steps to understand the nature of the business DBL was introducing.

Yorsipp says the provisional decision suggested DBL had a new advice model and Yorsipp should have raised questions about this, but presumably its advice model would need to have been registered with the FCA and if the FCA considered the advice model to be of high risk to consumers, it wouldn't have given DBL the required regulatory approvals. And if the FCA didn't deem DBL's advice model to be a risk, our Service can't reasonably conclude that Yorsipp, if it had asked questions about DBL's model, would have identified the model as high risk.

For clarity, I am not saying DBL had a new advice model. I am saying DBL was a new introducer to Yorsipp. And Yorsipp seems to be suggesting it can rely on the regulatory status of other regulated firms and doesn't have to understand how they fulfil their regulatory obligations – in other words, it didn't need to understand DBL's business model because DBL was an FCA regulated financial adviser.

At the relevant date, COBS 2.4.6R (2) provided a general rule about reliance on others:

> "*A firm will be taken to be in compliance with any rule in this sourcebook that requires it to obtain information to the extent it can show it was reasonable for it to rely on information provided to it in writing by another person*."

And COBS 2.4.8G says:

> "*It will generally be reasonable (in accordance with COBS 2.4.6R (2)) for a firm to rely on information provided to it in writing by an unconnected authorised person or a professional firm, unless it is aware or ought reasonably to be aware of any fact that would give reasonable grounds to question the accuracy of that information*."

So, it would generally be reasonable for Yorsipp to rely on information provided to it in writing by DBL, unless Yorsipp was aware or ought reasonably to have been aware of any fact that would give reasonable grounds to question the accuracy of the information.

However, while DBL's regulatory status and its acceptance of Yorsipp's Professional Client Agreement go some way towards meeting Yorsipp's regulatory obligations and good industry practice, I think Yorsipp needed to do more in order to satisfy itself that it was fair and reasonable to accept introductions from DBL.

It's not reasonable to take so much comfort from a firm's regulated status that it's thought that no monitoring is called for because, for example, the firm is under a regulatory duty to treat its customers fairly. There had been, prior to the events in this case, examples of regulated firms fined for various forms of poor conduct where the regulated firms failed to act in their clients' best interest.

And it's an obvious point that rules alone are not enough. Relevant behaviour must be observed or monitored to ensure that only permitted behaviour occurs. I'm satisfied this can only be done through effective monitoring. And I'm satisfied this is the case even if the party being monitored is a regulated firm.

I'm satisfied that had it undertaken adequate due diligence Yorsipp ought reasonably to have been aware of facts that should have caused it to decline to accept business from DBL before it accepted Mr T's business. In other words, I'm satisfied that if Yorsipp had undertaken adequate due diligence on DBL it ought to have identified risks associated with DBL and the business it was introducing, which I'll come on to, before it accepted Mr T's SIPP application. And, in failing to take this step, I think it's fair and reasonable to conclude that Yorsipp didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr T fairly.

Taking everything into account, I'm not satisfied Yorsipp took sufficient steps to understand the nature of the business being introduced to it by DBL. I think Yorsipp should have been concerned about how DBL was able to meet its regulatory standards, particularly given that DBL was a small firm who was a new introducer for Yorsipp. I think this was a clear and obvious potential risk of consumer detriment.

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

Yorsipp says DBL introduced a total of two clients to Yorsipp, so it couldn't have identified any 'formula selling' and there was no pattern of business or suspicious level of activity. And there was nothing about Mr T's application to warrant further enquiry by Yorsipp.

I'm aware that both of these clients (of which Mr T was one) have brought their complaints about Yorsipp to our Service. And based on the evidence I've seen in both of these complaints, I'm satisfied that the two clients introduced to Yorsipp by DBL ended up with most of their SIPP monies invested in high risk non-standard assets like Investment C and Investment K.

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 people

investing for their pension. And I think Yorsipp either was aware, or ought reasonably to have been aware, that the type of business DBL was introducing was high risk and therefore carried a potential risk of consumer detriment.

From the two complaints about Yorsipp brought to our Service which feature DBL as the advising introducer, I've seen that the client SIPP application forms sent to Yorsipp, including for Mr T, didn't include any details about the intended investment(s). And I note Yorsipp has told us that it acts as the administrator only of the SIPP and that its checks of the FCA Register showed the DBL adviser held the permissions needed to give investment advice. So, Yorsipp may argue it didn't know what Mr T and the other DBL-introduced client were investing in.

But while the 2009 Thematic Review Report made clear that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs, it also made 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."*

And the 2009 Thematic Review Report went on to give the following as examples of measures that SIPP operators could consider, taken from examples of good practice that the regulator had observed and suggestions it had made to firms:

> *"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."*

So even if the investments weren't recorded on Mr T's SIPP application form, Yorsipp should have known what investments were being made by DBL-introduced clients.

The availability of advice

Yorsipp says that when Mr T completed his SIPP application and his funds were transferred he was, as far as Yorsipp was concerned and Mr T had asserted, advised by DBL, which was appropriately authorised to both advise and to enter into arrangements that might result in investments being put into a SIPP. That Yorsipp didn't have a copy of the suitability report and there's no reason to ask for it unless it's to review suitability, and that's not the SIPP operator's role. Also, that Yorsipp would have thought it highly likely that DBL had advised on the investments, and there's no reason for it to assume otherwise - it's not reasonable to say a SIPP operator must second guess a client's declarations.

I acknowledge that the form Mr T signed on 27 March 2013 instructing Yorsipp to invest some of his SIPP monies in Investment K included the statement, *"I confirm that I have sought professional advice from the qualified and authorised adviser regarding the suitability of this Investment."* But based on the available evidence, I think Yorsipp ought to have been concerned about whether this was in fact the case. Because I note this Investment K instruction was witnessed by Mr S, of Firm S. And based on the emails I've seen, Yorsipp was aware at his time that Mr S was actively involved in arranging Mr T's investments in Investment C and Investment K.

Further, TPS had already told Yorsipp (on 19 March 2019) that it was no longer Mr T's adviser and enclosed a copy of a pre-printed letter Mr T had signed some weeks earlier. And I don't think Yorsipp could reasonably have taken this pre-printed letter as any sort of reassurance that DBL had advised Mr T on his investments, because the letter suggests DBL had advised Mr T on the *transfer* of his existing pensions but that Mr T could appoint another adviser in future in relation to his *investments*, if he didn't instruct his SIPP provider directly.

In addition, the undated letter Mr T sent Yorsipp regarding Firm S and Firm Q said they would provide him with *"wealth administration services".* Yorsipp itself argues that this phrase was intended to convey that neither Firm S nor Firm Q would provide investment advice, and that Mr T retained Firm S to provide wealth administration services, which is not a regulated activity – he did not appoint Firm S as his financial adviser

So while I acknowledge that Mr T had signed a form that included a pre-printed statement that he'd sought advice on the suitability of Investment K from a qualified and authorised adviser, I'm satisfied that the information available to Yorsipp at that time meant it wasn't at all clear who had given Mr T that advice, whether they had the appropriate permissions or what that advice was. And in light of the regulatory publications, I think it's reasonable to expect Yorsipp to have been concerned by this and to have taken steps to gather more information. But I've not seen that it did.

I note Yorsipp has told us it didn't have copies of TPS's suitability report for Mr T and that it was wrong to suggest it should have asked for this. But as I've already explained, the 2009 Thematic Review Report set out examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms, and this included SIPP operators *"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."* And as I've also already explained, I disagree with Yorsipp's view that the FCA's later publications meant it no longer thought it was good practice for SIPP operators to request copies of suitability reports.

And I note Yorsipp itself has highlighted the 2013 alert about advisers giving advice to consumers on SIPPs without consideration of the underlying investment to be held in the SIPP, setting out that this type of restricted advice didn't meet regulatory requirements. So Yorsipp acknowledges that it was aware advisers should advise on the overall proposition. But I've not seen any evidence that Yorsipp checked whether this was in fact what DBL was doing in the business it introduced to Yorsipp.

Taking everything into account, I'm not satisfied Yorsipp took sufficient steps to determine what advice DBL was offering to the clients it was introducing to Yorsipp, or whether DBL's advice model was in fact operating in line with Yorsipp's assumptions. And I'm not persuaded that the clients DBL was introducing to Yorsipp, like Mr T, were ever offered or given full regulated advice - that is, advice on the transfer to the SIPP, the establishment of the SIPP *and* the intended investment(s). The possibility that full regulated advice had not been given or made available to the consumers like Mr T that DBL was introducing to Yorsipp, and that advice was instead being restricted, was a clear and obvious potential risk of consumer detriment. Especially since Mr T was transferring more than £80,000 from his three existing pension schemes.

Yorsipp says DBL was an FCA regulated business and at the time of the client's SIPP application, Yorsipp was not aware of any reason it shouldn't accept introductions from it. Yorsipp essentially says it carried out appropriate due diligence on DBL and there was no

cause for concern or red flags. But I think that from very early on Yorsipp was aware, or ought to have been aware, that DBL 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 Investment C and Investment K, where no advice is being given by that firm on the esoteric investments. That's because the risks involved in such investments are unlikely to be fully understood by most people, without obtaining regulated advice. I think it's fair to say that most advice firms decline to be involved in such transactions.

I think this ought to have been a red flag for Yorsipp in its dealings with DBL. And I think Yorsipp ought to have recognised there was a risk that DBL might be *choosing* to introduce consumers without them having been offered regulated advice on the unregulated investments that their transfers to Yorsipp were being effected to make. I think Yorsipp 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.

Having carefully considered the available evidence, including in this and the other complaint brought to our Service against Yorsipp where DBL was the introducing adviser, I'm satisfied both of the DBL-introduced Yorsipp consumers were doing the same thing. By which I mean that application forms to establish a Yorsipp SIPP were being submitted for DBL-introduced Yorsipp consumers, that pension monies were then being transferred into the newly established Yorsipp SIPPs for those consumers, and, subsequently, the consumers SIPP monies were being invested in Investment C and other high risk non-standard investments.

Given what Yorsipp ought reasonably to have identified about the business it was receiving from DBL had it undertaken adequate due diligence, I think this should have been a significant cause for concern for Yorsipp and caused it to consider the business it was receiving from DBL very carefully. Particularly where this was a new business relationship, as was the case between Yorsipp and DBL.

I do not say Yorsipp's should have checked any advice that was given – but it should have taken steps to ascertain if a reasonable process was in place and consumers were taking these steps on an informed basis. And I think if it had undertaken such steps and carried out even a cursory investigation, then it would have become aware no reasonable process was in place and consumers were not fully informed of the risks, which I'll come to.

<u>The risk of an unregulated business being involved</u>

I note Yorsipp says SIPP providers are not barred from accepting business from unregulated introducers. But as I'll explain, while I think it's likely Firm S was involved from the start here and that Yorsipp was, or ought to have been, aware of this, the due diligence Yorsipp may or may not have carried out on Firm S isn't the basis on which I'm upholding Mr T's complaint, or something I've relied on in reaching my conclusions.

Yorsipp says Mr T's business was introduced to it by DBL, who was recorded on his SIPP application as his financial adviser. And Yorsipp has made various submissions to the effect that Mr T should have told Yorsipp that Mr S was the initial introducer and/or advising Mr T (if indeed Mr S was), that Yorsipp itself had no way of knowing these things, and that if it had known these things then it would have rejected Mr T's SIPP business.

As I've said, I'm satisfied both of the DBL-introduced Yorsipp consumers were doing the same thing. And I don't think it's credible that these DBL-introduced consumers were independently determining to transfer their pensions to a Yorsipp SIPP and to invest their

SIPP monies in Investment C and other high risk non-standard investments without any input from a third party. Based on the evidence provided, Mr T wasn't a high net worth investor or a sophisticated investor. He was a normal retail investor. And it's difficult to see why such a retail investor would in the first place choose to move all of his pensions to a SIPP (a fairly specialist pension arrangement), whilst waiving his cancellation rights, to invest in high risk, non-standard investments which are only suitable for a small number of clients and while understanding the implications of this, without the input of a third party.

I think that Yorsipp ought to have been alive to the risk that an unregulated third party might have been involved in promoting the transfer to a SIPP and the investments to investors, like Mr T, and that consumers were not receiving any regulated advice from DBL on the investments. And the regulator's examples of good practice said SIPP providers should identify instances of clients waiving their cancellation rights, as Mr T did, and the reasons for this.

Given what Yorsipp ought reasonably to have identified about the business it was receiving from DBL had it undertaken adequate due diligence, I think this should have been a significant cause for concern for Yorsipp and caused it to consider the business it was receiving from DBL very carefully.

What fair and reasonable steps should Yorsipp have taken, in the circumstances?

Yorsipp 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 DBL. That would have been a fair and reasonable step to take, in the circumstances. And it was clearly a step Yorsipp was aware it could take, given that the Professional Client Agreement reserved Yorsipp's right to stop accepting business from DBL, or to refuse any particular business it proposed, without giving reason.

Alternatively, Yorsipp could have taken fair and reasonable steps to address the potential risks of consumer detriment. I've set these out below.

<u>Requesting information directly from DBL</u>

Given the significant potential risk of consumer detriment I think that, as part of its due diligence on DBL, Yorsipp ought to have found out more about how DBL was operating and *before* it accepted Mr T's application. Mindful of the type of introductions I think it was receiving from DBL, and that it ought to have been concerned about whether the clients introduced were in fact receiving regulated advice on the intended investments, I think it's fair and reasonable to expect Yorsipp, in line with its regulatory obligations, to have made some very specific enquiries and obtained information about DBL'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 Yorsipp, and *before* it received Mr T's application from DBL, should have checked with DBL about: 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, how and why retail clients were interested in making higher risk non-standard 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 DBL was a fair and reasonable step for Yorsipp to take, in the circumstances, to meet its regulatory obligations and good industry practice.

It is possible that, if Yorsipp *had* checked with DBL and asked the *type* of questions I've mentioned above, DBL would have provided the information sought. But if Yorsipp had been unable to obtain the information sought from DBL, then I think it's fair and reasonable to say that Yorsipp should have then concluded that it was unsafe to proceed with accepting business from DBL in those circumstances. In my opinion, it wasn't reasonable, and it wasn't in-line with Yorsipp's regulatory obligations, for it to proceed with accepting business from DBL if the position wasn't clear.

Making independent checks

I think, in light of what I've said above, it would also have been fair and reasonable for Yorsipp, 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 DBL. For example, it could have asked for copies of correspondence relating to the transfer 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)

So I think it would have been fair and reasonable for Yorsipp to speak to applicants, like Mr T, directly.

I accept Yorsipp 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, as this could have provided Yorsipp with further insight into DBL's business model. This would have been a fair and reasonable step to take in reaction to the clear and obvious risks of consumer detriment I've mentioned.

Yorsipp says that even if it had contacted Mr T to ask questions, he wouldn't have provided Yorsipp with the investment details. Or if he did, incorrect information would have been provided. So Yorsipp wouldn't have been able to conduct the level of due diligence the provisional decision suggested was necessary.

But, on balance, I still think it's more likely than not that if Yorsipp *had* contacted Mr T to 'confirm the position', Mr T would have told Yorsipp that Mr S of Firm S had cold-called him

for a pension review and told him about Investment C and Investment K. That Mr S had told him his new pension would outperform his existing pensions without taking any degree of risk. That Mr S did all the paperwork and was the driver behind everything, and that he'd not had any dealings with DBL and he only ever dealt with Mr S. In short, I think Mr T would have told Yorsipp that in his view, Mr S was his adviser and had introduced him to the SIPP and the investments. And I note Yorsipp says that if Mr T had told Yorsipp that his adviser and introducer was Mr S of Firm S, Yorsipp wouldn't have opened his SIPP or placed his investments.

Had it taken these fair and reasonable steps, what should Yorsipp have concluded?

If Yorsipp had undertaken these steps I think it ought to have identified, amongst others, the following risks before it accepted Mr T's application:

- The SIPP business introduced by DBL had anomalous features – it appears to have been high risk business, where monies were ending up invested in unregulated and esoteric investments post-transfer.

- Concerns about how DBL was able to meet its regulatory standards, particularly given that it was a small IFA firm who was a new introducer for Yorsipp.

- The risk that DBL wasn't offering or providing the consumers it was introducing to Yorsipp (like Mr T) full regulated advice on the suitability of the high risk, non-standard and unregulated investments that their Yorsipp SIPPs were being established in order to effect.

- The risk of a business that wasn't authorised by the FCA to give pension transfer or investment advice being involved in the transfer and investment process.

- 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 Yorsipp received from DBL. I think that Yorsipp ought to have had real concerns that DBL wasn't acting in customers' best interests and wasn't meeting its regulatory obligations.

Yorsipp didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr T fairly by accepting his application from DBL. To my mind, Yorsipp didn't meet its regulatory obligations or good industry practice at the relevant time, and allowed Mr T to be put at significant risk of detriment as a result. Yorsipp should have concluded, and *before* it accepted Mr T's business from DBL, that it shouldn't accept introductions from DBL. I therefore conclude that it's fair and reasonable in the circumstances to say that Yorsipp shouldn't have accepted Mr T's application from DBL at all.

Due diligence on the underlying investments

Yorsipp had a duty to conduct due diligence and give thought to whether an investment itself is acceptable for inclusion into a SIPP. That's consistent with the Principles and the regulators' publications as set out earlier in this decision. It's also consistent with HMRC rules that govern what investments can be held in a SIPP.

Given what I've said about Yorsipp's due diligence on DBL and my conclusion that it failed to comply with its regulatory obligations and good industry practice at the relevant time, I don't think it's necessary for me to also consider Yorsipp's due diligence on the investments at this stage. I'm satisfied that Yorsipp wasn't treating Mr T fairly or reasonably when it accepted his SIPP application from DBL, so I've not gone on to consider the due diligence it may have carried out on the investments and whether this was sufficient to meet its regulatory obligations. And I make no findings about this issue.

Was it fair and reasonable in all the circumstances for Yorsipp to proceed with Mr T's application?

For the reasons given above, I think Yorsipp shouldn't have accepted Mr T's business from DBL. So things shouldn't have got beyond that.

In its submissions to our Service, Yorsipp has referred to forms that Mr T signed and suggests these indemnify Yorsipp. For completeness, in my view it's fair and reasonable to say that just having Mr T sign 'indemnity' declarations wasn't an effective way for Yorsipp to meet its regulatory obligations to treat him fairly, given the concerns Yorsipp ought to have had about his introduction.

Yorsipp knew that Mr T had signed forms intended to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on such indemnities when Yorsipp knew, or ought to have known, Mr T's dealings with DBL were putting him 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 to do would have been to refuse to accept Mr T's application.

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

COBS 11.2.19R

Yorsipp says the investments were made as instructed by Mr T and that he signed documentation to confirm he wanted to make the investments. Given these arguments, Yorsipp may also argue that COBS 11.2.19R obliged it to execute investment instructions. Before considering these points, I think it is important for me to reiterate that it was not fair and reasonable for Yorsipp to have accepted Mr T's SIPP application from DBL in the first place. So in my opinion, Mr T's SIPP should not have been established and the opportunity to execute investment instructions or proceed on an insistent client basis or in reliance on an indemnity should not have arisen at all.

In any event, the 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."

Therefore, I don't think the argument on this point is relevant to Yorsipp's obligations under the Principles to decide whether or not to accept an application to open a SIPP in the first place or to execute the instruction to make the investments i.e. to proceed with the application.

I'm satisfied that Mr T's SIPP shouldn't have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity shouldn't have arisen at all. And I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for Yorsipp to proceed with Mr T's application.

Is it fair to ask Yorsipp to pay Mr T compensation in the circumstances?

The involvement of other parties

In this decision I'm considering Mr T's complaint about Yorsipp. But I accept other parties were involved in the transactions complained about, including DBL.

Mr T pursued an FSCS claim against DBL. The FSCS upheld Mr T's claim, calculated his losses to be in excess of £50,000 and paid him its limit of £50,000 compensation. Following this the FSCS provided Mr T with a reassignment of rights.

Yorsipp has questioned the accuracy of Mr T's recollection. It says he's suggested he had no contact with DBL as he says he only ever dealt with Mr S, yet his FSCS claim about DBL's advice was successful. And that the FSCS only pays compensation where it considers the firm liable, so it's difficult to understand why it compensated Mr T without DBL's substantive involvement. So Mr T should explain why he was able to make a successful FSCS claim about DBL. And Yorsipp says it should have the opportunity to consider Mr T's explanation and respond to it.

I acknowledge that Mr T has told us that Mr S did all the paperwork, filled out all the forms, and presented paperwork for Mr T's signature, and that he didn't recall any dealings with DBL - he only ever dealt with Mr S. But I don't think what Mr T has told us about his recollections is at odds with his FSCS claim against DBL being successful. Because it's clear DBL was involved even if Mr T didn't recall it. And Yorsipp itself accepts that it was DBL who introduced Mr T's SIPP business to Yorsipp.

Yorsipp suggests DBL is really responsible for Mr T's losses, as it's said Mr T appeared to be complaining to Yorsipp about alleged failures by the adviser, and unfortunately the adviser is no longer trading, as otherwise this would be a complaint for the adviser *"under 1.7.1 of COBS"* – I think here Yorsipp is referring to COB 1.7.1, which was last in force in 2007. In any case, Yorsipp says the point it's making here is that our Service is required to follow the law and where it does not, provide reasons for why. And the Civil Liability (Contribution) Act 1978 says that where more than one party is responsible for a loss, a contributory claim can be brought against another party. So Yorsipp says I should also consider DBL's role - that the FSCS has already found DBL at fault and so it's not open to our Service to find Yorsipp wholly responsible for the loss.

But the Financial Ombudsman Service won't look at complaints against DBL as it's been dissolved and no longer exists as a regulated business.

And 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 Yorsipp accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mr T fairly.

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

I accept that other parties, including DBL, might have some responsibility for initiating the course of action that led to Mr T's loss. However, I'm satisfied that it's also the case that if Yorsipp had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr T wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

I want to make clear that I've taken everything Yorsipp has said into consideration and I've carefully considered causation, contributory negligence, and apportionment of damages. And it's my view that it's appropriate and fair in the circumstances for Yorsipp to compensate Mr T to the full extent of the financial losses he's suffered due to Yorsipp'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 Yorsipp is liable to pay to Mr T.

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

Mr T taking responsibility for his own investment decisions

Yorsipp says the principle (as highlighted by the Court of Appeal in *Adams*) of consumer protection, even where that involves protecting consumers from the consequences of their bad investment decisions, has limits. And that the judgment in *Adams* doesn't extend to suggesting that a firm in any way involved in a customer's activities effectively holds the customer harmless against any losses they might suffer as a result of their own decisions.

In reaching my conclusions in this case, I've thought about the points Yorsipp makes here. I've also 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.

Having carefully considered all this, I'm satisfied that it wouldn't be fair or reasonable to say Mr T's actions mean he should bear the loss arising as a result of Yorsipp's failings.

In my view, if Yorsipp had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr T's business from DBL at all. That should

have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr T wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

As I've made clear, Yorsipp needed to carry out appropriate initial and ongoing due diligence on DBL and reach the right conclusions. I think it failed to do this. And just having Mr T sign forms containing declarations wasn't an effective way of Yorsipp meeting its obligations, or of escaping liability where it failed to meet its obligations.

I wouldn't consider it fair or reasonable for Yorsipp to have concluded that Mr T had received an accurate explanation of the risks involved, given what Yorsipp knew, or ought to have known, about DBL's business model when it received Mr T's SIPP application.

And I'm satisfied that Mr T trusted the firms he was dealing with to act in his best interests. Mr T says he saw Mr S as very knowledgeable and thought he was offering a long-term investment relationship to help and guide his pension/investments, and that he'd trusted Mr S. DBL was a regulated firm who provided Mr T with advice on his pension transfer. Mr T also then used the services of a regulated personal pension provider, Yorsipp.

So, overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair and reasonable to say Yorsipp should compensate Mr T for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr T should suffer the loss because he ultimately instructed the transactions to be effected.

Had Yorsipp declined Mr T's business from DBL, would the transactions complained about still have been effected elsewhere?

Yorsipp has made a number of arguments to the effect that Mr T would likely have proceeded with the transfer and investments regardless of the actions Yorsipp took, as he was motivated to make the investment regardless of the controls Yorsipp put in place and that he was prepared to sign a SIPP application form that he knew to be false. I'd like to be clear that I've considered all of Yorsipp's arguments on this point. And I've thought carefully about what Mr T would likely have done if Yorsipp had told him it was rejecting his business.

I acknowledge that an email forwarded from Mr S to Mr T and then on to Yorsipp on 6 June 2013 said, *"As you can appreciate I remain disappointed this has taken so long but I ma [sic] relieved I can finally proceed to use the SIPP as I intended. Meaning using [Mr S] to introduce investments for my consideration and not an IFA who I feel doesn't add the value that justifies paying them fees."* But I'm mindful that Mr T says those views weren't his, but rather Mr S's that he forwarded on, and he saw Mr S as very knowledgeable and trusted his help and guidance. I'm also mindful that Mr T was a retail investor.

If Mr T had sought advice from a different adviser, I think it's more likely than not that the advice would have been not to transfer all his pensions into a SIPP and not to invest in Investment C and Investment K. Mr T has told us that other than his state pension, the only pensions he has are three pensions which provide him with monthly income totalling about £320 a month – and £240 of this comes from the FSCS compensation he'd received and put into a pension fund. So even if the three pensions Mr T transferred into the SIPP were not the entirety of his pensions provision at that time, I'm satisfied they were the majority of his pension provision. And Investment C and Investment K were high risk, non-standard investments. So based on the evidence provided, it remains the case that Mr T was not a high net worth individual such that he had this capacity for loss.

Given all this, I still think it's more likely than not that Mr T would have acted in accordance with advice not to transfer all his pensions into a SIPP and not to invest in Investment C and

Investment K. Alternatively, if Yorsipp hadn't accepted his business from DBL, Mr T might have simply decided not to seek pensions advice elsewhere from a different adviser and still then retained his existing pensions.

Yorsipp might also argue that other SIPP providers were accepting such investments at the time. And that another SIPP operator would've accepted Mr T's application had Yorsipp declined it. But I don't think it's fair and reasonable to say that Yorsipp shouldn't compensate Mr T for his loss on the basis of speculation that another SIPP operator would've made the same mistakes that I've found Yorsipp did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr T's application from DBL.

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."*

But, in this case, I'm not satisfied that Mr T proceeded knowing that the investment he was making was high risk and speculative, and that he was determined to move forward with the transactions in order to take advantage of a cash incentive.

It appears Mr T understood that his pension monies were being moved into a safe investment which would out-perform his existing pensions. I've also not seen any evidence to show Mr T was paid a cash incentive. It therefore cannot be said he was incentivised to enter into the transaction. And, on balance, I'm satisfied that Mr T, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams. And having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if Yorsipp had refused to accept Mr T's application from DBL, the transactions this complaint concerns would not have still gone ahead.

In conclusion

So, overall, I do think it's fair and reasonable to direct Yorsipp to pay Mr T compensation in the circumstances. While I accept that other firms might have some responsibility for initiating the course of action that's led to Mr T's loss, I consider that Yorsipp failed to comply with its own regulatory obligations and didn't, when it had the opportunity to do so, put a stop to the transactions proceeding by declining Mr T's application from DBL. And I'm satisfied that Mr T wouldn't have established the SIPP, transferred monies in from his existing pensions, or invested in Investment C and Investment K if it hadn't been for Yorsipp's failings.

Yorsipp didn't have to carry out an assessment of Mr T's needs and circumstances in order to meet its regulatory requirements, but it did have to treat Mr T fairly under the Principles. I'm satisfied that in the circumstances, and for all the reasons given, it's fair and reasonable to conclude that Yorsipp should compensate Mr T for the loss he's suffered.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr T. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against Yorsipp that requires it to compensate Mr T for the full measure of his loss. DBL was reliant on Yorsipp to facilitate access to Mr T's pensions. But for Yorsipp's failings, Mr T's pension transfers wouldn't have occurred in the first place.

As such, I'm not asking Yorsipp to account for loss that goes beyond the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I'm not able to determine. However, that fact shouldn't impact on Mr T's right to fair compensation from Yorsipp for the full amount of his loss.

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 Yorsipp shouldn't have accepted Mr T's SIPP application. For the reasons I've set out, I also think it's fair to ask Yorsipp to compensate Mr T for the loss he's suffered.

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

Putting things right

I consider that Yorsipp failed to comply with its own regulatory obligations and didn't put a stop to the transactions. My aim in awarding fair compensation is to put Mr T back into the position he would likely have been in had it not been for Yorsipp's failings. Had Yorsipp acted appropriately, I think it's *most likely* that Mr T would've remained a member of the pension plans he transferred into the SIPP.

In light of the above, Yorsipp should:

- Obtain the notional transfer value of Mr T's previous pension plans.
- Obtain the actual transfer value of Mr T's SIPP, including any outstanding charges.
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Pay an amount into Mr T's SIPP so as to increase the transfer value to equal the notional value established. This payment should take account of any available tax relief and the effect of charges.
- If the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- If Mr T has paid any fees or charges from funds outside of his pension arrangements, Yorsipp should also refund these to Mr T. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Pay to Mr T an additional amount of £500 to compensate him for the distress and inconvenience Yorsipp has caused him.

Treatment of the illiquid assets held within the SIPP

I think it would be best if any illiquid assets held could be removed from the SIPP. Mr T would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investment/s may prove difficult, as there is no market for it. For calculating compensation, Yorsipp should establish an amount it's

willing to accept for the investment/s as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment/s.

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

If Yorsipp is unable, or if there are any difficulties in buying Mr T's illiquid investment/s, it should give the holding/s a nil value for the purposes of calculating compensation. In this instance Yorsipp may ask Mr T to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding/s. That undertaking should allow for the effect of any tax and charges on the amount Mr T may receive from the investment/s and any eventual sums he would be able to access from the SIPP. Yorsipp will have to meet the cost of drawing up any such undertaking.

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

Yorsipp should first contact the providers of the plans which were transferred into the SIPP and ask them to provide a notional value for the policies as at the date of calculation. For the purposes of the notional calculation the provider should be told to assume no monies would've been transferred away from the plan, and the monies in the policy would've remained invested in an identical manner to that which existed prior to the actual transfer.

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

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would've enjoyed is allowed for.

If there are any difficulties in obtaining a notional valuation from the previous operators, then Yorsipp should instead arrive at a notional valuation by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index. I'm satisfied that is a reasonable proxy for the type of return that could have been achieved over the period in question.

Yorsipp says the FSCS compensation Mr T received should be deducted in full from any redress calculation together with any return on that money, on the basis that it's DBL's contribution to Mr T's loss. Yorsipp has also made comments on the amount it believes would be fair to notionally deduct to reflect the correct position, bearing in mind that if making a withdrawal from a pension, Mr T would usually pay tax.

As I've already explained, I'm satisfied Yorsipp's failings have caused the full extent of the loss in question. And I've considered both sides' comments but overall, I remain of the view that it is fair and reasonable to use the sum Mr T actually received from the FSCS in the calculation.

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

However, I do think it's fair and reasonable to allow for a *temporary* notional deduction equivalent to the payment(s) Mr T actually received from the FSCS for a period of the calculation, so that the payment(s) ceases to accrue any return in the calculation during that period. I say this bearing in mind that this is not in fact a pension withdrawal and contribution, it is simply a means of acknowledging that Mr T has had the use of some money from the FSCS during the period of time that Yorsipp is being asked to compensate him for. The notional deduction and addition reflects this position and ensures that Mr T isn't compensated for lost growth on that sum during the time that he had enjoyment of those monies.

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

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

Where there are any difficulties in obtaining notional valuations from the previous operators, Yorsipp can instead allow for both the notional deduction(s) and addition(s) in the notional calculation it performs, provided it does so in accordance with the approach set out above.

The notional value of Mr T's existing plan if monies hadn't been transferred (established in line with the above) less the current value of the SIPP (as at date of calculation) is Mr T's loss.

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

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

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr T as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%, and neither party has disputed this. So, making a notional deduction of 15% overall from the loss would ordinarily adequately reflect this.

If either party disagrees with the presumed income tax rate, they'll need to let us know as soon as possible and, if agreement can't be reached at this stage, certainly before a final decision is issued after which the redress can't be amended.

SIPP fees

If the investments can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mr T to have to continue to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Interest

The compensation resulting from this loss assessment must be paid to Mr T or into his SIPP within 28 days of the date Yorsipp receives notification of his acceptance of my final decision. The calculation should be carried out as at the date of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days.

Yorsipp must also provide the details of its redress calculation to Mr T in a clear, simple format.

Pay Mr T £500 for the distress and inconvenience the problems with his pension have caused him.

In addition to the financial loss that Mr T has suffered as a result of the problems with his pension, I think it's fair and reasonable to say that the possible loss of a significant portion of his pension provision has caused Mr T distress. So I think that it's fair for Yorsipp to compensate him for this as well.

My final decision

For the reasons given, it's my decision that Mr T's complaint should be upheld and that Yorsipp Limited must pay fair redress as set out above.

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

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

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend Yorsipp Limited pay Mr T the balance plus any interest on the balance as set out above.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 25 February 2025.

Ailsa Wiltshire

Ombudsman