DRN-5320048

The complaint

Mr M complains that Morgan Lloyd SIPP Services Limited failed to carry out sufficient due diligence before accepting the introduction of his self-invested personal pension ('SIPP') business and his application to invest in a high-risk unregulated investment scheme. And that its failures caused him a financial loss which it should compensate him for.

Mr M is represented in this complaint by a professional representative, but for ease I'll largely refer only to Mr M.

What happened

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

Morgan Lloyd SIPP Services Limited ('ML')

ML is a regulated SIPP provider and administrator. At the time of these events, ML was regulated by the Financial Conduct Authority ('FCA'). ML 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 personal pension scheme, and to make arrangements with a view to transactions in investments.

The Complete Financial Player ('TCFP')

Between July 2018 and April 2019, TCPF was a trading style of an FCA regulated financial advisory firm I'll call 'Firm F'.

Firm F is listed as an active company, but in August 2024 it applied to cancel its FCA authorisation.

German Property Group companies

These companies were set up in Germany and were not regulated by the FCA.

AS German Property Group GmbH, formerly Dolphin Trust GmbH (which was also formerly Dolphin Capital GmbH) ('Dolphin GmbH') was seemingly set up in 2008 to acquire historic sites in Germany in need of restoration with tax concessions. The plan was that properties would be sold to German investors once development potential and planning permission was in place. And funding for development of projects was by way of loan notes issued to investors.

The properties were meant to be held by a Special Purpose Vehicle through Dolphin GmbH and Dolphin Capital 80. Project GmbH & Co KG ('DC80'), set up in 2011, was separately used for the purpose of accepting investor's monies and issuing the loan notes in respect of the properties.

The security was meant to be by way of first legal charge granted on the properties by Dolphin GmbH, whereby it was intended that the investors' funds would be paid (as set out below) to DC80 upon the transfer of the legal charge by Dolphin GmbH into the name of the Security Trustee (held in favour of the loan note holder). And the Security Trustee would then only release the security if loan note holders had been repaid.

The promotional material originally advertised that the investment funds would be paid by investors directly to a German law firm ('BK Law'), who'd hold the funds in a secure account until the purchase of the property took place and the security documentation was issued, at which point the funds would be paid to DC80. However, this seemingly changed in or around August 2014 by which time BK Law no longer received any of the investment monies, albeit some of the documentation continued to reflect this process for a time – though I've not seen that this was the case at the time Mr M invested in Dolphin.

The loan notes issued were usually for a period of between two to five years and widely promoted with fixed annual returns of 10 to 15%, paid six monthly or at the end of the term, with the return of the capital at the end of the term. And, in or around 2021, Dolphin GmbH and DC80 entered administration.

Mr M's dealings with TCFP, ML and Dolphin

Mr M had an existing SIPP with another provider within which he made various investments. This included a £100,000 investment in Dolphin - it appears this investment was made in January 2014, and that at the end of the investment term Mr M received back over £144,000 in February 2017.

It appears that Mr M had also made another separate, direct, investment with Dolphin outside any pension he held - the investment paperwork names Mr M himself as the registered holder of the investment, rather than a pension or other trustee. Mr M made this investment of £40,000 in April 2017 for a five-year term. I've not seen that Mr M received a return from this investment at the end of its term.

In around August 2018, Mr M approached Firm F regarding his existing SIPP as he was interested in using his SIPP cash balance to make another investment in Dolphin, but his existing SIPP provider no longer accepted Dolphin in its SIPPs.

TCFP provided Mr M with advice in relation to transferring his SIPP to another provider and his intended investment. TCFP's advice report of October 2018 recorded, amongst other things, that Mr M:

- Was married with no financial dependants.
- Was retired, with a household income of £2,000 a month.
- Owned his home, valued at £450,000 and with no mortgage.
- Had £50,00 in cash assets, held in a bank account.
- Held £45,000 in *"stocks/bonds".*
- His existing SIPP had a current value of £221,866, comprising mostly cash but also holdings in what I'll call 'Asset S', 'Asset C' and 'Asset P' – these did not include the Dolphin investment. No other existing pension was recorded.

On 30 October 2018, Mr M signed a 'Transfer Out' form for his existing SIPP. This recorded that he'd taken advice from TCFP regarding transferring his existing SIPP, that the receiving scheme would be ML and that Mr M was transferring out of his existing SIPP because he was *"Unhappy with provider; inflexibility of investments".*

On the same date, Mr M signed a 'Statement for Self-Certified Sophisticated Investor' to confirm that, amongst other things:

- He understood he may have no right to complain to the FCA or the Financial Ombudsman Service, or to seek compensation from the Financial Services Compensation Scheme ('FSCS').

- He was a self-certified sophisticated investor because *"I have made more than one investment in an unlisted company in the two years prior to the date* [he signed the declaration]".

- He accepted the investments *"may expose me to a significant risk of losing all of the money or other property invested".*

- He was aware it was open to him to seek advice from someone who specialises in advising in investments.

In November 2018, Mr M signed an ML branded 'Directus' SIPP application form which included the following information:

- It gave Mr M's date of birth, showing that he was age 57 at that time. It recorded that Mr M wanted to retire at age 57, and that he'd taken benefits from his existing pension and was in flexi-drawdown.

- The 'Transfers' section set out the details of Mr M's existing SIPP to be transferred. This included that it had an approximate value of £221,867, and that the transfer would include assets 'in specie', i.e. without cashing them in first.

- The 'Investment Details' section set out that the first investment Mr M intended to invest his ML SIPP monies in was "*Dolphin Trust"* in the amount of £85,000. It didn't record details of any second investment, only that this was *"to be advised".*

- The 'Financial Adviser Details' section recorded that Mr M had been advised by 'Mr R' of TCFP, and included TCFP's signature and FCA authorisation number.

- The 'Legal Declarations' section signed by Mr M said, amongst other things, *"I agree that my Financial Adviser and I are solely responsible for all decisions relating to the purchase, retention and sale of the investments within my SIPP Fund and I agree not to hold the Trustee or Administrator liable for any decisions made by myself or my Financial Adviser. This does not affect the Administrator's right to refuse to action or to dispose of any investment which does not fall within the SIPP's list of permitted investments as amended from time to time. I understand that the Administrator has not carried out and shall not carry out any review of the nominated Investment Fund Manager's financial status or their investment and/or risk strategies."*

Mr M's ML SIPP was established in December 2018.

In early 2019, cash of £131,358 and in specie assets with a total value of £66,743 were transferred into it from his existing SIPP. The letter Mr M's previous SIPP sent to ML on 31 May 2019 to confirm the transfer listed that the in specie assets were Asset S and Asset P – no Dolphin investment was listed here.

Mr M signed a Dolphin 'Loan Note Offer' document, and on 21 May 2019 £85,000 of Mr M's ML SIPP monies were invested into a five-year Dolphin loan note.

In June 2019, Mr M began drawing down his ML SIPP pension benefits. And in August 2019, £25,000 of his ML SIPP monies were used to buy another investment I'll call 'Investment S'

On 28 October 2019, a company called 'CFE', which had been appointed to review Dolphin, wrote an update to investors. Amongst other things, this update said:

> *"You have invested money in the investment model of the German Property Group (formerly Dolphin Trust) and have realised for some time now that there are disturbances in the return flow of your investments. This circumstance is unpleasant for you and understandably leads to uncertainty regarding your investment.*
>
> *Your investments in listed real estate with expansion/value creation potential justified themselves in a market environment "real estate investment" with market-proven increase in value in substance as well as yield. Special effects of this in Germany, beyond commercial predictability, include among others:*
> *overloading of the approval authorities, legal reorganisation of relevant property taxes for real estate, political decisions on ecologically sustainable renovations and new buildings pp* [sic].
>
> *The above-mentioned circumstances only provide an excerpt of the factors influencing project financing and its implementation."*

And

> *"In the interests of responsible corporate management and transparency towards all stakeholders, in particular investors and financial markets, the German Property Group, namely* [name of director of Dolphin]*, has commissioned our company with the neutral and independent preparation of continuation reports and rating analyses."*

On 12 December 2019 Dolphin wrote to investors. It said:

> *"We have appointed Consult Finance Estate (CFE), CFE are experts in helping companies reorganise their structure. We appointed CFE due to difficult market conditions we have faced, we feel we need to have the assistance of a specialised company to assist us in the restructuring process and to ensure all we do is fully validated for the interests of our investors.*
>
> *The review can take up to 6 months to conclude, the reason for this timeframe is simply to allow a full and independent review of all the projects, the valuations, any delays currently in place and fully review the business structure. At the end of the process they will provide a detailed report that will be issued to all pension companies to review. During the review it is proposed that CFE will send an update every 4 weeks to clients to keep them updated.*
>
> *There will be no payments made on maturities during the review period, the reason for this is to ensure all clients are treat* [sic] *fairly and reasonably in receiving funds as advised by CFE."*

On 30 July 2020, Dolphin wrote to investors saying:

> *"The Core companies belonging to the German Property Group (formerly Dolphin Trust) have filed for bankruptcy with the Bremen Local Court (Insolvency Court). The Bremen Local Court has in turn appointed the experienced Gorg insolvency expert*

Prof. Dr. Gerrit Hölzle to serve as preliminary insolvency administrator in the context of an insolvency for GPG.

The companies now under bankruptcy protection consist of financing and coordination hubs within the diverse and important German Property Group and include the eponymous German Property Group GmbH itself. The gradual filing of insolvency applications for all of the individual project development companies belonging to German Property Group will soon take place in an order agreed with the court for reasons of procedural efficiency.

The court have appointed GÖRG Partner Gerrit Hölzle: a German bankruptcy procedure ensures that the interests of the creditors are carefully protected from the bankruptcy application and that each creditor is treated equitably. Every effort is now being made to ensure that the German Property is dealt with fairly and efficiently for the benefit of its creditors. We are confident that the numerous stakeholders of The German Property Group, including affected municipalities throughout Germany, will also benefit from the structure and clarity provided by this insolvency proceeding."

The Dolphin investment failed. As above, Dolphin filed for bankruptcy with the local court in Germany in 2020. The investment's failure has led to both civil and criminal proceedings against companies and individuals involved in the structure.

Mr M engaged a professional representative, which sent ML a 'letter of claim' in September 2020. In summary this said, amongst other things, that:

- Mr M was advised by to transfer his pension from his existing SIPP to a new SIPP with ML and invest his SIPP monies in Dolphin – he was told this was a safe investment with the possibility of healthy returns.

- ML had failed to carry out sufficient due diligence on the advising introducer TCFP before accepting Mr M's business from it. Had it done so, it ought to have known business introduced by TCFP likely posed a high risk of consumer detriment, as TCFP was acting as an introducer to an esoteric unregulated investment likely to be suitable only for a small proportion of a sophisticated investor's portfolio. ML ought to have thought it anomalous that TCFP was advising Mr M to make an in-specie transfer to ML. And it ought to have been concerned that Mr M had signed several disclaimers acknowledging the investment was high risk.

- ML had failed to carry out sufficient due diligence on the Dolphin investment before accepting it into its SIPPs. ML didn't carry out independent checks on its viability - and if had, it ought to have seen it had no real investor protection, no liquidity, couldn't be independently valued, was very high risk and effectively an unregulated collective investment scheme ('UCIS'), and that the Dolphin marketing material was misleading.

- Mr M hadn't been a sophisticated or high net worth ('HNW') investor – he was a retail investor and ML should have been mindful he was investing a significant part of his pension in Dolphin.

- So ML hadn't acted fairly or complied with its regulatory duties, specifically its responsibilities as set out in the Principles for Businesses at 2, 3 and 6 and COBS 2.1.1R. Had ML acted in accordance with its regulatory obligations and good industry practice at the relevant time, it should have refused to accept Mr M's introduction and investment. Therefore, it should compensate him for his financial loss, including the ML SIPP management fees he'd paid, 8% interest per annum and his costs.

Mr M brought his complaint to our Service in December 2020, as ML hadn't yet responded to his letter of claim. Mr M thought ML should compensate him for his loss of investment, taking into account its administration charges and what his pension would have been worth had it stayed where it was and not been transferred to ML in 2019. He also told us he had no legal action pending against ML.

In February 2021 ML responded to Mr M's letter of claim. Overall, ML thought it had acted in line with its contractual and regulatory obligations, that it had an appropriate due diligence framework, and there had been no reason to refuse Mr M's instruction to invest in Dolphin. The points ML's response made included that:

- Mr M was responsible for his investment decisions.

- The terms and conditions of Mr M's ML SIPP made it clear ML didn't provide pensions or investment advice, or accept any liability for the suitability, appropriateness or performance of Mr M's chosen investments.

- The judgment in *Adams v Options SIPP UK LLP (formerly Carey Pensions UK LLP)* [2020] EWHC 1229 (Ch) (18 May 2020) (Adams v Carey) held that the scope of a SIPP provider's duty was determined by the contractual terms agreed with the member and that the duty owed in COBS 2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client)* must be interpreted in the context of the contractual agreement between ML and Mr M. Further it was stated that *"...the claimant was to be responsible for his own investment decisions."*

- ML does not, and is not permitted to, provide advice. ML rejecting Mr M's Dolphin investment application would have been tantamount to advising him it was unsuitable for him and so acting in breach of the general prohibition.

- Mr M's business was introduced to ML by regulated adviser TCFP, and the significant due diligence ML carried out on TCFP didn't give ML cause for concern that business introduced by TCFP would pose a high risk of consumer detriment.

- TCFP must take responsibility for the investment decisions that were made. ML asked whether Mr M had taken any steps against TCFP.

- ML had systems in place to recognise and act on warnings by refusing to accept SIPP applications, as it had done on previous occasions – ML didn't clarify here whether these were applications from TCFP.

- It's not uncommon for assets to be transferred between SIPP providers on an in specie basis, so ML had no reason to think this anomalous. ML also obtained a copy of the advice report TCFP prepared for Mr M, which included the due diligence TCFP had undertaken on the Dolphin investment. The 'Investment Memorandums' make clear the risks associated with the investment and that financial advice should be sought if anything was not understood.

- The Dolphin investment was arguably speculative in nature but this didn't automatically mean it was unsuitable for Mr M.

- The documentation made clear to Mr M that this was a high risk transaction, that he was requesting investment on an execution-only basis with no advice from ML, and that he was responsible for his own investment decisions.

- Mr M signed a 'Statement for Self-Certified Sophisticated Investor' to confirm he was a sophisticated investor.

- Mr M received regulated financial advice in relation to the transfer of funds to ML and the Dolphin investment. This advice made clear the Dolphin investment didn't have FSCS protection, that there was no guarantee the investment would be repaid and that the investment was only suitable for HNW and sophisticated investors (amongst other things).

- Contrary to Mr M's suggestion, the facts of his case were very different to the *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) ('BBSAL') case, given that the scheme quoted in *BBSAL* had been found to be a fraudulent scam to which Berkeley Burke failed to obtain title to any underlying asset. Neither of these facts applied in Mr M's case.

- ML noted the regulatory publications for SIPP operators but they didn't change its position. ML doesn't advise clients but nevertheless ensures initially and on an ongoing basis that any intermediaries that do advise clients are FCA authorised and regulated, have the appropriate permissions, and aren't on the FCA warning list.

- ML accepted its obligations went further than just checking the Dolphin investment was 'SIPPable', however given that Mr M had received regulated advice regarding the investment, ML thought it reasonable to place the investment. And in Mr M's case there was no obvious risk of consumer detriment. Dolphin was not a novel investment and the structure and initial investments were confirmed in 2012. At the time Mr M invested, the loan note investments were continuing to pay biannual loan interest to its investors (where they chose this option).

- If ML had done more, it would have exceeded its scope of duty as an execution-only agent, gone beyond its SIPP terms and conditions, and would have strayed into providing advice - which ML expressly wasn't contracted or required to do.

- ML carried out its own due diligence on the Dolphin investment in line with SIPP operator requirements, and drew justifiable conclusions regarding acting in the consumer's best interests and identifying consumer detriment. Its initial due diligence in October 2017 involved its Due Diligence Committee reviewing many items including:
  - Dolphin Trust FAQs July 2016
  - Dolphin Trust German Listed Property Due Diligence
  - Dolphin Trust Sample Loan Note Instrument
  - Dolphin Trust Brochures
  - Dolphin Trust Information Memorandums
  - Dolphin Trust Case Study
  - German Heritage Legislation
  - Firm P's Solicitors' Letter
  - SIPP Death Benefit Letter
  - 2016 Track Record Purchases

- An ML director had a follow up call with Dolphin Trust and gathered more information, including:
  - All funding was exclusively for the acquisition of listed buildings for development into residential property.
  - The projects had the backing of the German Government who provided tax breaks for the buyers of the refurbished residential units.
  - They had completed over 80 projects.
  - There had never been an incidence of default.
  - Dolphin Trust had honoured all obligations in terms of interest and capital repayment.
  - All loan notes are secured as a first charge on the underlying property asset that is acquired.
  - They currently had 80 projects in progress with a gross development value of £0.5bn.

- ML noted the Information Memorandum and all the key information relating to contracts and processes and all associated promotional materials had been examined and approved for the purposes of Section 21 of the Financial Services and Marketing Act 2000 ('FSMA') by an authorised firm within the meaning of the FSMA.

- ML noted that in May 2012 a UK regulated law firm ('Firm P') had confirmed that the Dolphin investment was not a UCIS. ML also noted the Dolphin investment was high risk and only suitable for certain categories of investor – of which Mr M was one.

- ML concluded the Dolphin investment would be permitted by HMRC, was a bona fide investment conducive to the purposes of a SIPP, was capable of periodic valuation, that the trustees were able to secure good title, and that the issuer was operating and the securities being marketed without breaches to FSMA protections.

- ML also completed ongoing due diligence on the Dolphin investment, including in 2018. At this time Dolphin loan note investors were still receiving the expected interest payments. But one of ML's Dolphin corporate bond investors had been told their biannual interest payment was delayed - ML took action on their behalf and received a full redemption payment for them in June 2019.

- ML was told in 2019 that Dolphin Trust intended to rebrand as Red Rock and for the existing loan notes to stop being issued that year, with new loan notes on revised lower interest terms being issued by Red Rock. At this point, ML confirmed that any proposed investments into the rebranded Red Rock would first require an external due diligence review. ML received the report of the review in May 2019 and whilst it confirmed the asset could be held in a SIPP, it contained some negative information. Shortly after, negative press regarding the investment was published in the media. So ML decided not to allow further investments in Dolphin Trust.

- Mr M's Dolphin investment is not worthless or nominal. Its outcome remains unclear so there is still opportunity for some (or all) capital and interest to be repaid.

In January 2021, Mr M complained to Firm F about the advice TCFP had provided in 2018. Unhappy with Firm F's response, Mr M brought that complaint to the Financial Ombudsman Service. Ultimately, an Ombudsman decided not to uphold Mr M's complaint against Firm F – to clarify, the Ombudsman concluded that Firm F's advice hadn't been suitable for Mr M, as its recommendation to invest 40% into another Dolphin loan note was too high, and it should have instead recommended a much lower investment in Dolphin - but that would have been too small an investment for Mr M and he would have gone ahead anyway.

Meanwhile, an Investigator at our Service considered Mr M's complaint against ML. She said this complaint should be upheld. In summary, she thought ML hadn't undertaken sufficient due diligence on the Dolphin investment. She said ML ought to have been concerned about a lack of financial accounts, about a lack of security on the assets on which the investment was based, about whether the escrow process worked as described, and that the Dolphin marketing material was misleading and at odds with ML's own understanding of the investment. And that at the time of Mr M's SIPP application, ML knew a client's Dolphin corporate bond biannual interest payment was delayed, but ML accepted Mr M's SIPP and investment applications before this was resolved. She thought ML shouldn't have accepted Mr M's SIPP and investment application, so should compensate Mr M for his financial loss and also pay him £500 compensation for the distress and inconvenience it had caused him.

In response, Mr M told us a Dolphin investment hadn't been transferred in specie to his ML SIPP, he instead used the cash he'd transferred to ML to make a further Dolphin investment.

ML disagreed with our Investigator. Solicitors acting for ML provided further documentary evidence, including in relation to ML's due diligence on TCFP as a trading style of Firm P and Mr M's transfer out of his previous SIPP. Also, ML's solicitors reiterated some points ML had made previously regarding Mr M's complaint, as well as adding what I see to be the following relevant new points:

- Mr M already had first-hand knowledge of the Dolphin investment, having previously invested in it. ML had no involvement in the establishment of Mr M's previous SIPP or the investments held within it, or Mr M's previous investment in Dolphin.

- The advice report TCFP prepared for Mr M in October 2018 recorded Mr M's assets, that he wanted to make a further investment in Dolphin *"based on the success of the first investment" as* he had been *"happy with* [his] *experience and returns"*, and that his attitude to risk was seven out of ten (or, highest medium). Based on this information, Mr M was a HNW individual in accordance with COBS 4.12.6R, and he had higher than average risk appetite and capacity for loss.

- The Investigator was incorrect to say the Court of Appeal judgment in *Adams* wasn't relevant simply because Mr Adams did not plead a case based on the Principles.

- Mr M was not an unsophisticated investor. He signed to say he was a sophisticated investor. He was a businessman who'd run his own company, and had previous experience of high risk investments, including Dolphin and 'contracts for difference'. So he was very well placed to assess the risks associated with the Dolphin investment.

- Mr M was making an in specie transfer of his assets from his previous SIPP to the ML, so it's unclear on what basis his application should have been refused, as the investments stayed the same as before the transfer.

- An investment, like Dolphin, may be high risk but whether it's suitable depends on the consumer's overall risk profile, and ML didn't know about the investments Mr M made in any of his other pensions. Further, ML didn't have permissions to advise on suitability and so it couldn't consider any broader investments.

- The Berkeley Burke case set out some principles for investment due diligence. Notwithstanding that the Berkeley Burke case pre-dates and goes far beyond the scope of a SIPP operator's legal obligations as per the judgment in the Adams Case, ML conducted adequate due diligence before accepting the Dolphin investment and fulfilled the principles set out in *Berkeley Burke*. In particular, the value of the loan note was readily ascertainable, the Dolphin investment was not inappropriate for a pension scheme, and Mr M had obtained advice from TCFP.

- There was no reason to consider the investment wasn't genuine. At the time of Mr M's investment in 2019, Dolphin had a consistent record of successful investment in German property developments, there had been no defaults, there were clear instances of investors having their capital returned upon redemption having enjoyed investment returns for the duration of the investment. Further, the investment Information Memorandum set out that Dolphin had authorised a number of regulated advisers to provide information to prospective investors and this could be checked with Dolphin. And the properties were in Germany, which had its own financial regulatory structure.

- In addition, ML contacted third parties in relation to the Dolphin investment, It contacted solicitors Firm P, who acted for Dolphin and whose letter of May 2012 provided a professional assessment of the Dolphin investment and 'how it is compliant with UK Company, Regulatory and Pensions Legislation'. Further, an FCA registered firm approved the 'Dolphin Trust Information Sheet'. It was entirely reasonable for ML to rely on representations from these firms, who had their own regulatory obligations.

- Commercial property is an acceptable, valid and common SIPP investment. The level of risk was mitigated by ML's understanding that title to the underlying assets would be held by a note trustee for the benefit of the noteholders, which provided security.

- Marketing materials, other investment documents and TCFP's advice report outlined the investment risks. These documents were all available to Mr M and ML is not responsible if he didn't read some or all of these. But a sophisticated investor with previous investment experience including in Dolphin, like Mr M, was unlikely to take decisions to invest in a complex product lightly and not read the investment documentation.

- It wasn't clear why the Investigator thought the Dolphin marketing materials were at odds with ML's own view of the investment. But customers including Mr M signed documents that made clear the investment wasn't low risk, and so whether or not there were contradictions in the marketing materials was irrelevant.

- Dolphin wasn't a 'scheme' as such, but a number of different bonds and loan notes, and so different accounting data would apply to different instruments. As this investment was a new loan note, then no accounting data would yet have been published.

- ML's understanding was that a large number of buildings were purchased, evidenced by Dolphin's 'Track Record of Purchased Projects' document and it was reasonably not aware of any problem with the loans being secured at the point that Mr M made his investment, if there was such a problem. And German land registry records are not readily available to the public.

- In ML's experience, the only time an escrow is used is for direct property purchase, not for the acquisition of financial instruments such as bonds or loan notes. So ML didn't expect an escrow process would be used to facilitate the payment for Dolphin.

- Even if ML had rejected the application, Mr M would have made the same further investment in Dolphin with another SIPP provider, given that he'd already invested in Dolphin and TCFP's advice report recorded that he was 'comfortable' that Dolphin was a suitable investment for him.

- Although Dolphin is effectively insolvent with a number of the associated companies having entered bankruptcy proceedings, it continued to perform, making interest payments, until June 2019.

- Our Service must take account of relevant law and regulations as required by DISP 3.6.4R and explain when we depart from them. Our Investigator failed to explain ML's alleged duty to have refused Mr M's SIPP application and Dolphin investment instruction. No such duty was recognised in *Adams*. And key principles arose from *Adams* which our Service hadn't taken into account, contrary to DISP 3.6.4R.

- In particular, we didn't state whether the due diligence duty we found to exist is one recognised by law (rather than some broader professional standards) and, if so, the legal foundation of the duty. The duties suggested would not be recognised in a Court and legal liability would not be established.

- *Adams* didn't consider the Principles because a breach of such is not directly actionable in law – rather, they are overarching principles applicable to the whole regulatory regime, not just SIPP providers. Our Investigator hadn't taken account of *Adams* simply because the Principles weren't pleaded. It was wrong for Mr M and our Service to apply the Principles as actionable rules in the absence of any specific actionable rule, in order to circumvent the limited, execution-only function ML was permitted to exercise as agreed with Mr M.

- *Adams* specifically addressed the issue of due diligence under COBS 2.1.1R and the Investigator's conclusion contradicted the Court's findings.

- In the decision on Mr M's complaint against Firm F about its advice, the Ombudsman's conclusions included some relevant to Mr M's complaint against ML:

    - Mr M had invested in Dolphin previously, and likely in his own name.

    - The Ombudsman wasn't persuaded Mr M was an unsophisticated investor or that he'd never made high risk investments previously.

    - The Ombudsman didn't make a finding that the Dolphin investment would have been unsuitable in any circumstances. Rather, they concluded Firm F's advice was unsuitable because it recommended too high a proportion of Mr M's funds be invested in Dolphin. ML thought this suggested the Ombudsman accepted that the Dolphin investment, in and of itself, wasn't inappropriate for Mr M or the SIPP. So it wouldn't be fair or reasonable to conclude ML shouldn't have allowed Mr M to invest in Dolphin at all. It wasn't for ML to dictate the size of Mr M's investment, this was a matter for his adviser TCFP. For ML to refuse Mr M's application solely on the amount of the investment would've amounted to providing advice.

- Mr M would've made the same investment in Dolphin regardless of Firm F's advice. ML thought it therefore followed that Mr M would've still made the 2019 Dolphin investment regardless of ML's actions, and this was supported by Mr M directly investing in Dolphin previously – he was so determined to invest in Dolphin that he sought to achieve this outside a pension or other wrapper. So Mr M would have either found another SIPP provider to facilitate the 2019 investment or would have made it directly himself as he'd done before.

- On 12 May 2023 the FCA issued a "Dear CEO" letter addressed specifically to SIPP operators. This letter made no mention of an obligation on SIPP providers to prevent a customer from making a high-risk or speculative investment. Instead, it expected SIPP providers' due diligence to identify the risks associated with the chosen investments, and communicate those risks to customers so they can choose how to proceed. This is consistent with ML's submissions regarding the importance and effectiveness of risk warnings concerning the Dolphin investment, and consistent with the approach taken by the Ombudsman in Mr M's complaint against Firm F.

- It wouldn't be consistent, fair or reasonable for Mr M's complaint against ML to be upheld in circumstances where his similar complaint against Firm F (who advised him) wasn't upheld.

- ML isn't responsible for any Dolphin investment Mr M had already made - it had no involvement in the establishment of any other SIPP and the investments held in them. So any losses flowing from such a Dolphin investment aren't attributable to ML and this must be accounted for in any redress calculation.

- Our Investigator said ML should base its redress calculations for Mr M on the FTSE UK Private Investors Income Total Return Index, but this isn't a fair and reasonable benchmark. And our Investigator hadn't explored Mr M's attitude to risk and capacity for loss. He had multiple investments, and the Dolphin investment was only part of his pension and was a transfer from one SIPP to another anyway. So our Investigator was wrong to assume Mr M would have invested in the FTSE UK Private Investors Income Total Return Index or an equivalent fund, and wouldn't have invested in Dolphin or a higher risk investment. And this index is contrary to our Service's stance on a realistic return in upheld DB transfer complaints to which discount rates of about 4% are routinely applied - ML pointed to a separate decision by our Service which it thought supported this point.

- We must offset any compensation Mr M has received from Firm F against any loss we find ML responsible for, otherwise Mr M would be overcompensated and it's not fair or reasonable to for ML to be responsible for compensation already paid regarding another firm's legal liability.

- ML shouldn't compensate Mr M for distress and inconvenience, as it didn't cause Mr M any. He made his own investment decisions and obtained advice from TCFP. And the financial loss he suffered was caused by his own decisions and the investment performance.

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 M's complaint against ML should be upheld. In summary, I said ML hadn't carried out adequate due diligence and that if it had, it should have decided not to accept the Dolphin investment into its SIPPs, and before it accepted Mr M's business. And that Mr M wouldn't have established the SIPP, transferred monies in from existing pensions, or made a further investment in Dolphin if not for ML's failings. So I said

ML should calculate Mr M's financial loss and compensate him for it, and also pay him a further £500 compensation for the distress it had caused him.

Mr M accepted the provisional decision and asked that compensation be paid to him directly as a lump sum rather than into his SIPP.

ML disagreed. Its solicitors provided further comments, which can be summarised as:

- The provisional decision contradicted the finding made by the Ombudsman in the decision on Mr M's complaint against Firm F, that while Firm F's advice to reinvest in Dolphin was unsuitable, Mr M would have still invested in Dolphin even if suitable advice was given. But the provisional decision against ML says Mr M wouldn't still have invested in Dolphin, and places a higher burden on ML than on adviser Firm F.

- Even if our Service maintains that ML's due diligence on Dolphin was inadequate (which ML disputes), in light of the finding in the Firm F decision that irrespective of Firm F's advice (and so by extension, irrespective of ML's acceptance or refusal of his SIPP application and choice to invest in Dolphin), the only fair and reasonable outcome in this complaint is to not uphold it on the basis that Mr M had experience of high risk investments and would've invested in Dolphin again in any event.

- The provisional decision suggests Mr M would've been deterred by a SIPP provider not accepting new Dolphin investments so it would be unfair to assume other SIPP providers would have accepted such. But this ignores that Firm F's suitability report recorded that an alternative SIPP provider (not ML) had confirmed it would accept Dolphin. And other SIPP providers were accepting Dolphin at that time. So ML couldn't have prevented Mr M's further investment in Dolphin. He would simply have made it through another SIPP provider.

I'm now in a position to make my 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.

Both parties have provided detailed submissions to support their respective positions, and I'd like to assure them that I've carefully reconsidered everything they've provided. But while I mean no discourtesy, I won't address every piece of evidence or point raised. Instead my decision will focus on what I consider to be the key issues in reaching a fair and reasonable outcome to this complaint.

I'd also like to make clear that where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in light of the available evidence and the wider circumstances.

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 *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 ought to 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 M'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 M's case.

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

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

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

"In my judgment in order to identify the extent of the duty imposed by Rule 2.1.1 one has to identify the relevant factual context, because it is apparent from the submissions of

each of the parties that the context has an impact on the ascertainment of the extent of the duty. The key fact, perhaps composite fact, in the context is the agreement into which the parties entered, which defined their roles and functions in the transaction."

I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr M's complaint against ML. 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 M's complaint against ML, amongst other things, I'm considering whether ML ought to have identified that accepting the Dolphin investment into its SIPPs involved a significant risk of consumer detriment and, if so, whether it ought to have declined to accept the Dolphin investment in its SIPPs *before* it received Mr M's SIPP application.

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

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

However, 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 ML was under any obligation to advise Mr M on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mr M on the merits of the SIPP and/or the underlying investments. But I am satisfied ML'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 M's case.

ML argues that a contravention of the Principles cannot in itself give rise to any cause of action at law. 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."*

The later publications

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

> *"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*
>
> *All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a 'client' for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."*

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

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

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

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

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

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

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

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

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

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

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

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

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

"Due diligence

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

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

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

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

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

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

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

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

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

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

- correctly establishing and understanding the nature of an investment

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

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

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

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

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

I acknowledge that the 2009 and 2012 Thematic Review Reports and the 2014 *"Dear CEO"* letters 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.

ML may argue 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 ML acting purely as SIPP operators. The Report says that *“We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses…”* And it’s noted prior to the good practice examples quoted above that *“We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs.”*

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

It’s also clear from the text of the 2009 and 2012 Thematic Review Reports, and the 2014 *“Dear CEO”* letter (as well as the May 2023 “Dear CEO” letter ML has specifically referred to) 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 ML's actions with these documents in mind. The reports, 2014 *"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 2014 *"Dear CEO"* letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

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

I find that the 2009 Report together with the Principles provide a very clear indication of what ML could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting Mr M's applications.

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

And in determining this complaint, I need to consider whether, in accepting Mr M's application to establish a SIPP and make the underlying investment in Dolphin, ML 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 ML 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 ML to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into the Dolphin investment and the business TCFP was introducing *before* deciding to accept Mr M's applications.

What I'll be looking at here is whether ML took reasonable care, acted with due diligence and treated Mr M 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 M's complaint is whether it was fair and reasonable for ML to have accepted his SIPP application in the first place. So, I need to consider whether ML carried out appropriate due diligence checks on the Dolphin investment and TCFP before deciding to accept Mr M's application.

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

Taking account of the factual context of this case, it's my view that in order for ML to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), it should have undertaken sufficient due diligence checks to consider whether to accept or reject particular applications for investments, in this case Dolphin, with its regulatory obligations in mind. It's clear that ML's Due Diligence Committee's October 2017 review of many items relating to the Dolphin investment were to help enable ML to decide whether or not to permit this investment, so I think that ML understood this obligation that it had to undertake checks to consider whether to accept or reject particular investments.

What ultimately happened to the Dolphin investment scheme is well established, if poorly documented, and has been the subject of court action. What I'm looking at here is what ML knew or ought to have known about the Dolphin investment around the time Mr M made the investment that's the subject of this complaint, and what conclusions it ought to have drawn from this at that time.

The contract between ML and Mr M

ML has made submissions about its contract with clients and I've carefully considered everything ML has said about this.

For clarity, my decision is made on the understanding that ML acted purely as a SIPP operator. I don't say ML should (or could) have given advice to Mr M or otherwise have ensured the suitability of the SIPP or the Dolphin investment for him. I accept that ML made it clear to Mr M 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 M signed confirmed, amongst other things, that losses arising as a result of ML acting on his instructions were his responsibility.

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

What did ML's obligations mean in practice?

ML has made submissions in relation to the decision made by an Ombudsman at our Service regarding Mr M's complaint about Firm F, and I've considered everything it's said. However, what I'm looking at here is Mr M's complaint against ML regarding the due diligence it carried out before it accepted his SIPP and investment application. And I must be clear that, as I'll return to, ML did not simply have the same regulatory obligations as Firm F – ML had its own distinct regulatory obligations as a SIPP operator.

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

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

I am satisfied that, to meet its regulatory obligations, when conducting its business, ML was required to consider whether to accept or reject particular business, with the Principles in mind.

All in all I am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, ML should have carried out due diligence which was consistent with good industry practice and its regulatory obligations at the time. And in my opinion, ML should have used the knowledge it gained from this to decide whether to accept or reject business or a particular investment.

The due diligence carried out by ML on the Dolphin investment – and what it should have done

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

- Identified the Dolphin investment as a high-risk, speculative and non-standard investment, so it should've carried out thorough due diligence on it.

- Examined where Mr M's money would be invested – in other words, what type of Dolphin arrangement he was investing in.

- Considered whether the investment was appropriate for a personal pension scheme.

- Made sure the investment was genuine – in other words, not a scam or linked to fraudulent activity.

- Made sure the investment worked as claimed.

- Ensured that the investment could be independently valued, both at the point of purchase and subsequently.

- Ensured Mr M's SIPP wouldn't become a vehicle for a high-risk and speculative investment.

As above, what happened with Dolphin is now known and as a result of the various court actions and reports we have some insight into the workings of Dolphin, including some of the things that went wrong. The picture still isn't complete because of the deception and inadequacies in recordkeeping employed by those involved in the investment.

ML has pointed to forms and disclaimers it appears Mr M completed and signed. To be clear, I have taken these into account. But whilst a valid part of the sales process, these do not replace adequate due diligence processes or negate ML's responsibility to decide whether or not to accept certain introductions of business and whether or not to permit certain investments.

I accept that if having correctly established that an introduction was appropriate to accept ML could use forms and declarations to ensure it held certain information/highlighted certain risks. However, if having undertaken adequate due diligence ML ought to have decided not to accept the introduction/permit the investment then the use of such forms/declarations wouldn't be an effective way for ML to fulfil its obligations.

I acknowledge that ML did undertake some due diligence, including requiring the completion of forms and collating some paperwork and marketing material in relation to the investment. But under the circumstances I'm not persuaded that this went far enough.

Dolphin had operated for several years and offered a number a safeguards for investors and whilst I think that ML could take some comfort in this, I also think that it could and should have checked that this investment operated as it purported to – both initially and on an going basis. In saying this, I don't mean simply asking Dolphin questions, I mean by obtaining actual evidence and undertaking checks through third-party sources.

I think it is fair to say that it had been well established for years before the transactions which are the subject of this complaint that SIPP providers were supposed to check investments were genuine (not a scam or linked to fraudulent activity) and that they operated as claimed. I think it is also fair to say that misinformation and deception are common features of scams and fraudulent activity. This highlights the importance of undertaking independent checks.

Insolvency Practitioner's report of April 2021

The assessment provided by the insolvency expert is lengthy, so here I've included what I consider to be some of the relevant excerpts. And our Service has previously provided a copy of the full document to ML.

> *"As already described, (proper) accounting does not exist. Annual financial statements have not been prepared for years; around 700 financial statements are missing within the corporate group. Bookings were made to a large extent on the basis of Excel lists and independently of receipts. Initially, therefore, the only sources of information available to me were the lists of totals and balances drawn up in the run-up to the insolvency by CFE Ltd., the management consultancy formerly commissioned to prepare a restructuring plan. In retrospect, however, these also turned out to be unreliable because they were incorrect and, at best, outdated.*"

And

> *"The question of which investor is even a creditor in which company of the group is also not readily comprehensible. In particular, the payment flows of the investor funds have frequently to regularly not taken place as contractually agreed.*
>
> *In addition to the non-transparent (because presumably deliberately concealed) use of funds, the investment amounts, even if granted for a specific purpose, were in any case not used in accordance with their purposes to a considerable extent - I found significant disbursements to third-party companies which, at least at first glance, did not provide any services for the group. In addition, the funds available in the respective company were distributed within the corporate group "as needed" without this being documented in each case or the distribution being based on legal obligations at all."*

An excerpt from an EY (Ernst & Young) report referenced within the assessment says:

> *"In summary, it can be stated that essential duties of a businessperson, in particular with regard to the keeping, storage and maintenance of business transactions and books, were violated.*
>
> *To the best of our current knowledge, there were no business operations set up in a commercial manner with the aim of presenting a true and fair view of the net assets, financial position and results of operations in terms of accounting.*

By way of example, it was possible to demonstrate that the project financing was not fully allocated to the project companies intended for this purpose, so that it is not possible to trace which creditor funds were used for which projects in which subsidiary. On the contrary: There are growing indications that a considerable amount of creditor funds was used within GPG and even within the Charles Smethurst Group, which is no longer part of the GPG Group, without specific purposes being specified and without the transactions being documented in a traceable and auditable manner.

However, it must be added that further analyses are required in order to work through the entire extent of the - international - interconnections and suspected fraudulent acts. In view of the fact that it is not possible to conduct a comprehensive, overarching systemic audit, this will largely require an examination of individual cases (in cases of doubt, per business transaction) or a reconstruction of the events."

And

"Pursuant to clause 1 (2) of the articles of association, the purpose of the company is the acquisition and trading in real property for the construction of new buildings, subdivisions in accordance with the WEG and the sale of units. The purpose of the company was not entered in the commercial register or published. In fact, at no time did the company trade in real property or engage in the development, subdivision, etc. of real property. Instead, the company exclusively collected international capital from investors, primarily in the form of so called 'loan notes', and then made this capital available to other companies (sister companies and affiliates, not subsidiaries) within the group. In doing so, the managing director of the general partner GmbH acted with the knowledge and consent of the sole shareholder."

And

"In fact, according to my findings to date, although numerous listed properties were acquired in the years since 2008 (most of which are in great need of refurbishment), very few reference projects have actually been developed and realised. As far as is known to date, the number of projects actually realised is limited to well under 20, whereas investor funds were sourced for the acquisition of well over 100 properties."

And

"In the years that followed the founding of the company in 2008, Mr Smethurst developed a complex corporate network with numerous subordinate project companies, including the insolvency debtor in this case, as well as other secondary lines of business, in keeping with the picture that the focus was not on the realisation of the project but on the creation of a complex financing structure. In the meantime, a total of more than 200 companies have been identified that are directly and indirectly attributable to the group network. It also came to light that, in some cases, funds were raised for project companies that had advertised properties that did not exist."

And

"A comprehensive inventory of the GPG Group's known properties, each of which is held in individual project companies, revealed that these are in very diverse conditions. A single property was in the construction phase, whereby liquid funds were lacking here to complete the project ready for completion. In addition, a few projects were in a supposed project planning phase, whereby a continuation of the

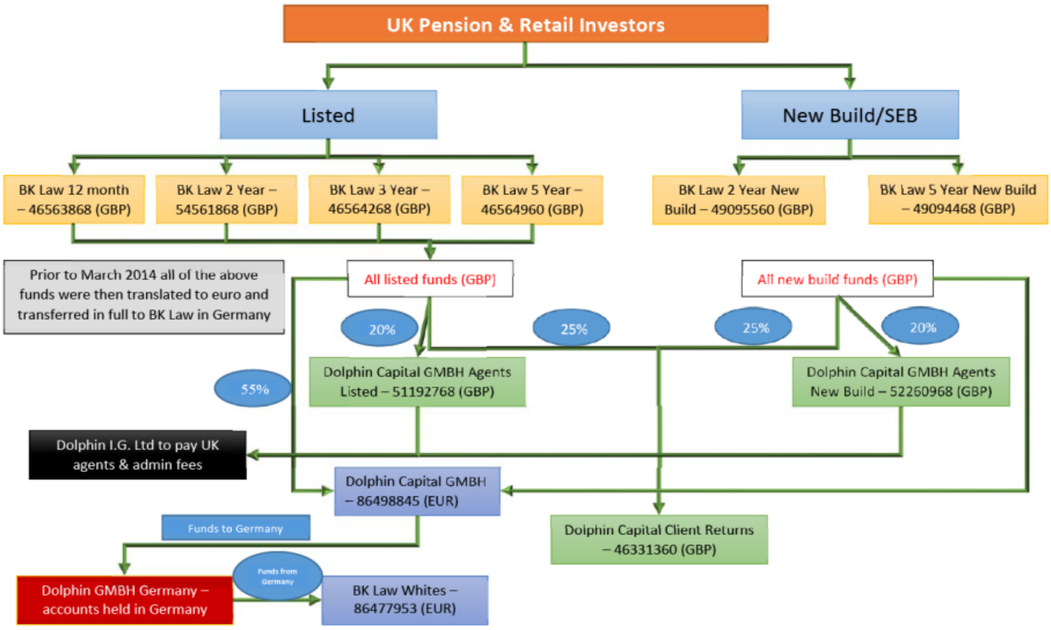
project was out of the question due to the lack of liquid funds, technical resources in the company and the economic viability of the overall project. Several projects were never realised despite the award of a building permit; the majority are only in a rough concept stage - probably only for reasons of capital acquisition - with the properties visibly falling into disrepair without there being any indication at all that activities had been undertaken with regard to project realisation. In a large number of cases, it turned out that the developments advertised could never have been realised with economically justifiable effort and would certainly not have been able to yield the promised interest and returns."

And

"The investors were promised that the funds raised would be secured by (certificated) land charges (Briefgrundschulden) held by trustees. ***Where such land charges were created at all, they are, as far as I have been able to ascertain to date, in any case in very few cases of any value, were regularly not held by the trustees in favour of the investors and were frequently also not validly established in favour of the investors*** *either under real estate law or insolvency law (see in detail below at nos. 243 et seq.).*

To the extent that the GPG Group ever took a serious interest in actually pursuing its advertised business model, this interest collapsed years ago. *The GPG Group did not succeed in repaying the loans taken out at high interest rates and charged with high commission obligations to brokers within the agreed period of time plus interest. A considerable portion of the funds was apparently, at least according to indications to date, also applied for matters unrelated to the company's purpose.* ***Whether born out of an increasing financing need, or designed from the beginning, soon after the formation of the company the business model turned into a Ponzi scheme, which factually did not allow the project planning of the acquired real estate at an early stage, because neither sufficient financial means nor sufficient technical or personnel capacities were available at all; this indicates that, apart from a few projects needed as references, serious project realisation, was never actually intended***. [my emphasis]

In the documents of the insolvency debtor I found the following chart visualising the cash flows from 2015 onwards with regard to the concept financing acquired mainly in Great Britain and Ireland:



According to this, it was apparently planned since 2015 at the latest that only 55 % of the amounts paid by investors would actually be forwarded to Germany to finance projects. The remaining 45 % were segregated from the outset in order to be able to make payments to investment brokers ("agents") and repayments to investors ("client returns")."

In relation to BK Law:

"However, there are indications in documents available to date that liquid funds, in particular cash transactions, were processed to a large extent via various trustees (see also the previous comments on the Whites Group). The law firm Bottermann Khorrami LLP, Katharina-Heinroth-Ufer 1, D-10787 Berlin; Local Court of Charlottenburg (Berlin) PR 699 B, acted as trustee for the administration of investor loans, especially from British investors (loan notes). A PDF document entitled "Bottermann DC 80 Agreement" amounts to a mandate framework agreement between DC 80 and Bottermann Khorrami for the fiduciary administration of investor funds until the registration of a land charge in at least the same amount. However, there is also evidence that, even after the termination of the fiduciary relationship with Bottermann Khorrami LLP, investors continued to be induced to make deposits into bank accounts that were designated as "Trusted Account BK Law" or similar."

And

"According to my further research, the insolvency debtor, when seeking investors, particularly in Great Britain and Ireland, not only advertised Germany as a location, but also that the investment was particularly safe because all amounts invested would first be paid by the investors into escrow accounts of the lawyers Bottermann Khorrami LLP, Berlin, (referred to here as BK Law) commissioned by the debtor. BK Law would only forward the collected amounts to the insolvency debtor once the agreed collateral had been registered in the form of first ranking land charges and the certificates for these had been handed over to the trustee.

According to the discussions we had with investors, at least for some investors it was precisely this circumstance that was decisive in deciding to invest with the insolvency *debtor and to invest their old-age pension funds there, since the interposition of the lawyers as trustees suggested a special degree of safety.*

…

It is also apparent from the correspondence in question that BK Law subsequently distributed the funds collected in the escrow accounts to the debtor or, on the debtor's instructions, to third parties (e.g. for the purpose of paying property purchase prices) if the debtor had requested it to do so and the investors were nominally secured by first-ranking land charges."

And

"However, my investigations to date have also revealed that, in addition to the three escrow accounts held by BK Law, the insolvency debtor also held the following accounts with the financial services provider Whites in England from at least 2013 onwards and also referred to these accounts as receipt accounts in loan notes, while retaining the designation of the accounts as "BK LAW" accounts. In particular based on determinations obtained in consultation with the liquidator of MUT 103. Ltd. in Ireland (see above at no. 94), it can however be assumed that this list is not complete:

[accounts listed]

When asked, BK Law in the meantime stated that it was never the holder of these Whites accounts or even had access to the accounts. Apparently, even after the termination of the retainer of attorneys Bottermann Khorrami, it was intended to be suggested to the investors that the funds would continue to be administered via escrow relationships with attorneys, which was in fact not the case.

Accordingly, based on the evidence to date, it must be assumed that the accounts maintained by Whites were exclusively accounts established and maintained by Whites for the insolvency debtor and/or the Dolphin group.

Despite this factual and legal position, at least until 2017, the insolvency debtor's loan notes regularly stated 'BK Law' as the 'Beneficiary' of these accounts and, at least in 2015, the insolvency debtor or the investment brokers acting on its behalf were still soliciting investors in the UK using documents which stated the following:

5. Money flow	Lenders funds are sent to a Botterman Khorrami Law bank account and are transferred to the Dolphin Trust SPV once the security is in place.

Despite this obvious deception of the investors about the actual owner of the bank accounts used, the insolvency debtor appears, according to the findings to date, to have nevertheless adhered at least in principle to the advertised route of the flow of funds until the beginning of 2014, even if the funds were then not actually used for the realisation of real estate projects.

According to the following internal records, it is likely that by March 2014, investor funds received in the Whites accounts were also converted to EUR and then transferred in full to BK Law to one of the three escrow accounts…

Despite this change in the flow of funds, according to the investigations to date, the insolvency debtor continued to advertise, at least in the UK, after September 2014 that investor funds would be paid to BK Law and would only be made available to the debtor if corresponding land register collateral existed. Furthermore, I was able to ascertain that investors continued to receive written confirmations in 2015 that the deposited funds had been received by BK Law, Berlin, although BK Law was no longer retained at that time and was no longer involved in the flow of funds.

Obviously, therefore, at least the investors of the insolvency debtor who were solicited in Great Britain were systematically deceived, at the latest since March 2014, about to whom they were transferring the investment funds and how these were further used and secured.

In total, according to my investigations, in Great Britain alone GPG Group marketed loan notes to investors until the end of 2018 and managed to attract approximately GBP 41,500,000.00 (equivalent to approximately EUR 48,140,000.00) between September 2014 and January 2019.

As already indicated, the business/advertising model of the insolvency debtor was based not only on the flow of money via "trustworthy lawyers", but also essentially on offering investors investments supposedly secured with first-ranking in rem collateral, which had the quality of bank collateral. This collateral was to be held by trustees collectively for a large number of investors.

Ladon Intertrust Treuhandgesellschaft mbH (Ladon) and Dactilus GmbH in particular acted as trustees in this context, with Ladon initially acting essentially in the concept financing of the insolvency debtor and Dactilus GmbH acting more in the project financing business area.

The insolvency debtor concluded agreements with investors on Loan Note Instruments, Loan Note Offers and secured loan note certificates in order to establish the trustee relationships. However, the documents do not contain any detailed references to specific collateral; instead, the contractual arrangement was limited to referring to "secured loan notes" in the loan note certificate and to including the following wording before the signature line in Loan Note Offers:

I understand that BK Law will ensure that a First Legal Charge will be registered in order to secure the Loan Note Amount and Interest.

***For its part, the insolvency debtor then concluded a (first) Framework Trust Agreement with Ladon in 2012, in which, significantly, not the investors but the insolvency debtor itself was specified as the trustor.** Furthermore, the Framework Trust Agreement and the structure of the Loan Note Instruments provided that Ladon should still conclude individual trust agreements with the respective investor on this basis, which, however, obviously never took place (for more details, see nos. 243 et seq. below)."*

And in relation to the accounting:

"There are no properly prepared, approved and published annual financial statements for the insolvency debtor. Documents were only able to be identified at all for the years 2011, 2012, 2014, 2015 and 2018; these suggest that annual financial

statements should have been prepared. However, according to the express statement of Ernst & Young in the attached report at no. 71, these documents do not comply with commercial law regulations:

"On the basis of the documents found to date, it cannot be assumed that the principles of proper accounting were observed at the company and accordingly, the overall correctness of accounting is not guaranteed. Accordingly, it cannot be assumed that the annual financial statements were prepared in accordance with applicable commercial law regulations (...)."

And

"The attached report by EY explicitly states the following at no. 49:

"To the extent that payments were made to companies within the German Property Group, which, according to our findings was the case to a considerable extent, these payments cannot be allocated to specific projects or investment purposes, neither in terms of the origin of funds nor in terms of the use of funds, due to the documentation and accounting deficiencies described. An allocation of the paid-in funds to a specific project or investment purpose resulting from the accounting and a comprehensible presentation of the related use of funds is currently not traceable from the accounting documents available to us at the outset for an expert third party within a reasonable period of time."

And

"The breach of the obligation to keep accounts in the qualified case of the absence of proper and comprehensible accounts as a whole is demonstrable in the present case and is evidenced not least by the opinion of the auditors of EY, who come to the following conclusion in no. 113 of the attached report:

"To the best of our present knowledge, there was no business set up in a commercial manner with the objective, in relation to the accounts, of giving a true and fair view of the assets, liabilities, financial position and profit or loss.""

And

"Furthermore, the lack of transparency is increased by the repayments to investors, some of which are neither documented nor traceable as to the origin of the funds used. In any case, these were not made from concretely recorded or reproducible project revenues such that certain investments in projects could be assigned to specific repayments from these projects. ***In the course of the extensive data analyses, it was found that the loan note agreements and the funds generated from them to a considerable extent were regularly subscribed for a specific project, but that the funds were usually not made available for the corresponding project.*** *Instead, these were passed on to a large extent elsewhere in the group without legal grounds and largely without documentation."*

In relation to insolvency:

"First of all, it must be assumed that the insolvency debtor has been insolvent since 1 August 2018 at the latest (no. 332 below); the occurrence of insolvency was foreseeable within the forecast period of max. 24, minimum 12 months that is taken as a basis for the determination of imminent insolvency within the meaning of § 18 InsO [section 18 of the German Insolvency Code]. *This is because the insolvency*

debtor did not have a sufficiently specific prospect of completing projects (in number and scope) within the forecast period that would have been enough to repay invested amounts and ancillary payments (in particular interest) falling due within the forecast period. This was already the case because not even a sufficient number of projects were at a stage of development that could have been expected to be completed and sold in the first place. Irrespective of the fact that, from an ex post point of view, there was also no sufficient certainty that enough new capital amounts could be raised within the forecast period, these should not be taken into account for the repayment of mature investment amounts in the liquidity planning anyway, because the misappropriation of funds, which is relevant under criminal law, could be stopped at any time by all parties involved (esp. also employees) and was sufficiently obvious in the context of the liquidity planning. The use of these misappropriated funds therefore cannot and must not be taken into account with the certainty necessary for the going concern forecast. It must therefore be assumed that the debtor's imminent illiquidity within the meaning of § 18 InsO was established at the latest 12 months before the occurrence of actual illiquidity within the meaning of § 17 InsO. The debtor was therefore imminently illiquid in the legal sense at the latest on 1 August 2017.

…

*According to EY's findings to date based on the analysis of the DATEV accounting data and the extensive electronic and physical data inventory**, the economic difficulties in the business model of the GPG Group and thus also of the insolvency debtor began as early as 2017.***"

Tax position:

"The insolvency debtor last published annual financial statements in 2012. For the years 2014 and 2015, annual financial statements appear to have been prepared, but in any case were not approved. Since then, no further financial statements have been available. It is true that there are corresponding files on the server which could suggest that annual financial statements were still prepared for some years, most recently for 2019. However, final versions are not available, nor are signed versions.

A tax audit by the tax office for large-scale tax audits in Hanover (which was previously responsible for the insolvency debtor) has been ongoing (without result) since 2015, whereby the tax auditor also pointed out at the beginning of his audit that the business model of the insolvency debtor was obviously a pyramid scheme.

According to their own statements, the tax authorities did consider criminal tax investigations, but did not consider them to be 'expedient', which is why such efforts apparently came to nothing."

Potential continuation of business:

*"The continuation of the previous business operations of the insolvency debtor in the narrower sense was and will also not be possible after the commencement of insolvency proceedings, since **the business model was geared towards defrauding investors**. However, a legitimation of the business model through the actual development of the construction projects under the leadership of the insolvency debtor and with the involvement of its investors is also not possible for various reasons. **On the one hand, according to my analysis so far, none of the projects is economically viable using the forecasts that were advertised. On the other hand, the GPG Group does not currently have, nor has it had in the***

past, the necessary human and professional resources to implement the projects.”

Land charges:

“It is clear from clause 1 (3) of the Framework Trust Agreement and clause 1 of the Model STA or DC 80 STAs that the land charges are intended to secure "claims of creditors under the notes" or to serve as "security for the Trustor's investment under the Loan Agreement". The basic security purpose is clear from these provisions. Which land charges were to secure which claims, however, is not clear from the Framework Trust Agreement, nor from the Model STAs and the majority of the DC 80 STAs identified, since the annex containing the details of the property that was provided for was not attached.”

And

“On the basis of the results of the examination to date, it can be assumed that the necessary connection between the security right over real property and the purpose of the security right over real property can only be established in a few cases.”

Other proceedings:

“As of 2019, the first judgments were also issued against the insolvency debtor. In the court proceedings, the insolvency debtor, obviously with the sole aim of extending these as long as possible, defended itself with the argument that the investments violated public policy in terms of § 138 BGB, because it was recognisable that the funds were never intended to be used for the realisation of a construction project, which is why the investors colluded with the debtor and a claim for repayment under § 817 BGB was allegedly precluded. As remarkable as this reasoning is in the overall context of the business model, the debtor of course clearly failed with this argumentation.

…

According to the written statement of Mr Charles Smethurst to the public prosecutor's office in Hanover, which was submitted to the criminal investigation file in the form of a statement by the defence lawyers retained by him, the intermediaries were aware that the collateral was too low in value in relation to the investments. Nevertheless, the intermediaries continued to solicit investments and did not inform the investors of this.

Whether the intermediaries, on the other hand, were not even aware of the full extent of the fraudulent business model - from the outset - will have to be further examined after proceedings commencement, but is in any case not remote (merely in view of the amount of the commissions agreed to for these).

In addition, I have found (no. 124 et seq. above) that the insolvency debtor solicited investors under false pretences since 2015, at least in the UK, by misrepresenting to (potential) investors that the transaction would be conducted through secured solicitor escrow accounts, which was not the case since September 2014.”

Commission:

> *"For the investor funds raised in the United Kingdom and Ireland alone, I am currently assuming a commission volume of up to* ***EUR 100,000,000.00*** *which may be relevant to liability."*

Summary findings of the report

The key relevant findings of this were that:

- The investment didn't operate as it was marketed: invested monies weren't held in escrow then allocated to a specific property, for years (if not from the outset) it was operated as a Ponzi scheme with repayments funded by incoming investments, BK Law hadn't been on retainer since 2014.
- The basic principles of accounting weren't followed.
- Annual financial statements hadn't been published for years.
- The business had been insolvent since 2018.

I acknowledge and understand that the report was based in large parts on information that ML didn't have access to. But, I don't think that means that the findings aren't relevant given that some of the things highlighted are things that would have been discoverable to ML if it had undertaken sufficient due diligence.

The Annex to the 2014 Dear CEO letter states that:

> *"We found that most firms do not have the expertise or resources to assess this type of business, but were still allowing transactions to go ahead. This increases the risk that a pension scheme may become a vehicle for high risk and speculative investments that are not secure assets, many of which could be scams. It is not acceptable for firms to put consumers at risk this way.*
>
> *Although our thematic review focussed on non-standard investments, it is important to note that guidance on due diligence applies to all investments.*
>
> *Findings from our review included firms failing to:*
>
> - *understand the nature of an investment, especially contracts for rights to future income, and sale and repurchase agreements*
> - *check that money was being paid to legitimate businesses, and*
> - *to independently verify that assets were real and secure, or that investment schemes operated as claimed*
>
> *We found that, typically, firms had difficulty completing due diligence for non-standard overseas investment schemes where firms did not have access to local qualified legal professionals or accountants.* ***Also, since the last review of SIPP operators, we noted an increase in the number of opaque investment structures, such as special purpose vehicles and limited companies, created to pool investment monies and finance other businesses. Firms had difficulty establishing where money was being sent, and whether underlying investment propositions were genuine****.*
>
> *We also found that many SIPP operators accepted investments into their schemes without adequate consideration of how investments could be valued or realised.*

Finally, we found many firms continuing to rely on marketing and promotional material produced by investment providers as part of due diligence processes, despite previous guidance highlighting the need for independent assessment of investments." [my emphasis]

The above highlights the need for ML to undertake appropriate due diligence, including independent checks. Had ML undertaken appropriate due diligence then some of the type of information it ought reasonably to have asked for, if provided, would have demonstrated that the investment didn't operate as claimed, or, if not provided, then ML couldn't have been assured Dolphin operated as claimed and it wouldn't have then been treating consumers fairly by proceeding to permit (or continuing to permit) the investment in its SIPP without having obtained the requisite information to be satisfied that it understood the nature of the investment/assets were real and secure/the investment scheme operated as claimed.

I think ML reasonably would have discovered that annual financial statements hadn't been published for years and at least aspects of the investment weren't operating as Dolphin said it would. Overall, even if it did not and could not have uncovered everything highlighted, I think that ML could and should have reasonably uncovered enough that it ought to have concluded that shouldn't permit the Dolphin investment in its SIPPs.

In addition, it appears ML knew in 2018 that one of its Dolphin corporate bond investors had been told their biannual interest payment was delayed - ML says it took action on its client's behalf. But I've not seen anything in the evidence provided so far to suggest that ML could have reasonably concluded that this matter was satisfactorily resolved before it accepted Mr M's SIPP application and Dolphin investment instruction some months later, in February 2019. ML has told us that it was able to secure redemption of the invested funds for that customer, which, to my mind, suggests that Dolphin knew that it would not be able to continue to pay the interest payments due to that customer going forwards. I think ML ought to have been seriously concerned that Dolphin returned that investor's funds, rather than assuring them that the contractual interest payments would be forthcoming as promised.

So there were red flags which should've caused ML significant concern and led it to conclude that it shouldn't permit Dolphin to be held in its SIPPs.

I'm satisfied that if it had undertaken sufficient due diligence, it's fair and reasonable to say that ML ought reasonably to have identified the type of red flags highlighted above, and ought to have drawn the conclusions I've set out, based on what was known and/or discoverable at the time.

At the point ML accepted Mr M's SIPP application, ML would have been aware not only that Mr M had already retired and started to draw his pension benefits, but also that he intended to invest a very significant portion of his pension fund in an unregulated, esoteric and high-risk investment which might be difficult to sell. This was an indicator of the kind of risk to which Mr M was being exposed.

I think that ML ought to have concluded from very early on, and certainly before it established Mr M's SIPP (the application for which made clear that Mr M's intended investment was Dolphin), that there was a significant risk of consumer detriment if it accepted the Dolphin investment into its SIPPs and that the Dolphin investment wasn't acceptable for its SIPPs.

As such, and based on the available evidence, I don't think ML undertook appropriate steps or drew reasonable conclusions from the information that I'm satisfied would have been available to it, had it undertaken adequate due diligence into the Dolphin investment. I don't think ML met its regulatory obligations and good industry practice, and it allowed Mr M's funds to be put at significant risk.

To be clear, I don't say ML should have identified all issues which later came to light. I only say that, based on the information that was available at the relevant time had it undertaken sufficient due diligence, ML should have identified that there was a significant risk of consumer detriment if it permitted the investment. And it's my fair and reasonable opinion that appropriate checks would have revealed issues which were, in and of themselves, sufficient basis for ML to have declined to accept the Dolphin investment in its SIPPs *before* Mr M's ML SIPP monies were invested in it. And it's the failure of ML's due diligence that's resulted in Mr M being treated unfairly and unreasonably. And I think that ML failed to act with due skill, organise and control its affairs responsibly, or treat Mr M fairly by accepting the Dolphin investment into his ML SIPP.

In conclusion

After considering these points, I don't regard it as fair and reasonable to conclude that ML acted with due skill, care and diligence, or treated Mr M fairly by permitting the investment in Dolphin. ML didn't meet its regulatory obligations or the standards of good practice at the time, and it allowed Mr M's pension fund to be put at significant risk as a result.

The due diligence carried out by ML on TCFP

In this case, the business ML 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 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 is appropriate to deal with. That involves conducting checks – due diligence – on introducers to make informed decisions about accepting business. This obligation was a continuing one.

But having reached the conclusions set out above, the due diligence ML may or may not have carried out on TCFP before accepting introductions from it isn't the basis on which I'm upholding Mr M's complaint, or something I've relied on in reaching my conclusions. As I've explained, I think ML failed to carry out sufficient due diligence on the Dolphin investment and that ML didn't reach the right conclusions based on the information available to it.

So I don't think it's necessary for me to also consider ML's due diligence on TCFP. I'm satisfied that ML wasn't treating Mr M fairly or reasonably when it accepted his SIPP application in order to invest in Dolphin, so I've not gone on to consider the due diligence it may have carried out on TCFP and whether this was sufficient to meet its regulatory obligations. And I make no findings about this issue.

Did ML act fairly and reasonably in proceeding with Mr M's instructions?

ML may argue that it had to act in accordance with Mr M's instructions - that it was obliged to proceed in accordance with COBS 11.2.19R as this obliged it to execute the specific investment instructions of its client once the SIPP had been established.

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.'*

I therefore don't think that such an argument ML may make on this point is relevant to its obligations under the Principles to decide whether or not to accept an application to open a SIPP or to execute the instruction to make the Dolphin investment i.e. to proceed with the application.

The indemnities

The declarations Mr M signed sought to confirm that he was aware the investment may expose him to significant risk of losing all the money he'd invested in it, that he was responsible for his own investment decisions, and that he wouldn't hold ML responsible for any liability resulting from the decisions made by him or his adviser.

The FSA's 2009 report said that SIPP operators should, as an example of good practice, be:

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

With this in mind, I think ML ought to have been cautious about accepting Mr M's applications even though he had signed indemnities. In the circumstances, I think very little comfort could have been taken from declarations stating that Mr M was responsible for his own investment decisions and understood the investment risks.

ML had to act in a way that was consistent with the regulatory obligations that I've set out in this decision. In my view, ML was not treating Mr M fairly by asking him to sign indemnities absolving it of responsibility, and relying on such indemnities, when it ought to have known that Mr M was being put at significant risk.

I'm satisfied that ML ought to have decided that it wouldn't permit Dolphin in its SIPP at all. Given this, this transaction shouldn't have progressed to the point of Mr M signing disclaimers and declarations. Therefore, Mr M's ML 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.

Is it fair to ask ML to compensate Mr M?

In my view, for the reasons given, ML should've refused to allow Mr M's investment in Dolphin. So, things shouldn't have progressed beyond that. Had ML acted in accordance with its regulatory obligations and good industry practice, it is fair and reasonable in my view to conclude that it shouldn't have permitted the investment.

In deciding whether ML is responsible for any losses that Mr M has suffered in respect of the transaction he complains about here, I need to consider what would have happened if ML had done what it should have done – in other words, had it rejected his applications.

When considering this I have taken into account the Court of Appeal's supplementary judgment in Adams ([2021] EWCA Civ 1188), insofar as that judgment deals with restitution/compensation.

I am required to make the decision I consider to be fair and reasonable in all the circumstances of the case and I do not consider the fact that Mr M signed indemnities means that he shouldn't be compensated if it is fair and reasonable to do so.

Had ML acted fairly and reasonably it should have concluded that it should not accept Mr M's SIPP application. That should have been the end of the matter – it should have told Mr M that it could not accept his business. And I am satisfied, if that had happened, ML's arrangements for Mr M would not have come about in the first place, and the loss he suffered could have been avoided.

ML says Mr M had previously invested in Dolphin so he would have proceeded with the transfer and invested further in Dolphin regardless of ML's actions, through another SIPP provider (and ML points to other SIPP providers accepting the Dolphin investment at that time) or directly by himself as he'd done previously. I've carefully reconsidered this, but I'm still not persuaded he would have done so.

I recognise that Mr M had already invested in Dolphin before and was keen at the time of his 2018 ML SIPP application to make a further investment in it, particularly as his own experience of investing in Dolphin appears to have been entirely positive - as far as he was aware, the investment in Dolphin had been delivered as advertised and he'd achieved a substantial return on his first investment. But I still don't think that this meant Mr M was necessarily knowledgeable about such investments or truly understood the risks involved with them.

As I touched on earlier, I've carefully considered the submissions ML has made regarding the decision made by a separate Ombudsman at our Service in Mr M's complaint against Firm F. But that complaint was about Firm F's advice – it was not about ML's due diligence. Here, I must reach my findings on the facts of this case against ML. When reaching my findings, I have taken into account the obligations upon ML - Firm F and ML were separate businesses and performed different roles here, and were subject to different regulations and expectations. I've explained above what was expected of ML when considering whether to accept Mr M's applications, and for the reasons given I think it was unreasonable for ML to accept them. And so I'm not looking at what Mr M would likely have done at the point he received advice from Firm F; I am looking at what he would likely have done at a later point, had ML decided to reject the Dolphin investment and his SIPP application and told him why - as I think it ought to have.

Mr M was aware that his existing SIPP provider had refused to allow the Dolphin investment within its SIPP, as it's why he was interested in transferring away from that SIPP. And in their decision about Firm F's advice, the Ombudsman said that suitable advice would have been for Firm F to recommend a much smaller investment in Dolphin than Mr M had suggested. So if ML had also refused to accept the Dolphin investment in its SIPPs, this would have been the second SIPP provider to tell Mr M this, and the third regulated professional party to cast very significant doubt on the Dolphin investment. I think ML could reasonably have given Mr M an explanation as to why it wouldn't accept the Dolphin investment, even in broad or general terms. I'm also mindful that, based on what's recorded in TCFP's advice letter (which ML says it obtained a copy of), the monies transferred to Mr

M's ML SIPP represented the bulk of his pension provision at the time, and Mr M had already retired and started accessing his pension benefits. I think it's more likely than not that if ML had told Mr M it refused to accept the Dolphin investment in its SIPPs and why, Mr M (although previously keen to invest again in Dolphin) would have reflected on this further warning sign about Dolphin, on top of the serious doubts already recently cast on it by other parties, and would have chosen to stop pursuing a further investment in Dolphin.

So I'm satisfied that Mr M would not have continued with the ML SIPP and the Dolphin investment he made within it, had it not been for ML's failings. And, whilst I accept other parties may be involved in the course of action that led to Mr M's loss, I consider that ML failed unreasonably to put a stop to that course of action when it had the opportunity and obligation to do so.

I've carefully considered all the points ML has made regarding other SIPP providers who would have accepted Mr M's further Dolphin investment at that time. That is the counterfactual position, but if this had happened then Mr M would potentially have a similar complaint against those SIPP operators. Taking everything into account, I remain of the view that it wouldn't be fair and reasonable to say that ML shouldn't compensate Mr M for his loss on the basis that another SIPP operator would have made the same mistakes as I think ML 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 permitted the Dolphin investment into its SIPPs, or accepted Mr M's applications.

As such, Mr M's only other option would've been to make the investment outside of the SIPP, as ML argues. I acknowledge Mr M had previously made a Dolphin investment himself, outside his SIPP, in April 2017. But I think it's more likely than not that in around late 2018 or early 2019, he wouldn't have done so again had ML rejected his SIPP application at that time.

I don't think it's likely that Mr M would in late 2018/early 2019 have withdrawn his pension benefits in order to make a further Dolphin investment outside of the SIPP. As I say, I appreciate Mr M had to that point only had a positive experience with his Dolphin investment. But I think that withdrawing a very significant sum from his SIPP and paying a substantial amount of tax, simply to make a further Dolphin investment, would likely have been a step too far for Mr M, bearing in mind that his existing SIPP provider had told him it didn't consider this was an appropriate way to invest pension monies and my finding that ML ought to have told him this too.

In addition, Mr M's ML SIPP application form made clear that he'd taken benefits from his existing SIPP and was in flexi-drawdown. And TCFP's October 2018 advice report (which ML says it obtained) recorded that Mr M had retired and had a household income of £2,000 a month. So I think it's more likely than not that Mr M would have considered it too much of a risk to gamble with his pension monies outside the SIPP, because he needed his SIPP for his retirement. And given that TCFP's advice report recorded his only other assets as his own home, £50,000 cash in a bank account, and £45,000 in stocks/bonds, I don't think it's likely Mr M would have put almost all his realisable assets into making the further investment in Dolphin either.

For all the reasons I've set out, I'm satisfied that it would not be fair to say Mr M's actions mean he should bear the loss arising as a result of ML's failings. I do not say ML should not have accepted the application because the investment was high risk. I acknowledge Mr M declared he was aware the investment may expose him to significant risk of losing all the money he'd invested in it. But, I'm satisfied that Mr M, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself.

So I am satisfied in the circumstances, for all the reasons given, that it is fair and reasonable to conclude that ML should compensate Mr M for the loss he has suffered. I am not asking ML to account for loss that goes beyond the consequences of its failings. I am satisfied those failings have caused the full extent of the loss in question. That other parties might also be involved in relation to that same loss is a distinct matter. And that fact should not impact on Mr M's right to fair compensation from ML for the full amount of his loss.

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if ML had refused to accept Mr M's applications, the transactions wouldn't still have gone ahead.

Mr M taking responsibility for his own investment decisions

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

For the reasons given above, I think that if ML had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted the Dolphin investment into its SIPPs at all. That should have been the end of the matter. If that had happened, I'm satisfied the arrangement for Mr M wouldn't have come about in the first place, and the loss he's suffered could have been avoided - since the purpose of the SIPP transfer was to enable Mr M's investment in Dolphin.

As I've made clear, ML needed to carry out appropriate due diligence on the Dolphin investment and reach the right conclusions. I think it failed to do this. And having Mr M sign forms containing declarations and indemnities wasn't an effective way of ML meeting its obligations, or of escaping liability where it failed to meet these.

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

The involvement of other parties

In this decision I'm considering Mr M's complaint about ML. But I accept other parties were involved in the transactions complained about.

Mr M made a complaint against Firm F (of which TCFP was a trading style) which was referred to our Service, but this wasn't upheld. And I've not seen that Mr M has received compensation from any party in relation to the matters he has complained of.

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 ML accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mr M fairly.

The starting point therefore, is that it would be fair to require ML to pay Mr M 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 ML to compensate Mr M for his loss.

I accept that other parties were involved in the course of action that led to Mr M's loss. However, I'm satisfied that if ML had complied with its own distinct regulatory obligations as a SIPP operator, the ML SIPP arrangement for Mr M wouldn't have come about in the first place, and the loss he's suffered in his ML SIPP could have been avoided.

I want to make clear that I've taken everything ML 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 ML to compensate Mr M to the full extent of the financial losses he's suffered due to ML'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 ML is liable to pay to Mr M.

Putting things right

I consider that ML failed to carry out adequate due diligence and comply with its own regulatory obligations and good industry practice, and didn't put a stop to the transactions that are the subject of this complaint. My aim in awarding fair compensation is to put Mr M back into the position he would likely have been in had it not been for ML's failings. Had ML acted appropriately, I think it's *most likely* that Mr M wouldn't have made a further investment in Dolphin and therefore wouldn't have transferred from his existing SIPP, since he transferred in order to make that further investment in Dolphin. So, I think it's *most likely* that Mr M would've remained a member of the SIPP he transferred into the ML SIPP.

What must ML do?

In light of the above, ML should:

- Obtain the notional transfer value of Mr M's previous pension plan(s).
- Obtain the actual transfer value of Mr M'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 M'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 M has paid any fees or charges from funds outside of his pension arrangements, ML should also refund these to Mr M. 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 M an amount of £500 to compensate him for the distress and inconvenience he's been caused.

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

Treatment of the illiquid assets held within the SIPP

I think it would be best if any illiquid assets held could be removed from the SIPP. Mr M 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, ML 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 ML 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 ML is unable, or if there are any difficulties in buying Mr M's illiquid investment/s, it should give the holding/s a nil value for the purposes of calculating compensation. In this instance ML may ask Mr M 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 M may receive from the investment/s and any eventual sums he would be able to access from the SIPP. ML will have to meet the cost of drawing up any such undertaking.

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

ML should first contact the provider of the plan which was transferred into the ML SIPP and ask it to provide a notional value for the policy 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 M has made will need to be taken into account whether the notional value is established by the ceding provider or calculated as set out below.

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

If there are any difficulties in obtaining a notional valuation from the previous provider, then ML 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've considered all of ML's submissions in relation to its view that it's not fair and reasonable to base redress calculations on the FTSE UK Private Investors Income Total Return Index. But in the particular circumstances of this complaint (which include Mr M's existing pension being a SIPP and not a DB pension as in the separate decision ML has pointed to) I'm satisfied that it is a reasonable proxy for the type of return that could have been achieved over the period in question.

The notional value of Mr M'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 M's loss.

Pay an amount into Mr M'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 M'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.

I note that Mr M would prefer compensation to be paid to him directly as a lump sum. But as I say, my aim in awarding fair compensation is to put Mr M back into the position he would likely have been in had it not been for ML's failings. And this means ML paying redress into Mr M's pension if possible.

However, if a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr M 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%. So, making a notional deduction of 15% overall from the loss adequately reflects this. And neither party has disputed this.

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 M 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 M or into his SIPP within 28 days of the date ML receives notification of his acceptance of my opinion. The calculation should be carried out as at the date of my opinion. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my opinion to the date of settlement if the compensation is not paid within 28 days.

Costs

Mr M has said ML should compensate him for his financial loss, including the ML SIPP management fees he'd paid, 8% interest per annum and his *"costs".*

Mr M hasn't specified or quantified what costs he's referring to here. Given he's represented by a professional representative, I've assumed Mr M is referring to his legal costs. And Mr M didn't dispute this assumption in his response to the provisional decision.

I'm not asking ML to compensate Mr M for his legal costs here. I think it was Mr M's choice to engage a professional representative – I'm not persuaded he had no alternative but to use a professional representative, and he could instead have himself contacted our Service at no cost. So I don't think it would be fair to ask ML to compensate Mr M for his choice.

Distress & inconvenience

ML disputes it caused Mr M any distress or inconvenience, as it says any financial loss was due to Mr M's investment decisions and investment performance. But as I've said, I consider that ML failed to carry out adequate due diligence and comply with its own regulatory obligations and good industry practice, and didn't put a stop to the transactions that are the subject of this complaint. So I think it's fair for ML to compensate Mr M for any distress and inconvenience it caused him as a result of this.

In addition to the financial loss that Mr M has suffered as a result of the problems with his pension, I think it's fair and reasonable to say that the loss of a significant portion of his pension provision has caused Mr M distress and inconvenience, so I think it's fair for ML to compensate Mr M for this. In the particular circumstances of this complaint, I think £500 is a fair and reasonable amount.

My final decision

For the reasons given, it's my decision that Mr M's complaint should be upheld and that Morgan Lloyd SIPP Services Limited must pay fair redress as set out above.

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

Determination and Award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Morgan Lloyd SIPP Services 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 Morgan Lloyd SIPP Services Limited pay Mr M the balance plus any interest on the balance as set out above.

The recommendation isn't part of my determination or award. Morgan Lloyd SIPP Services Limited doesn't have to do what I recommend. It's unlikely that Mr M could accept a final decision and go to court to ask for the balance and Mr M 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 M to accept or reject my decision before 23 April 2025.

Ailsa Wiltshire
Ombudsman