DRN-4649814

## The complaint

Mr H has a self-invested personal pension ('SIPP') with London & Colonial Services Limited ('L&C'). Mr H complains that L&C failed to carry out appropriate due diligence checks on his SIPP application which led him to invest in non-mainstream investments. The majority of his investments now have no or very little value, causing significant loss to his pension.

## What happened

On 22 February 2024, I issued a provisional decision to both parties explaining that I was intending to uphold the complaint. Both parties have now responded. Before I explain the reasons for my decision, which remain the same as those set out in my provisional decision, I will set out the background to this complaint.

The parties involved

*L&C*

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

*SVS Securities PLC ('SVS')*

SVS was authorised from 9 April 2003, firstly by the Financial Services Authority ('FSA') and then by the Financial Conduct Authority ('FCA') – I will refer to both bodies as the 'regulator'. SVS had permissions for a range of regulated activities, including arranging (bringing about) deals in investments; dealing in investments as agent; dealing in investments as principal; making arrangements with a view to transactions in investments; and managing investments.

*BlueInfinitas Ltd ('BlueInfinitas')*

BlueInfinitas was authorised and regulated by the FCA from 26 November 2013 until 19 January 2015. It had permissions for a range of regulated activities including advising on investments; arranging (bringing about) deals in investments; and making arrangements with a view to transactions in investments. BlueInfinitas entered into voluntary liquidation on 10 June 2015.

Background to Mr H's complaint

Mr H opened a SIPP with L&C and transferred just over £120,000 from a personal pension plan to a SIPP with L&C at the end of 2014. He said that the transfer came about after he saw an advert saying something along the lines of: *"…are you paying high administration costs on a pension you're no longer paying into."* And as a result of this, he made contact with the advertised business to find out more. Mr H said that he doesn't remember exactly where he saw the advert but says he thinks it was online.

When asked by our investigator why he decided to change pension providers, Mr H said that he was upset with the fees he was being charged by his current personal pension

provider. He went on to say he hadn't thought of changing providers until he saw the advert referred to above.

Mr H said after he contacted the advertised business, arrangements were made for a 'consultant' to visit him (Mr H) at his home address. He has confirmed the 'consultant' was an adviser from BlueInfinitas – I will refer to both the adviser and BlueInfinitas as the 'IFA' ('Independent Financial Adviser'). Mr H went on to say that during his meeting with the IFA, he (Mr H) was told that if he transferred his personal pension into a SIPP, the administration costs would halve.

The only investment experience Mr H said he had up until this point, was when he, along with other members of his family, set up an 'Accident Trust Fund' for his mother (the 'trust fund') with the help of a regulated firm who I will refer to as 'N'. During this process, he was asked about his 'attitude to risk', to which Mr H recalls responding that he was 'risk averse'.

Mr H says the BlueInfinitas IFA agreed with his (Mr H's) risk rating and told him he should think about putting his money in safer investments such as government bonds/gilts. Mr H said the IFA assured him any investments he made would be safe and the shares/bonds he invested in would be on the cautious side which could mean lower annual investment growth.

Mr H has told the Financial Ombudsman that he wasn't told specifically how the funds would be invested. Mr H reiterated he told the IFA that the reason for wanting to transfer his pension was to reduce costs but keep the investments as: *"safe as any investment can be and definitely not on risky investments"*. Mr H said the IFA agreed with him. But in or around early 2017 when Mr H asked N to look into the investments held in his SIPP, he (Mr H) realised how 'bad' the investments were.

Mr H doesn't remember being given any paperwork at the time from the IFA. But he says paperwork was completed during the meeting and the IFA did say that he would send some documents to him within a couple of weeks from the date of the meeting. Our investigator asked Mr H further questions about what he received from the IFA such as documents or emails. Mr H said he didn't have anything from the BlueInfinitas IFA to provide to us but added to his previous comments this could be as a result of his email being 'hacked' in 2016. He said this resulted in him closing this email account and he no longer has access to it.

The SIPP application form

Mr H was introduced to L&C in November 2014. This was two months after L&C had entered into an Intermediary Agreement with BlueInfinitas (see further below). On 12 November 2014, Mr H's SIPP application form was submitted electronically to L&C by BlueInfinitas. On the same day, L&C sent him an acknowledgment to say it had received his 'Multi-Platform' SIPP application which was marketed under the name of 'Open Pension'. L&C said Mr H was sent a copy of the key features document and terms and conditions relating to the SIPP account.

Under section 2 of the SIPP application form, this gave the name of Mr H's IFA firm as BlueInfinitas and the email address was given as the IFA who had visited him at his home address. The application said that advice had been given at the point of sale to Mr H and that it: *"takes account of the intended underlying investment strategy".*

Under the heading 'Platform Details' in section 4 of the application, it noted the chosen platform was 'SVS'. Under section 4.1 'Platform Trading', it said: *"I request that London & Colonial Assurance PLC appoint the following appropriately authorised person or organisation to act as Platform Trader, in relation to my SIPP and underlying investments."* The authorised person in this case was the BlueInfinitas IFA who was appointed as Mr H's

'Platform Trader'. And under section 4.2 'Investment Manager ('IM')/ Discretionary fund Manager ('DFM') details, all the boxes were completed as 'n/a'.

Under section 7 'Transfer Requests', details of Mr H's current personal pension provider were given and the value of his pension was estimated to be £116,990. And under the section 'Declaration' in section 9 of the application, amongst other things, it contained the following statement:

> *"I hereby agree to be responsible for any claims, losses, costs, charges or expenses which may be raised against London & Colonial or incurred by London & Colonial in consequence of London & Colonial acting on instructions received by facsimile or email from the address stated on this application form and/or provided by me. I understand that email is not a secure method of communication and confidential or sensitive information will not be transmitted in this format by London & Colonial unless I agree otherwise."*

The application was unsigned and undated as it was submitted electronically. It was acknowledged as being received by L&C by letter dated 12 November 2014. And on the same day, L&C sent a personal pension transfer form to Mr H's personal pension provider.

On 12 November 2014 L&C sent an email to SVS with the subject matter 'New Account Opening Application'. The L&C employee said to SVS: *"Please find confirmation that the customer below has a London & Colonial SIPP and SVS Securities have been appointed as the Discretionary Fund Manager. On opening the account please could you provide me via my email address with the relevant account reference number so we can transfer the monies to the* [SVS] *account?"*. Mr H's details were included in the email along with the details of his IFA, BlueInfinitas.

On 18 November 2014, SVS responded to L&C giving Mr H an account number and confirmed his SVS platform account had been set up. And on 4 December 2014, Mr H's former pension provider confirmed the transfer of £120,374.12 to L&C's SIPP bank account. And on 9 December 2014, L&C emailed him confirming his SIPP had been established and the transfer had completed. L&C let Mr H know the initial fee of £1,643.55 had been paid to his IFA, which was in line with the fee structure set out in the SIPP application.

From the £120,374.12 transferred to Mr H's SIPP, within two days (11 December 2014), £118,371.77 was transferred to the SVS platform. A 'Position Statement' was sent to Mr H in 2015 which was an SVS statement showing a breakdown of all his investments. This showed the following investments had been made on his behalf (all in 2014):

- 15 December – Shares in Affinity Global Developments PLC purchased for £54,506.75
- 17 December – Shares in Auhua Clean Energy PLC purchased for £43,319.54
- 17 December – Shares in Goldcrest Resources PLC purchased for £11,898.29
- 22 December – Shares in Titania Internet Ventures purchased for £3,985.11

Three of these companies were listed on exchange markets for 'growth companies' predominately aimed at helping to raise funds for small and/or medium start-up companies. I have provided more details about these investments below. There were several other smaller investments made of around £320 each, in what appear to be FTSE100 listed companies.

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

L&C's due diligence checklist was completed for SVS in 2013. The checklist showed the actions that were undertaken by L&C regarding SVS which included establishing whether

SVS was regulated; whether it was subject to disciplinary action by the regulator; establishing what regulated permissions it had; Companies House searches including checking Annual Returns; online searches; memberships of any trade bodies; company control and ownership; and historical or current disputes. Each box on the checklist was marked as either Green (acceptable), Amber (caution but acceptable) or Red (not acceptable – refer to director).

All but two items on the checklist were marked as 'Green'. Of the two entries which were marked as 'Amber' the first was due to a blog entry on an internet site which L&C said was unsubstantiated. The comment made on the blog discussed receiving a 'shoddy service' from SVS but there were other comments on the same website which said, other customers hadn't had any problems with SVS. The other item on the checklist that was marked as Amber was under 'Historical or current disputes/complaints between L&C & Entity' - a note said: *"See email from LS dated 1/8/2013."* The L&C reviewer's comment on this point was there was an ongoing complaint against SVS. But the reviewer noted L&C was taking the same approach as SVS.

The L&C reviewer went on to make some further comments. Under point 3 the reviewer said: (bold reviewer's emphasis): *"**Contractual Negotiations** – SVS using an un-amended 'specimen' DFM agreement provided by L&C (which originated on the whole from an agreement between* [a named company] *& L&C. Concerns are that SVS are offering us a DFM service but they do not appear to have a DFM agreement of their own to provide to us. The agreement does not match with the SVS Terms and Conditions as published on their own website…".*

Further notes were made by the L&C reviewer as follows:

- *"9/8/13 – Email from DW in response to GM concerns re point 3. Email saved in DD file.*
- *19/8/13 – GM called SVS on their mainline number and asked if they offered a DFM service as it was not listed on their website. They said that they do but it is mainly Equity and CFD as that is their business focus.*
- *Further contract negotiations have since taken place with SVS to ensure that the agreement includes their T&C's LB confirmed she and KW will be signing the agreement."*

The due diligence in respect of SVS was 'passed' by L&C on 22 August 2013.

L&C also carried out due diligence checks on BlueInfinitas including checking the IFA's regulatory status. L&C has provided print outs of the BlueInfinitas' relevant FCA Register page which included the permissions held by BlueInfinitas at the time of the check which was dated 10 September 2014. L&C also entered into an Intermediary Agreement with BlueInfinitas.

The Intermediary Application form was completed on 9 September 2014 by BlueInfinitas and included the following information.

- Name and regulatory details.
- Establishment date of 2 January 2014 but this was not the same date it became authorised by the FCA which was on 26 November 2013.
- It was a member of a service provider which was named and still exists.
- The advisory status was 'Independent'.
- BlueInfinitas confirmed that it and/or its advisers hadn't been refused business by any other provider; hadn't been subject to County/High Court proceedings; hadn't

been subject to any criminal or legal proceedings; and hadn't been subject to disciplinary proceedings by any regulatory/professional body.

An Intermediary Agreement was set up by L&C for BlueInfinitas which started from around September 2014. Amongst other things, this said: (bold is the agreement's emphasis and only sections 9 and 13 have been quoted in full):

*"**7 Investment Trader Provisions***

*7.1 If you have been nominated by the client as the Investment Trader and if we have agreed that you may so act then the following provisions will apply.*

*7.2 Unless specifically agreed with us all the investments must be within those shown on the most recent Permitted Investments List made available on our website.*

*7.3 You acknowledge that although the assets are those of London & Colonial, the investment transactions shall be those requested by or made upon the basis agreed with the client who shall be treated for these purposes as a retail client as defined by the UK Financial Conduct Authority (FCA)."*

*"**8 General***

*8.2 London & Colonial shall carry no responsibility for the selection or performance of investments made in connection with the Fund, this being a matter between you and the clients."*

***9 Indemnity***

*"9.1 You shall indemnify us and keep us indemnified from all loss resulting to us arising from*

*(a) any failure by you to comply with the provisions of the Act any regulations made thereunder and the rules of any relevant self-regulatory organisation or recognised professional body; or*
*(b) any breach by you of any of the provisions of this Agreement including, without limitation any failure to provide promptly and accurately the information required under this agreement;*
*(c) any other acts or omissions on your part."*

*"**10 Documentation***

*"10.3 You acknowledge that we may from time to time be obliged to send documents of various kinds direct to the client to comply with regulatory obligations but in all such circumstances we shall, unless required not to do so, notify you of the content of the communication. We also reserve the right to communicate directly with the client if we believe that for any reason the client may not otherwise receive information or documents sent to you for onward transmission to the client but in all such circumstances we shall notify you of the content of the communication to the client."*

"**13 Amendment, delegation and termination**

*13.4 This Agreement may be terminated by us with immediate effect so that no new business shall be placed with or accepted by us and without liability on our part by written notice to such affect to you on the occurrence of any or more of the following:*

*a) Any material breach by you of any of the provisions of this Agreement;*
*b) Misconduct on your part which is or could be prejudicial to our business or reputation;*
*c) You stop or intend to stop operating as an authorised intermediary"*

The investments

As I understand it, L&C didn't carry out any due diligence on Mr H's investments which were all purchased via the SVS platform on the instructions of the BlueInfinitas IFA. As noted above, the majority of Mr H's funds went into four main investments. More details about these investments are as follows:

*Affinity Global Developments PLC ('Affinity Global')*

On 15 December 2014, SVS invested £54,506.75 of Mr H's pension funds in Affinity Global (note that the company is now called Anilana International Developments PLC but for convenience I will continue to refer to it as 'Affinity Global' throughout this decision). A SVS Position Statement dated 16 November 2015 shows that Mr H held 54,100 Affinity Global shares at a cost of £1 each and was valued as of 16 December 2014 as £54,506.75.

From a review of Companies House records, this shows that Affinity Global was incorporated in 2014 in the UK. It became a Public Limited Company ('PLC') on 6 August 2014. And it appears that Affinity Global's business activity was issuing bonds *"to be listed"* on the GXG Main Quote Market in Denmark ('GXG'). It should be noted, however, that it is unclear during which period the Affinity Global investment was listed on the GXG exchange. The exchange itself ceased trading in August 2015 and L&C told Mr H about this in a letter it sent to him in December 2015.

Global Affinity's annual accounts, which were published at Companies House and audited, for the year ending May 2015 said that the GXG exchange was due to close in August 2015. And that as a result, Affinity Global would be looking to 'relist' on another alternative exchange. So, this does seem to suggest that sometime from August 2014 (when it became a PLC) to August 2015 (when the GXG exchange ceased to trade), Affinity Global was a listed business on a foreign recognised exchange.

On 2 August 2019, the FCA issued a 'First Supervisory Notice' against SVS. Affinity Global was noted in this document as follows:

*"b) SVS' Advisory account contains exposure to AFFINITY DEVELOPMENTS PLC for c.£6.4mn which is the second largest holding in this account. The asset is held as a physical certificate. Companies House state that an administrator was appointed over this company on 12 June 2019.*

*c) During the visit on 2 July, SVS provided a record of a holding in a related entity, ANILANA INTL DEVEL PLC (FORMERLY AFFINITY GLOBAL), held as a physical certificate with a value of c.£3.8mn. It appears that this valuation has now been marked to zero."*

*Auhua Clean Energy PLC ('Auhua')*

Mr H investment in Auhua was made by SVS on 17 December 2014 for £43,319.54. In the SVS Position Statement dated 16 November 2015 this states that Mr H purchased 138,697 shares in Auhua for 31pence each.

Auhua was a Jersey registered company that traded on the Alternative Investment Market ('AIM') until 2016. From the Jersey Financial Services Commission ('JFSC') records, Auhua was registered on 21 November 2011 and was dissolved on 1 October 2017. The company's prospectus, which was registered at the JFSC's website, said amongst other things, Auhua was an environmental technology group based in the Shandong Province of eastern China specialising in the development and application of green energy and energy efficient water heating solutions. Prospective investors were told to be aware that an investment in the company was speculative and involved a high degree of risk.

*Goldcrest Resources PLC ('Goldcrest')*

Goldcrest was incorporated and domiciled in England and Wales. The principal activity of this company was to evaluate opportunities for gold exploration in Ghana, West Africa. Goldcrest was publicly listed on the ISDX Growth Market ('ISDX').

On 17 December 2014, SVS invested £11,898.29 of Mr H's pension fund in Goldcrest (note the company's name was changed to Block Energy PLC in 2017 but I will continue to refer to it as Goldcrest throughout this decision). A SVS Position Statement dated 16 November 2015 states that Mr H held 6,560,400 shares in Goldcrest valued at 0.0018pence per share.

Goldcrest's annual accounts for the year ending June 2013, which were published at Companies House prior to Mr H's investment, made a number of statements as to the financial position of the company. This included an Auditor's Report which stated that:

> *"Short term funding has been established to finance the company in the immediate future. These funds are not sufficient for the foreseeable future and additional funds will need to be secured in order to safeguard the company's position. Although management have expressed optimism in this respect, material uncertainty exists which may cast significant doubt about the company's ability to continue as a going concern."*

The financial statement showed the company had made losses in 2012 of £46,056 rising to £133,785 for 2013. The company continued to operate at a loss in the subsequent years.

The annual accounts for Goldcrest for the year ending 30 June 2016, shows SVS (Nominees) were listed as having 552,719,931 ordinary shares in that company (Goldcrest), which represented 26.38% of the Goldcrest's issued share capital. This meant SVS held, for its clients, the largest holding in Goldcrest. The second largest investor owned 9.75% share capital in the company.

*Titania Internet Ventures PLC ('TIV')*

Mr H invested £3,985 in TIV on 17 December 2014. A SVS Position Statement shows he had a holding of 32,962 unquoted shares in TIV. TIV was a company initially registered under a different name and as a 'Limited' company. It changed to a PLC status on 18 June 2007 and also changed its name to TIV on 26 April 2011.

According to TIV's registered annual accounts for the year ending 30 June 2013, its principal activities were that of offering online auction services directly to consumers using various consumer brands by setting up and operating an online penny auction system, predominantly in Europe. Amongst the key risks highlighted by the company was the 'ability

to secure future investment' which it said depended on it being listed on the ISDX Growth Market in order to be able to raise funds for working capital purposes.

In the TIV annual accounts for the year 30 June 2013 it showed a carried forward loss of £2,384,533 and for the year ending 30 June 2014 the losses had risen to £2,484,456. On 12 January 2017, TIV went into Members Voluntary Liquidation. The company had no assets as at the date of liquidation. The liquidator confirmed that there would be no dividend distributions to creditors because there were no assets available to enable a distribution. TIV was dissolved on 31 March 2020.

L&C's updates to Mr H about his IFA, SVS and his investments

As noted above, Mr H was introduced by BlueInfinitas to L&C in November 2014 and he opened a SIPP with the latter firm, transferring his funds from his former pension provider. And his investments via the SVS platform were made in December 2014.

In a letter dated 15 December 2015, L&C wrote to Mr H with an update about his SIPP. Under the heading 'Background' L&C told Mr H that: *"We wrote to you previously to inform you that your financial adviser - Blue Infinitas Ltd - went out of business, and as yet, we are not aware that you have appointed a replacement financial adviser."*

I have not been provided with the letter that told Mr H about the closure of BlueInfinitas but as noted above, BlueInfinitas went into voluntary liquidation on 10 June 2015. L&C went on to say in its December 2015 letter that: *"To clarify, SVS are the investment company that you asked us to send your pension fund as indicated in your application form. Your application form also shows that you requested that your financial advisor (Blue Infinitas) to carry out the investment trading within the SVS account."*

L&C continued saying in terms of the shares in Affinity Global, the only way these could be sold was on a *"matched market"* basis, which it said meant a buyer would need to be found for the investment in order to be sold. But L&C went on to say the exchange (GXG) on which Affinity Global traded was at that time suspended which it said meant no sale could take place in any event. L&C told Mr H it understood Affinity Global was actively looking to re-list the investment on another exchange but that as at the date of the letter (15 December 2015), Affinity Global hadn't been successful.

In its December 2015 letter, L&C also let Mr H know about the status of Auhua and Goldcrest saying these investments were *"illiquid",* which it said meant they currently couldn't be sold. L&C noted some of his other funds held on his SVS platform may also be illiquid. L&C explained to Mr H that unless, or until, the illiquid investments could be sold he would not be able to access the funds in his SIPP account and/or transfer to another pension provider. L&C strongly recommended Mr H appoint a new IFA. And it also recommended he contact the Financial Services Compensation Scheme ('FSCS') in respect of a potential claim against BlueInfinitas.

On 20 April 2016, N, the regulated firm who assisted Mr H and members of his family to set up the trust fund referred to above, wrote to L&C to confirm it was being appointed by Mr H as his financial adviser. L&C confirmed to Mr H that his records had been updated and on 26 April 2016, L&C asked N to complete an Intermediary Agreement.

At the end of 2018, L&C wrote to Mr H letting him know that where SVS were acting solely as custodians it (SVS) would begin to make a yearly charge of £200 per client. But on 12 August 2019, L&C wrote to SVS clients letting them know SVS had entered into Administration. SVS was dissolved on 10 August 2023.

On 25 January 2018, funds held in Mr H's SIPP was valued at £0.20. A statement of Mr H's holdings showed that as of 9 December 2016, a sale of assets held within his SVS platform were made. And a payment of £873.98 was received into his SIPP from this sale. The sale proceeds were used to pay L&C's and N's fees which left Mr H with a balance of £0.20 in his SIPP.

In an email to the Financial Ombudsman dated 1 June 2022, Mr H confirmed the current value held in his SIPP was £4,258.80. A SIPP statement dated 20 July 2022, showed that he still had holdings under the name of 'SVS' which was valued at £3,455.96 as of 30 June 2022. Mr H also had cash of £875.58 as of 19 July 2022. Mr H told us that he'd not taken any benefits from the SIPP and/or made any contributions/withdrawals from his pension (SIPP) since he transferred from his previous provider.

Mr H's complaint

Mr H made a claim to the FSCS against BlueInfinitas at around the end of 2018. The FSCS' calculation report dated 28 March 2019 stated that Mr H's holdings in Affinity Global was valued at £16,382.05 as of 26 July 2018. This amount along with the £0.20 referred to above, was deducted from its (FSCS) calculation. The FSCS calculated his loss as £140,567.40. And he received £50,000 from the FSCS which was in line with its compensation limits. On 7 July 2022, the FSCS provided Mr H with a Reassignment of Rights where it agreed that he could make a claim against L&C. He referred his complaint to the Financial Ombudsman on 31 July 2019.

Mr H said it wasn't until he was informed by L&C about BlueInfinitas entering into liquidation (in or around May 2015) that he spoke to L&C. And it was also after he was informed by L&C that he appointed N to act as his financial adviser. Mr H said when he was told by N that the value of his SIPP had dropped to £69,891 as of 22 November 2017, and that he (Mr H) couldn't get the funds held in his SIPP transferred out, he decided to complain about L&C. He said the turning point for complaining was the lack of correspondence from SVS and L&C to the queries he made to each of them.

Mr H said he had very little investment experience when he agreed to transfer his pension and trade through the SVS platform. He also said he didn't know what investments were being made on his behalf until after they'd been made.

Mr H had initially had advice from a Claims Management Company ('CMC') who sent a letter of complaint to L&C on 9 April 2019. In summary, the CMC wrote to L&C explaining Mr H's complaint as follows:

- Mr H's money was invested into unsuitable investments and, as a result, he has suffered financial loss.
- L&C executed an instruction to purchase an investment without carrying out sufficient due diligence upon it.
- Mr H is a non-sophisticated and low risk investor.
- Mr H's funds had been invested into unregulated investments, which were a high risk, and was not suited to Mr H's risk profile. It was also not suitable for a SIPP.
- The investments were selected on Mr H's behalf and risks regarding the investments weren't properly disclosed to him.
- Recommendations made to Mr H relating to the SIPP transfer and investment selection were misleading and unbalanced.
- L&C has failed to meet its obligation as an authorised body to record and review the type and size of the investments.

- L&C has failed to meet its obligations as an authorised body to identify anomalous investments.
- L&C have failed to request suitability reports.
- Charges and fees associated with Mr H's investments have been unnecessary.
- The investments were mis-sold to Mr H.
- Mr H requires full repayment of the transfer values, plus loss of statutory interest.

It should be noted that during the course of Mr H's complaint with the Financial Ombudsman, the CMC that was representing him, became unregulated and could no longer act on his behalf.

L&C rejected Mr H's complaint. In a final response letter dated 18 September 2019, L&C said in summary:

- It provides an execution only SIPP administration service which was explained to Mr H in the application form and its key features document. Further, all risks and warnings were clearly communicated to him at the time through these documents.
- At no point did L&C advise Mr H on the transfer of his pension or underlying investments.
- The documents L&C provided to Mr H were not designed to absolve it of any responsibility - it was to aid him with his decision-making and alert him to risks in a general way.
- Mr H confirmed he had received regulated financial advice in his SIPP application.
- L&C treated Mr H as a retail client and understood he was not a sophisticated investor.
- L&C does not, and is not, permitted to provide any advice to clients.
- Section 11.2.19 of the Conduct of Business Sourcebook ('COBS'), meant L&C was obligated to carry out Mr H's specific instructions.
- L&C fully complied with the FCA's Principles for Businesses (the 'Principles').
- In any event, a breach of any Principle does not afford Mr H any actionable rights.
- L&C carried out full due diligence on Mr H's appointed IFA (BlueInfinitas) and SVS, (investment platform) both of which were FCA regulated firms.
- L&C completed appropriate due diligence in respect of the SVS trading account and the products being purchased were suitable to be held in a UK registered pension scheme.
- L&C carried out full due diligence on Mr H's chosen 'investment' - 'chosen investment' in this context was the 'SVS investment'.
- Mr H's underlying investments were purchased without L&C's knowledge and/or its agreement. Without its knowledge these were in contravention of L&C's permitted investment list ('PIL') and Terms of Business that it had with both SVS and BlueInfinitas.
- L&C's SIPP fees are applied to its members' pension schemes in accordance with the Fee Schedule which was provided to Mr H on 5 December 2014. L&C has continued to disclose its fees to Mr H at regular intervals.

Mr H remained dissatisfied with L&C's conduct so referred his complaint to the Financial Ombudsman on 1 October 2019. He reiterated his complaint points.

One of our investigator's issued their initial view upholding the complaint. In brief, they took an inquisitorial approach and considered the due diligence that L&C had carried out before accepting any business from BlueInfinitas, was insufficient. The investigator concluded this resulted in Mr H's pension funds being put at risk. And as a result of its actions, the investigator considered L&C should be held responsible for the full extent of Mr H's loss.

L&C disagreed and a further view was issued. Again the investigator considered the complaint should be upheld and set out the way in which L&C should put things right including paying £500 to Mr H for the distress and inconvenience it had caused.

L&C via its representative provided submissions in response to the views in a letter dated 25 August 2022. In summary, L&C said:

- L&C is an execution only business and it could not have been any clearer in describing to Mr H the scope of its role and the extent of its responsibilities.
- The view ignores the limited role of L&C.
- Mr H's complaint alleges his funds were invested into investments that were unsuitable for him. These and other similar allegations all relate to the role of BlueInfinitas, not L&C.
- It would not have been fair for L&C to reject Mr H's SIPP application. This is because other FCA regulated entities were involved, including Mr H's nominated IFA.
- It was outside the scope of L&C's SIPP provider duties to monitor each investment transaction being made via SVS.
- It was for Mr H's IFA to monitor his investments. When Mr H's IFA changed to N, N would've been responsible for the ongoing monitoring of Mr H's investments.
- Any monitoring carried out by L&C would take place once the investments had been actioned by SVS. As such, if an unsuitable investment had been purchased by SVS, it would have been extremely challenging for L&C to unwind the specific investment.
- Where an Intermediary was appointed such as BlueInfinitas, the SVS agreement made it clear that any investment instructions and/or related decisions were delegated from L&C to either the client and/or their Intermediary.
- It would not have been possible for L&C to intervene in the advisory process between Mr H and his IFA.
- It was entirely reasonable for L&C to place reliance on BlueInfinitas as it was a regulated firm.
- L&C carried out extensive due diligence on both SVS and BlueInfinitas such as searches on the FCA Register, which revealed no concerns.
- L&C also entered into an agreement with SVS, part of which was to treat each client as a 'retail client'.
- The SVS agreement confirmed its regulatory obligations to assess suitability could not be excluded by the agreement. In any event, the investment risk was to be decided by the client and/or his IFA.
- A L&C Intermediary Application form was completed by BlueInfinitas which confirmed that the IFA firm was FCA regulated, had never been refused registration or business terms from other businesses and had never been involved in criminal or civil proceedings. BlueInfinitas were bound by L&C's Terms and Conditions (Intermediary Agreement).
- L&C provided SVS/BlueInfinitas with a PIL in accordance with the agreement. It's only with hindsight that it could be said BlueInfinitas and SVS failed to adhere to this.
- L&C and SVS entered an addendum to the SVS agreement. This reinforced SVS' obligations and highlighted that the PIL should be always adhered to.
- Even if L&C had sought further information from BlueInfinitas as regards its business model, there is no evidence that the IFA would have said anything other than that it was fully FCA regulated.
- It's unclear how L&C was likely to have discovered anything that would have led it to reach a different conclusion about BlueInfinitas.
- Mr H made a claim against BlueInfinitas through the FSCS and received a sum of £50,000. This shows BlueInfinitas is responsible for his loss.
- The letter of complaint fails to specify whether, and how, Mr H's losses exceed the amount that he has already received in compensation from the FSCS.

- The view is inconsistent with other Financial Ombudsman decisions, where BlueInfinitas was found to be wholly responsible for loss suffered by the complainant.
- SVS is nominated as IM/DFM in the handwritten copy of Mr H's SIPP application, but L&C's practice was to generate an online form based on an investor's instructions. The finalised SIPP application shows Mr H had not selected a DFM/IM service.
- Mr H agreed to indemnify L&C from any losses he suffered as set out in the SIPP application form.
- Mr H was provided with a SIPP key features document, the SIPP fee basis document, and letters which set out general risks along with L&C's limited role.
- The Court in Adams (full court references below) confirmed two important principles, namely that the contract between the parties is of paramount importance and FCA publications shouldn't be considered when considering the SIPP provider's duties.
- The Adams judgements considered the Principles should not be taken into account when deciding the scope of SIPP providers' duties.
- The Financial Ombudsman is holding L&C to an artificially, and excessively, high standard, with the benefit of hindsight.
- The FCA publications are not intended to be prescriptive, and the language used makes it clear they are examples and ideas, as opposed to strict obligations that SIPP providers must abide by.
- L&C complied with its legal and regulatory duties at all material times.
- The views don't explain what L&C should have done and what it would have found as a result. Or how (or when) this would have prevented Mr H's loss in circumstances where two other FCA regulated entities are involved.

As noted above, I issued a provisional decision. In brief, I explained to both parties I was intending to uphold the complaint. I stated that I didn't think L&C had carried out sufficient due diligence on BlueInfinitas. And if it had done so, I considered Mr H wouldn't have opened a SIPP and transferred his personal pension, which would have prevented the loss he suffered as a result of the investments made on his behalf by the BlueInfinitas IFA. I considered L&C should be held accountable for the full extent of Mr H's loss.

In response to my provisional decision, L&C's representative stated the following:

- L&C maintains its position that this complaint should not be upheld.
- The Financial Ombudsman appears to be doing its utmost to uphold these complaints to ensure the investors are adequately compensated following the failure of other parties.
- The Financial Ombudsman is abusing its remit by attempting to regulate through its decisions, imposing artificial rules and standards that did/do not apply to SIPP providers.
- It is highly inappropriate to hold L&C liable simply because it means a further pot of money becomes available to the consumer to make up their losses.
- The Ombudsman does not appear to have taken L&C's prior submissions into account in reaching her decision.
- L&C has serious concerns that the Ombudsman has failed to act in an impartial, fair and reasonable manner.
- The Ombudsman's decision is unreasonable, biased, irrational and procedurally improper. Her decision is ripe for a judicial review.
- L&C reminds the Ombudsman that the FCA was at all material times entirely content with its (L&C's) operations.
- The Ombudsman's approach means customers have a far better chance at succeeding in a complaint if they progress it through to the Financial Ombudsman as opposed to the Court.

- The Ombudsman's almost exclusive reliance on the FCA produced publications is misplaced, unfair and unreasonable, and ignores established case law.
- The regulator itself, in its Enforcement Guide, also says any guidance or publications it issues, are not binding on regulated firms. And the FCA has specifically said the publications only provide examples of ways in which a firm might comply with the relevant rules. The Ombudsman acknowledges this.
- The publications relied on do not envisage they will be relied upon in the way in which the Ombudsman now seeks to do.
- The Ombudsman relied on the 2009 Thematic Review Report. The review does not mention SIPP providers being held liable for losses suffered as a result of unsuitable/detrimental SIPPs. The FCA has specifically highlighted in the 2009 review that any outcomes would relate only to reputation and/or enforcement action.
- L&C was/is aware of these publications, but this does not mean it should use them as a checklist regarding its due diligence process.
- L&C conducted itself properly and complied with the Principles.
- The Ombudsman's view as to what was good industry practice is subjective.
- What the Ombudsman considers is 'fair and reasonable' appears to weigh heavily in the complainant's favour.
- The Ombudsman must also take into account the law which would include the judgement in Adams. The judge in Adams made it clear the publications the Ombudsman relies on aren't particular to Adams but applies to all SIPP providers'.
- Mr H's case involves a virtually identical scenario so should be treated the same as the Adams judgement.
- The Ombudsman is ignoring case law by taking the approach she did (by not following Adams).
- The Ombudsman says that L&C should have checked that Mr H was aware of his investment strategy. Any probing by L&C as to what Mr H's investment strategy was, would involve some assessment of suitability.
- BlueInfinitas, not L&C, was another FCA regulated business with the relevant permissions to provide Mr H with appropriate advice.
- The Ombudsman suggests L&C should've been checking the investments were being made in accordance with the information Mr H had been given. Again this would have required it to assess suitability of the underlying investments.
- Checking Mr H was given correct information from his IFA would've involved an assessment of whether the investments were in line with his agreed investment strategy. This would've amounted to 'advice' - L&C didn't have regulatory permissions to do this.
- It is entirely unrealistic to suggest that L&C could reasonably have refused Mr H's application without an assessment of suitability.
- The Ombudsman has also acknowledged there is nothing inherently wrong with a client investing in riskier investments but her findings amount to imposing an obligation on L&C to undertake a qualitative assessment of the clients' investments.
- The FCA had no concerns about BlueInfinitas' operations. The regulator had conducted a review of the IFA shortly before Mr H's application was made. The Ombudsman should confirm whether she is suggesting L&C should be refusing to do business with FCA regulated firms whose operations the FCA itself was entirely comfortable with at the time.
- L&C's due diligence into BlueInfinitas (and SVS) was sufficient, and in accordance with best practice at the time. In fact, it went beyond what an execution only SIPP provider was obliged to do.
- The Ombudsman's decision is predicated on the conclusion that L&C should have carried out some form of qualitative assessment (suitability) of Mr H's investment strategy, which had been agreed with Mr H and his IFA. L&C did not have the correct permissions to carry out this function.

- L&C was not obliged to consider each and every individual investment being made via the SVS platform on behalf of each investor.
- L&C's questions to BlueInfinitas were sufficient and there was no obligation on it (L&C) to go any further than it did.
- L&C cannot be found at fault for failing to complete what the Ombudsman might, with hindsight, determine to be 'sufficient' due diligence.
- The Ombudsman holds L&C to an artificially high standard.
- There was insufficient management information ('MI') and evidence at the time of Mr H's application to enable L&C to identify any pattern or concerns in respect of multiple applications. Mr H's application was only the seventh referral from BlueInfinitas and was only two months after L&C entered into an agreement with the IFA.
- The Ombudsman shows a misunderstanding of the volume of business a SIPP provider deals with.
- BlueInfinitas only started trading in January 2014. Therefore, there was unlikely to be enough MI by the time it started as an Intermediary for L&C in September 2014, to gain an understanding of the BlueInfinitas' business model.
- The Ombudsman notes that BlueInfinitas were dealing with at least two other SIPP providers and many of their clients were investing in Affinity Global as well as other non-mainstream investments. The Ombudsman accepts Mr H's application was made at a point where the numbers of applications to the other SIPP providers would have been lower.
- L&C had no obligation to obtain any MI from other SIPP providers. There'd be no reason for a competitor SIPP operator to agree to provide this information.
- The Ombudsman says L&C should've been conducting regular reviews of the Intermediary Agreements. At the time of Mr H's application, it was too early to conduct a review.
- BlueInfinitas was an FCA regulated firm and the investment was also in an FCA regulated entity, so there was no reason to regard Mr H's investment as high risk.
- The Ombudsman has assumed there was (probably) a Power of Attorney ('PoA') in place so that SVS could act. Mr H should be asked for a copy of the PoA. Even if there was a PoA, L&C does not think, in itself, this should have alerted it to the fact BlueInfinitas were likely to act as it did.
- The Ombudsman concludes it should've been obvious to L&C that BlueInfinitas were investing clients' funds inappropriately. This conclusion has been reached simply by conjecture and speculation.
- The Ombudsman suggests L&C should've known BlueInfinitas would be investing Mr H's funds in investments which were outside of L&C's PIL. This is wrong and not accepted by L&C.
- L&C had no reason to suspect that BlueInfinitas would not abide by its (L&C's) PIL. And it was highly unlikely that BlueInfinitas would've been entirely honest and told L&C outright it was planning to breach the PIL and/or its regulatory permissions.
- BlueInfinitas had not recommended a stockbroking service. So, it was not foreseeable it might be advising on shares, which was potentially acting outside its permissions.
- It is unreasonable to suggest that L&C should have been able to predict any risk of consumer detriment – it was/is an execution only service.
- Any loss caused by L&C can only relate to the investments made and not the ultimate transfer of the pension plan to the SIPP.
- The Ombudsman's conclusions as to what 'additional' due diligence L&C should've conducted is focused entirely on ensuring the investments being made were suitable for Mr H. This goes beyond L&C's regulatory obligations and its permissions.
- Mr H confirmed he'd been given advice that took into account the underlying investment strategy. If this wasn't the case, he should not have signed to say he did.

- The Ombudsman concludes that Mr H's confirmation that he'd received advice about the underlying investments does not mean he received such advice. L&C submits this is not true.
- Mr H should at least bear some responsibility for his loss given his actions.
- Even if L&C's due diligence was insufficient (which it was not) this did not cause Mr H's loss. If L&C had rejected the application, another SIPP provider would have accepted it.
- The Ombudsman states it's fair to assume another SIPP provider would not have accepted Mr H's business from BlueInfinitas but then contradicts this by highlighting two other providers who were accepting business from BlueInfinitas. This is a further example of the Ombudsman's failure to approach this complaint in an impartial way.
- The Ombudsman has failed to properly take into account BlueInfinitas' role in Mr H's losses. BlueInfinitas was the party at fault here.
- The FSCS has already awarded Mr H compensation following his claim about BlueInfinitas. If Mr H has residual losses, it is not for L&C to cover these.
- Mr H should confirm what his loss is, and why the FSCS compensation did not adequately cover this.
- The Ombudsman has arbitrarily awarded a sum of £500 for distress and inconvenience without explaining exactly why.

Mr H accepted my decision and had nothing substantive to add.

**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.

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

As a preliminary point, I should also say the purpose of this decision is to set out my findings on what's fair and reasonable, and explain my reasons for reaching those findings, not to offer a point by point response to every submission made by the parties to the complaint. And so, whilst I've taken into account all the submissions made by both parties, I've focussed here on the points I consider to be key to my decision on what's fair and reasonable in all the circumstances.

***Relevant considerations***

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

In my view, the starting point is the regulator's Principles (the Principles for Businesses) which are of particular relevance to my final decision. The Principles, 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). I consider that the Principles relevant to this complaint include Principles 2, 3 and 6 which say:

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

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

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

I've carefully considered the relevant law and what it says about the application of the Principles. In R (British Bankers Association) v Financial Services Authority [2011] EWHC 999 (Admin) ('BBA') Ouseley J said at paragraph 162: *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."*

And at paragraph 77 of BBA, Ouseley J said: *"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."*

In R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service [2018] EWHC 2878 ('BBSAL'), Berkeley Burke brought a judicial review claim challenging the decision of an Ombudsman who had upheld a consumer's complaint against it. The Ombudsman considered the regulator's Principles and good industry practice at the relevant time. He concluded 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 (Berkeley Burke) had done so, it would have refused to accept the investment. The Ombudsman found Berkeley Burke had, therefore, not complied with its regulatory obligations and had not treated its client fairly.

Jacobs J, having set out some paragraphs of BBA including paragraph 162 which I've set out above, said (at paragraph 104): *"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles-based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."*

The BBSAL judgment also considered section 228 of the Financial Services and Markets Act 2000 ('FSMA') and the approach an Ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the Ombudsman in that complaint, which I have described above, and included the Principles and good industry practice at the time as relevant considerations that were required to be taken into account.

As outlined above, Ouseley J in BBA held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what's fair and reasonable in all the circumstances of a case. And Jacobs J adopted a similar approach to the application of the Principles in BBSAL. I therefore remain satisfied 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. As I said in my provisional decision, 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 in Mr H's case.

I've considered whether Adams means the Principles should not be taken into account in deciding this case and I'm of the view that it doesn't. I note the Principles 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.

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

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 further note L&C's submission that Mr H's case is almost identical to Mr Adams' case. But I remain of the view that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr H's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened after the contract was

entered into. And he wasn't asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP.

In Mr H's complaint, amongst other things, I'm considering whether L&C ought to have identified that the introductions from BlueInfinitas to the SVS platform involved a significant risk of consumer detriment. And, if so, whether it ought to have ceased accepting introductions from BlueInfinitas, particularly in regard to the SVS platform before it (L&C) entered into a SIPP contract with Mr H.

The facts of Mr Adams' and Mr H's cases are also different. I make that point to highlight there are factual differences between Adams v Options SIPP and Mr H's case. And I need to construe the duties L&C owed to Mr H under COBS 2.1.1R in light of the specific facts of his (Mr H's) case. So, I've considered COBS 2.1.1R, alongside the remainder of the relevant considerations, and within the factual context of Mr H's case, including L&C's role in the transaction.

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

Additionally, as I said in my provisional decision, I want to emphasise that I don't say L&C was under any obligation to advise Mr H on the SIPP and/or underlying investments. But I remain of the view that refusing to accept an application isn't the same thing as advising Mr H on the merits of the SIPP and/or the underlying investments.

Overall, I'm satisfied that COBS 2.1.1R is a relevant consideration. However, I think it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Mr H's case.

***The regulatory publications***

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

- The 2009 and 2012 Thematic Review Reports (the 'review' or 'reviews').
- 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.

<u>The 2009 review</u>

The 2009 review 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 clients. 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* [treating customers fairly] *consumer outcomes.*

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

*Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their clients' interests in this respect, with reference to Principle 3 of the Principles for Business ('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 regulator 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 clients fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a "client" for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."*

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

> *"**Relationships between firms that advise and introduce prospective members and SIPP operators***
>
> *Examples of good practice we observed during our work with SIPP operators include the following:*
>
> - *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un-authorised business warnings.*
> - *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
> - *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
> - *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
> - *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

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

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*
- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*
- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from non-regulated introducers"*

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

*"**Due diligence***

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

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*
- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
- *having checks which may include, but are not limited to:*
    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*
- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*
- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm"*

The July 2014 Dear CEO letter provides a further reminder that the Principles apply and an indication of the regulator's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles. And it sets out how a SIPP operator might meet its obligations in relation to investment due diligence. It says those obligations could be met by:

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

This section ends by saying: "*Please note that the due diligence necessary for individual investments may vary depending on the circumstances, and the five areas highlighted above are not exhaustive."*

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

***L&C's response to the application of the regulators' publications***

In its response to my provisional decision, L&C reiterated what it had previously said which was, amongst other things, that the 2009 review wasn't formal guidance and/or wasn't binding on it as a SIPP operator. It has also questioned my use of the other FCA produced publications in reaching my decision. It says, in brief, that the guidance wasn't meant to be relied on in the way it says I've done. And it's unfair and unreasonable on my part to use the guidance issued by the regulator.

To be clear, I have not simply relied on the FCA produced publications in reaching what I consider to be a fair and reasonable decision. I have formed my own view as I am bound to do. I am considering the circumstances including the nature of the relationship between the parties, and all the evidence and arguments in order to decide what is fair and reasonable taking into account the relevant law and regulations – this includes the caselaw as I've set out above. I do, however, also need to take account of the regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

I acknowledge that the 2009 and 2012 reviews and the Dear CEO letter, aren't formal guidance (whereas the 2013 finalised guidance is). However, I'm of the view that the fact the reviews and the Dear CEO letter didn't constitute formal guidance doesn't mean their importance should be underestimated.

The publications provide a reminder that the Principles apply. And are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulator's expectations of what SIPP operators should be doing, also go some way to indicate what I consider amounts to good industry practice. I, therefore, remain 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.

L&C has also indicated that the 2009 review didn't provide guidance in any meaningful sense. But as the review's introduction 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 2009 review 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."*

I note L&C's comment that my view of good industry practice is subjective. But I remain satisfied the 2009 review 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 2009 review sets 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.

L&C says that it was not bound to follow the examples in the FCA publications. But as I said in my provisional decision, it is bound by the Principles and the 2009 review makes this clear where it says: *"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."*

I'm satisfied that L&C, at the time of the events under consideration here, thought the 2009 review and other publications were relevant. L&C acknowledged in its submissions that it'd regard to the FCA produced publications and highlighted some areas of good practice. The remainder of the publications also provide a reminder that the Principles apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and to produce the outcomes envisaged by the Principles. In this respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. Therefore, I remain satisfied it's appropriate to take them into account.

All of the regulators' publications referred to above were issued before Mr H's SIPP was set up. These documents collectively gave examples of the good industry practice and, in my view, were good practice at the time of the relevant events. The Principles that underpin them existed throughout, as did the obligation to act in accordance with them.

It's also clear from the text of the 2009 and 2012 reviews (and the Dear CEO letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business. I've noted L&C's point that the judge in the Adams case didn't consider the 2012 review, 2013 SIPP operator guidance and 2014 Dear CEO letter to be of relevance to his consideration of Mr Adams' claim. But, as I said in my provisional decision, 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. And as previously mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time. I noted in my provisional decision, when considering what's fair and reasonable, I'll not only consider L&C's actions with these documents in mind. The reviews, the Dear CEO letter and guidance, gave non-exhaustive examples of good practice. They didn't say the suggestions

given were the limit of what a SIPP operator should do. As the annex to the Dear CEO letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

Further, to be clear, I don't say the Principles and/or the publications obliged L&C to ensure the transactions were suitable for Mr H. As I acknowledged in my provisional decision, it's accepted L&C wasn't required to give advice to him and couldn't give advice under its permissions held at the time. I accept the publications don't alter the meaning of, or the scope of the Principles. But they're evidence of what I consider to have been good industry practice at the relevant time, which, as I've said, would bring about the outcomes envisaged by the Principles.

I find that the 2009 review together with the Principles provide a very clear indication of what L&C could, and should, have done to comply with its regulatory obligations that existed at the relevant time before accepting Mr H's introduction from BlueInfinitas. It's important to keep in mind the judge in Adams v Options cases 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 H's SIPP application from BlueInfinitas, L&C complied with its regulatory obligations which were to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and treat them fairly; and to act honestly, fairly, and professionally. In doing that, I'm looking to the Principles and the publications listed above to provide an indication of what L&C should have done to comply with its regulatory obligations and duties.

***Arrangements between L&C and Mr H***

This decision is made on the understanding that L&C acted purely as a SIPP operator. As I've said, I don't say L&C should (or could) have given advice to Mr H or otherwise have ensured the suitability of the SIPP or the investments placed by his IFA (BlueInfinitas) into the SVS platform for him personally. I've also not overlooked or discounted the basis on which L&C was appointed. I accept L&C made it clear to Mr H that it wasn't giving, nor was it able to give advice, and that it played a purely administrative role in his SIPP investments. And that forms Mr H signed confirmed, amongst other things, his understanding that losses arising as a result of L&C acting on his instructions were his responsibility.

My decision on what's fair and reasonable in the circumstances of Mr H's case is made with all of the above in mind. So, I've proceeded on the understanding that L&C wasn't obliged – and wasn't able – to give advice to Mr H on the suitability of the SIPP, the proposed investments and using SVS as an execution only stockbroker. Rather the business L&C was conducting was its operation of SIPPs. And I'm satisfied that, to meet its regulatory obligations, when conducting its operation of SIPP business, L&C had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind.

The regulator's 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 a particular introducer is appropriate to deal with and that a particular investment is appropriate to accept. That involves conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one, and to be clear, I consider this ought to have included having a clear oversight and understanding of the specific investments its (L&C's) clients, such as Mr H, were having their pension funds invested in.

The arrangement in this case was that the IFA was able to go direct to a stockbroker on behalf of the client and the IFA was able do so without first obtaining an agreement for each investment from the client, in this case Mr H. Whilst I have not seen a copy of a 'Power of Attorney' (PoA), the agreement SVS had with L&C said: "*We* [SVS] *shall not accept instructions from third parties unless a valid Power of Attorney has been established for this purpose."* And this arrangement was reflected in the SIPP application where Mr H gave his authority for the IFA to act on his behalf in relation to SVS. So, I think it's likely the arrangement that was in place was one where BlueInfinitas could go directly to SVS, and could, in practice, do so without obtaining Mr H's agreement for each investment.

L&C has said that Mr H should provide a copy of the PoA. But he has already stated that he has no documents from BlueInfinitas (see further above). Even if there was no PoA in place, the SIPP application made it clear the IFA could make investments via the SVS platform without Mr M's knowledge and/or consent. The L&C SIPP application stated at section 4.1 *"Platform Trading"* that: *"I request that London & Colonial Assurance PLC appoint the following appropriately authorised person or organisation to act as Platform Trader, in relation to my SIPP and the underlying investments."* In this section, it went on to say: *"Platform trading to be performed by: Financial Advisor".*

Further, L&C said in its letter dated 25 August 2022 that: *"The complaint relates to the underlying funds that* [Mr H's] *appointed financial adviser* [BlueInfinitas] *chose and went on to purchase in its* ***discretionary capacity,*** *which was out of the control of LCS and yet the FOS has chosen to make LCS responsible for another FCA regulatory third party's actions. This is neither fair nor reasonable"* (bold my emphasis). L&C went on to say:

> *"…the Adjudication* [the investigator's view] *finds that there was an obligation on LCS to complete extensive due diligence on the SVS investment, which was simply a platform account provided by SVS Securities, an FCA regulated company at the time. BlueInfinitas was appointed by* [Mr H] *to be the discretionary investment manager of the SVS Securities account meaning the adviser purchased investments without further referral or approval from either* [Mr H] *or LCS. Discretionary investment managers are commonplace in the UK's financial services sector and they should be held responsible for their actions, and where such a discretionary investment manager is no longer in existence, it is not fair or reasonable to hold a third party, in this case LCS, who had no control over the FCA regulated adviser's decisions, responsible for this unconnected party's actions just because there is no ability to recover the losses from the discretionary investment manager, in this case BlueInfinitas."*

From its submissions, it seems to me that L&C clearly understood the arrangement that was in place between Mr H and BlueInfinitas, or at least, that there was a risk that BlueInfinitas could act in the way that it did (i.e. on a discretionary basis). The latter firm was not offering, and did not, and/or could not, offer a DFM service as it did not have the regulatory 'managing investments' permission which was needed in order to carry out this service. This is something L&C would have seen from its checks of the FCA Register which showed the permissions BlueInfinitas had. Further, Mr H had specifically declined a DFM service in the SIPP application.

All in all, in my view, the SIPP application was sufficient to show that there was a risk that BlueInfinitas could, or intended to, act on a discretionary basis. And from its submissions, L&C understood this to be the case as well.

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

As set out above, to comply with the Principles, L&C needed to conduct its business with due skill, care and diligence; organise and control its affairs responsibly and effectively; and

pay due regard to the interests of its clients (including Mr H); and treat them fairly. And I agree with what L&C said about its obligations in that these weren't prescriptive. I said this in my provisional decision and also noted what L&C did would depend on the circumstances, information, and events on an ongoing basis.

I think that L&C understood its due diligence duties to some degree at the time too, as it did more than just check the regulator's entries for BlueInfinitas and SVS to ensure they were both regulated. It also entered into separate agreements with SVS and BlueInfinitas and obtained assurances from both firms that the investments would comply with its PIL (permitted investment list) via their respective agreements.

Given the arrangement to bring about/arrange investments in this case, L&C needed to pay regard to its due diligence duties to ensure it took account of this particular set up in order to avoid the risk of consumer detriment. In practice, neither L&C or Mr H had any oversight of the investments being purchased on Mr H's behalf, which I think left the arrangement open to abuse and/or misuse. I consider L&C ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments to be held in either its SIPP or by the third-party stockbroker, who in this case was SVS.

So, as far as its dealings with BlueInfinitas, who was Mr H's IFA, and who chose the investments on his behalf, L&C should've understood its obligations meant it had a responsibility to carry out appropriate checks on BlueInfinitas to ensure the quality of the business it (BlueInfinitas) was introducing. What type of checks were done should have borne in mind the type of arrangement Mr H had entered into where the BlueInfinitas IFA could act on his behalf when purchasing assets via the SVS platform. And these checks should have been done well before accepting Mr H's application.

With all that I've set out above, I'll focus on what due diligence L&C carried out on BlueInfinitas. I think this is where the main risk was in this particular arrangement. So, whilst I accept L&C's carried out due diligence on SVS as well as the IFA, given my findings which are set out below, I've not considered L&C's obligations under the Principles in respect of carrying out sufficient due diligence on SVS.

***What due diligence did L&C do?***

As I've noted above, from the information that has been provided, I'm satisfied that L&C did take some steps towards meeting its regulatory obligations and good industry practice. It has explained to us that it wouldn't have accepted SIPP business from a firm unless that firm had been authorised and regulated by the regulator and this is reflected in the Intermediary Agreement with BlueInfinitas. Amongst other things, I can see:

- L&C carried out a credit check on the BlueInfinitas Managing Director dated 10 September 2014.
- L&C checked that BlueInfinitas was regulated and authorised by the FCA – it has provided a printout from the time it made this search which includes the permissions BlueInfinitas held at the time. The relevant pages from the FCA Register are dated 10 September 2014.
- L&C ensured BlueInfinitas signed up to its Intermediary Agreement.
- Through the Intermediary Agreement, L&C obtained BlueInfinitas' written assurance that it would only advise on investments/assets which were permitted under the terms of the PIL and that this would be: *"…those requested by or made upon the basis agreed with the client who shall be treated for these purposes as a retail client as defined by the UK Financial Conduct Authority (FCA)."*

The PIL itself offered a measure of protection for clients as it meant certain, high risk investments would not be allowed to be purchased by the IFA on their behalf. The PIL that was in force at the time of Mr H's SIPP included a definition for 'Investment Transactions' which was: *"…all matters relating to and including the purchase and sale of the assets of the fund."* And permitted investments was defined as: *"…the assets that London & Colonial have determined may be held within the Fund from time to time."*

Amongst other things, the PIL that was in force at the relevant time included the following prohibited investments:

- All esoteric investments including *"bio fuels, Teak, Bamboo, Agricultural leases etc".*
- Unquoted shares.
- And: *"Any investment that has been structured using a permitted vehicle but ultimately holds assets/investments that are not permitted".*

And under the 'permitted list' investments it included:

- Securities listed on the Alternative Investment Market, the London Stock Exchange, or a recognised overseas investment exchange.
- A DFM portfolio.
- An investment platform.
- A regulated collective investments scheme.

The Intermediary Agreement highlighted that BlueInfinitas was required to act in line with the latest PIL. And not to do so would be a breach of L&C's terms of business.

The L&C Intermediary Agreement said*: "You acknowledge that although the assets are those of London & Colonial, the investment transactions shall be those requested by or made upon the basis agreed with the client who shall be treated for these purposes as a retail client as defined by the UK Financial Conduct Authority (FCA)."* So, given BlueInfinitas didn't have the permission to carry out a discretionary service for Mr H, it would seem to me that its only option was to agree with him what investment was to be made on his behalf before it was purchased.

***What was BlueInfinitas doing in practice?***

Acting on a discretionary basis/advising on shares

As I've said above, given the details provided in the SIPP application form stating the IFA could act on Mr H's behalf when selecting investments, L&C needed to take account of the risk that BlueInfinitas would act without referral or approval from Mr H when making investments on his behalf. I think the consequences that could result from being able to act in this way posed a significant risk of consumer detriment and was something L&C ought to have been aware of.

L&C says Mr H was receiving advice about the investments from the IFA (BlueInfinitas). To support this position L&C reiterated Mr H had confirmed in his SIPP application that he'd agreed to the statement: *"Advice given at the point of sale to the client that takes account of the intended underlying investments strategy."* But this statement simply confirms he had received some type of advice about the 'underlying investment strategy', not about the particular investments that would be made in line with this strategy. I've taken account of L&C's comments about this – which were, essentially, that it didn't agree with my analysis. But I remain of the view, that the statement in Mr H's SIPP application does not mean he was

made aware of the underlying funds which were made on his behalf by BlueInfinitas before the IFA instructed SVS on their purchase.

Mr H says the 'strategy' he discussed with his IFA was that his (Mr H's) pensions monies would be invested in low risk investments such as government gilts. Mr H thought this had happened but when he spoke to his subsequent financial adviser (N), he says he was given an explanation of exactly what these investments were.

As I noted in my provisional decision, I can see that L&C sent Mr H a letter in December 2015, which was before N was appointed, explaining that a number of his investments including Affinity Global, were (illiquid). A SVS Position Statement was also enclosed which gave the names of the investments along with the amount invested. But again, L&C's letter and the statement enclosed with it, were sent *after* the investments had already been made.

I also note L&C refers to the SVS platform as the 'investment'. And that Mr H was aware of this investment before his pension monies were invested. In his SIPP application, it said that SVS would be appointed as the 'Platform'. Once the money was placed with the SVS platform following the transfer of Mr H's pension to his L&C SIPP, SVS was instructed by the IFA (BlueInfinitas) on what underlying investments to purchase. So, whilst Mr H was told about the platform from which his investments would be made, I don't think, on balance, that he was told about the underlying investments that were made subsequent to his transfer to the SIPP.

Given all that I've said above, I remain of the view that Mr H did not know about the underlying investments until *after* they were purchased on his behalf by BlueInfinitas. So, I think, as L&C has said, it was effectively providing a 'discretionary management service' to Mr H, which it did not have permissions to do (see further above).

I've also closely considered the extract from the FCA Register that L&C says it relied upon to confirm BlueInfinitas was regulated. From this I can see that BlueInfinitas was regulated and was authorised in '*Advising on Investments'* and included in this was *'Personal Pension Schemes'*. And it appears that BlueInfinitas had, at the time of the events this complaint concerns, the required permissions to *'Arrange (bring about) deals in investments'*, and *'Shares'* was listed as one of the Investment Instruments. But it does not appear that BlueInfinitas had the required permissions to 'Advise' on shares.

I think after reviewing the permissions BlueInfinitas had and knowing that it wanted to use a stockbroking service to execute some of its investments on behalf of its clients, L&C should have identified the potential risk of consumer detriment associated with business introduced by BlueInfinitas before it accepted Mr H's application. I say this because I think it was reasonably foreseeable that BlueInfinitas seeking to arrange/bring about investments through a stockbroking account, and since it was on the PIL as well as an obvious investment type to be held with a stockbroker, this would mean, as an IFA, it would *'advise'* some of its clients to invest in shares.

Given BlueInfinitas didn't have the required regulatory permissions to advise on shares, L&C ought not to have permitted an arrangement under which there was a significant risk that BlueInfinitas was going to act beyond its regulatory permission. BlueInfinitas was not authorised and so, therefore, presumably not competent to give advice on the merits of buying or selling shares. And so there was a real risk of consumer detriment in allowing an adviser to act in a way that exceeded its regulatory permissions.

In its response to my provisional decision, L&C disagreed it was reasonably foreseeable that BlueInfinitas would breach its permissions regarding 'advising' on shares. It says this is because Mr H hadn't selected this service in his SIPP application. But as I said in my provisional decision, even if I'm wrong about this, based on the available evidence, I think it's

more likely than not that the majority of the SIPP business introduced to L&C by BlueInfinitas prior to it receiving Mr H's application, was business where clients would be investing with SVS post-transfer. And L&C did not know where these funds would be invested.

I consider L&C was unaware of where the funds would be invested post-transfer because in practice it was not monitoring compliance with the PIL. In other words, there was a potential that consumer's monies could end up being invested in investments which were not included in its PIL post-transfer. And L&C would not have known it was happening. It has admitted in its previous submissions this is exactly what happened in Mr H's case.

Breaching the PIL

On that latter point, in addition to choosing investments on behalf of Mr H on a discretionary basis, it also appears that BlueInfinitas was choosing investments that breached the PIL it had with L&C. In using its discretion with no monitoring in place by L&C, I'm of the view that this facilitated BlueInfinitas breaching the L&C terms of business including its PIL. L&C has admitted BlueInfinitas did breach its PIL but hasn't said which investments were in breach. Looking at the four largest investments, I can see at least one of these investments was in breach of the PIL because it was an investment in unquoted shares. This was the TIV investment. This investment was not on any relevant exchange and was therefore, an investment in unquoted shares.

It is also questionable whether other investments purchased on behalf of Mr H fell within the PIL because, whilst they were listed on a relevant exchange, the PIL also had the following term in regard to an investment that is permitted becoming prohibited under certain conditions: *"Any investment that has been structured using a permitted vehicle but ultimately holds assets/investments that are not permitted".*

So, for example, whilst held on a permitted vehicle (the AIM exchange), Auhua's business activity was 'developing green energy' and 'efficient water solutions' which is likely to fall under the definition of an 'esoteric' investment. Given this, the fact it was registered on the AIM, may not have prevented it from being a prohibited investment as defined by the L&C PIL in place at the time of Mr H's investment. I think the same could be said for Goldcrest, whose principal activity was *"to evaluate opportunities for gold exploration in Ghana, West Africa."* I consider this would likely fall under the definition of: *"All Esoteric Investments including "bio fuels, Teak, Bamboo, Agricultural leases etc".*

***What ought L&C should have done****?*

Checks to establish the business model of BlueInfinitas

Given the arrangement that was in place, which, in my view, was open to abuse and misuse by BlueInfinitas, I think L&C should have gained a better understanding of its (BlueInfinitas') business model. As I noted above, L&C would have known or ought to have known, that there was a possibility BlueInfinitas would advise on purchasing shares on behalf of some or all of its clients given it was proposing to use a stockbroking service. And/or it ought to have known there was a risk of a client not knowing about their investment(s) until post-transfer. Both of these issues should have been a red flag for L&C and in my view, prompted it to find out more about the BlueInfinitas business model before agreeing to do business with it.

BlueInfinitas only started to trade in or around January 2014 and the Intermediary Agreement with L&C started in mid-September 2014. So, there was little in the way of a previous business relationship or an established trading history that L&C could draw comfort from.

I can see that in the Intermediary Application form L&C did ask some relevant questions such as whether BlueInfinitas and/or its advisers had been refused business by any other provider; had it been subject to County/High Court proceedings; had it been subject to any criminal or legal proceedings; and had it been subject to disciplinary proceedings by any regulatory/professional body. To all these questions BlueInfinitas said 'no'.

However, given L&C was dealing with a relatively new business who was proposing to invest via a share trading platform, and the risk BlueInfinitas could buy shares, or other investments without the clients' agreement, I think L&C should have done more to understand its (BlueInfinitas) business model. I don't think the questions asked in the Intermediary Application went far enough to do this.

For example, L&C could have asked BlueInfinitas what businesses it had worked with before/at present and the level of business it was dealing with up until that point through those other businesses. Another question could have been directed at establishing the type of business/investments the IFA was undertaking with those businesses. I think if L&C had asked some more questions, it would have found out that BlueInfinitas was dealing with at least two other SIPP providers.

One of the SIPP operators had started working with BlueInfinitas accepting introductions via the SVS platform around two months before the Intermediary Agreement with L&C. The other SIPP provider had had an agreement in place since in or around January 2014. And it was apparent that through these other SIPP providers, many of its (BlueInfinitas) clients were investing in one particular asset which was Affinity Global as well as other non-mainstream investments. It was also executing these deals through the SVS platform.

Looking at the published decision DRN-4045393, BlueInfinitas had submitted over 332 applications over an 18-month period via another SIPP provider up until April 2015 at which point BlueInfinitas ceased to trade. Of these applications, 248 clients were placed in non-mainstream investments as part of a wider portfolio. Further, many of these clients invested in the Affinity Global investment. As I said in my provisional decision, an explanation in terms of the selling of Affinity Global by BlueInfinitas is that it seems to have had a relationship with it (Affinity Global), which it acknowledged to another SIPP operator referred to in the published decision DRN-4045393.

It does seem that BlueInfinitas did carry on with its business model in terms of purchasing the Affinity Global investment for the clients it introduced to L&C. I note that in one of L&C's introductions which has also been referred to the Financial Ombudsman involving BlueInfinitas and SVS, exactly the same four main investments were purchased for a client as those purchased for Mr H. This was shortly after his (Mr H's) investments were made. Again, Affinity Global was one of these investments.

I accept the number of SIPP applications to these other SIPP providers would have been less than those I've set out above by September 2014, which is when Mr H's application was submitted to L&C. And I note L&C's response to my provisional decision that there simply would not have been sufficient MI to gain an understanding of the BlueInfinitas business model given the timing of Mr H's application. This was in November 2014 and he was only the seventh introduction from BlueInfinitas to L&C. Nonetheless, given the IFA had been trading since January 2014 at the latest, and it had started business with L&C nine months later, I consider, on balance, BlueInfinitas would have been able to provide L&C with sufficient information about the type of business it was undertaking with at least two other SIPP providers. And this information would have provided L&C with an understanding of BlueInfinitas' business model.

I also think that it wasn't simply about the level of management information (MI) available at the time of Mr H's application, or when L&C accepted BlueInfinitas as an introducer. L&C also could

have asked the IFA (BlueInfinitas) other questions before receiving Mr H's SIPP application such as: how the IFA came into contact with potential clients; what agreements it had in place with its clients; what agreements it had in place with SVS; how and why all of the retail clients it was introducing were interested in investing specifically through SVS (which would have been apparent if it had found out information about its business model which it operated through other SIPP providers as I've set out above); how a firm of its size was able to meet with or speak with all its clients given the not insignificant volume of business it had already introduced through one or more other SIPP providers; what material was being provided to clients by it; and what it was telling its clients about SVS and the proposed investments.

L&C said BlueInfinitas may not have provided a truthful response if asked about its business model. But there's no reason to think BlueInfinitas would not have acknowledged what it had already told at least one other SIPP provider if L&C had asked it (BlueInfinitas) about the source of its business (which L&C didn't). And I've also noted that L&C said other SIPP providers would not have shared information with it. But it was for BlueInfinitas to provide this information. The IFA would, or should, have had the information of the types and numbers of introductions it had made with other SIPP providers.

To be clear, I appreciate there is nothing inherently wrong with a client investing in riskier investments to hold in their respective SIPPs but they have to be suitable for them. The type of investments being purchased by BlueInfinitas for its clients weren't ones that were normally suitable for retail clients such as Mr H. So, I do think there should have been some concern if L&C had found out information about BlueInfinitas' business model from the outset. And certainly by the time of Mr H's application on 12 November 2014.

Monitoring the activities being carried out by BlueInfinitas

In addition to what I've said above, I think that L&C should have done more to monitor the activities of BlueInfinitas under the Intermediary Agreement it had with it. From what L&C has said, it didn't know that the IFA was breaching the PIL, or that Mr H was unaware of the investments he was making. This clearly posed a significant risk of consumer detriment. And I think L&C should have taken steps to address this potential risk.

I accept L&C had agreements in place with SVS and BlueInfinitas that any investments either firm placed on behalf of clients needed to comply with the L&C PIL. But this did not absolve L&C from carrying out adequate checks to ensure the Intermediary Agreement it had with BlueInfinitas was being adhered to. The Intermediary Agreement was set up to, in part, meet with L&C's due diligence duties to ensure that its clients were being treated fairly and weren't put at risk of consumer detriment by those firms L&C chose to do business with. But despite this, by its own admittance, L&C was unaware that some of the investments held in Mr H's SVS account were in breach of its PIL.

Following my provisional decision, L&C has provided the number of cases it had from BlueInfinitas by the date of Mr H's application, which it said was seven. Whilst it has said that not all of the introductions involved clients investing in the same way, it hasn't said whether the SVS platform was used on each occasion. It has also said that there simply wasn't enough MI to carry out a review or establish any patterns. But I think seven applications would have been sufficient to reach a view on whether further questions needed to be asked of BlueInfinitas. I also think put together with information L&C could have asked for (see further above), its likely there was sufficient information to make an informed decision about whether to do business with BlueInfinitas from the outset and certainly by the time of Mr H's application which was two months after the Intermediary Agreement began.

I consider that having gone to the trouble of setting up an Intermediary Agreement and PIL, relevant extracts I've set out above, the onus was on L&C, in its capacity as the SIPP

operator, to have adequate systems and controls in place to monitor the agreement(s) was being adhered to by BlueInfinitas. Given the significance of the risk of consumer detriment, I don't think it was reasonable for L&C to have just relied on the Intermediary Agreement without any monitoring of it. As Principle 3 says: *"A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems."*

I also think given it was dealing with a new business, L&C didn't have to wait for the investments to be made before making appropriate checks. As I've said above, it was dealing with a new business, so the onus was on the SIPP provider to ensure that it carried out sufficient due diligence to gain an understanding of what type of business BlueInfinitas would be introducing to it (L&C). I don't think the fact that both SVS and BlueInfinitas were regulated firms was sufficient to discharge it (L&C) of its due diligence duties.

If L&C had obtained a clear understanding of the BlueInfinitas business model, as part of its monitoring activities and/or initial checks, I think it (L&C) could have checked with Mr H before accepting his application to, for example, ask him if he was aware of the 'strategy' that had been agreed and/or what that strategy was. The Intermediary Agreement made it clear that L&C could directly communicate with clients – whilst this was to ensure they (the client) had received relevant material, I think contacting clients directly under certain conditions was something open to L&C to meet with its regulatory requirements under the Principles.

I think given the type of investments BlueInfinitas were making and the relatively small pension fund Mr H was transferring, this could have prompted L&C to check he knew what type of investments were being made on his behalf. L&C disagrees with this. But as I said in my provisional decision, even if L&C didn't think it was appropriate to contact Mr H directly, if, from the outset, it had taken appropriate action to understand BlueInfinitas' business model by finding out more information from the IFA directly, I think it's unlikely it would've accepted business from it (BlueInfinitas) in the first place.

L&C argues BlueInfinitas' breaches of its (L&C's) PIL and any other failings it made, was something it (BlueInfinitas), as a regulated business was responsible for. L&C says BlueInfinitas was a regulated firm and the expectation was it would conform to the PIL as it was required to do. But in my view, this was an agreement that L&C had set up. And as I've said, the onus was on it to ensure that it monitored its Intermediary Agreements to ensure the introducers it chose to do business with were not posing a significant risk of detriment to its members by acting in a way which was contrary to its agreement.

The Intermediary Agreement said if the IFA breached any of the conditions in the Intermediary Agreement, L&C could, and presumably would, terminate the agreement with immediate effect. But this could only have been done if L&C was taking appropriate actions to monitor the Intermediary Agreement and the way BlueInfinitas was acting in relation to it. I think L&C had a duty to do so as part of its obligations under the Principles to act with skill care and diligence, to take reasonable care to organise and control its affairs responsibly and effectively with adequate risk management systems, and to pay due regard to its customers interests and treat them fairly. And I don't think by the date of Mr H's application it was 'too early' to monitor the type of business BlueInfinitas was introducing.

***What fair and reasonable steps should L&C have taken if it had carried out adequate due diligence checks?***

Based on the evidence provided to us to date, I'm of the view L&C failed to conduct sufficient due diligence on BlueInfinitas before accepting Mr H's application or draw fair and reasonable conclusions from what it did know, or ought to have known, about the business

model of BlueInfinitas. L&C ought to have identified that BlueInfinitas did not have the required regulatory permissions to carry out the type of business it was likely to be doing i.e. advising on buying shares and acting as a DFM.

Given the above, I consider L&C ought reasonably to have concluded it should not have accepted business from BlueInfinitas in the first place. And certainly by the time of Mr H's application, which was two months after the Intermediary Agreement began, L&C ought to have ended its relationship with it before it accepted Mr H's application. I say this because by this point, I think it would or could have gained an understanding of the type of business BlueInfinitas was undertaking if it had carried out sufficient checks. L&C could simply have concluded that, given it appeared BlueInfinitas did not have the required regulatory permissions to advise on shares or act in a DFM capacity, it should not accept applications from the IFA. That would have been a fair and reasonable step to take in the circumstances.

Even if I'm wrong about that, and BlueInfinitas did hold the required permissions to carry out the business it was operating (which I do not think it did), I still consider it shouldn't have accepted applications from the IFA. I say this because of the potential risk of consumer detriment that would have been evident from the pattern of business being introduced by BlueInfinitas. L&C would likely have found out what type of business BlueInfinitas was introducing if it had made reasonable enquiries from other SIPP providers BlueInfinitas was doing business with and/or asked the IFA directly for data about the business it was doing with other firms. I appreciate L&C's point that other 'competitive' SIPP providers would not have shared information with it. But as I set out above, this didn't stop it asking the IFA directly for such information.

Given the potential risk of consumer detriment I've identified above, I think L&C ought to have found out more about how BlueInfinitas was operating before it received Mr H's application. And, mindful of the fact that this was a new introducer relationship with an only recently regulated business, I think it's fair and reasonable to expect L&C, in-line with its regulatory obligations, to have made some specific enquiries and carried out independent checks on early cases to ensure all was in order and nothing of concern was happening.

I accept that L&C was not responsible for checking the suitability of the investments or the SIPP for each of its clients. But it was responsible for carrying out due diligence checks on the firms it was doing business with to mitigate the risk of consumer detriment. And I think having adequate systems and controls to manage the risk that its agreements/arrangements weren't open to abuse or misuse by those it had entered a business relationship with would've been reasonable steps to take.

I note what L&C has said about the FCA being happy with it and BlueInfinitas at the relevant time. I take on board what L&C has said including that it should be able to rely on the regulatory status of other parties. However, I've not disregarded the regulatory status of BlueInfinitas and/or SVS – I have taken these facts into account. But as I've set out above, I'm reaching a view on all the circumstances of this particular case including the nature of the relationship between the parties, and all of the evidence and arguments in order to decide what is fair and reasonable. This includes taking in to account relevant law and regulations; regulators rules, guidance, and standards; codes of practice; and, where appropriate, what I consider to be good industry practice at the relevant time.

And in my view, the regulatory status of the firm does not absolve a SIPP provider from its due diligence duties. Something L&C has recognised in its submissions to us. The October 2013 finalised SIPP operator guidance also gave an example of good practice as: *"Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and*

*whether they use other SIPP operators. Being satisfied that they are appropriate to deal with."* I think suggestions outlined in the finalised guidance would have been reasonable steps for L&C to take before accepting business from BlueInfinitas.

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

I've already touched on some of the areas where I think L&C had failings and what it would have discovered if it had not been but for these failings. In particular, I don't think it had sufficient systems and controls in place and as a result, I think that Mr H wasn't treated fairly or reasonably as it led to a number of breaches of the agreements that L&C had set up going unchecked.

As I've already acknowledged L&C did carry out a number of due diligence checks before accepting BlueInfinitas as its Intermediary. For example, L&C checked the regulatory status of BlueInfinitas as well as SVS. The Intermediary Application completed in September 2014 also asked a number of questions such as how long BlueInfinitas had been trading and other relevant questions.

But I maintain, as I've said above, that further reasonable questions about the BlueInfinitas business model would've led to L&C considering whether this was a firm it wanted to do business with. BlueInfinitas was a relatively new advisory firm who was already working with at least two other SIPP providers. Whilst that in itself was not a cause for concern, there was cause for concern about the number of applications it was making that involved introducing clients who were investing in non-mainstream investments. I consider by November 2014, the date of Mr H's application, there would have been sufficient information that BlueInfinitas could have provided from its own records for L&C to have formed a view about the type of business BlueInfinitas was going to introduce.

L&C has argued that it was not privy to the agreements that BlueInfinitas had with the other providers. But as I've said above, this is information it could have asked BlueInfinitas to provide before doing business with it. I've seen other Intermediary Applications/Introducer Applications that ask questions such as 'what other businesses have you worked with' and 'what type of business have you conducted with them'. So I don't think these are unusual questions to ask the Intermediary firm.

Further, I think it's likely that if L&C had asked BlueInfinitas reasonable questions and requested suitable evidence to support what it (BlueInfinitas) was saying, this would have helped L&C to gain an understanding of its (BlueInfinitas') business model. Knowing the type of investments BlueInfinitas was purchasing for its SIPP clients without their knowledge, L&C may have chosen not to have done business with it at all. Or at the very least, have set up adequate systems and controls to ensure its (L&C's) clients weren't put at risk of consumer detriment due to BlueInfinitas selling practices.

As I've set out in detail above, examples of the types of actions L&C could have taken were set out in a number of publications issued by the regulator all of which had been issued by the time of Mr H's investments. And the type of investments being recommended/sold by BlueInfinitas to its clients weren't ones that were normally suitable for retail clients such as Mr H. On balance, by the time of Mr H's SIPP application, I think there would have been enough information for L&C to have reasonably refused to accept his application.

If L&C had carried out adequate due diligence on the investments being purchased for its clients by BlueInfinitas, it would also have found out that the IFA was in breach of the PIL. L&C refer to 'SVS' as the 'investment', which it did carry out due diligence on. But SVS could only act on the instructions of Mr H or his IFA – and as I've said, it was Mr H's IFA that gave these instructions. The 'investments' were the underlying investments held on the

SVS platform. And a breach of the PIL, on its own, according to the terms of its Intermediary Agreement, would have led to the immediate termination of the relationship with BlueInfinitas as one or more of the investments were in breach of the PIL.

I also consider if L&C had gained the necessary understanding about BlueInfinitas willingness to act outside its regulatory permissions, L&C ought to have declined to accept business from the IFA. And as I've said, I don't think there's anything to show that BlueInfinitas would not have provided information requested from L&C i.e. about the way it operated and the type of investments it was recommending to investors and in what numbers. What I've set out above, are reasonable steps to take and if the IFA refused to answer them, then this would have been a cause for concern in itself.

I think understanding the business model of firms you are conducting business with, is in line with the Principles to treat clients fairly and reasonably (Principle 6) and to act with skill, care, and diligence (Principle 2). And by not gaining an understanding of the BlueInfinitas business model before it decided to do business with it and once it had made that decision, not continuing with this due diligence, I think this put clients such as Mr H at the risk of consumer detriment.

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

For the reasons given above, I think L&C should not have been accepting business from BlueInfinitas by the time it received Mr H's application. So things shouldn't have gone beyond that. Further, in my view it's fair and reasonable to say that just having Mr H sign declarations, wasn't an effective way for L&C to meet its regulatory obligations to treat him fairly, given the concerns it ought to have had about the business being introduced by BlueInfinitas.

L&C knew that Mr H had signed forms intended to acknowledge, amongst other things, his awareness of some of the risks involved with investing and to indemnify L&C against losses that arose from acting on his instructions. And, in my opinion, relying on the contents of such forms when L&C ought to have known that the type of business it was receiving from BlueInfinitas would put investors at significant risk of detriment, wasn't the fair and reasonable thing to do. L&C ought to have identified the risks I've mentioned above. And having identified them, it's my view that the fair and reasonable thing for L&C to have done, and before it received Mr H's application, would have been to decline to accept the business from BlueInfinitas.

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

So, I'm satisfied Mr H's L&C SIPP shouldn't have been established. And further that the opportunity for L&C to execute investment instructions to invest Mr H's monies with SVS or proceed in reliance on an indemnity and/or risk disclaimers, shouldn't have arisen at all. I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for L&C to accept Mr H's business from BlueInfinitas. I consider by the time of his SIPP application, knowing the type of business BlueInfinitas was conducting with its clients or with other SIPP operators, L&C should have been concerned enough to carry out further checks before accepting Mr H's application. And I think if it had done so, it would have refused to accept his application due to the concerns I've raised above.

***COBS 11.2.19R***

L&C argues it was reasonable to proceed with Mr H's application because of the disclaimer he signed and that it was obliged to carry out his instructions by COBS 11.2.19R. L&C says it complied with its obligations under COBS 11.2.19R in acting on its clients written instructions to switch his pension rights and transfer funds to SVS which were subsequently invested as set out above. L&C says to decline to do so would have been akin to assessing suitability requiring it to investigate the full extent of Mr H's financial circumstances. And L&C did not have regulatory permission to carry out such work.

As I said in my provisional decision, I don't agree with L&C's argument regarding COBS 11.2.19R. And L&C could have refused Mr H's application without giving advice or acting in a way that was akin to giving advice, just as it would have done if the application had instead involved a prohibited investment (if it had been aware of there being one). And such a refusal would have been consistent with its role as a non-advisory SIPP operator.

As the Court made clear in the BBSAL case, COBS 11.2.19R is concerned with the method of execution of a client's order. It does not regulate the question of whether or not an order should be accepted in the first place. As I consider L&C should not have accepted Mr H's application, I do not think it fair and reasonable for L&C to rely on the disclaimer he signed saying he instructed L&C to make the investment. And that L&C would not be responsible for any losses based on those instructions. Things should never have reached this stage. If L&C had acted in its clients best interests Mr H would never have been put in the position where he was asked to sign that disclaimer.

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

From the evidence provided to me to date, I think it's more likely than not that BlueInfinitas arranged for Mr H's pension monies to be transferred to L&C to be specifically invested through SVS. L&C has re-iterated what it said in its initial submissions, which was, it did not cause Mr H's losses. L&C says if it hadn't accepted Mr H's application from BlueInfinitas to invest in its SIPP and trade through SVS, that the transfer and investments would still have been effected with a different SIPP provider. But I remain of the view it's not fair and reasonable to say L&C shouldn't compensate Mr H for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found L&C did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice and therefore, wouldn't have accepted Mr H's business from BlueInfinitas.

I note L&C's submissions about the two other SIPP operators accepting applications from BlueInfinitas. But that doesn't mean that it can be assumed that every SIPP provider would have accepted introductions from BlueInfinitas. And/or not complied with regulatory obligations and good industry practice. Even if I'm wrong about that, in the circumstances, I'm satisfied it's fair and reasonable to conclude that if, and before it received Mr H's application, L&C had declined to accept business from BlueInfinitas, Mr H's monies wouldn't still have been invested with SVS.

In Adams v Options SIPP, the judge found that Mr Adams would have proceeded with the transaction regardless. HHJ Dight says (at paragraph 32): *"The Claimant knew that it was a high risk and speculative investment but nevertheless decided to proceed with it, because of the cash incentive."* But, in this case, I'm satisfied that Mr H proceeded without knowing that the investments he was making were high risk and speculative.

Mr H says he was told by BlueInfinitas that there was little or no risk to his pension fund. And based on the evidence I've seen to date I'm satisfied that Mr H didn't know anything about the specific investments his funds were placed in until after the transactions had occurred. I've also not seen any evidence to show Mr H was paid a cash incentive. It therefore cannot be

said he was incentivised to enter into the transaction, and, on balance, I'm satisfied that Mr H, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself.

So, in my opinion, this case is very different from that of Mr Adams. And having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mr H's application from BlueInfinitas, the transaction this complaint concerns, wouldn't still have gone ahead.

I appreciate L&C might say that its contract was with BlueInfinitas and not Mr H. And that if his application was refused it wouldn't have been at liberty to, or had reason to, contact him. But L&C did receive Mr H's application, so I'm considering what it ought to have done having received it. And for the reasons I've explained at length above, I'm satisfied that having received Mr H's application from BlueInfinitas, L&C shouldn't then have accepted it.

Mr H went through a process with BlueInfinitas which culminated in him completing paperwork to set up a new L&C SIPP and with the expectation that monies from his existing pension plan would be transferred into the newly established SIPP. Having gone to the time and effort of doing this, I think it's more likely than not that if the L&C SIPP wasn't then established, and if his pension monies weren't then transferred to L&C, that Mr H would have wanted to find out why from BlueInfinitas and L&C. I don't think it fair and reasonable to say that L&C shouldn't compensate Mr H for his losses on the basis of any speculation that BlueInfinitas and/or L&C wouldn't have confirmed to Mr H the reason why the transfer hadn't proceeded if he'd asked.

I consider it's more likely than not that if L&C had refused to accept Mr H's application from BlueInfinitas and Mr H had received an explanation as to why his application hadn't been accepted, even in very broad or general terms, he wouldn't have continued to accept, or act on, pensions advice provided by BlueInfinitas. And I think it's very unlikely that advice from another regulated business that had the necessary permissions would have resulted in Mr H taking the same course of action particularly as his main objective was to save money. I think it's reasonable to say that a regulated business with the necessary permissions would have given suitable advice. Alternatively, Mr H might have simply decided not to seek pensions advice from a different adviser at all and retain his existing pension plan.

***The involvement of other parties***

In this decision I'm considering Mr H's complaint about L&C. However, I accept that other parties were involved in the transactions complained about – BlueInfinitas and SVS. I also accept that Mr H pursued a complaint against BlueInfinitas with the FSCS. The FSCS upheld Mr H's complaint, it calculated his losses to be in excess of £50,000 and paid him this amount in compensation as this was its limit. Following this the FSCS provided Mr H with a Reassignment of Rights.

The Dispute Resolutions: Complaints ('DISP') rules set out when an Ombudsman's determination includes a money award, then that money award may be such amount as the Ombudsman considers to be fair compensation for financial loss, whether or not a Court would award compensation (DISP 3.7.2R). In my opinion it's fair and reasonable in the circumstances of this case to hold L&C accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mr H fairly.

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

I accept that other parties, might have some responsibility for initiating the course of action that led to Mr H's loss. However, I'm satisfied that it's also the case that if L&C had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr H wouldn't have come about in the first place, and the loss he's suffered could have been avoided. I want to make clear that I've taken everything L&C has said into consideration. But I remain satisfied that it's appropriate in the circumstances for L&C to compensate Mr H to the full extent of the financial losses he's suffered due to its failings.

***In conclusion***

Taking all of the above into consideration, I think that in the circumstances of this case it's fair and reasonable for me to conclude that L&C should have decided not to accept business from BlueInfinitas before it received Mr H's SIPP application. And I also think it's fair and reasonable for me to conclude that if L&C hadn't accepted Mr H's introduction from BlueInfinitas then Mr H wouldn't have invested with SVS.

So, for the reasons I've set out, I also think it's fair and reasonable to direct L&C to compensate Mr H for the loss he's suffered as a result of L&C accepting his business from BlueInfinitas and the resultant investment of his L&C monies with SVS. I say this having given careful consideration to the Adams v Options judgments, but also bearing in mind that my role is to reach a decision that's fair and reasonable in the circumstances of the case having taken account of all relevant considerations.

**Putting things right**

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

In light of the above, L&C should:

- Obtain the notional transfer value of Mr H's previous pension plan.
- Obtain the actual transfer value of Mr H'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 H'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 investments and is used only or substantially to hold one or more of those assets, then any future SIPP fees should be waived until the SIPP can be closed.
- If Mr H has paid any fees or charges from funds outside of his pension arrangements, L&C should also refund these to Mr H. Interest at a rate of 8% simple per year from date of payment to date of my final decision should be added to this.
- Pay to Mr H an amount of £500 to compensate him for the distress and inconvenience he's been caused.

I've set out how L&C 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 H 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 investments may prove difficult, as there is no market for them. For calculating compensation, L&C should establish an amount it's willing to accept for the investments as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investments.

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

If L&C is unable, or if there are any difficulties in buying Mr H's illiquid investments, it should give the holdings a nil value for the purposes of calculating compensation. In this instance L&C may ask Mr H to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holdings. This is subject to my comments made about maximum awards and recommendations below. That undertaking should allow for the effect of any tax and charges on the amount Mr H may receive from the investments and any eventual sums he would be able to access from the SIPP. L&C will have to meet the cost of drawing up any such undertaking.

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

L&C should first contact the provider of the plan which was transferred into the SIPP and ask it to provide a notional value for the policy as at the date of my final decision. For the purposes of the notional calculation the provider should be told to assume no monies would've been transferred away from the plan, and the monies in the policy would've remained invested in an identical manner to that which existed prior to the actual transfer.

Any contributions or withdrawals Mr H 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 the notional valuation from the previous provider, then L&C should instead arrive at a notional valuation by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return index). That is a reasonable proxy for the type of return that could have been achieved over the period in question. And, again, there should be a notional allowance in this calculation for any additional sums Mr H has contributed to, or withdrawn from, his SIPP since its inception.

I acknowledge that Mr H has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr H's Reassignment of Rights require him to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required. So, I think it's fair and reasonable to make no permanent deduction in the redress calculation for the compensation Mr H received from the FSCS. And it will be for him to make the arrangements to make any repayments he needs to make to the FSCS. However, I do think it's fair and reasonable to allow for a temporary notional deduction equivalent to the payment(s) Mr H actually received from the FSCS for a period of the calculation, so that the payment(s) ceases to accrue any return in the calculation during that period.

As such, if it wishes, L&C may make an allowance in the form of a notional withdrawal (deduction) equivalent to the payment(s) Mr H received from the FSCS following the claim about BlueInfinitas, and on the date the payment(s) was actually paid to Mr H. Where such a deduction is made there must also be a corresponding notional contribution (addition), at the end date of my final decision equivalent to any FSCS payment(s) notionally deducted earlier in the calculation. To do this, L&C should calculate the proportion of the total FSCS payment(s) that it's reasonable to apportion to each transfer into the SIPP, this should be proportionate to the actual sums transferred in. And L&C should then ask the operator of Mr H's previous pension plan to allow for the relevant notional withdrawal(s) in the manner specified above.

The total notional deductions allowed for shouldn't equate to any more than the actual payment(s) from the FSCS that Mr H received. L&C must also then allow for a corresponding notional contribution (addition) as at the date of my final decision, equivalent to the accumulated FSCS payment(s) notionally deducted by the operators of Mr H's previous pension plan. Where there are any difficulties in obtaining notional valuations from the previous operators, L&C can instead allow for both the notional withdrawal(s) and contribution(s) in the notional calculation it performs, provided it does so in accordance with the approach set out above.

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

*Pay an amount into Mr H'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 H's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr H 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.

*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 H 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 investments and is used only or substantially to hold those assets, 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 H or into his SIPP within 28 days of the date L&C receives notification of his acceptance of my final decision. The calculation should be carried out as at the date of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days.

Where L&C pays interest, income tax may be payable on any interest paid. If L&C deducts income tax from the interest, it should tell Mr H how much has been taken off. And L&C should also then give Mr H a tax deduction certificate in respect of interest if he asks for one.

*Distress & inconvenience*

L&C has said the amount I recommended of £500 in my provisional decision for the distress and inconvenience it caused Mr H, is arbitrary. But I did provide an explanation of why I thought this was a fair and reasonable amount to pay Mr H. I remain of the view that the loss of the pension provision that is the subject of this complaint caused Mr H significant distress, and this is clear from his submissions to us. He used all of his pension funds to try to save on costs and instead found that he had lost nearly all of his pension provision. Therefore, I consider L&C should pay £500 to fairly compensate Mr H for the distress and inconvenience it has caused him.

## My final decision

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

**Decision and award:** I uphold the complaint. I think that fair compensation should be calculated as set out above under 'Putting things right'. My decision is that London & Colonial Services Limited should pay Mr H the amount produced by that calculation – up to a maximum of £160,000 and any interest that becomes payable as set out above.

**Recommendation**: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that London & Colonial Services Limited pays Mr H the balance. This recommendation is not part of my determination or award. London & Colonial Services Limited doesn't have to do what I recommend. It's unlikely that Mr H can accept my decision and go to court to ask for the balance. Mr H may want to get independent legal advice before deciding whether to accept this decision.

If London and Colonial Services Limited does not pay the recommended amount, then any current illiquid investments that are retained by Mr H should be retained by him until any future benefit that he may receive from the investments together with the compensation paid by London and Colonial Services Limited, equates to the full fair compensation as set out above. London & Colonial Services Limited may request an undertaking from Mr H that he accounts to it for the illiquid investment (as mentioned above) thereafter. London & Colonial Services Limited will need to meet the cost of drawing up this undertaking.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 17 May 2024.

Yolande Mcleod
**Ombudsman**