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UT (Tax & Chancery) Case Numbers: UT-2024-000009
UT-2024-000010

Upper Tribunal
(Tax and Chancery Chamber)

At the Rolls Building, London

FINANCIAL SERVICES – transfers from defined benefit schemes to defined contribution schemes – Decision Notices issued on basis that advice not suitable or compliant – one matter relied by Authority being outside the six year limitation period – sampling and review process – Authority's change to outcomes of review process – Tribunal findings about the sample – majority of advice suitable – findings about other advice and supervision failings – whether Applicants were dishonest – whether one Applicant was reckless – Applications allowed in part

Heard on 26-30 January; 2-4 February
and 11-13 February

Judgment given on: 27 April 2026

Before

JUDGE ANNE REDSTON
TRIBUNAL MEMBER ADAM SAMUEL
TRIBUNAL MEMBER JOHN WOODMAN

Between

RICHARD BRIAN FENECH
HEATHER IMOGEN DUNNE

Applicants

and

THE FINANCIAL CONDUCT AUTHORITY

Respondent

Representation:

For Mr Fenech: Alexander dos Santos KC, instructed by K&L Gates LLP

For Ms Dunne: Douglas Cherry, instructed by Fladgate LLP

For the Authority: Simon Pritchard of Counsel, instructed by the Financial Conduct Authority

DECISION

INTRODUCTION AND SUMMARY

1. This decision concerns advice given by Ms Heather Dunne, who at all relevant times was a qualified pension transfer specialist ("PTS") and the appointed representative ("AR") of Financial Solutions Midhurst Ltd ("FSML"), an advisory firm owned and operated by Mr Richard Fenech.

2. On 2 January 2024, the Authority[1] notified Mr Fenech and Ms Dunne (together, "the Applicants") of its decisions to impose financial penalties and prohibition orders on them ("the Decision Notices").

3. The Authority issued its Decision Notice to Ms Dunne on the basis that:

   (1) she had breached Statement of Principle 2 ("SoP 2") by failing to act with due skill, care and diligence when giving advice about pension transfers from defined benefit ("DB") schemes to defined contribution ("DC") schemes ("Pension Transfers"), because her approach did not comply with the applicable regulatory requirements; and

   (2) she had breached Statement of Principle 1 ("SoP 1") because she was knowingly concerned in the dishonest provision of a backdated AR agreement to the Authority, and so demonstrated a lack of integrity.

4. The Authority issued its Decision Notice to Mr Fenech on the basis that:

   (1) he had breached Statement of Principle 7 ("SoP 7") because he had failed to ensure adequate management and oversight of Ms Dunne; and

   (2) he had breached SoP 1:

      (a) by failing to respond to warnings given to him by an external compliance consultant about Ms Dunne's advice, and was thus reckless; and

      (b) by deliberately providing a backdated AR agreement to the Authority and so demonstrating a lack of integrity.

5. The relevant period for Ms Dunne was 29 April 2015 to 22 June 2017 and that for Mr Fenech was 3 January 2015 to 22 June 2017.

6. Under s 66 of the Financial Services and Markets Act 2000 ("FSMA"), the Authority imposed a penalty of £399,817 on Ms Dunne and a penalty of £270,646 on Mr Fenech. Under FSMA s 56 the Authority imposed orders on both Applicants prohibiting them from performing any function in relation to any regulated activity. The Applicants referred the Decision Notices to the Upper Tribunal (respectively "the References" and "the UT" or "the Tribunal").

7. We had the benefit of excellent written and oral submissions from Mr Alexander dos Santos KC for Mr Fenech; from Mr Douglas Cherry for Ms Dunne, and from Mr Simon Pritchard for the Authority. We are particularly grateful to Mr Cherry and Fladgate LLP, whose services were provided to Ms Dunne on a *pro-bono* basis. We also thank members of the legal teams who prepared the bundles and assisted in other ways with the case preparation. We have not referred in this decision to all the submissions each party has made, but they have all been carefully considered and appreciated.

8. This was an unusual and complicated case, for the following reasons:

[1] References in this judgment to "the Authority" also include the Financial Services Authority, as the Financial Conduct Authority was previously known.

(1) Ms Dunne operated a specific type of "two adviser" model under which she gave the client pension-specific advice, while the client's independent financial adviser ("IFA") advised on the destination of the transferred funds. The Authority's position was that "two adviser" models were only compliant if the PTS knew the destination of the transferred funds, including the related charges, and took that information into account when deciding whether the Pension Transfer was suitable. For most of her relevant period, Ms Dunne did not know that information and so was unable to take it into account as part of her Pension Transfer advice. Mr Pritchard called her approach the "transfer in isolation" or "TII" model; the Applicants adopted the term and we have done the same.

(2) The Authority issued the Decision Notices on the basis that, because of the TII model, Ms Dunne always had insufficient information to advise a client to make a Pension Transfer.

(3) The Authority also relied on a sample of Ms Dunne's files, which had been reviewed by a team of PTSs from Grant Thornton ("GT"). However:

(a) GT's original findings were that in eight out of 17 cases, Ms Dunne had correctly advised that a Pension Transfer was suitable for the client, often abbreviated to "suitable advice";

(b) the Authority subsequently "recalibrated" those eight files on the basis that Ms Dunne was unable to give compliant advice because she did not have information about the DC scheme, including its charges, and in consequence, all Ms Dunne's files were assessed as "non-compliant";

(c) the Authority then extrapolated from the file sample and decided that all Pension Transfers made by Ms Dunne during her relevant period were non-compliant.

(4) The Authority accepted that it was out of time to impose a penalty on Ms Dunne in relation to her operation of the TII model, pursuant to the limitation provisions in FSMA s 66.

9. In consequence, the Authority could neither rely directly on Ms Dunne's operation of the TII model nor could it rely on the file review outcomes which had been decided on the basis that Ms Dunne had operated that model. Those included not only the "recalibrated" files, but other cases where the GT assessor had taken a similar view to the Authority.

10. Because of the limitation issue, Mr Pritchard sought to identify, by reference to the material in the files reviewed by GT, other failures in Ms Dunne's advice in addition to those consequential upon her operation of the TII model. Mr dos Santos described Mr Pritchard's task as akin to walking "a tightrope over a canyon…where there are high winds and the rope is slippery".

11. Mr dos Santos and Mr Cherry also submitted that the sample files did not support many of the conclusions drawn by GT, both before and after the recalibration, and that the underlying files therefore needed to be carefully and independently considered by the Tribunal.

The approach of the Tribunal

12. All parties thus agreed that in order to decide the Applications, the Tribunal needed to consider the material in the sample files, as well as other relevant documents and witness evidence. This was a significant exercise, as the files extended to almost 27,000 pages, plus a further 3,000 pages of other evidence.

13. We first reduced the sample by one, because it fell outside Ms Dunne's relevant period. We then considered those 16 files ("the Sample"); the evidence relating to GT's reviews; Ms Dunne's evidence about each of the cases in the Sample and the parties' related submissions.

Our findings about Ms Dunne and SoP 2

14. Having carried out that review of the Sample, we found that Ms Dunne had given suitable advice to ten of the clients (62% of the Sample). She had given unsuitable advice in six cases (38% of the Sample) for one or both of the following reasons:

(1) her advice was inconsistent with the client's capacity for loss – in other words, the clients were being advised to transfer from a secure DB pension to a more risky DC scheme, when their other income and assets made it unlikely they would be able to absorb subsequent falls in value; and/or

(2) the benefits available to the client from remaining in the DB scheme were more beneficial than those on offer from the DC scheme.

15. We noted that those outcomes (62% suitable, 38% unsuitable) were consistent with results previously obtained by the Authority when it carried out two smaller reviews of Ms Dunne's files in 2017 and 2019, before GT was instructed. The former review concluded that Ms Dunne had given suitable advice in 62% of the cases (five out of eight files); the latter that suitable advice had been given in 60% of the cases (three out of five files).

16. Using a table provided by Dr Purdon, a statistician and the expert witness in these proceedings, it was possible to extrapolate from the statistically valid sample of 16 files we had considered to the whole population of Ms Dunne's clients. The result of that extrapolation was that we could be 95% certain that between 18% and 62% of her clients had been wrongly advised to carry out a Pension Transfer.

17. The 44% confidence interval (from 18% to 62%) was extremely wide. This had come about because the Authority did not increase the sample size after receiving the results of GT's review; but instead recalibrated the outcomes. The burden of proof being on the Authority, we found as a fact that at least 18% of Ms Dunne's clients had received unsuitable advice, but we have not gone further.

18. In carrying out our review of the Sample, we also identified the following compliance failings in Ms Dunne's advice:

(1) She provided her advice in the form of Suitability Reports. Much of the preliminary work for those Reports was carried out by staff employed by her unregulated company, Heather Dunne Consulting Ltd ("HDC"). Although by February 2017, two of those staff had acquired the AF3 pension qualification, none was a PTS. Until February 2017, Ms Dunne reviewed all the Suitability Reports, but after that date, she reviewed only 10%. That was a breach of Rule 19.1.1R in the Authority's Conduct of Business Sourcebook ("COBS"), which required all transfer recommendations to be prepared or checked by a PTS.

(2) Before issuing the Suitability Reports, HDC issued Initial Reports in which it (a) gave advice as to the suitability of the Pension Transfer, and (b) told the IFA and the client to make the transfer decision based on that Initial Report. That too was a breach of COBS 19.1.1R.

(3) All the Suitability Reports breached COBS 4.2.1R, which required that communications with clients be fair, clear and not misleading, for both of the following reasons:

(a) They included templated passages which were not tailored to the customer. This made the Suitability Reports unclear and risked obscuring important matters.

(b) It was hard to locate information about what was being given up by the Pension Transfer, while the benefits of moving the funds to the DC scheme were given prominence.

(4) Some Suitability Reports contained errors, omissions and/or inconsistencies which were caused by Ms Dunne's failure to check her advice carefully before finalising it. That too was a breach of COBS 4.2.1R.

(5) In five of the cases in the Sample, Ms Dunne failed to gather the information about the clients' financial situation and/or investment objectives which was necessary to give Pension Transfer advice. This was a breach of COBS 9.2.1R, which makes it obligatory to collect that information before deciding whether the Pension Transfer was suitable.

(6) Before a DB scheme could make a Pension Transfer, a PTS had to provide it with a "Confirmation Letter" and an "Advice Declaration" stating that the client had received "appropriate independent advice" that the Pension Transfer was suitable. In four of the cases in the Sample, Ms Dunne sent the "Confirmation Letter" and "Advice Declaration" to the DB scheme before she had issued the Suitability Report. Although this was not a breach of COBS (the provision was subsequently amended), it misled the DB scheme and triggered the transfer of funds before the client had received Ms Dunne's advice.

19. Taking into account both the unsuitable advice and the above compliance failings, we agree with the Authority that Ms Dunne's conduct breached SoP 2 because it fell below that which was reasonable for an experienced professional with many years' experience in her field.

Our findings about the TII model

20. Although the Authority was out of time to rely on the TII model in relation to the penalties charged on Ms Dunne[2], it was not barred by limitation from relying on it in relation to the prohibition notices. We therefore considered whether Ms Dunne's use of that model was reasonable, and found that it was not.

21. We did not take the TII model into account when deciding whether the advice given to the Sample clients was suitable, but had we done so, it would not have changed the outcomes. That was either because (a) the advice was unsuitable in any event, or (b) the advice was suitable despite the absence of information about the DC scheme. As the Authority itself had said[3] some years earlier, a disclosure failing does not "necessarily result in a suitability failing where there is no material impact on the outcome for the member".

Our other findings

22. We found that Mr Fenech had failed adequately to supervise Ms Dunne, and so breached SoP 7. However, we also found that he had not been reckless, and so did not breach SoP 1 for that reason.

23. We decided that both Applicants had dishonestly provided the Authority with a backdated agreement and had breached SoP 1 in so doing. However, the context of that dishonesty is also relevant, as the Authority recognised in their "Statements of Principle and Code of Practice for Approved Persons" ("APER"): this says at 3.1.3G that in assessing a breach of a SoP, "all the circumstances" are to be considered. We found as follows:

[2] The position for Mr Fenech was more complex, as we explain in the main body of the decision.
[3] In a "Thematic Review" entitled "Enhanced transfer value pension transfers" published in 2014, see §141 below.

(1) In relation to Mr Fenech, backdating the agreement was a one-off action at a time he was under significant personal and professional pressure, and it was out of character.

(2) In relation to Ms Dunne, she too acted under pressure in relation to the backdated agreement, but also acted dishonestly when she knowingly provided Confirmation Letters to the DB schemes before the issuance of the Suitability Reports, albeit her purpose was to assist her clients.

Outcome

24. The Authority decided to impose penalties on the Applicants, and issue prohibition notices on the basis of its conclusions concerning the use of the TII model and the file reviews. All parties asked to defer their submissions on what action the Authority should take, until after the Tribunal had made the relevant key findings of fact, and issued its decision on whether the Applicants had breached one or more of the SoPs.

25. We agreed that this was in the interests of justice, and in consequence our decision on the quantum of any penalties and on the prohibition notices has been deferred to a further hearing to take place in June 2026 in the light of the findings set out in this judgment.

The structure of this decision

26. We first explain the Tribunal's jurisdiction, summarise the evidence and set out extracts from the Authority's rules and guidance. The rest of our decision is structured in seven Parts as follows:

(1) Findings of fact relating to the case as a whole.

(2) Ms Dunne and limitation issues, including findings on the TII model.

(3) Findings of fact about the file sample assessed by GT, and what happened subsequently.

(4) The Tribunal's assessment of the Sample, including findings on the suitability of the advice and on other matters.

(5) Whether Mr Fenech breached SoP 7 by failing adequately to supervise Ms Dunne.

(6) Whether Mr Fenech was reckless.

(7) Whether the Applicants acted dishonestly.

THE TRIBUNAL'S JURISDICTION

27. Mr dos Santos helpfully summarised the jurisdiction of the Tribunal as follows:

(1) a reference is not an appeal against the Authority's decision, but a complete rehearing of the issues which gave rise to the decision: *Lewis Alexander Ltd v FCA* [2019] UKUT 0049 (TCC) at [29];

(2) the burden of proof is on the Authority, and the civil standard applies: *Markou v FCA* [2023] UKUT 00101 (TCC) at [66], and *Carrimjee v FCA* [2015] UKUT 0079 (TCC) at [47];

(3) the Tribunal may consider any evidence relating to the subject matter of the reference, whether or not it was available to the decision-maker at the material time: FSMA s 133(4);

(4) a reference to the Tribunal of a decision by the Authority to impose a penalty under FSMA s 66 is a "disciplinary reference" pursuant to section 133(7A) of that Act. A decision to impose a prohibition order under FSMA s 56 is not: *Page v FCA* [2022] UKUT 00124 (TCC) at [113] to [115];

(5) on a disciplinary reference, the Tribunal's jurisdiction and powers are set out in FSMA s 133(5) as follows:

> "In the case of a disciplinary reference…the Tribunal
>
> (a) must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter; and
>
> (b) on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination."

(6) In any other case (such as a reference of a decision to impose a prohibition), FSMA s 133 relevantly provides:

> "(6) In any other case, the Tribunal must determine the reference or appeal by either—
>
> (a) dismissing it; or
>
> (b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal.
>
> (6A) The findings mentioned in subsection (6)(b) are limited to findings as to—
>
> (a) issues of fact or law;
>
> (b) the matters to be, or not to be, taken into account in making the decision; and
>
> (c) the procedural or other steps to be taken in connection with the making of the decision."

(7) FSMA s 133(7) provides that the Authority's decision maker must act in accordance with any determination or direction given by the Tribunal.

28. We also adopt the following summary provided by Mr Pritchard:

> "In *FCA v Seiler* [2024] EWCA Civ 852 at [51], Fraser LJ explained that on a reference 'the Authority is engaged in a common enterprise with the Upper Tribunal in ensuring that the objects of the legislation are achieved and that public confidence is maintained in the integrity of financial markets, with those who are not fit and proper persons prohibited from engaging in regulated activity'. In terms of the 'objects of the legislation', the Authority's statutory objectives, set out in s.1B(3) FSMA, include securing an appropriate degree of protection for consumers and protecting and enhancing the integrity of the UK financial system."

29. We return to the Tribunal's jurisdiction at §342, where we consider whether we are able to take into account points which have not been included in the Authority's Statement of Case.

THE DOCUMENTARY EVIDENCE

30. As already noted, we were provided with over 30,000 pages of documentary evidence, which included:

(1) correspondence entered into by Mr Fenech and Ms Dunne about the way they worked;

(2) Ms Dunne's files for the cases reviewed by the Authority;

(3) documentation relating to those file reviews, including the working papers from the Authority's internal Defined Benefit Advice Assessment Tool ("DBAAT"); and

(4) transcripts of Mr Fenech and Ms Dunne's interviews by the Authority.

Failure to disclose?

31. The Applicants submitted that the Authority had failed to disclose relevant material, in particular certain documents about the discussions between members of the Authority's staff and GT about "recalibrating" some of the sample files from "suitable" to "not compliant", and that some of the documents had been redacted. A particular example (see §317(4)) was an email from Ms Rebecca Paton of the Authority headed "Heather Dunne/FS Midhurst – Suitable/MIG" but the entire text had been blacked out. It was possible to infer from the unredacted reply that Ms Paton had suggested or requested that one of Ms Dunne's files be reclassified so it was no longer "suitable". When Mr Cherry questioned this redaction, Mr Pritchard's response was that Ms Paton was a lawyer and "the redaction was made for legal advice privilege reasons".

32. Mr Cherry made his disclosure challenge in the course of the hearing, but no formal application for disclosure of that document (or any other) was made by the Applicants either before or during the hearing. In addition, the documents in question concerned how the Authority had carried out its investigation. It is not part of the Tribunal's role to adjudicate on that issue: our purpose is to decide the Applications, not to carry out a judicial review of the Authority's approach. We were confident that we had sufficient evidence to make the necessary findings.

THE WITNESS EVIDENCE

33. We begin with a summary of the overall approach we have taken and an overview of the evidence given by each witness. The Applicants submitted that the Authority had failed to call certain witnesses, and we consider that issue at §60.

Our approach to the witness evidence overall

34. In assessing the witness evidence, we have followed the guidance set out in case law, in particular *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) ("*Gestmin*"). We took into account that the relevant periods for both Applicants began eleven years ago and ended over eight years ago. In addition, some evidence related to events in 2012, 2013 and 2014, which were even more distant in time.

35. It was thus unsurprising that some of the witnesses had no independent recollection of the events in question. Their evidence consisted of a summary of documents together with their current view as to what they "would have" done or thought in relation to the matters there set out. We place little or no reliance on those suppositions, but have instead made our findings based on the contemporaneous documents.

Mr Fenech

36. Mr Fenech provided a witness statement, gave evidence in chief led by Mr dos Santos, was briefly cross-examined by Mr Cherry and (for over a day) by Mr Pritchard. He answered questions from the Tribunal and was re-examined by Mr dos Santos.

37. He was sometimes reluctant to give straightforward answers, such as in his replies to Mr Pritchard's questions about a decision made by the Financial Ombudsman Service ("FOS") and about the TII model. He also sought to disavow some statements he had made, such as those in a letter to Ms Dunne on 23 January 2015. However, overall he gave credible evidence, while very fairly also saying that he could not remember all the events which occurred a decade or so ago.

Ms Dunne

38. Ms Dunne provided a witness statement, was briefly cross-examined by Mr dos Santos and then more extensively by Mr Pritchard over two and a half days; she answered questions from the Tribunal and was re-examined by Mr Cherry. She carefully considered each question asked and did her best to respond, although this was sometimes difficult, given the extensive documentary evidence and the lapse of time since the events in question. Ms Dunne changed her evidence on two matters from the witness box, and we return to those points at §494 and §624ff. With those exceptions, she gave credible evidence.

The Authority's witnesses

Ms Prestage

39. Ms Prestage is a Chartered Financial Planner with over 25 years' experience working with or for regulated firms. She joined GT in December 2015, working in its Financial Services Regulatory team, and was their "lead" on Life and Pensions engagements. When GT was engaged by the Authority to review the Pension Transfer advice files for a number of firms, including FSML, Ms Prestage managed the team of assessors and was responsible for quality assurance.

40. Her witness statement was originally filed and served as an expert report, but in a pre-trial review ("PTR") hearing, Judge Redston held that she was not able to give expert evidence because she had a conflict of interest. That judgment was published as *Fenech and Dunne v FCA* [2026] UKUT 00020 (TCC).

41. The Authority was, however, given permission to rely on the factual parts of Ms Prestage's report as evidence of fact. Given the short period of time between the PTR and the substantive hearing, Judge Redston decided it was unnecessary for a new version of Ms Prestage's witness statement to be filed and served, but that the Tribunal would not take into account as evidence, the passages in the statement which were opinion rather than fact. At this hearing, Mr Pritchard asked that Ms Prestage's opinions about Ms Dunne's files instead be treated as part of the Authority's submissions and we agreed.

42. Ms Prestage was cross-examined by Mr dos Santos and Mr Cherry; she answered questions from the Tribunal and was re-examined by Mr Pritchard. We found her to be a reliable witness who gave clear and credible evidence.

Mr Chipperfield

43. Mr Neil Chipperfield was employed by the Authority until he retired in February 2024. He provided a witness statement and was cross-examined by Mr dos Santos and Mr Cherry. The Bundle contained evidence relating to his communications with Ms Dunne in 2012 and 2013, when he was working for the Authority's supervision division ("Supervision"). Early in his witness statement he said that "given the passage of time, I do not independently recall interactions that I had with Ms Dunne". The main body of his statement sets out his view as to what he "would have" done or not done, and he took a similar approach in the witness box. With one exception (see §120), we have not relied on what Mr Chipperfield considers he would have done, but have instead relied on the contemporaneous documents.

Mr Stimson

44. Mr Robert Stimson joined the Authority in 2000, and in 2013 was working in Supervision as a "generalist front line supervisor". During that year he communicated with both Mr Fenech and Ms Dunne about complaints made to FOS. Mr Stimson provided a witness statement, was cross-examined by Mr dos Santos and Mr Cherry and re-examined by Mr Pritchard. He had no independent recollection of the communications with the Applicants. As with Mr Chipperfield,

we have not placed weight on comments he made in his witness statement about those communications.

Mr Hewitt

45. Mr Christopher Hewitt is a PTS who began working for the Authority in 2010. Between November 2016 and January 2020 he led the Authority's file review function, and in that role was responsible for the detailed build of the DBAAT and for training the GT assessors who carried out the file reviews relevant to the Applications. Mr Hewitt also attended some of the case clinics at which the GT team considered issues arising from the file reviews. He provided a witness statement, was cross-examined by Mr dos Santos and Mr Cherry, re-examined by Mr Pritchard and answered questions from the Tribunal. He was a straightforward and credible witness.

Mr Berenbaum

46. Mr David Berenbaum is a qualified actuary who joined the Authority in January 2017; he worked in its Pension Policy team until October 2019. He provided a witness statement, was cross-examined by Mr dos Santos and Mr Cherry and re-examined by Mr Pritchard. He was present at a meeting with Mr Fenech and Ms Dunne on 15 June 2017.

47. Mr Berenbaum also gave evidence about two "Alerts" and a consultation issued by the Authority. We have come to our own view as to the content of those documents, but accepted his evidence as to their context.

Mr Smart

48. Mr Jonathan Smart joined the Authority in 2010. At all relevant times, he was working in the Authority's enforcement division ("Enforcement"). From January 2021 to July 2022, and from July 2024 onwards, he managed the team conducting the investigations into FSML and the Applicants. He provided a witness statement, was cross-examined by Mr dos Santos and Mr Cherry and answered questions from the Tribunal. We found him to be a straightforward and credible witness.

Mr Ellis

49. Mr Julian Ellis is a PTS who provided compliance support services to FSML at various points between 2014 and 2018. He provided a witness statement at the request of the Authority, gave evidence-in-chief led by Mr Pritchard, was cross-examined by Mr dos Santos and Mr Cherry, answered questions from the Tribunal and was re-examined by Mr Pritchard.

50. We have disregarded Mr Ellis's response to one question asked in re-examination, because it was given after a discussion between the Tribunal and Mr Pritchard. Mr Ellis's response could, in our judgment, have been influenced by that discussion. On all other matters, the Tribunal found Mr Ellis to be a straightforward and credible witness.

Ms Hill

51. Ms Rebecca Hill supplied compliance support services to FSML in 2017. She provided a witness statement at the request of the Authority, but the evidence in that statement was not challenged. She did not attend the hearing and we accepted her evidence.

Dr Purdon

52. All parties had permission to call expert witnesses, but only the Authority did so. Dr Susan Purdon is a professional statistician with extensive experience in complex sample design and analysis. On 7 November 2025, she provided an expert report relating to the Applicants. She was cross-examined on her report by Mr dos Santos and answered questions from the Tribunal.

53. Mr dos Santos also sought to cross-examine Dr Purdon on the instructions she had received from the Authority. Mr Pritchard objected, on the basis that this was not permitted under CPR 35.10(4) or PD35 para 5, as there were no "reasonable grounds" to consider that she had not disclosed her instructions in the main body of her report. Mr dos Santos then applied to the Tribunal for permission to carry out that cross-examination. He submitted that it was reasonable to infer that there were "reasonable grounds" because:

(1) Dr Purdon had exhibited two letters of instruction dated 20 February 2019 and 26 October 2021, but these were generic, as they related to the provision of expert evidence on all the firms whose pension transfer advice was under review by the Authority;

(2) she had listed, but not exhibited, two letters of instruction relating specifically to Ms Dunne; and

(3) it was clear from her report that she had had discussions with the Authority about issues arising after she had begun her work on Ms Dunne's case.

54. Mr dos Santos added that he had "made it absolutely plain" during the December PTR hearing that he "intended to cross-examine" Dr Purdon about the disclosure in her report.

55. We took time for consideration. Although not bound by the CPR, the Tribunal commonly takes the same approach (see for example *Wired Orthodontics v HMRC* [2021] UKUT 0318 (TCC)), and no party suggested that CPR 35 should not be followed.

56. We took into account the following:

(1) By the time Mr dos Santos made his application, Dr Purdon had already been cross-examined on other matters, and the Tribunal had found her to be entirely credible.

(2) The directions issued to the parties before the hearing required the expert to provide "a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based". The same requirement is at PD35 para 3.2(3).

(3) Dr Purdon confirmed in her report that she was "aware of the requirements of Part 35 of the Civil Procedure Rules 1999, Practice Direction 35 and the Guidance for the Instruction of Experts in Civil Claims 2014 and [had] sought to comply with their provisions".

(4) Under the heading "my instructions and the issues addressed in this report", Dr Purdon listed her instructions relating to the selection of the sample, its size, and the subsequent extrapolation. In footnotes, she added the instructions received following queries she had raised with the Authority in the course of preparing her report. These were in addition to the two generic letters of instruction which had been exhibited.

(5) Dr Purdon knew that she was required to disclose her instructions, and in compliance with that requirement, had both exhibited the generic instructions, and carefully explained in the body of the report what the Authority had told her to do in response to the questions she had raised about the sample used for the Applicants' case.

57. Given the above, we concluded there were no "reasonable grounds" to allow Mr dos Santos to cross-examine her, and we refused his application.

58. As Mr dos Santos had also relied on his recollection of the PTR, Judge Redston records as follows:

(1) In advance of that hearing, the Applicants had raised disclosure of the experts' instructions as one of many points to be considered.

(2) However, at the hearing itself the parties had agreed the issues on which they needed a judicial decision, and had addressed those issues.

(3) At the end of the hearing, the parties said they would seek to agree any remaining matters between themselves. Judge Redston invited them to contact the Tribunal if they subsequently decided further judicial involvement was required, but no party did so.

(4) Thus, it had not been clear at the end of the PTR hearing that Mr dos Santos still intended to cross-examine Dr Purdon on her instructions.

The "character" witnesses

59. Mr Fenech and Ms Dunne both relied on evidence from individuals who the parties described as "character witnesses", ie as giving evidence about the Applicants' character rather than about the events which led to the issuance of the References. The Authority informed the Applicants before the hearing that they did not require any of the character witnesses to attend the hearing to be cross-examined, and we accepted their evidence.

The "missing" witnesses

60. The Applicants invited the Tribunal to find that the Authority had failed to call certain material witnesses from GT and from the Authority.

61. Mr dos Santos submitted that the outcomes of the file reviews carried out by GT were "the subjective assessment of the reviewers, none of whom are witnesses in the matter", and Mr Cherry made a similar submission**.** However, we agreed with Mr Pritchard that calling the reviewers as witnesses was unlikely to have assisted the Tribunal, because:

(1) we had copies of the DBAATs they had completed, so could see what they had considered and their reasoning;

(2) in any event, no party asked us to rely only on the DBAATs, and we have not done so; we have also considered the material in Ms Dunne's files, on which the DBAATs were based;

(3) the reviews were carried out in 2019, now over six years ago, and each reviewer had considered multiple files from around thirty firms, in addition to those of Ms Dunne, so were unlikely to have had a clear recollection (or indeed any recollection) of a particular case within the Sample.

62. The Applicants also suggested, although with less force, that the Authority should have called other employees as witnesses, but they named only one such possible witness. That was Mr Stephen Bell, who worked in Enforcement and had been involved in investigating Ms Dunne's files.

63. We disagreed with the Applicants for the reasons explained in *Banque Havilland v FCA* [2024] UKUT 115 (TCC). In that case the Tribunal said at [134] that "…the scope of the investigation, the Authority's investigative steps, the evolving nature of the Authority's case…are not matters which are relevant to the issues which the Tribunal needs to decide on these references".

THE AUTHORITY'S RULES AND GUIDANCE

64. The Authority has set out its rules and guidance for UK financial firms in a "Handbook" which is divided into "Modules". Those particularly relevant to this case are the "High Level Standards" and the "Business Standards". Within the former, the parties and Tribunal have focused on the Statements of Principle and Code of Practice for Approved Persons (APER) and within the latter, on the "Conduct Of Business Sourcebook" or "COBS". In this part of our

decision, our citations are taken from the rules and guidance in force during the Applicants' relevant periods.

The Conduct Rules

65. The Authority is empowered by FSMA s 64A to issue "Conduct Rules" which apply to those authorised under s 59 to carry on a regulated activity (and to employees and directors of authorised persons). The Conduct Rules were contained in the APER, with seven Statements of Principle set out at APER 2.1 and further detail being provided in other Chapters.

66. SoP 1 read: "an approved person must act with integrity in carrying out his accountable functions". The Authority decided that both Applicants had breached this Principle because they had been dishonest. We consider this at Part Seven of this decision. The Authority also decided that Mr Fenech had also breached SoP 1 because he had been reckless; we consider this at Part Six.

67. SoP 2 read: "An approved person must act with due skill, care and diligence in carrying out his accountable functions". The term "accountable functions" is defined by APER 1.1A.2R as including "FCA controlled functions". Both Ms Dunne and Mr Fenech held FCA controlled functions. The Authority decided that Ms Dunne had breached this Principle "by failing to act with due skill, care and diligence in providing Pension Transfer advice". We consider that issue at Part Four.

68. SoP 7 read:

> "an approved person performing an accountable higher management function must take reasonable steps to ensure that the business of the firm for which they are responsible in their accountable function complies with the relevant requirements and standards of the regulatory system."

69. The Authority decided that Mr Fenech had breached this Principle, and we consider this at Part Five.

70. APER 3.1.3G read:

> "In assessing compliance with, or a breach of, a Statement of Principle, the FCA will look at all the circumstances of a particular case. Account will be taken of the context in which a course of conduct was undertaken, including the precise circumstances of the individual case, the characteristics of the particular accountable function and the behaviour to be expected in that function."

71. APER 3.1.4G(1) read:

> "An approved person will only be in breach of a Statement of Principle where he is personally culpable. Personal culpability arises where an approved person's conduct was deliberate or where the approved person's standard of conduct was below that which would be reasonable in all the circumstances..."

COBS rules and guidance

72. COBS contains detailed rules and guidance applicable to firms giving pension transfer advice. Rules are indicated by the suffix "R" and guidance by the suffix "G". Under the heading "Interpreting the Handbook", GEN 2.2.2G said that "guidance may assist the reader in assessing the purpose of the provision, but it should not be taken as a complete or definitive explanation of a provision's purpose".

73. COBS was amended in June 2015 (so after the beginning of the Applicants' relevant periods) to include advice on the conversion or transfer of pension benefits: in the extracts below, these amendments are shown in square brackets. Most of those changes relate to pension

"conversions" and to "safeguarded benefits" and had no effect on the issues in this case. There were further changes to COBS after the Applicants' relevant periods; these are summarised at §225ff.

Overall obligations during the relevant period

74. COBS 2.1.1R set out "the client's best interests rule", which requires that a firm "must act honestly, fairly and professionally in accordance with the best interests of its client".

75. COBS 4.2R applied to communications from a firm to a client (apart from third party prospectuses), and provides that "a firm must ensure that a communication…is fair, clear and not misleading".

76. COBS 9.2 was headed "assessing suitability", and 9.2.1R provided:

> "(1) A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client.
>
> (2) When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client's:
>
> (a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;
>
> (b) financial situation; and
>
> (c) investment objectives;
>
> so as to enable the firm to make the recommendation, or take the decision, which is suitable for him."

77. The term "personal recommendation" was defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 as follows:

> "…a personal recommendation is a recommendation–
>
> (a) made to a person in their capacity as an investor or potential investor…;
>
> (b) which constitutes a recommendation to them to do any of the following (whether as principal or agent)–
>
> (i) buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular investment which is a security or a relevant investment; or
>
> (ii) exercise or not exercise any right conferred by such an investment to buy, sell, subscribe for, exchange or redeem such an investment; and
>
> (c) that is–
>
> (i) presented as suitable for the person to whom it is made; or
>
> (ii) based on a consideration of the circumstances of that person."

78. COBS 9.2.2R set out the firm's obligations relating to the giving of a personal recommendation, as follows:

> "(1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:
>
> (a) meets his investment objectives;
>
> (b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and

(c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

(2) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.

(3) The information regarding the financial situation of a client must include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments."

79. In March 2011, the Authority published "Finalised guidance" under the reference number FG11/05 about the application of COBS 9.2.1R and 9.2.2R, headed "Assessing suitability: establishing the risk a customer is willing and able to take and making a suitable investment selection". Para 1.8 read:

> "Although most advisers and investment managers consider a customer's attitude to risk when assessing suitability, many fail to take appropriate account of their capacity for loss."

80. The term "capacity for loss" was defined as "the customer's ability to absorb falls in the value of their investment".

81. COBS 9.2.3R read:

> "The information regarding a client's knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:
>
> (1) the types of service, transaction and designated investment with which the client is familiar;
>
> (2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;
>
> (3) the level of education, profession or relevant former profession of the client."

82. COBS 9.2.5R provided that "[a] firm is entitled to rely on the information provided by its clients unless it is aware that the information is manifestly out of date, inaccurate or incomplete", and COBS 9.2.6R read:

> "If a firm does not obtain the necessary information to assess suitability, it must not make a personal recommendation to the client or take a decision to trade for him."

Suitability Reports

83. COBS 9.4.1R provided that "[a] firm must provide a suitability report to a retail client if the firm makes a personal recommendation to the client and the client… enters into a pension transfer [pension conversion] or pension opt-out". COBS 9.4.4R provided that the suitability report must be provided "no later than the fourteenth day after the contract is concluded".

84. COBS 9.4.7R provided:

> "The suitability report must, at least:
>
> (1) specify the client's demands and needs;

(2) explain why the firm has concluded that the recommended transaction is suitable for the client having regard to the information provided by the client; and

(3) explain any possible disadvantages of the transaction for the client."

85. COBS 9.4.8G then provided that "[a] firm should give the client such details as are appropriate according to the complexity of the transaction".

86. COBS 12 Annex 2 1.2R set out the maximum growth assumptions that a firm can use when preparing an illustration of projected growth in a DC scheme. At the relevant time, the lower rate was 2%, the intermediate rate 5% and the higher rate 8%. Those rates were not predictions of investment growth; the Authority imposed them to give investors an idea of the differences in potential outcomes of their investments. Where a particular asset class was not expected to achieve any of the rates concerned, a still lower figure had to be used.

Pensions supplementary provisions

87. COBS 19.1 was headed "Pension transfers [conversions] and opt-outs" and read:

"19.1.1R: If an individual who is not a pension transfer specialist gives a personal recommendation about a pension transfer or pension opt-out on a firm's behalf, the firm must ensure that the recommendation is checked by a pension transfer specialist.

19.1.2R: A firm must:

(1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme [or other pension scheme with safeguarded benefits] with the benefits afforded by a personal pension scheme or stakeholder pension scheme [or other pension scheme with flexible benefits], before it advises a retail client to transfer out of a defined benefits pension scheme [or other pension scheme with safeguarded benefits];

(2) ensure that that comparison includes enough information for the client to be able to make an informed decision;

(3) give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice [in good time, and in any case] no later than when the key features document is provided; and

(4) take reasonable steps to ensure that the client understands the firm's comparison and its advice.

19.1.3G In particular, the comparison should:

(1) take into account all of the retail client's relevant circumstances;

(2) have regard to the benefits and options available under the ceding scheme and the effect of replacing them with the benefits and options under the proposed scheme;

(3) explain the assumptions on which it is based and the rates of return that would have to be achieved to replicate the benefits being given up; and

(4) be illustrated on rates of return which take into account the likely expected returns of the assets in which the retail client's funds will be invested; [and

(5) where an immediate crystallisation of benefits is sought by the retail client prior to the ceding scheme's normal retirement age, compare the benefits available from crystallisation at normal retirement age under that scheme]."

88. The comparison required to be provided under COBS 19.1.1R was known as a Transfer Value Analysis ("TVA"); this was usually completed using a Transfer Value Analysis System

("TVAS"). The TVAS calculated the rate of return needed in the DC scheme to provide the same level of benefits as were being given up in the DB scheme, assuming that the transferred funds were used to purchase an annuity. That rate of return was known as the "critical yield". We return to the concept of critical yield at §258ff.

89. COBS 19.1.4R and COBS 13 Annex 2 specified the assumptions to be used in the TVAS, including the annuity rate, mortality, investment returns, and inflationary increases. In particular, COBS 19.1.4R began by saying:

> "When a firm compares the benefits likely to be paid under a defined benefits pension scheme with the benefits afforded by a personal pension scheme or stakeholder pension scheme (COBS 19.1.2R (1)), it must:
>
> (1) assume that:
>
> (a) the annuity interest rate is the intermediate rate of return appropriate for a level or fixed rate of increase annuity…"

90. Under the heading "Suitability", the following guidance was provided:

> "19.1.6G When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme [or other scheme with safeguarded benefits] whether to transfer [convert] or opt-out, a firm should start by assuming that a transfer [conversion] or opt-out will not be suitable. A firm should only then consider a transfer [conversion] or opt out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer [conversion] or opt-out is in the client's best interests.
>
> 19.1.7G When a firm advises a retail client on a pension transfer [pension conversion] or pension opt-out, it should consider the client's attitude to risk [including where relevant] in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up.
>
> 19.1.7AG When giving a personal recommendation about a pension transfer [or pension conversion], a firm should clearly inform the retail client about the loss of the fixed benefits[4] and the consequent transfer of risk from the defined benefits pension scheme [or other scheme with safeguarded benefits] to the retail client, including:
>
> (1) the extent to which benefits may fall short of replicating those in the defined benefits pension scheme;
>
> (2) the uncertainty of the level of benefit that can be obtained from the purchase of a future annuity and the prior investment risk to which the retail client is exposed until an annuity is purchased with the proceeds of the proposed personal pension scheme or stakeholder pension scheme; and
>
> (3) the potential lack of availability of annuity types (for instance, annuity increases linked to different indices) to replicate the benefits being given up in the defined benefits pension scheme.
>
> 19.1.7BG In considering whether to make a personal recommendation, a firm should not regard a rate of return which may replicate the benefits being given up from the defined benefits pension scheme as sufficient in itself."

PART ONE: FINDINGS OF FACT

91. Based on the evidence provided, we make the following findings of fact. We make further findings of fact later in our decision; when we do so, they are identified as such.

[4] Amended to "safeguarded benefits" in June 2015.

Mr Fenech and Ms Dunne

92. At all relevant times, Mr Fenech was the sole director of FSML and was approved to perform the CF1 (Director), CF10 (Compliance Oversight), CF11 (Money Laundering Reporting) and CF30 (Customer) controlled functions at that company.

93. Ms Dunne is a pension transfer specialist who at all relevant times traded as HDIFA (an acronym for Heather Dunne IFA). She started working in financial services in 1985, and from 1991 began advising on Pension Transfers. She obtained the G60 qualification in 1995 and shortly afterwards received her initial approval as a PTS for that firm. She was also the owner and director of a separate unregulated company, HDC Ltd ("HDC"), which provided paraplanning services to HDIFA and other firms. None of the staff employed by HDC was a PTS.

94. In 2010 Ms Dunne was approved as a PTS for FSML. In August 2012, she asked Mr Fenech if she could become an AR for FSML, and Mr Fenech agreed. By that date, Ms Dunne had twenty-seven years of professional industry experience, and had been authorised and approved by the Authority more than forty times. Because FSML was Ms Dunne's principal, it was responsible for overseeing her, and as Mr Fenech was that company's only director and the holder of its CF10, he was required to carry out that role.

95. As part of the discussions about Ms Dunne becoming an AR for FSML, on 6 August 2012, she emailed Mr Fenech saying, *inter alia*: "I know my work causes major concerns for most people and need to work with someone who can understand what I do, how I do it and why it is safe". In a subsequent email she said, under the heading "compliance oversight":

> "You asked me about oversight and I confirmed that my agreement with the FSA is that I do my own under HDC, because of course my client firms do not have the qualifications to enable them to do so.
>
> You have appointed a Compliance specialist and he has a consultant who can undertake specialist supervision of a PTS. I think you need, for your own security and peace of mind, to arrange for separate formal visits to HDIFA as an AR…
>
> I know my systems and processes are structured [and] robust and each case is individually formally signed off. However I would appreciate a second expert opinion and accept that this should form part of the costs being met out of the commission share or payaway HDIFA makes to FSML."

96. The "compliance consultant" referred to in this email was Lee Werrell of CEI Compliance Ltd ("CEI"), who the following year carried out a review of Ms Dunne's advice, see §121 below.

97. Ms Dunne paid FSML a fee based on the work she carried out, which grew significantly between 2012 and 2017. During the Applicants' relevant periods, the position was as follows:

(1) For 2015-2016, Ms Dunne paid FSML £95,569.24. Mr Fenech said that after deducting regulatory, PII, legal, compliance and accounting costs of £24,775.95, FSML's total gross profit before tax from Ms Dunne's work was £70,793.23.

(2) For 2016-2017, Ms Dunne paid FSML £103,098.31. Mr Fenech's position was that this should be reduced by regulatory, PII, legal, compliance and accounting costs of £80,679.07, leaving a profit before tax of £22,419.24.

98. We will make further findings of fact about the claimed reductions to the gross figures after the further hearing in June 2026, which has been listed to consider the quantum of the penalties and the prohibition notices.

The approach

99. Typically, an IFA would contact HDC or Ms Dunne after having had a conversation with a client about the possibility of a Pension Transfer. Ms Dunne's unchallenged evidence was that during the relevant period, the IFAs who referred clients to her were all "qualified experienced advisers" who "would only submit details of cases where they thought a review would be helpful". Because HDC charged the IFA for carrying out an initial review, this inhibited IFAs from "sending through details where the case was clearly unsuitable". Ms Dunne described the IFAs as "an initial filter".

100. On receiving a new case, HDC provided the IFA with a short fact-finding document or "data sheet" which the IFA then completed with the client. The data sheet captured names, ages, the client's assets, and other information. Ms Dunne sometimes refused to continue with the Pension Transfer on the basis that it was clear from the data sheet that a transfer was unsuitable: this was a second filter.

101. If, as was normally the case, the review process continued, HDC contacted the IFA to resolve questions arising from the information on the data sheet. At or around the same time, HDC sent a standard letter to the client's DB scheme, which provided a pack of information in response, including a "cash equivalent transfer value" or CETV, which was typically valid for three months. All information about each client was uploaded into an electronic filing system.

102. An HDC employee then drafted an "Initial Report", which included a TVAS. Ms Dunne's unchallenged evidence was that she reviewed the Initial Report including the TVAS before it was issued to the IFA. If, while collating or reviewing the Initial Report, it was clear that she could not recommend a Pension Transfer, Ms Dunne emailed or called the IFA; she did not issue a negative initial report: all HDC's Initial Reports therefore said that a Pension Transfer was potentially suitable for the client. This was a third filter.

103. The Initial Report was sent to the IFA along with a Pension Review Questionnaire ("PRQ") and a covering letter[5] telling the IFA to:

(1) review the Initial Report;

(2) check with HDC if anything was unclear;

(3) discuss the Initial Report with the client at a face to face meeting; and

(4) complete and return the PRQ if the client wanted to proceed.

104. When a PRQ was received, staff at HDC checked it for missing information, and where this was identified, they contacted the IFA to obtain what was required. However, HDC did not seek information about the fund(s) or product(s) into which the Pension Transfer would be invested, although the IFA did sometimes provide that information.

105. HDC then prepared the Suitability Report. There was conflicting evidence as to how often these were reviewed by Ms Dunne and we return to this at §494ff.

106. The Suitability Reports included illustrations of likely future returns. Until February 2017, these did not include the fees of the receiving scheme, but instead assumed that the fund would be held in cash with nil charges. That remained the position even where the IFA had provided information about the fund in question, including the fees which would be payable, as was sometimes the case. Ms Dunne took that approach because she considered that:

(1) it was for the IFA to provide that advice to the client as she was not qualified to give investment advice; and

[5] We make further findings of fact about the covering letter at §490.

(2) transferred funds were usually held in cash for a while, until the client decided, with advice from the IFA, which of the receiving schemes' other funds to invest in.

107. As we noted at the beginning of this judgment, the parties referred to this as the "transfer in isolation" or TII model, and we have done the same. We return to the TII model later in our decision. From February 2017, the position changed slightly, as explained at §297.

108. The Suitability Report was sent to the IFA along with relevant transfer forms. These had been partially completed by HDC based on the information held in the firm's electronic data system. The IFA then had another face-to-face meeting with the client to discuss the report and complete the transfer forms, which were returned to HDC. Ms Dunne sent a Confirmation Letter and an Advice Declaration to the ceding scheme confirming that the client had been advised that the Pension Transfer was suitable. The ceding scheme would then pay the funds to the receiving scheme and the Pension Transfer was effected.

109. Sometimes, delays by the IFA, the client, the ceding scheme, the receiving scheme and/or HDC/HDIFA meant that the Suitability Report had not been finalised by the end of the validity window for the transfer value offered by the ceding scheme. A new value had then to be obtained, and the process repeated. On occasion, Ms Dunne provided her Confirmation Letters and Advice Declarations to the ceding scheme before the Suitability Report had been sent to the client. We return to this at §513ff and §620ff.

The January 2013 Alert

110. On 18 January 2013, the Authority published an Alert headed "Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP" ("the 2013 Alert"). It began by saying:

> "It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes). Examples of these unregulated investments are diamonds, overseas property developments, store pods, forestry and film schemes, among other non-mainstream propositions."

111. The 2013 Alert continued by saying that some customers "have transferred out of more traditional pension schemes and invested their retirement savings wholly in unregulated assets via SIPPs, taking on very high and often entirely unsuitable levels of risk despite receiving advice on the pension transfer from regulated firms".

112. After making some further points, the 2013 Alert then stated that financial advisers who were giving advice only on the SIPP wrapper and not on the investments held within it were:

> "…under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.
>
> The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that,

> where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating."

113. Ms Dunne's view was that the 2013 Alert was relevant only to investments in unregulated products (which she referred to as "non-reg"). Her evidence, as given in her witness statement, was that before the Alert was issued, she had terminated her relationships with IFAs who invested in unregulated products, and that subsequently she "never contemplated that the end destination of pension transfer assets would be non-reg investments". However, under cross-examination she agreed that in 2014 she was still working with at least one IFA who might advise his clients to invest in unregulated products. We return to this change in her evidence at §624ff.

114. Mr Fenech also read the Alert and similarly did not consider it was relevant to Ms Dunne's model, because it "focussed on pension transfers into unregulated investments".

Mr Chipperfield

115. In early April 2013, it fell to Mr Chipperfield to consider the compliance position of another investment advisory firm, which had told the Authority it was compliant because Ms Dunne was on the record as its CF30. On 5 April 2013, Mr Chipperfield called Ms Dunne to ask if that was the case. Ms Dunne said she had not carried out any work for that firm for some time, and on more than one occasion had asked the principal to remove her from the record.

116. Following that call, Ms Dunne wrote a long, detailed, email to Mr Chipperfield. She began by saying "to explain my relationship with [the firm] I need to explain a significant amount about how I work as it is somewhat unusual". She went on to say she was a qualified PTS and owned and operated HDC which "offers Pension Transfer Specialist (PTS) Support services to advisers". Under the heading "Advice Process" she said:

> "You specifically asked about what I would do when meeting with "clients". I presume that you mean investors or consumers. As a general rule I do not meet with consumers. Our clients are the adviser firms with whom we work… I have never been involved in any investment advice for any of my adviser clients. On the odd occasion where I am included in a client meeting it is always made clear I do not give investment advice. My role is technical pensions support."

117. She attached HDC's brochure to the email, saying it "sets out how this works". The cover page reads (emboldening and italics in original):

> **"Pension Transfer Specialists**
>
> '*We can help you access a lucrative source of business, safely and effectively*'
>
> Heather Dunne ACII FPFS Chartered Financial Planner
>
> *This document is designed for professional introducer's [sic] only, not direct clients and as such is not compliant with Financial Conduct Authority (FCA) requirements for direct advice"*

118. The first page began (again, emboldening and italics in original):

> "We offer Pension Transfer support to financial advisers; enabling them to arrange transfers from Occupational Pension Schemes efficiently and professionally under their own name.
>
> ***Our services enable Adviser Firms to access this lucrative market safely***
>
> Very few other firms offer these services; most operate on a referral basis. We have worked in this way for over ten years. We look at the individual

circumstances of each case to enable us to make a positive recommendation in accordance with regulatory requirements.

We look for a reason to transfer, rather than a reason not to

We work closely with our adviser clients. We help them so they can spend more time with their clients, improving and strengthening the relationship. Our role is to complete the background work, enabling them to meet client needs. Our process reduces our adviser clients' risk; not only at outset, but also in the longer term…

HDC contracts out Heather Dunne as Pension Transfer Specialist (PTS) when required. Heather is therefore recorded on the Financial Conduct Authority (FCA) website under her own reference number HID00002 as an adviser for several firms. This includes Heather's own firm HDIFA, which is authorised to arrange pension transfer on a referral basis i.e. when introduced by advisers.

Heather Dunne is a Pension Transfer Specialist for several firms

You will have access to Heather's expertise via HDC. HDC offers a full research, support and report writing facility to advisers. All advice will be provided under the auspices of your own firm but we will be there to support you in the process."

119. Under the heading "We prepare the report for you", the brochure said (our emphasis):

> "We will gather the data regarding the scheme(s) and prepare the report using the details you have provided, together with any additional guidance you have given us. **We will include details of the new provider and associated investments in our draft report, if you provide them. In the absence of that information, our recommendation for the investments will be Cash**."

120. Mr Chipperfield had no recollection of his interactions with Ms Dunne, but accepted under cross-examination that he would have given the brochure "a cursory glance". We found on the balance of probabilities that a person receiving an attachment of this nature would have at least glanced at it, and we therefore find as a fact that Mr Chipperfield did give it "a cursory glance".

The CEI audit

121. On 10 April 2013, Mr Werrell of CEI visited Ms Dunne's offices and carried out a "compliance audit" on behalf of FSML. This had been prompted by Ms Dunne's request earlier the same year, that Mr Fenech's compliance officer look at her systems so she could be reassured she was meeting regulatory requirements.

122. The overall conclusion set out in CEI's audit report was that:

> "The Firm generally has good robust processes and procedures that all the staff appear to understand and adhere to in their function of supporting Heather. Compliance as a culture is better embedded here than in many firms we have visited and this should be a source of pride for Heather.
>
> There are some fairly fundamental errors in evidence that are often experienced in entrepreneurial ventures that are maturing and these are often around the governance and compliance, version controls and legacy advertisements.
>
> A further point to be aware of is regulatory developments for authorised firms, not just pension transfer business needs to be observed and applied as required. Although not specifically tested during the onsite visit, neither was it any way referred to."

123. The audit did not (a) comment on the TII model; (b) identify errors or omissions in data gathering from clients; or (c) criticise Ms Dunne's Pension Transfer advice. Ms Dunne summarised the visit in a letter to Mr Fenech on 13 October 2014, some eighteen months later, as follows:

> "[Mr Werrell] undertook a cursory review and spent the majority of his visit explaining the benefits of LinkedIn. The majority of his comments were not relevant and I did not find his suggestions in any way helpful so it was not a request I made again."

Contact with Mr Stimson

124. At some point before 12 July 2013, FOS contacted the Authority about complaints made by two clients, Mr H and Mr T. In relation to Mr T, FOS said:

> "Complainant believed he received advice (to transfer the value of preserved occupational pension scheme benefits to a Liberty SIPP) from [name of IFA]. Liberty SIPP confirmed that the application was submitted by Heather Dunne."

125. On 12 July 2013, Mr Stimson called Ms Dunne about those complaints. Ms Dunne's response was that the claim "should have been placed at the investment advisor's door", and said she operated as HDIFA and owned HDC.

126. On 15 July 2013, Mr Stimson emailed Ms Dunne and asked for "a copy of the report [she] prepared for the complainant". On 1 August 2013, Mr Fenech emailed Mr Stimson with an "update", which began:

> "As you know Heather Dunne of HD IFA is an appointed representative of Financial Solutions Midhurst Limited and as such we have fully investigated the complaints raised by Mr H and Mr T in respect of their investments within the SIPPS established with [receiving scheme]."

127. Mr Fenech told Mr Stimson that he had concluded his "investigation into the matter" and the complaints had been referred back to the IFA; he attached "copies of the application forms whereby [the IFA] was responsible for the underlying investments advised upon". He continued:

> "I should add that HD IFA only provides advice around the suitability, or not, to transfer deferred benefits with a DB scheme to an alternative pension structure and does not provide any investment advice as that remains the responsibility of the introducing IFA.
>
> As such, having also sought guidance from our external compliance consultants, CEI Compliance Limited, and our PI Insurers, both concur with my understanding that HD IFA do not have any complaint to answer to and this is why the matter has been passed over to [the IFA]."

128. He added:

> "Further, as a separate matter and in line with our ongoing compliance oversight of HD IFA, the complaints have led us to make further enhancements to the systems and controls in place particularly surrounding the types of introductions and the credentials of IFA firms introducing to HD IFA. We are already working with our compliance consultants and HD IFA, (a process we started in April 13) to ensure the systems and controls HD IFA uses continue to robustly manage the 'risks' associated with in this advice area."

129. Mr Fenech was unable to recall what "further enhancements" had been made, and neither could Ms Dunne. We find that any changes had no material impact on Ms Dunne's approach.

130. On 7 August 2013, Mr Stimson replied to Mr Fenech's email, saying:

> "I note that you have carried out an investigation to establish the apportionment of liability with these complaints. I don't really have anything to add here, except that I note that you appear to be striving to continuously improve your processes and have attempted to forestall any similar complaint in the future."

131. On 16 October 2013, Ms Dunne contacted Mr Stimson about another FOS complaint relating to a transfer made in 2011, where she was an AR for a different principal. She told Mr Stimson that she had informed FOS that "if it related to investment advice that was outside my remit and was the responsibility of the introducing adviser". Mr Stimson asked Ms Dunne for a copy of her contract with that principal, but made no substantive comment on the rest of the email.

The February 2014 visit

132. On 17 February 2014, Mr Fenech visited Ms Dunne's office. After that visit, Ms Dunne emailed him, setting out what had been said "as clearly as possible for the record". We have accepted that contemporaneous email as a correct record of the meeting and find as follows:

(1) Ms Dunne told Mr Fenech she was working with one IFA who might recommend clients to invest their Pension Transfers in unregulated as well as regulated investments. Mr Fenech asked if she had "undertaken any checks on the firm", to which she replied that she had checked that the firm was authorised by the Authority.

(2) Mr Fenech suggested Ms Dunne "should be undertaking a spot check on cases with the end clients" including asking "if they had received the paperwork and understood it", but Ms Dunne rejected that suggestion, setting out the process she followed, and ending by saying: "I stand by my assertion that a client has a responsibility to read documents before signing them and pointing out if they are incorrect or inaccurate".

(3) Mr Fenech told Ms Dunne he was changing his compliance support firm; she responded by saying that she "would really like for them to review our HDIFA systems and processes and see if there is anything we should be adding. It would be good if they could add some input into the reports and actual advice..."

The 2014 Alert

133. On 28 April 2014, the Authority published an Alert headed "Pension transfers or switches with a view to investing pension monies into unregulated products through SIPPs - Further alert" ("the 2014 Alert"). It began by saying:

> "We are alerting firms to our requirements when they give advice on self-invested personal pensions (SIPPS), giving our view and key messages. We also set out the failings we have encountered, which firms in this market should carefully consider."

134. Under the heading "why are we issuing this alert", the text began:

> "On 18 January 2013, we outlined our concerns that firms were advising on pension transfers or switches to SIPPs without assessing the advantages and disadvantages for customers of the underlying investments to be held within the new pension arrangement."

135. Under the heading "what does this mean for firms", it said:

> "Where a financial adviser recommends a SIPP knowing that the customer will transfer or switch from a current pension arrangement to release funds to invest through a SIPP, then the suitability of the underlying investment must

> form part of the advice given to the customer. If the underlying investment is not suitable for the customer, then the overall advice is not suitable.
>
> If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer or switch at all as it will not be able to assess suitability of the transaction as a whole…"

136. Ms Dunne read the 2014 Alert when it was issued, and "satisfied [her]self that it was purely an update on the previous one, confirming that the regulator was still looking into non-regulated investments". Mr Fenech also read it, and similarly did not consider that it was relevant to Ms Dunne's model, because, like the last one, it "focussed on pension transfers into unregulated investments".

The 2014 Thematic Review

137. In July 2014, the Authority published a "Thematic Review" entitled "Enhanced transfer value pension transfers" ("the 2014 Thematic Review"). It considered a sample of cases where employers had offered an Enhanced Transfer Value ("ETV") for employees to leave their DB schemes and transfer to a DC scheme; its focus was on the suitability of the advice given to groups of employees ("bulk pension transfer advice").

138. Under the heading "who will be interested in this report" the Authority said (our emphasis):

> "This report summarises our recent thematic research on pension transfer advice processes where ETVs were offered. It is not general guidance on the operation of our rules.
>
> This review is primarily aimed at financial advisers who provide ETV pension transfer advice and their senior management. **Our findings will also be of interest to financial advisers who provide any pension transfer advice to consumers who are DB pension scheme members,** and to pension trustees, and employers with DB schemes."

139. The review was carried out by taking a statistically valid sample of 300 cases from a significant proportion of firms known to have provided bulk ETV advice between 2008 and 2012. The files in the sample were assessed for (a) "suitability" – whether the recommendation and the advice process resulted in a suitable outcome in the member's individual circumstances, and (b) "disclosure" – whether the advice was in accordance with the rules and whether it was "clear fair and not misleading" so the member could make an informed choice.

140. The outcome of the review was that 52% of the clients in the sample had received suitable advice, with the balance having received unsuitable advice or the position was unclear. In 21% of cases, firms had given acceptable disclosure, with 74% being unacceptable and the remaining 5% unclear.

141. The report said (again, our emphasis):

> "…a disclosure failing would typically arise from some form of process or **information provision failing**. While we would expect firms to ensure that they make the correct disclosures, **a disclosure failing would not necessarily result in a suitability failing where there is no material impact on the outcome for the member**."

142. The report highlighted a number of common failings, including the following:

(1) *Preferred retirement age*. Under the heading "poor practice", the report said "Information recorded on file was not sufficient to assess whether the member would be in a position to retire at their required level of income at their preferred retirement age".

(2) *Capacity for loss*. The text said "In a significant proportion of the cases, there was insufficient evidence to suggest that the member's capacity for loss had been considered in conjunction with the member's ATR [Attitude to Risk]".

(3) *Supporting evidence for advice.* Under the heading "poor practice", the report also included the following (our emphasis):

> "• The TVAS and KFI were not tailored to the member's specific circumstances (i.e. spouses' age, preferred retirement age, actual fund, annual management charges) and this was not explained to the member.
>
> • Because the assumptions were incorrect, this significantly understated the critical yield, leaving members with a false impression of the return required to match the benefits of the ceding scheme.
>
> • The **inputted TVAS data (e.g. fund charges) was incorrect which led to materially misleading reports**."

143. The report ended by saying (again, our emphasis):

> "**All financial advisers who provide pension transfer advice**, including where ETVs are offered, should consider:
>
> • the FCA Handbook requirements;
>
> • the relevant guidance;
>
> • findings in this paper and the examples of good and poor practice provided below; and
>
> • review their arrangements accordingly.
>
> We would expect firms to ensure that **any pension transfer advice** is sufficiently robust to meet our requirements."

144. Mr Fenech agreed under cross-examination that he had considered "the subject matter" of this report, and he also agreed that it had identified a failure to include the charges of the receiving scheme in the TVAS as being "poor practice". When Ms Dunne was asked if she had read the report, she said "Of course I did, yes".

FOS notifies the Authority

145. On 13 August 2014, FOS sent an email to the Authority about the Mr T complaint; it was sent from "FOS-Liaison" to "FCA Liaison Mailbox" and read:

> "Following the alerts you published (January 2013 and April 2014) about pension switches/transfers into unregulated products through SIPPs, we could like to bring the following arrangement to your attention.
>
> The consumer had deferred benefits in an occupational pension scheme. He completed a fact find with Heather Dunne IFA Limited, a member of Financial Solutions Midhurst. This recorded that they were advising on the transfer to the '[name] SIPP', but not on the subsequent investment of the SIPP.
>
> The transfer went ahead and a significant proportion of the SIPP was invested in property related fixed interest bonds on the advice of [the IFA] in connection with [name] (an unregulated business). The property bond investment cannot be sold - resulting in lower tax free cash being paid to the member.
>
> Heather Dunne IFA says that they knew nothing about the investment plans and that it is [the IFA], in connection with [name] that advised where the SIPP should be invested."

146. The email chain was forwarded to others within the Authority, including "Intelligence Services" which was a part of the Authority's Enforcement division, with a note saying "Relates to the [name] SIPP I believe. For your awareness and logging?"

The FOS decision

147. In October 2014, FOS issued its decision about Mr T's complaint. It related to FSML rather than to Ms Dunne, because FSML was the principal, with regulatory responsibility for Ms Dunne. It begins by setting out the background:

> "[Mr T's] complaint concerns the advice that he received in October 2012 from Financial Solutions Midhurst Limited to transfer the value of his deferred pension benefits in a former employer's pension scheme into a Self-Invested Personal Pension Plan (SIPP) and to then invest a significant proportion of his total pension provision in unquoted shares in [name] Hotels Limited."

148. The Ombudsman continued:

> "The business had previously stated that the complaint should be against the advisers who had recommended the investment within the SIPP…the business…said they were not responsible for the advice [Mr T] received to make the investment within his pension and that they were not aware of the specific investment."

149. In relation to the critical yield, the decision said:

> "The transfer value offered to [Mr T] in lieu of the deferred pension benefits that he had accrued over 16 years was approximately £52,000. A report produced indicated that a return of 8.3% per annum was required to just match the benefits that were being given up. The report also stated:
>
> > 'The critical yield figure of 8.3% per annum calculated within the Transfer Value Analysis System is very low and as such suggests that the scheme have granted a generous transfer value.'
>
> In my opinion the business should have realised that at the time of advice in 2012 that a critical yield of 8.3% was not low. It should have been aware that pension providers were required by the regulator to produce illustrations on standard assumed growth rates of 5%, 7% and 9%."

150. The Ombudsman went on to note that "the business argues that it was only advising on the transfer to the SIPP and not on the subsequent investment that was to be used", and continued:

> "In my opinion the business should have investigated the investment plans that [Mr T] had for his SIPP as in my opinion it would not be possible to advise on the transfer and not consider where the funds were to be invested.
>
> Investments in the hotel were high risk and the business should have warned [Mr T] that they could be potentially difficult to sell if he needed to realise some of the investments in the near future to pay either the SIPP fees or the benefits that he wanted to take on his 55th birthday."

151. FOS required FSML to pay compensation to Mr T. When taken to this decision by Mr Pritchard in cross-examination, Mr Fenech agreed with its conclusions, and he also agreed that (a) a non-pension expert could have been misled by the critical yield figure in the report and (b) the findings made against FSML were serious.

Mr Ellis's advice in 2014 and 2015

152. Meanwhile, FSML had begun taking compliance advice from Mr Ellis, who at some point had attended a Chartered Insurance Institute conference at which Ms Dunne had spoken.

He raised concerns with Mr Fenech about Ms Dunne's business model; in particular he was worried about the role played by HDC and about the TII model.

153. On 29 September 2014, Mr Fenech told Ms Dunne that Mr Ellis would carry out a compliance review of "the services, processes and procedures of HDIFA and where appropriate Heather Dunne Consulting Ltd".

154. On 13 October 2014, Ms Dunne replied, saying that Mr Fenech had "no jurisdiction" over HDC; that the firm provided the "processes and procedures" used by HDIFA, and if Mr Fenech had been prompted to act by the FOS complaint, "HDIFA had done nothing wrong" and neither had HDC; instead, the responsible person was the IFA who had sold Mr T the unregulated investment. Ms Dunne also provided Mr Fenech with various documents he had requested, most of which were financial.

155. On 4 November 2014, Mr Fenech forwarded her correspondence to Mr Ellis. He responded on 2 December 2014, setting out what was required to allow him to assess Ms Dunne's suitability as a PTS. His list included:

> "File assessments 100% of the next four cases to be submitted prior to issue of Suitability Report; Assessment of file assessments based on the above reviews; Minimum of 10% of business conducted to be reviewed."

156. On 11 December 2014, Mr Fenech wrote to Ms Dunne saying he had considered the information she had provided and had discussed it with his "appointed compliance consultants and legal advisers" (which was in fact Mr Ellis alone). Mr Fenech then set out two options, the first of which was that she provide all the information and documents on Mr Ellis's list, and that the file assessments would be carried out. The second option was that Ms Dunne's status as an AR for FSML would be "terminated with effect from 11 January 2015".

157. Those options were explained by reference to a number of "backdrop" points, which included the following:

> **"Fit and proper test**: I am not satisfied that FSML would be able to comprehensively demonstrate to the regulator that you are deemed fit and proper, notwithstanding the information you have provided, you will note under Option 1 that there is a considerable amount of work which would need to be undertaken swiftly in order to ensure fit and properness can be comprehensively demonstrated.
>
> **Regulatory risk**: I continue to be very concerned with the risk associated with your business model, which is totally dependent upon introduced business from IFAs and other advisory firms where there would appear to be very little vetting procedure…"

158. On 3 January 2015 (the start date for Mr Fenech's relevant period), Mr Ellis sent Ms Dunne a list of amendments which in his view should be made to the presentation pack she regularly used; he copied the email to Mr Fenech. Mr Ellis's changes included the insertion of the following passage:

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

159. Mr Ellis said that the sentence in Ms Dunne's presentation which read "Investment advice is completed by the referring firm" should be replaced by the following:

> "Transfer advice cannot be given in isolation. See FCA Fact Sheet. Investment advice must be considered by HD but then the agency is transferred to the referring firm [links to the 2013 and 2014 Alerts]."

160. Ms Dunne responded on 4 January 2015, copying Mr Fenech, saying:

> "You have said that transfer advice cannot be given in isolation and referred me to the FCA Factsheet. I have discussed my model with the regulator on numerous occasions since HDIFA started trading in 2007. They have confirmed that as long as it is perfectly clear who is undertaking which portion of the advice they have no concerns about us undertaking a transfer into a SIPP bank account, where the investment portfolio by another authorised adviser. The two documents you refer me to, relate to transfers, where the subsequent advice is undertaken by non-authorised advisers into un-regulated investments. We don't operate in that market. All of our introducers are themselves authorised advisers registered with the Financial Conduct Authority. We did accept a handful of referrals from non-authorised firms before January 2013, when the rules were changed. Based on my own investigations with the regulator, and allowing for the fact the presentation is made to authorised advisers, I will not be changing this wording."

161. Mr Ellis replied by return, copying Mr Fenech, saying:

> "…in respect of your business model, your response is confounding for a number of reasons. Who from the FCA has written to you and confirmed that you can separate the advice on investments and transfers? I would like a copy of the letter and confirmation that the regulatory alerts that I sent to you do not apply and why they don't apply…
>
> With regard to the presentation providing it is in the name of HDC and there is no reference to HD (or if the name is changed, to HDIFA) or FSML in the slides or notes or by you, you can say what you like. But absolutely no reference can be made to FSML."

162. Ms Dunne responded later the same day, again copying Mr Fenech, saying:

> "The regulator has made it clear they do not work on a prescriptive basis, they expect us to use our intelligence to interpret the handbook in a sensible manner. They appreciate that each individual client is just that – an individual and that they like advisers need to be treated as such.
>
> The two regulatory alerts you refer to, specifically deal with non-regulated investments, being sold by individuals who are not authorised advisers. My discussions were with Neil Chipperfield and Robert Stimson. One was before those updates were issued and the second conversation with Neil Chipperfield was after the Financial Conduct Authority replaced the Financial Services Authority. The conversation with Robert Stimson was actually with regard to the [Mr T] case. The Financial Ombudsman Service works to an entirely separate set of rules. FOS has already found me liable for advice given by another adviser. In that case, they did not abide by their own internal rules nor those imposed on them in relation to processing complaints. They ignored the fact the client had not actually made a complaint about me, the transfer or even the investment. The fact the client had taken money illegally, from a non-authorised firm was also overlooked. Furthermore, they ignored the facts of the case itself and the client's requirements. They found me liable because I'm still authorised and the other adviser is no longer in the industry. Also, the network he belonged to was somewhat larger than me."

163. She continued:

> "No doubt, you will point out that the Critical Yield will be affected by the underlying investments. That is why we assess the Critical Yield on a nil charge nil Adviser Remuneration basis. We are trying to use the Critical Yield to do what the regulator invented it for; to assess whether or not the transfer value is actually reasonable in relation to the benefits being promised within the scheme. By stripping out costs and charges of the alternatives, we can get to an accurate assessment. The regulator made it clear that the decision regarding a transfer should not be based purely on the critical yield nor should any other factor be given undue reliance. In other words, the Critical Yield is no more and no less significant than any of the other "soft facts". I refer you to the regulator's consultation document issued in February 2012, which resulted in increases in Critical Yields the following May."

164. Ms Dunne ended her letter by saying that she would "continue to make the presentation on behalf of HDC, my non-authorised company". Later the same day, she emailed Mr Ellis again, copying Mr Fenech, saying: "When you have decided which files you wish to review, please let me know and I will arrange for them to be sent to you". Mr Ellis replied by return, copying Mr Fenech, saying "as I said in my previous email, providing there is no mention of HD the AR or FSML you can say what you like in your presentation".

165. Ms Dunne did not give Mr Ellis copies of her correspondence with Mr Chipperfield and Mr Stimson, and it would be a further year before Mr Fenech asked for copies, see §175. Mr Fenech also did not subsequently ask Mr Ellis or any other compliance company to carry out file reviews of Ms Dunne's advice work, and Mr Ellis was not asked to review any updated version of Ms Dunne's presentation pack.

166. Under cross-examination, Mr Fenech agreed that:

> "If charges are not included when assessing critical yield, the critical yield will necessarily be understated…if critical yields are being understated, it gives rise to a risk that customers do not know the actual critical yield when they make their investment decision…and that gives rise to a risk of non-compliant advice."

167. Mr Fenech accepted that he knew at that time that as a result there was "potentially" a risk that customers would make Pension Transfers on the basis of non-compliant advice. However, he also said that critical yield was "an almost arbitrary figure" and "almost meaningless", for the reasons set out later in this decision, see §258ff.

Compensation paid

168. After FSML had paid compensation to Mr T in accordance with the FOS decision, on 9 January 2015, Mr Fenech emailed Ms Dunne saying that she was to reimburse that amount to FSML. Ms Dunne refused to do so, on the basis that the liability was that of FSML. On 23 January 2015, Mr Fenech responded, saying:

> "I am astounded that you believe it is acceptable for you to transact a piece of business that is wholly inappropriate for the client, as has been deemed by the ombudsman, and expect FSML to carry the full cost which is loss-making for FSML."

169. The financial dispute was finally settled later that month, with Ms Dunne agreeing to pay the "excess" charged by FSML's insurer following the FOS decision.

Pension Freedoms

170. On 6 April 2015, most of the provisions of the Pensions Schemes Act 2015 came into force. That Act introduced what were colloquially known as "Pension Freedoms", allowing individuals aged 55 or over to (a) access their entire pension savings; (b) withdraw part of their

pension fund and leave the balance in flexi-access drawdown; or (c) take an annuity. In all three scenarios, 25% of the value in the pension fund could be withdrawn tax free. Previously (apart from the 25% tax free lump sum) most people could only use their pension savings to purchase an annuity.

171. On 29 April 2015, Ms Dunne's "relevant period" began; this was the date on which she provided the first of the 17 Suitability Reports which underpinned the Authority's Decision Notice: see Parts Three and Four of this decision.

172. In June 2015, the Authority published a Policy Statement entitled "Proposed changes to our pension transfer rules" ("PS15/12"). This said that "The Government's new flexible pension regime is expected to lead to an increase in demand from those with DB assets to transfer in order to take advantage of these flexibilities". Consequential changes to the COBS have been set out earlier in this decision**.**

Information about Ms Dunne's approach

173. On 6 July 2015, Ms Dunne responded to a request from the Authority for information (the context of the questions asked is unclear from the redacted correspondence with which we were provided). She said that "investment advice is arranged by the authorised adviser" and that this advice was provided "after we have arranged the transfer". On 7 July 2015, that email was forwarded to the Authority. Mr Pritchard said that the Authority accepted that it had been aware from that date that Ms Dunne was providing transfer advice without knowing the investments into which a Pension Transfer was to be transferred. We return to this email in the context of limitation, see §245 in relation to Ms Dunne and §542 in relation to Mr Fenech.

Further complaint

174. In early 2016, a further complaint was made to FOS. Ms Dunne drafted an acknowledgement in which she said that her advice process had been "discussed and approved by the regulator". On 22 February 2016, she was asked by Mr Fenech's assistant, Ms Jones, to provide evidence to support that statement, and she replied as follows:

> "I have previously referred on numerous occasions to my exchanges with the financial services authority and financial conduct authority in relation to our advice process. It was something I specifically referred to when undertaking a series of exchanges with Julian Ellis in relation to his reviewing my seminar slides. I attach a copy of my email of 4 January, 2015 in which I refer specifically to both contacts at the regulator.
>
> Richard [Fenech] is also aware of a series of conversations I had with Robert Stimson from the Financial Conduct Authority in relation to the complaints by [Mr H and Mr T]. It was during those various discussions that Robert confirmed that he fully understood the investment advice was undertaken by a separate firm. Again, I attach copies of the email exchanges at that time (July 2013).
>
> During those exchanges, I refer to previous exchanges with Neil Chipperfield. To evidence that I attach a further email from April 2013 in that respect. You will see that does also referred [sic] to a conversation in January 2013. That so happened to coincide with the regulatory update, which is why it was something I talked to Neil about when he contacted me in respect of [the firm for which Ms Dunne was previously a PTS].
>
> I think you will find that Julian Ellis has also spoken with both gentlemen from the Financial Conduct Authority, because I am pretty certain I recall he said as much to me in a conversation at some point.

> I hope that this combination of documentation is sufficient evidence to confirm that the regulator is comfortable with the transfer advice being distinct from the investment advice so long as the investment advice is undertaken by an authorised party."

175. Ms Dunne attached to that email copies of her correspondence with Mr Chipperfield and Mr Stimson. Mr Fenech referred the email to Mr Ellis, saying "there are a few assertions by Heather here which I wish to clear up with you, can we speak tomorrow pls".

176. Mr Ellis had no recollection of having previously spoken to Mr Chipperfield and Mr Stimson, as Ms Dunne had indicated was the case, but said "it would not have been usual for me to approach the Authority regarding a point such as this". We find as a fact on the balance of probabilities that Mr Ellis did not speak to either Mr Chipperfield and Mr Stimson about Ms Dunne's business model.

177. On 24 February 2016, Mr Fenech met Ms Dunne, and told her Mr Ellis would carry out regular reviews, and would also visit her every quarter. Mr Fenech said this was triggered by the new complaint; by the growth of Ms Dunne's business and by the "increasing perception by the regulatory and PI market of high risk associated with DB transfers". Mr Fenech also raised the 2014 Alert with Ms Dunne.

178. Ms Dunne responded the same day, saying:

> "I have no problem with Julian [Ellis]…reviewing a sample of cases…I have no concerns on this front and actually welcome the opportunity to have an expert opinion. I had understood that Julian would be arranging something along those lines last year.
>
> Similarly I had fully expected Julian to undertake regular reviews. I am therefore quite comfortable with him visiting me quarterly. I have copied in [names of HDC employees], who will organise the appointments and provision of files once you are ready to go ahead."

179. On 26 February 2016, Mr Fenech told Ms Dunne that he was putting in place "immediate and enhanced long-term review and monitoring procedures" under which Mr Ellis would carry out an immediate file review of 15 files, five for each calendar year 2013, 2014 and 2015. Mr Fenech said that the outcome of that review would "determine the nature and shape of ongoing monitoring and oversight of the business which you undertake". In the same letter, Mr Fenech stated (his emphasis):

> "I am mindful that HDIFA does not provide the ultimate investment recommendation to the end retail client and that on transfer funds are allocated to cash and then the agency transferred back to the introducing regulated IFA firm. However, the regulator has made it absolutely clear that we have a duty of care to ensure that the ultimate investment is suitable to the client and forms part of the overall transfer advice process. Therefore with immediate effect, we will look at a process to review the existing HDIFA advice process in order to ensure that, whilst HDIFA is not providing the **investment** advice, there is satisfactory recognition of it to the extent that HDIFA can be comfortable in principle that the intended investment to be recommended by the introducing IFA is indeed appropriate and suitable to the client."

180. On 29 February 2016, Ms Dunne responded. With reference to the 2014 Alert, she said it was clear from its title that it was only related to non-regulated investments, and so was not relevant to "virtually all the business" she undertook. She added:

> "I remain satisfied that HDIFA has no responsibility for undertaking the investment advice, that is organised arranged and advised upon by the

> introducing adviser who retains long-term responsibility for the clients retirement needs."

181. She also said that "[a]s confirmed in all my previous correspondence this process has been discussed and agreed with various senior staff at the regulator and the predecessor regulator". In a subsequent email the same day, Ms Dunne said:

> "I appreciate that you are concerned about the ultimate investment recommendation. You are well aware of my view that the regulator's requirement to ensure the investment recommendation is suitable is adequately covered because the introducing firm is fully authorised and undertakes the investment advice once they have taken over the agency of the new plan.
>
> If HDIFA starts to investigate further into the intended investment and assess whether or not it is appropriate or suitable for the client, that will make the current distinct advice process blurred and personally I believe make HDIFA more responsible for subsequent investment advice."

182. On 1 March 2016, Mr Fenech wrote again, saying that it was not his intention "to put in place a structure whereby HDIFA is responsible for the subsequent investment advice", but that it was his and Mr Ellis's objective to ensure that "the HDIFA pension transfer process is comprehensively aware of the intended investment to be made by the introducing IFA and that that investment can be deemed by HDIFA to be 'appropriate' to the client". Mr Fenech supported his approach by citing from the 2014 Alert.

183. Ms Dunne replied by return, saying:

> "I remain extremely concerned that by commenting on investment HDIFA will be perceived to have been involved in the recommendations. Furthermore if we are to assess their suitability to enable us to comment, we will need to undertake an investment based attitude to risk and obtain the appropriate systems and processes to make investment recommendations. We simply don't have that expertise. Finally as we are not being paid for that or the ongoing advice and we are not going to undertake it, we would be opening ourselves up to liability without recompense or control…
>
> I have to also mention that I have asked my team whether they think we have details of the investment recommendation that the introducer adviser clients have made. They confirmed my view that it's extremely unlikely we have that information. We would have to contact each adviser and ask."

184. Mr Fenech replied the following day, saying "it is essential that HDIFA can be satisfied it has awareness of where funds are intended to be invested" but then saying:

> "Rather than worrying about reporting to us on what you believe has been invested in normal investments (model portfolios, life office pension funds, acquisition of commercial property or appointed to a discretionary manager), maybe the focus can be on those that are not normal investments?"

Another complaint

185. On or shortly before 30 March 2016, Ms Dunne was contacted about another complaint. She discussed it with Mr Fenech and then called the Authority's Customer Contact Centre ("CCC"). She recorded Mr Fenech's position in an email she sent to the Authority later that day:

> "My current Principal [FSML] has sought advice from a compliance firm [Mr Ellis]. They are convinced that as your alerts refer to the requirement to consider the ongoing investment I must be liable for the investment advice

> even though it was, recommended, arranged and transacted by an entirely separate authorised firm. I have tried to rebut this based on my previous discussions with Robert Stimson and Neil Chipperfield, both of whom are senior staff at both the Financial Conduct Authority..."

186. In the same email she said that:

> "In my conversation today [with the FCA] I was advised again that the investment advice can be separate to the transfer advice if the two firms are formally authorised and the position is clear to the consumer. They are and it is. Please can you confirm in writing for the record that this is the case."

187. Ms Dunne continued by asking the Authority to confirm "…that though the transfer should consider numerous factors, it is acceptable for the subsequent investment advice to be undertaken separately as long as that is arranged by an authorised firm and it is clear to the consumer which firm is responsible for which advice" and that "as the investment advice is separate the firm responsible for that is the firm which made the recommendation and undertook the transactions to arrange it".

188. The email was referred by the CCC to Supervision**,** with a note saying:

> "…please note that the firm is asking us to confirm things that we in the CCC believe is outside of our remit and a judgement call we cannot make. Equally, the firm is seeking the FCA's views in order to help her fight current/future claims against her firm. The firm should be having a conversation with the FOS who ultimately would hold them liable for these cases."

189. On 30 March 2016, Mr Ellis emailed Mr Fenech's personal assistant to set out the issues to be discussed with Ms Dunne; that email was almost immediately forwarded to Mr Fenech. Mr Ellis said:

> "The main issue is how was the know your client information gathered and by whom. How does the know your client information reflect on the retirement plans of the individual concerned and therefore provide the basis on which to assess the suitability of a transfer from a final salary scheme (and indeed other money purchase schemes) to a SIPP? What challenges were undertaken by HDIFA in relation to the know your client information? How was the clients attitude to risk assessed against a transfer from defined benefit to a defined contribution scheme?
>
> With regard to cases completed after January 2013, what assessment was taken to understand the FSA alert regarding the use of UCIS [Unregulated Collective Investment Schemes] in SIPPs?
>
> HDIFA has denied responsibility for investment as has the regulated introducer. Whether FOS would agree is another matter. What checks were undertaken by HDIFA in relation to how the client was getting investment advice?"

The 2017 Alert

190. On 24 January 2017, the Authority issued another Alert ("the 2017 Alert") entitled "Advising on pension transfers – our expectations". It began by saying "This alert highlights our requirements when you provide advice on pension transfers, including advice in particular circumstances", and continued:

> "We are aware that some firms have been advising on pension transfers or switches without considering the assets in which their client's funds will be invested. We are concerned that consumers receiving this advice are at risk of transferring into unsuitable investments or – worse – being scammed.

> Transferring pension benefits is usually irreversible. The merits or otherwise of the transfer may only become apparent years into the future. So it is particularly important that firms advising on pension transfers ensure that their clients understand fully the implications of a proposed transfer before deciding whether or not to proceed."

191. Under the heading "what we expect", the text read:

> "We expect a firm advising on a pension transfer from a defined benefit (DB) scheme or other scheme with safeguarded benefits to consider the assets in which the client's funds will be invested as well as the specific receiving scheme. It is the responsibility of the firm advising on the transfer to take into account the characteristics of these assets.
>
> Our rules set out what a firm must do in preparing and providing a transfer analysis. In particular, our rules (COBS 19.1.2R(1)) require a comparison between the benefits likely (on reasonable assumptions) to be paid under a DB scheme or other scheme with safeguarded benefits and the benefits afforded by a personal pension scheme, stakeholder scheme or other pension scheme with flexible benefits.
>
> The comparison should explain the rates of return that would have to be achieved to replicate the benefits being given up and should be illustrated on rates of return which take into account the likely expected returns of the assets in which the client's funds will be invested. Unless the advice has taken into account the likely expected returns of the assets, as well as the associated risks and all costs and charges that will be borne by the client, it is unlikely that the advice will meet our expectations (see guidance at COBS 19.1.2 and 19.1.6-19.1.8)."

192. On 30 January 2017, Ms Dunne emailed Mr Fenech, saying that the only part of the 2017 Alert which caused her concern was "the split of transfer and investment advice". She said she would in the future incorporate charges in the TVAS, but would "still use a nil charge version in the initial report stage enabling [her] to continue to evaluate transfer values".

193. Mr Fenech forwarded the email to Mr Ellis, who asked two questions:

(1) why the Pension Transfer would be initially evaluated on a nil charge basis when it will not be undertaken on that basis; and

(2) since the 2017 Alert had said "[u]nless the advice has taken into account the likely expected returns of the assets, as well as the associated risks and all costs and charges that will be borne by the client, it is unlikely that the advice will meet our expectations", how would a "nil charge" basis be a suitable evaluation of the Pension Transfer.

194. On the same date, Ms Dunne drafted a detailed 15 page response to the 2017 Alert, which she sent to the Authority on behalf of HDC. She noted the requirement that it was the responsibility of the firm advising on the transfer to take into account the assets into which the funds would be invested, and said it "does differ from previous guidance" she had received from "senior members" of the Authority, including Mr Chipperfield and Mr Stimson. She also said:

> "I am well aware that the regulator will not specifically state what is or what is not acceptable, but will purely provide guidance. Therefore, I have to assume that my interpretation fits within the parameters of that guidance unless you advise me otherwise."

195. On 10 February 2017, a Mr Alexander Smith from the Authority replied, thanking Ms Dunne for her response, and saying that the Authority would "reflect on" her comments as part of their wider work on Pension Transfers. He continued:

> "In your note you expand on both your business model and approach. The FCA does not approve individual business models and it is the responsibility of firms to ensure their systems and processes are robust, effective and consistent with our expectations. Therefore this email should not be considered approval of your organisation's approach to fulfilling its regulatory obligations, although we note that you have taken steps to consider the contents of our alert and what this means for your firm."

The Authority's enquiries

196. Meanwhile, on 4 January 2017, Ms Samantha Bauld of Supervision had sent Mr Fenech a questionnaire about Pension Transfers. Mr Fenech replied on 26 January 2017, saying:

(1) FSML had carried out 6 transfers in the last six months; and

(2) HDIFA had carried out 164 transfers in the last 18 months, and had declined to recommend a transfer in 15 cases.

197. On 1 February 2017, Mr Fenech informed Ms Dunne that he had reviewed three of her recent files, and that although they included the annual management charges of the receiving schemes, they excluded investment charges and ongoing adviser remuneration. Mr Fenech said "this is going to be an area which we will need to change immediately".

198. On 13 February 2017, Ms Bauld asked Mr Fenech to provide eight HDIFA files for Supervision to review; these had been selected from the list of Pension Transfers provided by FSML. Ms Bauld also asked Mr Fenech to provide extensive further information about procedures, including critical yields and FSML's monitoring process in relation to Ms Dunne's work.

199. On 6 March 2017, Mr Fenech replied to that letter; in relation to the files, he said:

> "The data has been sent separately via Special Delivery using an encrypted flash drive. When this is received, you will need to phone the office and request the password which will be provided to you verbally."

200. In reliance on its internal records (which were not provided to us), the Authority's position was that the files were received on 8 March 2017. The Applicants did not dispute this, and we find it to be a fact. The files were then reviewed by Supervision using a tool developed by the Authority called the Investment Advice Assessment Tool ("IAAT"). This had been built to assess financial advice which was subject to the suitability rules in COBS Chapter 9, so although not designed specifically to assess Pension Transfers, it could be used for that purpose. The outputs of the file reviews were quality controlled by qualified PTSs. We return to these file reviews at §464ff.

Mr Fenech's and Ms Hill's reviews

201. On 22 March 2017, Mr Fenech produced a document entitled "HDIFA Q1 2017 Oversight and Monitoring Review", in which he said that the "advice process" was the "most critical area for immediate attention", and that:

(1) the Suitability Reports were "simply too long" and contained "too much duplication";

(2) all advice "has to be cognitive of the type of intended investment" and the "running cost" of those investments had to be incorporated; and

(3) fact finding quality "appears to be frail".

202. In May 2017, FSML engaged Ms Hill to carry out a review, and provided her with four Pension Transfer files. The Bundle contained the document setting out Ms Hill's overall conclusions and five pages of the Appendix which summarises Ms Hill's review of one of the four files. The Suitability Report in that case was issued on 21 February 2017, so after the 2017 Alert; we had no information about the dates of the other Suitability Reports.

203. Ms Hill's report was dated May 2017, but as the reviews with which we were provided had been carried out on 31 May 2017, we find that the report was finalised and issued no earlier than after 1 June 2017. It was not provided to Ms Dunne until a long time after the end of her relevant period.

204. Ms Hill made a number of positive comments about Ms Dunne's process and documentation, including the following:

> "It is my belief the technical content of the files is well documented, very complete information appears to have been requested and received from the scheme and all of this used to assess the benefits on offer and the suitability of the transfer.
>
> The files are consistent and demonstrate a repeatable process has been completed, there is also a good level of accuracy within the documentation.
>
> There is evidence of robust checks being undertaken by Heather prior to the initial report and again prior to the suitability report, this demonstrates good practice."

205. Ms Hill also recommended that FSML had "some direct client contact" with the client considering a Pension Transfer. Her comments on the files included the following:

> "…the objectives I have seen on the files reviewed are often generic, the client wants improved death benefits and flexibility. These need to be more specific, why better death benefits, why flexibility what does the client have planned that means these features are important to them…In all the reports I was left with questions about the client's objectives, how much do the clients anticipate needing in retirement, are there other assets that will help out, why do they feel flexibility is important to them. What objective does transferring now meet rather than waiting for a time nearer retirement when they will have a clearer understanding of their needs in retirement and how much flexibility they will need…"

206. Ms Hill also cited from the 2017 Alert, which had said that "the firm which is advising on pension transfers cannot do so without assessing the receiving scheme and the assets being invested", and went on to identify the following as "the key risk in your advice process":

> "there is no mention on your files of the investment strategy and the TVAS is run with either nil charges or just the product charge and the cash fund charge. I did not locate an assessment of the likelihood of the return overcoming the required critical yield taking into account all the product charges, advice charges and fund charges that will be borne by the client."

207. She assessed all four files as requiring action in relation to documentation, and although two files were assessed as containing suitable advice (the other two were unclear), that conclusion was subject to the following caveat (again, informed by the 2017 Alert):

> "Whilst I do feel the case meets the needs of the clients, the regulator's stance is that unless the TVAS has taken into account full charges and the plausibility of the Critical Yield being met has been assessed in the context of the new investments it is unlikely that DB advice will be found as suitable."

The June 2017 meeting

208. After Ms Bauld had received the sample of files and other information from Mr Fenech, a visit was arranged for 15 June 2017. As well as the Applicants and Ms Bauld, it was attended by Mr Murdoch of Supervision and Mr Berenbaum of the Authority's policy department. A number of meetings were held during that day, some attended only by one of the Applicants and some by both.

209. In making our findings as to what happened at these meetings, we rely on the contemporaneous evidence of Ms Dunne, Mr Fenech and Mr Berenbaum. We find the following facts:

(1) Mr Murdoch said:

(a) five of the files which had been reviewed by Supervision contained suitable advice; two were unclear and one was unsuitable;

(b) in relation to the receiving scheme, all eight were unsuitable because the TVASs did not include charges; and

(c) in relation to disclosure, all eight were "unacceptable".

(2) The Authority criticised the text on HDC's website, which (like that in HDC's brochure) said "We look for a reason to transfer, rather than a reason not to", and Ms Dunne agreed to remove that wording.

(3) Mr Fenech and Ms Dunne agreed that the Suitability Reports were "far too long and need streamlining".

(4) The Authority ended the meeting by saying that unless FSML agreed to a "temporary" and "voluntary" suspension of all Pension Transfer advice, the Authority would impose a suspension on the firm.

(5) Mr Fenech agreed to the suspension, which Mr Murdoch said was likely to be lifted "in days".

210. On 16 June 2017, Ms Bauld emailed Mr Fenech with a list of "outstanding information", which included a copy of the AR agreement between FSML and Ms Dunne. We return to this agreement at Part Seven of our judgment. On 22 June 2017, Mr Fenech provided his responses to the Authority's questions, and that date marks the end of both Applicants' relevant periods.

The Authority's letter, FSML's response and referral to Enforcement

211. On 29 June 2017, Ms Bauld sent Mr Fenech a letter setting out the Authority's conclusions. It began by saying that the Authority had "significant concerns" with HDIFA's business model because of its advice process and because of HDC's involvement; that the Authority did not believe it was "possible for HDIFA to deliver compliant DB pension transfer advice following the process currently in place", adding:

> "the issues we have identified from the file review sample are a result of systemic flaws in the firm's advice process and that there is a risk of customer harm having occurred as a result of the firm's failure to follow a compliant process."

212. Ms Bauld also said that of the eight customers whose files had been provided, only one had received suitable advice; the advice for the others was unsuitable, because HDIFA had assumed the funds would be invested in cash (i.e. without the charges which would apply to the actual investments), all eight files were unacceptable in relation to disclosure.

213. We had no evidence as to why the numbers of suitable files had changed from the figures provided to the Applicants at the meeting. Mr Berenbaum suggested that the Authority had amended the figures to reflect the lack of information about the receiving scheme. Given that this point had been raised at the meeting (see §209(1)(b)) we agree that this is a reasonable inference and find accordingly.

214. On 28 July 2017, Mr Fenech replied to Ms Bauld's letter, saying that FSML had already introduced many changes, including that (a) four cases per month were being reviewed by an external consultant; (b) more robust KYC checks had been introduced; (c) all TVASs would include the costs of the products into which the client would transfer the fund; and (d) in the next 6-12 months, FSML would be conducting a review of its "systems and controls to manage its relationship with HDIFA", as well as implementing other changes.

The June 2017 Consultation

215. Meanwhile, on 21 June 2017 (the day before the end of the Applicants' relevant periods) the Authority had published a consultation document entitled "Advising on Pension Transfers" ("CP 17/16"). This Consultation and the subsequent changes to COBS were relied on by Ms Dunne as part of her case that the Authority was judging her advice against rules and guidance which were only clarified after her relevant period; we have emboldened certain passages which are relevant to that dispute.

216. The first paragraph of CP 17/16 read:

> "Defined Benefit pensions, and other safeguarded benefits involving guaranteed pension income, provide valuable benefits so most consumers will be best advised to keep them. However, we recognise that the economic and legislative environment has changed significantly, so we want to ensure that financial advice considers the customer's circumstances in full and properly considers the various options now available to them. **We want to provide advisers with a framework which better enables them to give the right advice so that consumers make better informed decisions**."

217. Under the heading "outcomes we are seeking", it said at paragraph 1.12:

> "**Our new approach** builds on the rules and guidance which are currently already in place for advice of this nature including our recent pension transfer alert. **The clarity provided by this consultation should better equip advisers to give the right advice**."

218. In the following Chapter, CP 17/16 said:

> "2.2 **Our policy intention in relation to the transfer of safeguarded rights remains unaltered**. We aim to ensure that consumers receive good quality advice in order to allow them to make informed decisions. However, in the changed environment, **our existing rules might not be the most effective way to achieve that policy intent**. The current rules do not explicitly allow for the variety of options available to members under the pension freedoms. In addition, we are aware that **advice has become focused on the transfer value analysis (TVA) output rather than making a rounded assessment of suitability.** There is also an increased perception that the availability of advice is limited because advisers are cautious about advising on pension transfers.
>
> 2.3 We are taking this opportunity to re-state the starting assumption when advising on a transfer of safeguarded benefits, and **clarifying that the onus is on the adviser to prove that a transfer is in a client's best interests**. This does not represent a softening of our approach, but makes it clear that is essential for an adviser to demonstrate that an individual will benefit from giving up a valuable pension."

219. At paragraph 2.8 the Authority described the proposals as "ensuring that our rules and guidance provide advisers **with more clarity** on our expectations".

220. Chapter 3 included the following passages:

> "3.12 We also propose **additional guidance to help advisers assess suitability and to clarify our expectations,** building on the previously published alert. This guidance **will make clear that in order to provide a suitable personal recommendation an adviser should consider the following elements**:
>
> • the client's income needs and expectations and how these can be achieved, the role safeguarded benefits play in providing this income and the impact and risk if a conversion or transfer is made
>
> • **the specific receiving scheme being recommended following the transfer and the investments being recommended within that scheme** to ensure that it is appropriate for the risk profile of the client
>
> • the way in which the funds will be accessed, either immediately or in the future, including follow-on arrangements
>
> • **alternative ways of achieving the client's objectives**. For example, there may be ways for a client to provide death benefits which can be funded from income rather than by a lump sum funded by a pension transfer, and which does not carry so much risk
>
> • the relevant wider circumstances of the individual.
>
> 3.13 We do not propose to list examples of 'relevant wider circumstances' in the Handbook as the relevance will be dependent on the individual. However, **this will include** tax issues, death benefits, interaction with means tested benefits, state of health, family situation **and other sources of retirement income**."

221. In Chapter 4, the Authority asked for views on "replacing the current transfer value analysis requirement (TVA) with a requirement to undertake appropriate analysis of the client's options including a prescribed comparator indicating the value of the benefits being given up". The reasons given for that proposal included the following:

> The TVA "is generally not a helpful tool for clients approaching normal retirement age".
>
> "The concept of a critical yield is not widely understood by consumers, many of whom have no or limited experience of investments."
>
> Consumers may "not appreciate how difficult it is to achieve returns which are equivalent to the critical yield and how the volatility of returns can impact on the outcome".
>
> "Without careful explanation it can be difficult for consumers to understand that critical yields for drawdown options are not directly comparable with those relating to annuitisation due to the underlying differences in who is responsible for carrying the mortality and longevity risk."

222. The text continued at para 4.7:

> "Taking everything together, we believe that the changes in the pensions environment mean that the current TVA is no longer leading to the best outcomes for consumers, and advisers are often focusing too much on this analysis when advising in this area. **We therefore propose to replace TVA with an overarching requirement to undertake appropriate analysis of**

the client's options. We will refer to this as the 'appropriate pension transfer analysis' or APTA. Part of this process will be the inclusion of a prescribed comparator providing a financial indication of the value of benefits being given up."

223. The concept of "appropriate pension transfer analysis" was expanded as follows:

"4.8 Advice on giving up safeguarded benefits should be based on the individual client's circumstances and backed up by robust financial analysis which looks at the differences between the benefits offered by the ceding scheme and the benefits being considered as an alternative to that scheme, irrespective of how those benefits are taken. As each client's needs and objectives are different, we consider that advisers are best placed to consider the detailed approach which is appropriate for each client.

4.9 The proposed rules will set out what we expect the appropriate analysis to include, as a minimum:

• **an assessment of the client's outgoings and therefore potential income needs throughout retirement**.

• the **role of the ceding and receiving scheme in meeting those income needs,** in addition to any other means available to the client – effectively obtaining an understanding of the client's potential cashflows.

• **consideration of death benefits** on a fair basis, for example where the death benefit in the receiving scheme will take the form of a lump sum, then the death benefits in the ceding scheme should also be assessed on a capitalised basis, and both should take account of expected differences over time.

• the prescribed comparator.

4.10 …

4.11 **The analysis should consider the actual scheme being proposed as a receiving scheme and, where relevant, the underlying investments within that scheme,** as well as the way benefits will be accessed…"

224. CP 17/16 then said at para 4.29:

"Although **it is our current expectation that when undertaking TVA firms should take account of the charges incurred in the receiving scheme, this is not currently explicit in COBS 19.1. We therefore propose adding explicit requirements on the charges to be included in an APTA, including the TVC, as follows:**

• the inclusion of relevant product, platform and adviser charges…."

Changes in 2018

225. In March 2018, the Authority published a Policy Statement entitled "Advising on Pension Transfers – feedback on CP17/16 and final rules and guidance". This said that the Authority had for the most part decided to adopt the proposals in CP 17/16, including in particular replacing the TVAS with the APTA. It also set out the changes to COBS.

226. The following new paragraphs came into force in October 2018 (again, we have highlighted areas which are particularly relevant to Ms Dunne's position):

"19.1.1CR

(1) A firm must make a personal recommendation when it provides advice on conversion or transfer of pension benefits

(2) Before making the personal recommendation the firm must:

(a) **determine the proposed arrangement with flexible benefits to which the retail client would move**; and

(b) carry out the appropriate pension transfer analysis and produce the transfer value comparator.

19.1.2BR

To prepare an appropriate transfer analysis a firm must:

(1) assess the benefits likely to be paid and options available under the ceding arrangement;

(2) compare (1) with those benefits and options available under the proposed arrangement; and

(3) undertake the analysis in (1) and (2) in accordance with COBS 19 Annex 4A and COBS 19 Annex 4C."

227. Thus, to carry out the APTA, the firm had to carry out the comparison using Annex 4A and 4C. The former contained detailed prescriptive requirements, including "use rates of return which reflect the investment potential of the assets in which the retail client's funds would be invested under the proposed arrangement". Under the heading "Charges used for the appropriate pension transfer analysis", Annex 4A.3R said:

"An **appropriate pension transfer analysis must take account of all charges that may be incurred** by the retail client as a result of a pension transfer or pension conversion and subsequent access to funds following such a transaction, other than:

(1) adviser charges paid by a third party (e.g. an employer); and

(2) adviser charges that would be payable whether the pension transfer or pension conversion happened or not."

228. That Rule was accompanied by Annex 4A.4G, which said:

"**The charges in COBS 19 Annex 4A 3R include, but are not limited to, any of the following**:

(1) product charges, including those on any investments within the product;

(2) platform charges;

(3) adviser charges in relation to the personal recommendation and subsequently during the pre-retirement period as well as at benefit crystallisation and beyond, where likely to be relevant; and

(4) any other charges that may be incurred if amounts are subsequently withdrawn."

229. In addition, changes were made to COBS 19.1.6G. We have set out the previous version at §90. With effect from 1 April 2018, it was amended to read as follows, where subparagraphs (2) and (3) were taken from the earlier version:

"(1) The guidance in this section relates to the obligations to assess suitability in COBS 9.2.1R to 9.2.3R.

(2) Where a firm is making a personal recommendation for a retail client who is, or is eligible to be, a member of a pension scheme with safeguarded benefits and who is considering whether to transfer, convert, or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable.

(3) A firm should only consider a transfer, conversion or opt out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the retail client's best interests.

(4) To demonstrate (3), the factors a firm should take into account include:

(a) the retail client's intentions for accessing pension benefits;

(b) the retail client's attitude to, and understanding of the risk of giving up safeguarded benefits (or potential safeguarded benefits) for flexible benefits;

(c) the retail client's attitude to, and understanding of investment risk;

(d) the retail client's **realistic retirement income needs** including:

(i) how they can be achieved;

(ii) the role played by safeguarded benefits (or potential safeguarded benefits) in achieving them; and

(iii) the consequent impact on those needs of a transfer, conversion or opt-out, including any trade-offs; and

(e) **alternative ways to achieve the retail client's objectives** instead of the transfer, conversion or opt-out."

Referral to Enforcement

230. On 19 March 2018, Enforcement appointed investigators into FSML "in respect of its Appointed Representative Heather Dunne". Mr Fenech was informed of this on 20 March 2018 by a letter which said that the Authority's "principal issues and concerns" were those identified in the Authority's letter of 29 June 2017. On 19 April 2018 and 11 May 2018 respectively, Mr Fenech and Ms Dunne were interviewed on a "compelled" basis.

The DBAAT

231. Following the introduction of pension freedoms, the Authority had begun a "thematic review" of Pension Transfers, called "Project Branford". As the number of cases being considered increased, it became apparent that a DB-specific tool (i.e. the DBAAT) was required to replace the IAAT.

232. The DBAAT was designed and built by Mr Hewitt and others within the Authority's Pension Policy team. It consists of an Excel workbook together with instructions as to how the workbook should be completed. There are six tabs, each of which represented elements the Authority considered a firm should take into account when advising on Pension Transfers:

(1) *Information tab*: whether the firm has collected "necessary information" to make a personal recommendation, including the client's "attitude to transfer risk".

(2) *Suitability – Pension transfer tab*: whether the firm has taken reasonable steps to give suitable pension transfer advice.

(3) *Suitability – Investment advice tab*: whether the firm has taken reasonable steps to give suitable investment advice.

(4) *Insistent client tab*: where the client is treated as an insistent client[6], and the firm arranges the transfer, whether the firm has complied with the insistent client obligations.

[6] An "insistent client" is defined by the Authority as a client who wishes to take a different course of action from the one recommended by the adviser and who wants the adviser to facilitate the transaction. Ms Dunne did not regard any of the clients for whom she provided Suitability Reports as "insistent clients".

(5) *Disclosure tab*: whether the firm has complied with relevant disclosure rules relating to the advice.

(6) *Causation tab*: where the firm conduct is not compliant with the suitability or insistent client requirements, whether it has caused the client to take a certain action.

233. The DBAAT was designed to "grey out" changes introduced after the date of the advice being assessed: in particular, it greyed out references to APTA for advice given before October 2018, and it greyed out references to the TVAS for advice given after that date. However, it did not grey out the changes made in 2018 to COBS 19.1.6G, because, as Mr Hewitt put it "it was the Authority's expectation that during the relevant period, firms should have been considering these factors", although he also said that "these were considerations that the Authority regularly saw being missed prior to 1 April 2018".

The Authority's reviews of Ms Dunne's files

234. At some point between 30 April and 6 June 2019, Enforcement had taken a random sample of five of Ms Dunne's files**.** These were assessed by Mr Dilip Vekariya and quality controlled by Mr Stephen Bell. Both worked in Enforcement and had received training in relation to assessing Pension Transfers; they used the DBAAT to carry out the assessments. Mr Vekariya and Mr Bell decided that the advice given on three of the cases was "suitable" while two were "unsuitable".

The data and the Grant Thornton file reviews

235. In the period before June 2019, the Authority had identified between 80-100 firms which had given Pension Transfer advice about which they had concerns, but they had insufficient qualified resource to review the files on a timely basis. On 5 June 2019, the Authority engaged GT to undertake the reviews.

236. The firms in question were required to provide the Authority with a list of their files relating to advice given between April 2015 and September 2018. The Authority then selected samples from those lists, using a tool devised by Dr Purdon, who also advised the Authority on the size of the sample required for each of the firms.

237. Once the sample had been selected, the GT team used the DBAAT to assist them in their assessments. The assessors' work was quality controlled by other GT employees who worked as a quality assurance team. When an assessor began work, the first five cases were quality controlled; if any were unsatisfactory, quality assurance continued until the assessor had produced five reviews without material failings. From then on, the quality assurance team checked 15% of each assessor's reviews.

238. Ms Prestage managed the assessors and was head of the quality assurance team. She also managed GT's relationship with the Authority's project team and their PTSs, and chaired regular "case clinics" and "calibration meetings". The clinics and calibration meetings were attended both by the Authority's technical specialists and by GT's reviewers and quality assurance staff. Mr Hewitt's unchallenged evidence was that the purpose of the clinics was to ensure that GT's approach to assessing the files was aligned with the Authority's instructions, but that they also provided a forum to discuss complex cases and to calibrate the weighting associated with different aspects of a client file.

239. Mr Hewitt confirmed from the witness box that although the Authority would have considered GT's opinions "ultimately if we got to a point where we had to take a call, it was our view which was taken" and the results of GT's review work "must be consistent with the FCA's view, no matter what".

The reviews of Ms Dunne's files

240. In September and October 2019, GT reviewed 16 of Ms Dunne's files using the DBAAT; one file contained two Pension Transfers, so 17 transfers were considered. At Part Three of this judgment, we make findings about how those files were selected; whether they constituted a statistically valid sample; how the reviews were carried out and how the Authority reached its conclusion that all the cases were non-compliant, see §303ff.

The further interviews, the Warning Notices and the Decision Notices

241. On 10 September 2021, Enforcement appointed investigators into Ms Dunne and Mr Fenech. The Applicants were informed of this by letters dated 15 September 2021. On 9 March 2022, Enforcement carried out a second compelled interview with Mr Fenech, and on 4 July 2022 with Ms Dunne. During that interview, Ms Blaak of the Authority had the following exchange with Ms Dunne:

> "Ms Blaak: Did you understand Mr Ellis' concerns about you not taking, sort of, the final destination of the pension, of the funds into account when assessing the suitability of a pension transfer?
>
> Ms Dunne: I did because it was a concern that was levied to me relatively frequently, because everybody else interpreted it differently. Just because I interpreted it differently to the rest of the market doesn't mean I was wrong."

242. On 17 January 2023, the Authority sent both Mr Fenech and Ms Dunne annotated draft Warning Notices, to which they responded. On 6 March 2023, the Authority issued them both with Warning Notices, and on 2 January 2024, with the Decision Notices. On 26 and 29 January 2024, the Decision Notices were referred to the Tribunal. Neither Applicant has worked in the financial services industry since FSML was suspended in 2017.

PART TWO: MS DUNNE – LIMITATION AND THE TII MODEL

243. Ms Dunne's Decision Notice was in part based on her TII model. The Authority decided that her model was "deficient" because it "did not take into account the overall suitability of the destination investment in giving her advice to the customer on the suitability of the Pension Transfer, which she was required to do". However, as explained below, the Authority accepted it was out of time to take the TII model into account in deciding whether to impose a penalty on Ms Dunne.

244. That has complicated the approach the parties had to take when making submissions at the hearing, and has also made our decision more complex. Additionally, there are also implications for Mr Fenech's Application, for the reasons explained at §542 and §552.

LIMITATION

245. FSMA s 66 is headed "Disciplinary powers" and so far as relevant reads:

> "(1) A regulator may take action against a person under this section (whether or not it has given its approval in relation to the person) if—
>
> (a) it appears to the regulator that he is guilty of misconduct; and
>
> (b) the regulator is satisfied that it is appropriate in all the circumstances to take action against him.
>
> (1A) For provision about when a person is guilty of misconduct for the purposes of action by a regulator—
>
> (a) see section 66A, in the case of action by the FCA, and…

> (3) If the regulator is entitled to take action under this section against a person, it may do one or more of the following
>
> (a) impose a penalty on him of such amount as it considers appropriate;…
>
> (4) A regulator may not take action under this section after the end of the relevant period beginning with the first day on which the regulator knew of the misconduct, unless proceedings in respect of it against the person concerned were begun before the end of that period.
>
> (5) For the purposes of subsection (4)–
>
> (a) a regulator is to be treated as knowing of misconduct if it has information from which the misconduct can reasonably be inferred; and
>
> (b) proceedings against a person in respect of misconduct are to be treated as begun when a warning notice is given to him under section 67(1).
>
> (5ZA) "The relevant period" is—
>
> (a) in relation to misconduct which occurs before the day on which this subsection comes into force, the period of 3 years, and
>
> (b) in relation to misconduct which occurs on or after that day, the period of 6 years."

246. Section 66(4) therefore provides that the Authority cannot start proceedings (here, issue a Warning Notice) under FSMA s 66 more than six years after the first day on which it knew of the misconduct in respect of which it is taking action, and the Authority is thus unable to impose a penalty under s 66(3)(a) if it is out of time under subsection (4) read with subsection (5ZA)(b).

Application to Ms Dunne

247. The Authority accepted that the limitation clock had started to run for Ms Dunne's TII model on 7 July 2015, when it received a copy of the email in which she said "investment advice is arranged by the authorised adviser" and that this advice was provided "after we have arranged the transfer".

248. Mr Pritchard said:

> "The Authority considers that it could reasonably infer from that email that HD's transfer advice did not consider matters arising from the investment advice (such as advisor fees or product charges) because she was suggesting that the investment advice was not given until *after* she had given transfer advice."

249. On that basis, the six year period expired on 6 July 2021. The Warning Notice was issued to Ms Dunne on 6 March 2023, so the Authority was out of time by twenty months in relation to her operation of the TII model.

250. Had the Authority not conceded the limitation issue, we would in any event have decided this point in Ms Dunne's favour, by reference to the email sent by FOS to the Authority on 13 August 2014 about the Mr T complaint, see §145 and §146. That email was received by the Authority almost a year before the one referred to by Mr Pritchard: it said that "Heather Dunne IFA says that they knew nothing about the investment plans and that it is [the IFA], in connection with [name] that advised where the SIPP should be invested". This email was forwarded to Enforcement.

251. The consequences of limitation are as follows:

(1) the Authority is unable to impose a penalty on Ms Dunne as the result of her operation of TII model, because:

(a) s 66(4) prevents the Authority from taking action under that section if limitation applies; and

(b) the actions which can be taken under that section include the imposition of penalties.

(2) The Authority therefore cannot rely, in the context of penalties, on:

(a) any overall findings about the operation of the TII model, for instance based on Ms Dunne's evidence and contemporaneous correspondence; or

(b) findings about the TII model which formed part of the reasoning used by GT's assessors when carrying out their reviews of the Sample, such as Ms Dunne's failure to obtain information about the funds into which the transferred money was to be invested, or about the related charges.

THE TII MODEL

252. Although the Authority cannot rely on "misconduct" caused by the TII model in order to impose a penalty on Ms Dunne, we nevertheless had to make findings about that model, because they are relevant both (a) to the Authority's decision to impose a prohibition notice on Ms Dunne (as limitation does not apply to prohibition notices), and (b) to Mr Fenech's Application.

The parties' positions in outline

253. The Authority's position was that:

(1) a "two adviser" model under which a PTS worked with an IFA who had investment qualifications could be compliant with COBS, as long as the IFA provided the PTS with information about the funds into which the money would be invested, and about the related charges.

(2) However, the TII model did not do that: Ms Dunne did not seek that information from the IFA, and she gave her advice on the assumption that the transferred funds would be held in cash with no charges. As a result, her critical yield figures were inevitably too low and risked misleading clients.

254. Ms Dunne's position was that she acted reasonably, because:

(1) the critical yield was relatively unimportant;

(2) it was factually correct to assume that the funds would initially be invested in cash;

(3) she had relied on advice given to her by the Authority;

(4) she had followed the guidance which was current at the time; and

(5) she had changed her approach following the 2017 Alert.

255. We discuss below each of the points made by the parties, together with our own view. We begin with what we consider to be the key issue, and then consider the other points made by the parties.

What the rules required

256. As set out above, the Authority considered that in consequence of the TII model, Ms Dunne's critical yield figures were inevitably too low and risked misleading clients; whereas Ms Dunne's position was that the critical yield was relatively unimportant.

257. The key issue is what the COBS rules required during the relevant period. We first consider the critical yield, then the other COBS rules, and finally the comparators in Ms Dunne's Suitability Reports.

The critical yield

258. During the relevant periods, COBS 19.1.2R(1) required the PTS to compare (a) the benefits likely to be paid by the ceding DB scheme with (b) those likely to be paid by the receiving DC scheme; that comparison had to be carried out **on the basis that the latter was used to purchase an annuity**, see COBS 19.1.4R. The "critical yield" was the rate of return an annuity would have to provide when compared to the benefits in the DB scheme. Para 1.4 of CP 17/16 provided a summary:

> "When advising on the conversion or transfer of safeguarded benefits, our current rules require advisers to make a comparison, commonly known as a transfer value analysis (TVA), between the benefits being given up and the benefits available under the receiving scheme. The analysis calculates the rate of return – often referred to as the critical yield – that is necessary to reproduce the safeguarded benefits being given up, assuming the purchase of an annuity is based on the same benefits."

259. Ms Dunne's position was that the critical yield was relatively unimportant, because:

> "The whole purpose of looking at a transfer is not to provide the same level of benefits at the same point in the same format, it's to be able to provide benefits in a different format, in a different shape, which is more suitable to the client's…objectives."

260. In other words, as most of those who make Pension Transfers do so in order to draw funds from their pension on a flexible basis and do not want to buy an annuity, comparing the rate of return in the DB scheme with that which would be received if the transferred money was invested in an annuity was not a particularly useful calculation.

261. In CP 17/16, the Authority set out a similar view (see §221ff) namely that "critical yields for drawdown options are not directly comparable with those relating to annuitisation", and the CP 17/16 went on to recommend that the TVAS (with its focus on the critical yield) should be replaced by the APTA. The Authority also said that:

> "The concept of a critical yield is not widely understood by consumers, many of whom have no or limited experience of investments."
>
> Consumers may "not appreciate how difficult it is to achieve returns which are equivalent to the critical yield and how the volatility of returns can impact on the outcome".
>
> "Without careful explanation it can be difficult for consumers to understand that critical yields for drawdown options are not directly comparable with those relating to annuitisation due to the underlying differences in who is responsible for carrying the mortality and longevity risk."

262. We agree with Ms Dunne that the critical yield calculation she was required to carry out under COBS (comparing the DB benefits with an annuity which the client was unlikely to want to access) may not have been particularly useful to many of the clients she was advising. However, the calculation does have value, because a low critical yield indicates that the ceding scheme has offered a relatively high transfer value compared to remaining in the DB scheme, and *vice versa*.

The COBS rules more generally

263. However, the critical yield calculation was only one element of the requirements placed on a firm giving pension transfer advice during the relevant period. These were broadly drafted, and included the following:

(1) A firm must obtain…such information as is necessary…to have a reasonable basis for believing…that the specific transaction to be recommended…is such that he is able financially to bear an investment risks…(COBS 9.2.2R(1)).

(2) In assessing a client's risk profile, the firm must assess his capacity for loss (FG11/05).

(3) A firm must act honestly, fairly and professionally in accordance with the best interests of its client (COBS 2.1.1R).

(4) The firm must provide a Suitability Report which must include an explanation of "any possible disadvantages of the transaction for the client" (COBS 9.4.7R).

264. By the time Ms Dunne began working with FSML, she had twenty-seven years of professional industry experience. We agree with the Authority that the reasonable PTS with that level of experience would have realised that the charges to be levied by the receiving scheme were likely to be a relevant factor when assessing whether a Pension Transfer was suitable, irrespective of the critical yield calculation required by the rules. Without that information, it might not be possible to know whether the transfer was consistent with the client's capacity for loss and whether it was in his best interests. In addition, the PTS was required to identify "possible disadvantages of the transaction", and the charges levied by the receiving scheme were an obvious disadvantage.

Other comparators

265. CP 17/16 noted at para 4.6:

> "As alternative options to annuities have developed, following the introduction of the pension freedoms, the way in which the TVA is presented to consumers has been extended by firms. Frequently, consumers are shown numerous critical yields depending on how and when they might take their benefits. Critical yields are being presented for drawdown although there is no standard methodology for this approach."

266. Ms Dunne's Suitability Reports included some of those other comparators, for example she calculated how long the funds would last in the DC scheme assuming different drawdown options and various growth rates.

267. Although there was, as CP17/16 said, no "standard methodology" for how to carry out those comparisons, Ms Dunne's failure to include the charges of the receiving scheme in her calculations inevitably meant that the funds in the DC scheme were projected to last longer than would be the case in reality. In consequence, that information was misleading.

Conclusion on the key point

268. Thus, while we agree with Ms Dunne that the effect of leaving out the charges was less important in the context of the critical yield figures, their omission was nevertheless a breach of the overall requirements of COBS, and given Ms Dunne's experience, it was unreasonable of her not to have realised that this was the position.

Correct to assume investment in cash?

269. Ms Dunne's position was that it was factually correct that (a) when money is transferred from a DB scheme to a DC scheme, it is normally held in cash, and (b) cash funds normally have nil or negligible charges. We agree. However, as Ms Dunne herself said under cross-

examination, "there was never any intention [the transferred money] was going to remain in cash". When the money was moved into a different fund, charges would inevitably increase.

270. Ms Dunne also defended her approach on the basis that the charges could not be included, because at the time of the Pension Transfer, the IFA generally did not know which funds would be selected; that investment decision was only made after the transfer. We accept that this was often the position. However, COBS 19.1.2R required that the comparison be made "on reasonable assumptions", and it was not reasonable to assume that there would be nil charges.

271. In addition, Ms Dunne assumed that the money in the receiving scheme would grow at 5%, being the intermediate rate set by the Authority. However, that growth rate is not realistic with her assumption that the funds would be held in cash.

272. We therefore find that the cash assumption was unreasonable, both because the cash fund was only a temporary home and because Ms Dunne then used a growth assumption which was inconsistent with the funds being in cash.

Reliance on Mr Chipperfield?

273. It was part of Ms Dunne's case that Mr Chipperfield had approved her TII model, and that she had reasonably relied on his approval. However, she accepted under cross-examination that Mr Chipperfield had never provided her with any written confirmation that her TII model was compliant with the Authority's rules.

274. In her witness statement, she also said:

> "Mr Chipperfield confirmed that, as long as it was clear who was responsible for which part of the advice, it was acceptable for me to review the transfer and the IA to make the investment recommendation."

275. That evidence too was challenged during cross-examination. The following exchange took place:

> "Mr Pritchard: He didn't tell you, did he, that when giving your transfer advice you did not need to take into account the intended end investments?
>
> Ms Dunne: He did not tell me that when I undertook my transfer advice I had to take into account the intended underlying investments. He did not disagree with my explanation as to how I work."

276. We find as a fact that Mr Chipperfield did not confirm to Ms Dunne either orally or in writing that her TII model was compliant with the Authority's rules; he simply did not respond to the information she had provided about how she operated.

Reliance on Mr Stimson?

277. It was also part of Ms Dunne's case that she had reasonably relied on Mr Stimson's approval of her TII model. However, she agreed with Mr Pritchard that Mr Stimson had never provided her with any written confirmation that her TII model was compliant with the Authority's rules.

278. Ms Dunne also said in her witness statement that Mr Stimson had "endorsed" her approach of "placing investments in cash for the purposes of [her] illustrations and suitability reports". The following exchange took place during her cross-examination:

> "Ms Dunne: I was explaining to him that my pension transfer advice was undertaken by me and the investment advice was undertaken by somebody else, and he had no -- he didn't say to me: well, you can't do that…

> Mr Pritchard: The Authority's case is you can have a two adviser model, but the transfer advice must take into account the overall investment proposition. Mr Stimson did not say anything to the contrary, did he?
>
> Ms Dunne: No, he didn't."

279. We find as a fact that Mr Stimson did not confirm to Ms Dunne either orally or in writing that her TII model was compliant with the rules. Instead, like Mr Chipperfield, he did not respond to the information she had provided about how she operated.

Failure of the Authority to correct the position?

280. There was no dispute that on 5 April 2013 Ms Dunne provided Mr Chipperfield with her brochure, which included the following passage:

> "We will include details of the new provider and associated investments in our draft report, if you provide them. In the absence of that information, our recommendation for the investments will be Cash."

281. Although Mr Chipperfield gave the attachment "a cursory glance", he did not reply to Ms Dunne.

282. Similarly, on 16 October 2013, Ms Dunne told Mr Stimson that "investment advice…was outside my remit and was the responsibility of the introducing adviser", but Mr Stimson did not comment on that information.

283. Ms Dunne said that as she had explained her model to the Authority, and they had not corrected or challenged her approach, it was reasonable for her to continue to believe it was compliant. She said from the witness box "if what I was doing was as wrong as the regulator now says it is, I think the regulator had a responsibility to tell me".

284. However, she also said:

> "The regulator is not in the habit of confirming that specific individual processes are acceptable. That's just a general knowledge thing that we all in the industry know, they will not comment on a specific investment process or whatever."

285. We therefore find that Ms Dunne knew at all relevant times that the Authority did not advise individuals about their business models, and it was therefore unreasonable of Ms Dunne to rely on a lack of response from either Mr Chipperfield or Mr Stimson as constituting approval.

The 2013 and 2014 Alerts

286. Another point relied on by Ms Dunne was that:

(1) Until the 2017 Alert, there had been no guidance which would have alerted her to the fact that her TII model was non-compliant.

(2) It was not until CP/17, which was issued at the end of her relevant period, that the Authority proposed "additional guidance to help advisers assess suitability and to clarify [its] expectations, building on the previously published alert". That new guidance would "make clear that in order to provide a suitable personal recommendation" the adviser must, *inter alia,* consider:

> "The specific receiving scheme being recommended following the transfer and the investments being recommended within that scheme to ensure that it is appropriate for the risk profile of the client."

(3) COBS itself was not changed until 2018 when the APTA was introduced; this required the adviser to take into account "all charges".

287. Mr Pritchard said that the Authority's position had nevertheless been clear many years earlier. He relied on the following passage in the 2013 Alert:

> "It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy, the advice on the pension transfer must take account of the overall investment strategy the customer is contemplating."

288. He also relied on these paragraphs from the 2014 Alert:

> "Where a financial adviser recommends a SIPP knowing that the customer will transfer or switch from a current pension arrangement to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the customer. If the underlying investment is not suitable for the customer, then the overall advice is not suitable.
>
> If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer or switch at all as it will not be able to assess suitability of the transaction as a whole."

289. Ms Dunne's position was that both Alerts related only to unregulated schemes, not to other transfers, and thus did not apply to her TII model.

290. It is true that the 2014 Alert began by saying that "firms *within this market* should carefully consider" the guidance there set out, and ended by warning "if you continue to operate *in this area*, you must have a robust and compliant advisory process in place". Nevertheless, we agree with Mr Pritchard that the reasonable PTS with Ms Dunne's experience, reading the passages set out above from those Alerts, would have identified the Authority's view as being that advice on *any* Pension Transfer required consideration of the client's overall investment strategy, including the funds of the receiving scheme into which the money was to be transferred.

291. In addition, the Authority's position was clear in the 2014 Thematic Review, which listed as an example of "poor practice" that "the inputted TVAS data (e.g. fund charges) was incorrect which led to materially misleading reports".

292. Although that Review focused on advisers making bulk transfers, it began by saying that its findings "will also be of interest to financial advisers who provide any pension transfer advice to consumers who are DB pension scheme members", and so was plainly relevant to Ms Dunne.

293. We therefore reject her position that the Authority had provided no guidance on the need to take the funds and charges of the receiving scheme into account; instead the Alerts and the Thematic Review set out the position, albeit the main focus of those documents was specific to unregulated investments and bulk transfers respectively. We instead agree with the Authority that the reasonable person in Ms Dunne's position would have understood and accepted the wider guidance in the 2013 and 2014 Alerts and the 2014 Thematic Review, even if not when first published, but in any event in January 2015, when Mr Ellis drew her attention to the key passages from the Alerts.

The FOS decision

294. Ms Dunne rejected Mr Pritchard's suggestion that the reasonable person in her position would have realised from the FOS decision that her TII model was deficient. Mr Pritchard referred her to the passage where the Ombudsman had concluded (see §150):

> "the business should have investigated the investment plans that [Mr T] had for his SIPP as in my opinion it would not be possible to advise on the transfer and not consider where the funds were to be invested."

295. Ms Dunne's response from the witness box was that her opinion differed from that of the Ombudsman. She added:

> "unfortunately for financial advisers, the Ombudsman has a different set of rules and requirements to the FCA. So the fact that the Ombudsman finds something at fault does not mean that we're not complying with the regulatory requirements. The Ombudsman has a much more discretionary assessment of a case."

296. However, the relevant part of the Authority's Handbook (DISP 3.6.4R) requires the Ombudsman to take into account the "regulator's rules, guidance and standards", and it is clear from the case law that if an Ombudsman departs from those rules, he is required to state that this was the position and explain his reasons, see *R (oao Heather Moor & Edgecomb) v FOS* [2008] EWCA Civ 642 at [49]. There was no such statement in this FOS decision. It was therefore not reasonable for Ms Dunne to treat the FOS decision as merely expressing an opinion.

Change of approach?

297. We have already found as a fact that following the 2017 Alert, Ms Dunne told Mr Fenech she was changing her approach and would in the future incorporate the charges of the receiving scheme in the Suitability Reports, see §192.

298. The Sample included four cases where the Suitability Reports were issued after the 2017 Alert. In three of those cases Ms Dunne continued to assume that the investments would be held in cash, because she did not know the particular fund within which the money would be invested, see §364, §371 and §388. In the fourth (see §412(3)), she added the charges to the end of the Suitability Report with a warning that the effect would be to reduce the client's returns, but she did not include them in the TVAS or in any of her other numerical comparators.

299. We therefore find that after the 2017 Alert, Ms Dunne made only superficial changes to the TII model, and in particular failed to include the charges of the receiving scheme when carrying out the calculations in her Suitability Reports, even though she now knew the Authority's position. That too was not reasonable.

The general view

300. We agree with Mr Pritchard that in addition Ms Dunne knew she was taking a different view, not only from Mr Ellis and the Ombudsman, but from other advisers in the market place. This is clear from her interview with the Authority in July 2022, when she said that "everybody else interpreted it differently", where "it" was the rules about the final destination of the transferred funds, see §241.

Overall conclusion

301. We therefore find that Ms Dunne knew she had never received confirmation from the Authority that her TII approach was correct, and she also knew that the Authority was "not in the habit of confirming that specific individual processes are acceptable".

302. The reasonable person in her position:

(1) would not have brushed aside the 2013 and 2014 Alerts; the FOS decision; the Thematic Review; Mr Ellis's criticism, and the fact that "everybody else" interpreted the requirements differently;

(2) would not have failed to implement the requirements in the 2017 Alert;

(3) would instead have reviewed the principles set out in COBS and recognised that routinely omitting the charges might mean that (a) she was unable properly to assess the adequacy of the transfer value, and (b) she had not informed the client of what might have been a key disadvantage; and

(4) would have recognised that omitting the charges of the receiving scheme in her calculations inevitably meant that the funds in the DC scheme were projected to last longer than would be the case in reality. In consequence, that information was misleading.

PART THREE: THE SAMPLE

303. The findings on which the Authority relied when deciding that Ms Dunne had breached SoP 2 were not only based directly on the TII model. The Authority also relied on the sample of Ms Dunne's cases which had been reviewed by GT. However, that was also problematic, because the Authority had directed GT to change the outcomes of some file reviews, from "suitable" to "non-compliant", essentially because of Ms Dunne's failure to include information about the receiving fund – in other words, because of the TII model, on which it was now unable to rely because of limitation.

304. In the following paragraphs we make findings of fact about the sampling; the GT reviews and the individual client files; we also consider the statistical validity of the sample and Dr Purdon's report. We then set out the parts of Ms Dunne's Decision Notice which relate to her alleged breach of SoP 2; we explain how Mr Pritchard sought to meet the Authority's burden of proof on that issue, and how we approached the evidence in order to assess whether Ms Dunne did breach that Principle. Our findings are at Part Four.

FINDINGS OF FACT

305. FSML was one of the firms investigated by the Authority as part of its Project Branford review of Pension Transfer advice (see §235). In accordance with the Authority's approach to firms within that Project, it (a) obtained a list of FSML's clients who had received Pension Transfer advice, most of whom were Ms Dunne's clients, (b) cleaned the data and (c) sorted it according to the date the Suitability Reports were issued.

306. After Dr Purdon had been instructed in relation to Project Branford, the Authority asked her a number of questions about sampling, one of which was whether it was "reasonable to exclude previously reviewed files from the sample". On 23 May 2019, Dr Purdon said:

> "Yes, that is reasonable. But if those reviewed previously are not being used in your assessment then the sample you draw will represent the population of all clients/files minus those already reviewed. You will just have to acknowledge this somewhere."

307. In Ms Dunne's case, the Authority deleted from the data, the eight files which had already been reviewed by Supervision in 2017 (of which five had been assessed as "suitable"). That left a total population of 352 files.

308. The five files reviewed by Enforcement in 2019 (of which three had been assessed as "suitable") remained in the population from which the GT sample was selected, although none of those five files was chosen by the sampling tool.

309. In the same email exchanges between the Authority and Dr Purdon in May 2019, a "phased approach" to the sampling was agreed. This was documented in an email from Mr McArthur of the Authority to Dr Purdon on 22 May 2019:

> "…our intention is to tailor our approach to sampling of the firms, reflecting the fact that some firms are already under investigation. In respect of those

> firms, we will identify a sample of files necessary to achieve 95% confidence to a 15% margin of error. However, we will undertake a phased approach in terms of actually obtaining and reviewing the files. Accordingly, we will initially obtain the first 20 files in the sample population, and will only obtain the remainder if we consider it necessary following that review."

310. On 7 August 2019, the Authority contacted Dr Purdon to ask what sample size should be selected from FSML's total population. Dr Purdon replied the following day, giving a sample size of 39 files. She said in her report that if the initial sample size of 20 "was judged by the Authority to give unambiguous findings, then the remaining 19 would not need to be reviewed".

311. After obtaining advice from Dr Purdon about the sample size, the Authority realised that seven of the files were outside the relevant period, and the total thus reduced to 345. The Authority reasonably took the view that the sample size of 39 was still appropriate, as there had been only a small reduction in the population.

312. The Authority then used Dr Purdon's tool (within which a systematic random sampling algorithm was embedded) to identify 39 files from Ms Dunne's relevant period, and subsequently used the tool again to select a random sub-sample of 20 files from the 39. That sub-sample was referred to as "Table A" and the remaining files as "Table B". Of the 20 files within Table A, two related to Pension Transfer advice given by another PTS acting for FSML, leaving 18 files belonging to Ms Dunne.

313. The GT reviewers initially concluded that Ms Dunne had provided suitable advice to seven of the clients; unsuitable advice to six clients, and that five files could not be assessed for suitability because there were Major Information Gaps ("MIGs").

314. On 29 November 2019, Dr Purdon was asked to provide the "95% confidence intervals" for the outcomes of the file reviews for Ms Dunne and also for other firms within Project Branford. Taking into account both the MIGs and the unsuitables, Dr Purdon said that there was a 95% probability that between 39% and 79% of all Ms Dunne's cases were non-compliant, either because they were MIGs or because the advice was unsuitable. Phrased in statistical terms, there was a confidence interval ("CI") of between 39% and 79%.

315. Dr Purdon sent the results for Ms Dunne and the other firms to the Authority the same day with a covering email saying:

> "we agreed that the next step would be for you look over those and decide whether there are firms for which it is difficult at present to draw a conclusion and where you will need a second sample so that the CI is narrowed."

316. After Dr Purdon had been provided with the figures set out above, GT carried out some further work, and identified that one of the files contained no Suitability Report, and that another concerned a transfer between two DC schemes, leaving 16 files of which eight (rather than seven) were suitable, three were MIGs and five (rather than six) were unsuitable. The DBAATs for those files had been completed by one of six different GT reviewers and the outcomes were "finalised" by Ms Hannah Williams of GT (there was no evidence as to what that involved). None of the files was subject to quality assurance, but this was unsurprising, as quality assurance was only applied to 15% of each reviewer's output, see §237.

317. Those results were then discussed at a number of case clinics and in correspondence between the Authority and GT as follows:

(1) The clinic on 11 December 2019 considered at least one of Ms Dunne's cases (we were not told which case). The participants in the clinic noted that the file did not include information about charges to be levied on the transferred funds, and the minutes record

that it had been agreed to "remove suitable outcomes" because "unclear" was "the right result in these cases". Mr Hewitt's unchallenged evidence was that "unclear" was shorthand for a failure to collect the necessary information, and he added that:

> "the Authority was suggesting in cases where this sort of information was missing, then the information collection section was 'not compliant'."

(2) On 6 February 2020, Mr Tom Baker, one of the Authority's investigators into FSML, asked that two of the "suitable" files be reconsidered, because he considered the "suitable" ratings were "pretty marginal calls"; he was also "mindful that the firm is already in Enforcement". Mr Ritchie Thomson and Ms Max Bacon of the Authority subsequently said that the same two cases "seem borderline".

(3) On 11 February 2020, those two files were then considered at a case clinic where they were discussed "at length", but GT said they were "happy they have the right result".

(4) On 18 February 2020 at 13.46, Ms Paton of the Authority emailed Mr Brifcani of GT. The heading on the email is "Heather Dunne/FS Midhurst – Suitable/MIG" but the entire text has been redacted. From Mr Brifcani's response to the email, we infer that it contained a suggestion or request for one of Ms Dunne's cases to be reclassified so it was no longer "suitable".

(5) Mr Brifcani responded to Ms Paton at 15.33, saying he had "checked the data captured in the DBAAT and…agree that this case should be classified as a MIG". He said he would "amend the DBAAT to reflect missing information regarding the client's financial situation…and an overall outcome of not compliant – unclear".

(6) Ms Paton emailed Mr Brifcani by return, saying "Thanks Ayman. I've let Tom (the case officer) know". Four minutes later, she sent a further email, saying:

> "I've another question from Tom [Baker] about FS Midhurst. He has asked whether various recommendations should…be assessed as MIGs where there is no information about the receiving scheme. Are you able to check for me?"

(7) That exchange was followed by a long detailed email from Mr Baker to Mr Brifcani, setting out his views on each of the cases which GT had assessed as "suitable", and concluding "just so you understand my view of the files".

(8) Mr Brifcani responded that evening, saying *inter alia*: "this is a complex issue because there are some files where the missing information is considered more material to the assessment determinations (i.e. ratings) than others", and adding that it would be necessary to consider the extent to which "materiality of the missing information should be a factor".

(9) On 19 February 2020, Ms Paton emailed Mr Brifcani, copying Ms Prestage as well as Mr Baker, Mr Hewitt and a Mr Nick Platten (all from the Authority). Ms Paton said that the recent case clinics on Ms Dunne "raise an issue about whether GT should have proceeded to assess suitability" where (a) Ms Dunne had no details of the receiving scheme or (b) although Ms Dunne had details of the receiving scheme, she did not know the underlying investments. Ms Paton said she and Mr Hewitt considered that "the assessors should have stopped at the first tab[7] as all of these categories are major information gap cases" and proposed that GT reconsider all Ms Dunne's cases and change those which had been assessed as "suitable" to "MIG" and so non-compliant.

[7] The tabs are explained in the section of this decision about the DBAAT, see §232.

Under cross-examination by Mr dos Santos, Ms Prestage agreed that the Authority was here "giving a very clear steer to Grant Thornton".

(10) On 3 March 2020, Ms Paton set out a draft of the "steps for GT to take to review the TVAS information gap cases". Subject to some minor amendments, this was then agreed by GT. As Mr Hewitt said, the Authority had "outlined specifically how [they] expected Grant Thornton to complete the DBAAT where they saw missing information of the type identified in the files for Heather Dunne/FSML" and that:

> "This led to the results of the affected cases being changed, such that the original 'suitable' rating given to the pension transfer advice was removed, and the 'information' rating was changed to 'Not compliant – material information gap'..."

318. The Authority's position was that these files had been "calibrated" or "recalibrated". The Applicants used the same term, although Mr Cherry also described the process as "regrading" and Mr dos Santos as "reclassification".

Ms Dunne's feedback

319. When cases were ruled "non-compliant" or "unsuitable", the Authority's usual practice was to give the firm in question the opportunity to provide additional evidence. Those responses were then reviewed either by GT or the Authority, and where appropriate, factored into the DBAAT assessment.

320. On 16 October 2020, Ms Joan Bailey of Enforcement wrote to Ms Dunne, requiring her to provide information about the Authority's findings in relation to:

(1) twelve files assessed as "non-compliant MIG"; and

(2) five files assessed as unsuitable for transfer advice.

321. Ms Dunne was told to provide her responses to the "unsuitable" files first, and to copy her response to Mr Baker. She carried out what she described (and we accept) was a "comprehensive, thoughtful, and detailed response in respect of each of the client files". This exercise was particularly challenging, because it took place during the COVID epidemic and lockdown, when Ms Dunne had significant health issues and was also supporting a close family member through a cancer diagnosis, surgery, and chemotherapy.

322. The Authority forwarded Ms Dunne's responses to the "unsuitable" files to GT, and they were considered by Ms Williams. Before she responded, the Authority received Ms Dunne's comments on the other twelve files.

323. On 30 March 2021, Mr Baker emailed Mr Stephen Bell and Ms Blaak, noting that Ms Dunne's comments were "lengthy", and saying that the Authority needed to consider whether to ask GT to review them. He continued:

> "An important factor in our decision is that, of the 12 MIGs, 8 were originally assessed by GT as compliant for information collection and suitable for transfer advice. The outcomes for those files were changed to 'MIG' after discussion with GT of the effect of HDIFA's failure to obtain information about the proposed arrangement. Therefore, broadly speaking, the issue in respect of two thirds of the files is the same. If we do ask GT to review, we could formulate together a global response which applied to all 8 of those files (HD refers to FCA consultation papers etc in justifying her position re the proposed arrangement, so we might need to combine the expertise of GT, Enforcement and Policy…) and then ask GT to respond 'as usual' to the other four."

324. Mr Bell replied the same day, saying:

> "We spoke to GT briefly about [Ms Dunne] last week and their views were unchanged on the unsuitable files so we need to think carefully where we go from here. As you say points of policy can be dealt with internally. My gut feel is that we shouldn't be sending this back to GT unless there are actually additional documents that look like they can plug the gap which seems unlikely."

325. Following that exchange, GT was not provided with Ms Dunne's comments on the other files. No further review was carried out by the Authority until Ms Prestage considered them as part of the preparations for this hearing, see §41.

A further exclusion

326. The Suitability Report for one of the clients within the Table A sample had been sent to the client by Ms Dunne after the end of the relevant period. Dr Purdon identified that issue in the course of preparing her report, and raised it with the Authority. She was "instructed that the Authority understands that Ms Dunne *commenced* her advice within the relevant periods" (our emphasis) and therefore treated the file as remaining within the sample.

327. We noted, however, that the Authority had previously told Dr Purdon that the sample had been selected "on the basis of date of advice". When we asked Dr Purdon about this file during the hearing, she said that "the sensible thing" from a statistical perspective would be to remove it from those taken into account. We agree, and have not considered that file when making our findings about the advice given by Ms Dunne. As a result, the total number of files reduced from 16 to 15, one of which contained advice on two transfers. We have called these files "the Sample".

Dr Purdon's report

328. Dr Purdon was instructed in October 2025 to provide an expert report on the basis that the Authority had carried out a review of 16 files (one with two transfers); and the outcome of the reviews was that all 17 cases had been assessed as non-compliant.

329. The instructions given to Dr Purdon:

(1) did not include any information about the "recalibration" of the eight files previously assessed by GT as suitable;

(2) did not remind her that in 2019 she had been sent the outcome of GT's initial file review, which had found that Ms Dunne had provided suitable advice to seven of the clients; unsuitable advice to six clients, and that five files could not be assessed for suitability because there were MIGs; and

(3) did not remind Dr Purdon that she had then told the Authority there was a 95% probability that between 39% and 79% of all Ms Dunne's cases were non-compliant.

330. When Mr dos Santos took Dr Purdon to her 2019 spreadsheet, she was surprised, saying "I don't recognise those numbers because…what I'd been working with is 17 files with 17 non-compliant".

331. In her report, Dr Purdon had concluded (on the basis that 100% of the files were non-compliant) that the sample size of 17 gave "unambiguous findings" and "definitive results and there is no reason to review a larger sample". She continued:

> "If, instead, the confidence intervals had covered a range where the lower bound represented an acceptably small percentage of non-compliant instances of advice, but the upper bound represented an unacceptably high percentage,

> then it would be difficult to reach firm conclusions from the sample. Under this scenario a larger sample size would be needed.
>
> The possibility that the results from a small sample might prove to be ambiguous is why the initial advice I gave suggested taking a larger sample of 39 customer files and reviewing a random subset of around 20 of those files first. If the initial, smaller sample gave unambiguous results there would be no need to review the rest of the sample. But if the smaller sample gave ambiguous findings, carrying out a review across a larger sample would be a sensible way forward, so that the confidence interval narrows."

332. Attached to Dr Purdon's report was a helpful table ("Dr Purdon's Table") showing the confidence intervals with sample sizes along the horizontal axis and numbers of non-compliant files along the vertical axis[8]. Thus, where the sample size was 17, and all files were non-compliant, the table showed that there was a confidence interval of 81% to 100%: in other words, one could be 95% confident that between 81% and 100% of all the files in the population were also non-compliant. However, where there were 16 files, 6 of which were non-compliant, the confidence interval was between 18% and 62%, so one could be 95% confident that between 18% and 62% of the total population was non-compliant.

333. The Tribunal asked Dr Purdon whether, in that situation, the Authority needed a bigger sample. She gave a careful answer, saying she would only have given that advice had the Authority come to her and said they didn't know what to do because the confidence interval was so wide.

334. Dr Purdon was unequivocal in her opinion that as the sample had been selected on a random basis, the outcomes were statistically valid. In other words, if there was a reduction in the number of non-compliant files, this would affect the confidence intervals but did not prevent an inference being drawn from the results, albeit that the confidence interval might be very wide. No party challenged that evidence and we accept it.

THE DECISION NOTICE AND THE STATEMENT OF CASE

335. In Ms Dunne's Decision Notice, the Authority said she had breached SoP 2 in the relevant period "by failing to act with due skill, care and diligence in providing Pension Transfer advice". The Authority based that finding in part on the outcomes of the file reviews, saying:

> "In 2019-2020, the Authority requested and assessed a statistically representative sample of 17 of HDIFA's Pension Transfer files from the Relevant Period against the relevant rules in COBS (as in force during the Relevant Period) relating to suitability. The results of the Authority's file reviews revealed the following:
>
> (1) Failure to collect the necessary information to give Pension Transfer advice in 100% of cases, with the consequence that in 71% of total cases the Authority was unable to assess whether Ms Dunne's advice was suitable…
>
> (2) Ms Dunne gave unsuitable Pension Transfer advice in 100% of those cases it was able to assess for suitability…"

336. The first of those findings relied in part on the recalibration of those files which GT had decided were suitable, and that recalibration was itself based on Ms Dunne's use of the TII model.

337. The Statement of Case similarly said:

[8] Dr Purdon explained that she had taken into account the fact that one of the files contained two transfers, and there was no challenge to that evidence.

> "Only five of the 17 files reviewed by the Authority were capable of being assessed for suitability. This was due to Ms Dunne's non-compliant information collection practices. There were material information gaps in 12 of the 17 files reviewed."

338. Both the Decision Notice and the Statement of Case went on to refer to particular reasons why, in the Authority's view, Ms Dunne gave unsuitable advice to those five clients. In relation to the remaining files, the Authority did not consider whether, despite the missing information, the advice was nevertheless suitable.

339. We agree with the Applicants that both the Decision Notice and the Statement of Case were flawed, not only because the Authority had relied directly on the TII issue, but because it had also relied on the reclassification of eight suitable files as MIGs based on the TII issue, when the Authority was prevented from relying on that issue because of limitation.

MR PRITCHARD'S APPROACH

340. Mr Pritchard submitted that it was nevertheless clear from the underlying files and from Ms Dunne's evidence in cross-examination that, in addition to the TII issue, there were significant compliance failures in all or most of the Sample, including the eight files originally classified as suitable.

341. That submission raised an issue about the Tribunal's jurisdiction to take into account matters which had not been included in the Decision Notices or in the Authority's Statement of Case, and we consider that next.

THE TRIBUNAL'S JURISDICTION

342. As summarised at the beginning of this decision (see §27), a reference is not an appeal against the Authority's decision, but a complete rehearing. FSMA s 133(4) provides that we "may consider any evidence relating to the subject matter of the reference whether or not it was available to the decision-maker at the material time".

343. In *Bluecrest v FCA* [2024] EWCA Civ 1125, Popplewell LJ gave the leading judgment; Nugee LJ delivered a short concurring judgment, and Falk LJ agreed with both judgments. The issue before the Court was what was meant by "the subject matter of the reference". Popplewell LJ answered that question at [202]:

> "What is clear is that there must be some sufficient relationship between the matter referred and the decision which triggers the right to refer, and the critical question is: what is required by the concept of sufficiency in this context? The answer is to be found in the fact that the decision is a stage in the regulatory process, and the Tribunal reference a further stage in that process. The logical answer is therefore that something is sufficiently related to the decision which triggers the reference to amount to or be included in "the matter" if it has a real and significant connection with the subject matter of the process, in the sense of its procedural or substantive content, which has culminated in the decision notice or supervisory notice. Such connection must be real and significant, not fanciful or tenuous. But if so, that is sufficient. It need not be something upon which the FCA has specifically relied during the process, provided that it has a real and significant connection with the subject matter of the process. What is required when the FCA seeks to rely on something new in the Tribunal is an examination of what is new, and of the procedural or substantive content of the process culminating in the decision or supervisory notice, and the establishment of a real and significant connection between them. If what is new has this connection it is within the Tribunal's jurisdiction. It is a separate question whether the FCA should be permitted to

> rely upon it in any particular case, which is a matter for the exercise of the Tribunal's case management powers as to whether it would be just and fair."

344. We therefore accept, and the Applicants did not seek to argue otherwise, that the Tribunal has the jurisdiction to consider the new points made by Mr Pritchard in his submissions.

345. We also agree with Mr Pritchard that:

(1) any other "misconduct" (unrelated to the TII model) was first identified by the Authority when it reviewed Ms Dunne's files;

(2) the Authority first received samples of Ms Dunne's files on 8 March 2017 (see §200);

(3) the Warning Notice was issued on 6 March 2023, so just within the six years provided for by FSMA s 66(5ZA)(b); and

(4) if there was other misconduct, the Authority can rely on FSMA s 66 to impose a related penalty on Ms Dunne.

PART FOUR: ASSESSING THE EVIDENCE AND SoP 2

346. In this Part we describe how we approached the evidence, and we set out our conclusions. We then consider whether, on the basis of our findings, Ms Dunne breached SoP 2.

APPROACH TO THE EVIDENCE

347. All parties accepted (and we agree) that Dr Purdon's Table could be used to infer the total number of cases where Ms Dunne had given unsuitable advice.

348. One option was for the Tribunal to accept the original findings made by the GT assessors, namely that eight files (out of a total of 16) were suitable. Applying Dr Purdon's Table, that would lead to the conclusion that there was a 95% probability that between 27% and 73% of the advice given by Ms Dunne was unsuitable.

349. However, all parties were unhappy with that approach:

(1) Mr dos Santos and Mr Cherry had concerns about reliance being placed on the DBAATs at all, given the lack of version control, the absence of any quality assurance, and the Authority's failure to provide GT with most of Ms Dunne's responses.

(2) Mr Pritchard wanted the Tribunal to take into account his submissions on the case files. Mr Cherry and Mr dos Santos pointed out that Mr Pritchard is not a PTS, and that even if he identified a gap or contradiction in the information within Ms Dunne's files, it did not follow that the advice was not suitable: that was a question of judgment to be made by a PTS.

(3) Mr Pritchard responded by saying that as an expert Tribunal we should and could reassess all the cases on a *de novo* basis in order to establish whether Ms Dunne gave suitable advice. The Applicants agreed.

350. That approach involved taking into account the material in Ms Dunne's files, each of which contained around 1,500 to 2,000 pages. Mr Pritchard referred to reading "every page" of the files, while Mr Cherry described it as an "inevitable task" given the "allegations" made by the Authority.

351. We agreed with the parties that in carrying out that exercise, we would not simply accept the findings set out on the DBAATs, for the following reasons:

(1) Some files had been assessed as non-compliant on the basis there was a lack of information about the receiving scheme, but the Authority was precluded from relying

on that TII issue because of the limitation provisions in FSMA s 66. Those files include the eight which were recalibrated, but there were others in addition.

(2) As Mr dos Santos and Mr Cherry rightly submitted, the lack of version control meant that the reasoning on the DBAATs could include points made by persons other than the GT reviewer. For example, Mr Brifcani amended one of the DBAATs following an email from Ms Paton; Ms Williams "finalised" the DBAATs, and Mr Baker provided GT with "his view of the files".

352. We nevertheless decided that in most of the DBAATs it was possible to identify the findings made by the original GT reviewers, because later commentators had simply added their often contradictory comments to the end of the documents. We were less sure about the four DBAATs completed by Ms Williams, but that did not prevent us from taking them into account.

353. In making our findings on a *de novo* basis for each of the cases in the Sample we reviewed Ms Dunne's files (including in particular the PRQs, correspondence with the IFAs clarifying various issues, and the Suitability Reports). We also considered:

(1) the parts of each DBAAT which appeared to reflect the original unamended comments of the GT reviewers;

(2) the amendments to the DBAATs following the Authority's "recalibration" process described above;

(3) Ms Dunne's comments on the DBAATs and her oral evidence; and

(4) the parties' submissions, including in the case of the Authority, both those made by Mr Pritchard and those adopted from Ms Prestage's witness statements.

354. The findings in the following paragraphs only concern suitability; we consider later in this decision whether Ms Dunne also complied with the Authority's other rules, see §482ff below.

355. In relation to each client, we make findings of fact as to the situation, the advice given and the findings of the GT assessor, together with our view as to whether there was sufficient information for Ms Dunne to make a personal recommendation and if so, whether her advice was suitable. We have also said whether our conclusion would have been different had we taken into account the TII issue. That is because the Authority is relying on the outcome of the file reviews, not only in relation to the penalties charged on the Applicants but also in relation to the prohibition notices (which are unaffected by limitation). In coming to our conclusions we have applied the COBS rules which applied during Ms Dunne's relevant period.

356. We have not thought it necessary to name the individual assessors other than Ms Williams, as she played a wider role. In addition to the other abbreviations set out earlier in this decision, we have used the abbreviations CETV (cash equivalent transfer value); TFC (tax free cash) and NRD (normal retirement date).

THE "SUITABLE" FILES

357. We begin with the files originally categorised by the GT assessors as "suitable" and subsequently "recalibrated". We have already excluded one of the eight cases because it fell outside the relevant period, see §326. As regards the other seven, the Applicants' position was that the Authority had wrongly changed the outcomes of these file reviews, when the trained and qualified GT assessors had decided that Ms Dunne's files contained sufficient information to allow suitability to be assessed.

358. We also took into account the unchallenged evidence given by Mr Hewitt, who had designed and built the DBAAT and trained the GT reviewers. He said:

> "It is for the assessor to assess the case in the round…It is for the assessor to decide whether the advice is unsuitable, not the DBAAT. The DBAAT is simply a tool to assist the assessor in considering the relevant factors when assessing the advice and to record the outcome of the assessment, including the evidence relied upon to form that assessment."

359. Under cross-examination from Mr dos Santos, Ms Prestage similarly confirmed that:

(1) the DBAAT was not a checklist but "an assessment and then a judgment by the person who reviewed it"; and

(2) GT's assessors had the relevant pension transfer specialist experience, expertise and qualifications, enabling them to exercise that necessary professional judgment.

360. We agree with the Applicants that the Authority had been wrong to recalibrate all these files on the basis that there was a single missing piece of information, namely the identity of the receiving fund and the related charges. The COBS rules set out earlier in this decision have as their starting point that the PTS's obligation is to act in the best interests of the client, and when giving Pension Transfer advice (our italics):

(1) "must *take reasonable steps to ensure* that a personal recommendation…is suitable for its client";

(2) must "obtain from the client such information *as is necessary* for the firm to understand the essential facts about him and have a *reasonable basis* for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended"; and

(3) that information must include "to *the extent appropriate to the nature of the client*, the nature and extent of the service to be provided and the type of product or transaction envisaged".

361. As is clear from the italicised passages, it is a question of judgment what information is required before deciding whether a Pension Transfer is suitable. It does not automatically follow from the fact that some information has not been collected and/or considered, that the PTS was unable to decide on suitability. Instead, as Mr Brifcani rightly said to Mr Baker, it was necessary to consider the extent to which "materiality of the missing information should be a factor". The Authority had previously made a similar point in the 2014 Thematic Review, when it said (our emphasis):

> "…a disclosure failing would typically arise from some form of process or **information provision failing**. While we would expect firms to ensure that they make the correct disclosures, a disclosure failing would not necessarily result in a suitability failing **where there is no material impact on the outcome for the member**."

The individual cases

362. The seven files were assessed by five different GT reviewers, one of whom reviewed three files; the others reviewed one each. None was assessed by Ms Williams.

Client A

363. The client was retired, with a secure ongoing income for the rest of his life of around £70k pa. He was also wealthy, with an investment portfolio of over £1.5m; a second home worth £250k; cash of £160k and other assets; in addition, his partner owned a second property

valued at £0.5m. He wanted to ensure his partner would benefit from his pension fund on death, but his DB scheme would not confirm this would be the case.

364. The GT assessor decided that the transfer advice was suitable and in the client's best interests (despite the fact that Ms Dunne did not take into account information about the charges of the receiving fund) because of the client's objectives, his assets and income, and the fact that he was already retired and did not envisage his expenditure changing in the future.

365. In challenging that conclusion, Mr Pritchard submitted that:

(1) the Suitability Report contained incorrect information about the protection provided by the Financial Services Compensation Scheme ("FSCS") if the new provider were to become insolvent;

(2) the client could have protected his partner's position by taking out life cover rather than by a Pension Transfer; and

(3) Ms Dunne had not properly taken into account the client's health issues.

366. We disagree: the mistake about the FSCS does not make the advice unsuitable; the life insurance possibility was covered in the Suitability Report, and the client had described his "general health and lifestyle" as "good". We instead agree with GT's assessor that the transfer advice was suitable, and that Ms Dunne had sufficient information to come to that conclusion, without the information about the receiving fund.

Client B

367. The client was 49; she and her husband had net assets of £1.4m; equity in the family home of £700k and undistributed cash within their company of £320k. The CETV for the DB pension was £800k; the critical yield was negative for retirement at age 55, and it was 3.3% for the normal retirement date of 60.

368. The client wanted to access the TFC when she reached 55, so she could use it to purchase a commercial property for around £200k. If she stayed in the DB scheme and took early retirement at 55, she would receive TFC of £74,608 and an indexed pension of £11,191. If she transferred, the TFC was £200k, with £600k remaining in the DC scheme. She wanted to have flexible access to that pension fund and to secure lump sum death benefits for her husband and children.

369. The GT assessor decided that Ms Dunne had collected sufficient information to advise on the Pension Transfer and that: the transaction met the client's investment objectives; she had the necessary knowledge and experience to understand the risks involved and was able financially to bear those risks. Mr Pritchard made various minor criticisms of Ms Dunne's advice, but we again agreed with the GT assessor.

370. Ms Prestage defended the recalibration of this file on the basis that Ms Dunne had failed to take into account information about the receiving scheme, including charges. In fact, Ms Dunne did identify the receiving scheme and she did include its establishment fee and annual fee. That was because this Suitability Report was issued in April 2017, after the 2017 Alert which said the Authority "expected" PTSs to take into account "the likely expected returns of the assets, as well as the associated risks and all costs and charges that will be borne by the client", see §191.

371. It is true that Ms Dunne did not know into which of the receiving scheme's different funds the Pension Transfer would be invested, as this had not been agreed between the client and the IFA, so she therefore continued to assume that the fund would be held in cash with no charges. However, even if all charges had been identified and included, the critical yield would

have remained low. In short, the failure to include all the charges did not prevent Ms Dunne from being able to advise that the Pension Transfer was suitable.

Client C

372. The client was a senior investment banker who had recently retired from his employment. He had investments of over £2m; he was expecting deferred bonuses over the next two years, and he had cash savings as well as rental income. His attitude to investment risk was "adventurous". The object of the Pension Transfer was to improve the death benefits available to his spouse, to benefit from the flexibility of a DC scheme and to manage the tax implications arising from the Lifetime Allowance ("LTA")[9].

373. As with Client B, Ms Dunne issued this Suitability Report after the 2017 Alert, so it includes information about the annual management charge of 0.35% which would be levied by the receiving scheme: Ms Dunne also advised that when the money was moved from the cash fund, that charge would alter.

374. The GT assessor carefully considered the material on the file, decided there was sufficient information to assess despite the lack of some of the information about charges, and went on to agree with Ms Dunne's assessment as to suitability. We agree with the GT assessor.

Client D

375. The client was in her mid-fifties and retired; she had previously worked as a carer, so we made the reasonable inference that her earnings had been relatively low. She had received two previous organ transplants and was awaiting a third; her husband was about to donate to the transplant pool and understood this would speed up a further transplant for his wife.

376. The couple's monthly expenditure was around £1,500 pcm, of which £400 related to the mortgage, currently standing at £85k; they had a small income deficit of £240 pcm which was being met by cash savings. The CETV offered by the DB scheme was £198k and the TFC was thus £49.5k. The critical yield required to match the pension benefits offered by the scheme for retirement at age 60 was high at 19.8%, so the value of the CETV was low relative to the benefits being given up. The PRQ said that the client had "little in the way of other assets or pensions to fund [her] retirement".

377. The client's husband earned £18k pa, and had the following pension assets:

(1) a personal pension valued at £32k;

(2) four years of contributions to a DB scheme;

(3) savings in a money purchase scheme, the value of which was unknown, and

(4) benefits in the Pension Protection Fund following the closure of another scheme; the value of those rights was also unknown.

378. The client's objectives in making the Pension Transfer were to use some of the TFC to reduce the mortgage, and the balance to fund their living costs, especially during the period around the husband's operation, when he expected to be unable to work. She also wanted to have flexible access to the money remaining in her pension and to enhance the death benefits payable to her husband.

379. The DB scheme had confirmed that the client could take early retirement on ill health grounds on application; the scheme would then pay TFC of £32,260 and an indexed pension

[9] The LTA restricted the amount which could be held in pension funds without incurring tax by way of a Lifetime Allowance charge on withdrawal.

of £4,839, which was guaranteed for five years. That TFC was thus £17.2k less than the one available if the client made the Pension Transfer.

380. If the client were to die during that guarantee period, the same pension would be paid to her husband; at the end of that period he would be entitled to a 50% pension for life. If the Pension Transfer went ahead, the funds remaining in the receiving scheme (some £150k) would be payable to her husband in full.

381. The GT assessor noted that there was some missing information, but decided that given the client's circumstances, in particular her ill-health, he could continue with the DBAAT process and review suitability. Having done so, he concluded that the client's objectives were valid and would be met by the Pension Transfer and the advice was therefore suitable.

382. Mr Pritchard submitted that the lack of information about the husband's pension entitlements meant that Ms Dunne should not have proceeded to advise on the Pension Transfer. Under cross-examination Ms Dunne accepted that she should have obtained details of the husband's pension entitlements "to ensure they were a decent size".

383. We agree with Mr Pritchard that, on the facts of this case, Ms Dunne should not have proceeded to a suitability assessment without knowing what pension would be available to the husband, because this was key to understanding the couple's overall financial situation (see COBS 9.2.1R(2)(b)), given the lack of other assets. This file therefore contained a major information gap or MIG.

384. On the basis of the information which was available, a Pension Transfer was not suitable. The CETV was low relative to the benefits being given up, and had the client instead taken early retirement from the DB scheme, the TFC available would have provided more than sufficient money to fund the period when the husband could not work, and would also have ensured that he had an indexed pension for the rest of his life.

Client E

385. The client was working in the NHS earning £20k pa; he had contributed to the NHS pension scheme for six years; had £30k in savings; £33k in a DC pension and significant equity in his house from which he was expecting to downsize and realise around £150k. Ms Dunne's advice concerned the transfer from a previous employer's DB scheme to the client's existing DC fund; the CETV was over £182k.

386. The main reasons the client wanted to transfer were (a) to ensure that his daughter, who was not a dependant, would benefit from his pension savings on his death, and (b) to have flexible access to his fund. Both those aims would be achieved by the transfer: if he remained in the DB scheme but died before retirement, his daughter would receive only around £12k; if he died after retirement, any payment would be discretionary and could well have been nil. The GT assessor noted that although life insurance could have been used, the premiums would be high because the client was an overweight smoker with diabetes and high cholesterol; the assessor concluded that "this objective is best met by transfer".

387. The assessor went on to decide that Ms Dunne had sufficient information and that the advice was suitable. Mr Pritchard disagreed. His main challenges were the following:

> (1) The PRQ said that the client was expecting to work until retirement; Ms Dunne assumed that he would stay with the NHS and inferred the likely future income he would receive from the final pension. The GT assessor considered those assumptions to be reasonable, but Mr Pritchard did not agree. Under cross-examination Ms Dunne carried out a calculation of the amount the client would receive if he remained with the NHS, which Mr Pritchard accepted was "impressive maths". We agree with the GT assessor

that the inferences made about the value of his NHS pension were reasonable, given the information in the PRQ and Ms Dunne's knowledge of how the scheme worked.

(2) Mr Pritchard identified that the Suitability Report took into account a £300k inheritance when there was no reliable information. Although he was correct, we agree with the GT assessor that had Ms Dunne omitted that amount, it would not have changed the outcome.

388. The Suitability Report was issued in February 2017, shortly after the 2017 Alert. Ms Dunne attached information about the charges levied by the receiving scheme and said that the amounts would depend on the particular fund into which the money was transferred. We agree with the original GT assessor that there was sufficient information to consider whether the advice was suitable, and we also agree that it was suitable.

Client F

389. The client was an investment banker in the process of emigrating to New Zealand. He had DC benefits of around £160k; his spouse had private pension provision of just under £400k; the couple had investments of £355k and an "emergency fund" of £280k.

390. In order to obtain residence status in New Zealand, the client required an "investor" visa. That aim could be achieved by a Pension Transfer into a New Zealand DC pension which was recognised by HMRC as a Qualifying Recognised Overseas Pension Schemes ("QROPS"). The GT assessor described this as the client's "only real objective" and "a compelling reason" for the transfer. We agree with the assessor that Ms Dunne had sufficient information to give advice, and we also agree that the advice was suitable. The absence of information about the funds/charges in the QROPS does not change that outcome.

Client G

391. The client and her husband were retired; she was aged 64 at the time of the Pension Transfer. In addition to the DB scheme which was the subject of the transfer advice, she had three pensions in payment, totalling around £3k per month. She also had a rental property of £200k which generated £12.8k a year, and other investments totalling £50k with another £25k to be received shortly. Her total annual income was £23k, and her husband had pension income of £45k pa. Their home was worth £400k without a mortgage. The client also had an additional "Tulip" pension fund from which she had taken the TFC, the remaining fund was valued at over £1.1m.

392. If the client had remained in the DB scheme she could have taken an indexed pension of £4.5k pa and TFC of £30k (without any reduction for early retirement). On transfer to a DC scheme, she could take TFC of £39k and be left with a pension fund of £118k. The critical yield required to match the DB pension for retirement at age 65 was relatively low.

393. The client had no requirement for further income "for the foreseeable future" and wanted to make the transfer to maximise the TFC and so she could flexibly draw on the balance of the pension.

394. Given that (a) the client had no need of the pension income from the DB scheme, and (b) the transfer gave her the higher TFC and flexibility she was seeking, the GT assessor decided he had sufficient information to assess suitability and that the transfer was suitable.

395. Mr Pritchard disagreed, on the basis that the client was vague about what she would do with the TFC, saying she might invest in her son's property business, but was "unsure" how much she would use for this, and was also unsure what she would do with any excess. However, we agree with Ms Dunne that obtaining an extra £9k tax free was itself a relevant factor. Mr Pritchard also correctly identified that Ms Dunne had omitted the Tulip pension savings from

the Suitability Report, but that omission increases the client's capacity for loss and does not change the position on suitability. We agree with the GT assessor that Ms Dunne had sufficient information and that the Pension Transfer was suitable.

Conclusion on the "suitable" files

396. For the reasons set out above, we find that Ms Dunne's advice was suitable for the client in six of the seven cases, despite the lack of information about the receiving fund. In the seventh case (Client D), there was a major information gap; on the information provided, the advice was not suitable.

THE "INSUFFICIENT INFORMATION" FILES

397. The next group of cases all had the same GT reviewer, Ms Williams. She decided that the cases were all non-compliant because Ms Dunne had insufficient information for a Pension Transfer recommendation to be given.

Client H

398. The client was single, aged 54 and had no dependants. She earned £16k pa, owned her own house worth £130k with no mortgage; had £1k in savings and no liabilities; her monthly expenditure was £800 leaving a surplus each month of £300. She had opted out of her current employer's pension scheme.

399. The Pension Transfer related to a former employment for which the CETV was £121k. The client had other pension entitlements: an NHS pension from a previous employment which was due to pay TFC of £14,670 and a pension of £5k pa on reaching 60, and two pension pots with a total value of £8.5k. Her object was to retire at 60, and reduce her working hours before then, using the money from the DC scheme on a flexible basis to top her earnings.

400. If the client had not made the transfer, but had remained in the DB scheme until the NRD of 65, she would have received a pension of £8,069, or TFC of £37,197 plus a pension of £5,580. We noted that in this scenario:

(1) she could have met her objective of working fewer hours (ie without the money from the DC scheme) because she already had a surplus each month of £300;

(2) she could have further reduced her hours once she reached 60 and was in receipt of her NHS pension; and

(3) the NHS pension together with that from the DB scheme would give her more than sufficient money to meet her outgoings after retirement.

401. If, as Ms Dunne advised, the client made the transfer, she would be able to fund a gradual retirement and stop work at 60. However, from that point until she reached the state retirement age of 65, she would only have her NHS pension and the amount remaining in her DC scheme. When she reached 65, she would receive her state pension which would top up her monthly income.

402. Ms Williams decided that the following information was required before suitability could be assessed:

(1) how much the client intended to draw from the DB scheme before she reached state retirement age;

(2) how much that fund would be reduced by charges; and

(3) the amount of the client's state pension.

403. In relation to the third of those points, Ms Dunne had told the client in the Suitability Report: "You will, of course, be able to draw on your state pension, once you are eligible".

However, it was clear from the information on file that the client would not receive a full state pension because she had been contracted out for seven years when in the DB scheme, and the NHS scheme was also contracted out.

404. Ms Williams concluded that Ms Dunne did not have sufficient information to give advice, because she needed to know whether the client would be able to fund her income needs in retirement. Ms Dunne disagreed, on the basis that Ms Williams had incorrectly applied guidance which was not in force during the relevant period, namely that the requirement to look at "the way in which the funds will be accessed, either immediately or in the future, including follow-on arrangements" was first proposed in CP 17/16 and not introduced until 2018, and that the same was true of the requirement to consider "an assessment of the client's outgoings and therefore potential income needs throughout retirement" as well as "alternative means of meeting the client's objectives" as well as the obligation to take charges into account.

405. Ms Dunne is correct that those elements were not made explicit until after her relevant period. Nevertheless, the following rules and guidance did apply:

(1) COBS 9.2.2R required an adviser considering suitability to obtain the information necessary "to understand the essential facts about him and have a reasonable basis for believing…is such that he is able financially to bear any related investment risks consistent with his investment objectives";

(2) COBS 19.1.3G required Ms Dunne to "take into account all of the retail client's relevant circumstances"; and

(3) COBS 19.1.7G said that a firm should only consider a transfer to be suitable "if it can clearly demonstrate, on contemporary evidence, that the transfer...is in the client's best interests".

406. We would therefore go further than Ms Williams and say that on the evidence we have, the Pension Transfer was not suitable. The information provided to Ms Dunne via the PRQ said that client wanted her pension fund to be secure; that she was uncomfortable with a loss of more than 5% and that she disagreed with the statement that "I am not concerned about falls in value as I expect to recover any capital loss over the longer term". Those responses are consistent with her limited capacity for loss.

407. Our conclusion would have been the same had we ignored Ms Dunne's failure to consider the funds/charges in the DC scheme (i.e. the TII issue in relation to which limitation applied).

Client I

408. The client was aged 53 and married. He earned £62.6k pa; his monthly expenditure (including mortgage payments and pension contributions into a workplace DC scheme) was less than his income, leaving a monthly surplus of around £1k. His spouse was retired and had no income. The couple owned their own home worth £200k; the small mortgage balance remaining of £30k would be fully repaid within 3 years. The client also had a share of another property worth £80k; a DC pension into which he was contributing and which was currently worth £90k; shares of £22k and cash of £8k.

409. The client's deferred benefits in his employer's previous DB scheme was projected to provide TFC of £127,514 and a pension of £19,127 when he reached 60, or TFC of £90,404 and a pension of £13,561 if he took his benefits at 55. The CETV was £777,620, so the TFC was £194,405[10].

[10] The Pension Transfer was delayed by the suspension of Ms Dunne's business; a new CETV was subsequently obtained for the higher value of £820,6501.

410. The client's aims were:

(1) to improve the death benefits for his spouse and children: the DB scheme would have given his spouse a 50% pension with nothing to his children;

(2) to maximise the TFC: by making the transfer he would receive £104k more than if he took a pension and lump sum at 55, and almost £67k more compared to waiting until he was 60;

(3) to retire at 55 and use the TFC to purchase another property for £200k; he could not achieve that objective unless he carried out the Pension Transfer; and

(4) to have flexible access to his pension fund in retirement.

411. Ms Williams said that there was insufficient information for Ms Dunne to make a decision on suitability, because she had not identified the client's expenditure in retirement; the value of his state pension; the funds/charges of the receiving scheme and whether he intended to rent out the new property.

412. We do not agree, for the following reasons:

(1) Ms Dunne had identified the client's current expenditure (which was considerably less than his income) and established that this would reduce once the mortgage had been paid off.

(2) Given the client's wealth, the value of the state pension was not a material consideration. In addition, it was clear that the client had more than sufficient assets and income to sustain his lifestyle in retirement.

(3) Ms Dunne completed the Suitability Report on 9 June 2017 and sent it to the IFA on 15 June 2017, after the 2017 Alert. She included information about the fund into which the CETV would be invested and the related charges: being 2.2% pa of the fund value, plus an establishment fee of £90 and an annual fee of £240. Although the 2.2% was not incorporated into the TVAS, it was added to the end of the Suitability Report with a warning that the effect would be to reduce his returns.

(4) Information about what the client intended to do with the new property was not required: whether it was sold or rented, the TFC would have been invested in an asset.

413. Mr Pritchard criticised the Suitability Report because it had wrongly said that there was no cap on the amounts payable under the FSCS, but in context that error was not material.

414. Having taken into account all relevant factors we find not only that there was sufficient information for Ms Dunne to provide a personal recommendation, but also that the advice to transfer was suitable.

Client J

415. The client was aged 56 and divorced with no dependants. She worked as a senior tax adviser and had earnings of £82k pa; equity ISAs of £45k and £30k of premium bonds. Her monthly expenditure of £2.4k included mortgage payments of £1.5k; each month she had a surplus of income over expenditure of £1.25k. She planned to retire at 70 and did not want to retire any sooner.

416. The client carried out two Pension Transfers, one from a DB scheme formerly operated by her employer, where the CETV was £549,725, and a much smaller scheme with a CETV of £36,242. The total TFC was thus £146,491. The critical yield for the former was low at 2.4%; for the latter it was 6.9%. This was above the intermediate growth rate of 5% set by the

Authority but below the high rate of 8% (see §86). Both rates would have increased had the charges of the receiving scheme been included.

417. The client's objective was to take the maximum available TFC and use it to build houses; she said that the flexibility of the remaining DC fund was "essential" to enable her to make further withdrawals if required to support that project. In due course, she planned to sell or rent the houses she had built in order to increase her income. She would be unable to carry out that venture if the funds remained in DB schemes. Her risk attitude was "adventurous" in relation to this property investment, but in relation to the money remaining within the DC scheme, her risk attitude was "cautious".

418. Ms Williams decided that Ms Dunne had insufficient information to make a personal recommendation because: the client's risk appetite was unclear; there was insufficient information to assess her capacity for loss or income needs in retirement; the likely proceeds or income from the property development had not been established, and neither had the amount of her current mortgage or her state pension entitlement. Finally, there was no information about the funds/charges into which the remaining DC money would be invested.

419. We disagree. The client's risk appetite was clear; there was more than sufficient information about her assets, income and expenditure to assess her capacity for loss; there was no basis to consider that she would be unable to meet her expenditure in retirement, including her mortgage (if it had not been paid off during the sixteen years which remained before she stopped work). The future income/proceeds from the property development would provide a further financial cushion, and the amount of the state pension would not make any difference in the context of her overall financial situation, and neither would the charges of the DC fund. The client did not want a pension before she was 70 (whether from that DB scheme or from an annuity), because she was still working and the pension/annuity would be taxable at 40%. The critical yield for the larger scheme indicated that the transfer value was generous. Although that for the smaller scheme was likely to have been high once the charges of the receiving scheme were included, critical yield was a relatively minor factor for this client, given that she wanted flexibility; did not want or need an annuity and had significant capacity for loss.

420. Mr Pritchard added the following further criticisms: that Ms Dunne did not know the location of the land in question and had not obtained proof of ownership, and that the amount of money required for the project had not been established. We again disagree. The PRQ stated that the client already owned the land, and it is plain from the documents on the file that she expected to complete the project with the TFC but wanted the extra flexibility afforded by the DC scheme in case of overruns.

421. Not only was there sufficient information for Ms Dunne to provide personal recommendations to this client, we agree with her that the advice was suitable. The outcome would have been the same, whether or not the funds/charges of the receiving scheme had been taken into account.

Conclusion on the "insufficient information" cases

422. For the reasons set out above, we conclude that in one of these three files there was insufficient information to give Pension Transfer advice, but on the information available, the advice was unsuitable. In the other two cases (one of which involved two Pension Transfers), Ms Dunne had sufficient information and the advice was suitable for the client.

THE "UNSUITABLE" FILES

423. In five cases, the GT assessors decided that Ms Dunne had obtained sufficient information to give advice, but had wrongly decided that a Pension Transfer was "suitable". Ms Williams was one of four assessors; she reviewed Client O's file.

Client K

424. HDC opened the file for this case in May 2015, a month after the client's 61st birthday. He was a self-employed kitchen and bathroom fitter, earning around £40k pa. His wife earned £5k pa as a receptionist. He had an "emergency fund" of between £15k and £18k, and a life insurance policy which would pay £100k on death; improving death benefits was therefore not an object. He had pension income in payment of £124 pcm, and two small policies worth around £14.5k in total. There was no information on file about his or his wife's state pension entitlements. He did not disclose the couple's expenditure, other than that they had no mortgage and no surplus of monthly income over expenditure. The Pension Transfer concerned a deferred annuity with a NRD of 62. The CETV was £123,136, so the TFC was £30,784.

425. As the client was already 61 when HDC began working with the IFA on the Pension Transfer, he had less than a year to run before he reached the NRD[11]. Had he remained within the DB scheme, he would have received an annual pension of £5,654 indexed at 3% pa; there would also have been a 50% spouse pension. We were unable to identify from the file the reduced pension which would have been payable had he taken the TFC.

426. The client's stated objective in making the Pension Transfer was to take the TFC now, and use it for home improvements, although the information on the file did not specify how much of the TFC he would use for that purpose, or what he would do with any excess. In relation to the balance of the fund, the file contained conflicting information, stating that the client (a) wanted to draw the TFC "immediately without taking a pension income", but also (b) wanted to reduce his hours and top up the income by drawing down on the DC fund.

427. As is clear from the above summary, there were a lot of gaps in the information available to Ms Dunne; Mr Pritchard submitted that in consequence she was not able to advise on suitability. The GT assessor noted most of the omissions, but said there was enough information to find that the transfer was unsuitable.

428. We agree with the GT assessor, and find that the advice to transfer was unsuitable for the following reasons:

(1) At the time of seeking the advice, the annuity had nearly reached its payout date, when the client could have obtained a pension for life of £5,654 with guaranteed indexation, or a lower indexed pension and TFC.

(2) The client had minimal other income in retirement (the state pension position not having been considered) and his expenditure was unknown.

(3) There was little information about why the client needed the TFC, other than vague statements about the home improvements: there was nothing about their cost; why they were necessary; why the emergency fund could not be used for that purpose; why the renovations could not be deferred until after he reached 62, or about how much of the TFC would be left over and what would be done with any excess.

(4) The lack of any information about the funds/charges in the receiving scheme was also relevant, but our conclusion would have been the same had we disregarded that factor.

Client L

429. The client was aged 51, married with two school-age children, and a gross salary of £14k; she and her employer each contributed £65 pcm to a workplace DC scheme. Her husband was a self-employed builder earning £18k pa; he had no pension entitlements. The couple also had

[11] In the event, because of delays, the Pension Transfer was not processed until May 2016, after his 62nd birthday.

£2.5k pa in child benefit and tax credits. Their monthly expenditure was £2,269, one-third of which related to mortgage payments and a further £229 related to loans and credit cards. Their home was worth £175k but the total mortgage figure (and thus the equity in the property) was not in the file. The couple had an "emergency fund" of £500. The client's attitude to risk was cautious: she said she would "forgo potentially large gains if it means the value of my retirement fund is secure" and described herself as "a conservative investor who requires limited exposure to the equity market" who was "willing to accept growth in line with inflation". Both the client and her husband planned to retire at 65. The Pension Transfer concerned a contracted-out DB scheme from a previous employment, under which at age 62 the client was entitled to an index-linked pension of £12,213, or £8,969 plus TFC of £59,790. The CETV was £215,520.

430. As the client was only 51, she was unable to take any TFC at the time of the transfer; the Suitability Report stated that at age 62 she would be able to take £90,666 from the receiving scheme (compared to the £59,790 from the DB scheme) but we were unable to locate the calculations which underpinned that figure.

431. The client's main objective was to take the maximum TFC when she reached 55, which she would have been unable to do if she remained in the DB scheme, and use it to "clear some of the mortgage and any outstanding liabilities to reduce expenditure". Her secondary objectives were to improve death benefits and have flexibility to draw income from the pension fund after retirement. Consistently with Ms Dunne's TII model, there is no information on the file about the funds into which the Pension Transfer would be invested, or the related charges.

432. The GT assessor decided there was (a) insufficient information provided for Ms Dunne to make a personal recommendation, but that (b) on the basis of what was known, the advice was unsuitable. We agree. As the PRQ stated, the DB scheme represented "a major proportion" of the client's retirement fund and would have provided a stable, index-linked income; the effect of the transfer was to remove that scheme without taking into account the client's relevant circumstances (see COBS 19.1.3G), and in particular the following key factors:

(1) The main focus in the Suitability Report was the comparison between the TFC of £59,790 available at age 62, and the estimated £90,666 said to be available from the receiving scheme. Since the client wanted as much TFC as possible, that comparative figure was attractive. However, its basis was doubtful, given that the client wanted to take her TFC when she was 55, not when she was 62, and the amount would plainly be different; it would also be affected by the charges levied by the receiving scheme in the meantime (which were unknown).

(2) If the client made the Pension Transfer the couple would be reliant in retirement on the client's current DC scheme; the balance remaining in the receiving scheme and the state pension, because the husband had no pension savings. Ms Dunne did not know:

(a) the value of the DC scheme into which the client and her employer were contributing; or

(b) the amount of state pension to which the client would be entitled, given that the ceding scheme had been contracted out, and she knew nothing about the husband's state pension entitlement.

(3) Ms Dunne also failed to obtain information about the amount of the couple's borrowings; all that was known was that these were costing £229 pcm.

433. The client was a conservative investor who wanted limited equity exposure and was willing to accept growth in line with inflation, exactly what the DB scheme would have provided. Ms Dunne advised her to move her retirement provision from that safe haven to a

DC pension, and that was not in her best interests. We again confirm that our finding would have been the same had we had not taken into account the TII factor.

Client M

434. The client was 56 and married with three children, two of whom were teenagers. He had his own company providing health and safety services; both he and his wife worked in the company and drew a salary of £11k pa; in addition, he took dividends of £30k and she took dividends of £20k. Their net income exceeded expenditure by £1,860 pcm, and they had almost £200k of equity in their home. They both planned to retire at age 67. On his PRQ the client ticked the "high risk" box, which read:

> "I am an investor with previous experience of equity markets or I am happy to accept a high degree of risk in exchange for the possibility of a higher pension in retirement."

435. He had a DB scheme with an NRD of 65. This would have provided him with a pension of £6,731pa (or £5,205 plus TFC of £34,699); the CETV was £185,849 and the critical yield required from the personal pension to match the defined benefits being given up was extremely low (assuming retirement at 65). The client already had a DC scheme in drawdown from which he had taken the TFC, this had a current value of £143,690; he also had another SIPP with a value of just over £5k.

436. He wanted to transfer the CETV to the DC scheme so he could access the TFC of £46,452 and invest it in his business; he also wanted to be able to access his pension fund on a flexible basis and to improve the death benefits. He did not need a pension income at the DB scheme's NRD as he would still be working. The GT assessor decided that Ms Dunne had not obtained sufficient information about the client's income or assets.

437. As Ms Dunne said, in her reply to the Authority when sent the GT findings, it was difficult to understand the basis for that conclusion: the file contained all the information set out in the three paragraphs above and more, and that information was relied on in the Suitability Report. It is true that Ms Dunne had not established the amount of the state pension, but in the context of the client's wider financial position, that was a minor factor.

438. The GT assessor additionally criticised Ms Dunne for not having obtained "details of the client's company turnover and cash balance". In subsequent comments added by Ms Williams, after she received Ms Dunne's response in 2021, she said the "company turnover and cash balance" was relevant because the client was planning to invest his TFC in his business and Ms Dunne's failure to consider whether his company was financially viable meant that she had failed to show that the Pension Transfer was in the client's best interests.

439. We disagree: on the evidence, the client and his wife were withdrawing regular and significant dividends from the company, which they would have been unable to do had the business not been profitable. The PRQ said that the client expected that their income from the company would grow at a rate which outpaced inflation. Ms Dunne was not required to go further, and assess the future viability of the company's business as a precondition for finding that the Pension Transfer was in the client's best interests. COBS 9.2.5R provided that "[a] firm is entitled to rely on the information provided by its clients unless it is aware that the information is manifestly out of date, inaccurate or incomplete". Ms Dunne had received current information and there was nothing to indicate that it was either inaccurate or incomplete, but rather the contrary.

440. Finally, the GT assessor also said that as Ms Dunne:

> "had no knowledge of where the funds would be invested, we consider [she] did not have a reasonable basis for believing the transaction met the client's

> investment objectives, that they were able financially to bear any related financial risks, and had the necessary experience and knowledge in order to understand the transaction."

441. We again disagree. The client was an "adventurous" investor prepared to take a high degree of risk; he was running his own business and had other DC pension savings worth almost £150k, as well as significant equity in his home.

442. The GT assessor went on to hold that the Pension Transfer was unsuitable because Ms Dunne had not considered whether the client could have borrowed money via a loan or mortgage to invest in his business rather than taking the TFC. When she was provided with the reviewer's comments, Ms Dunne gave the following response, with which we agree:

> "a business loan, personal loan, secured loan or mortgage all put the family home at risk and decrease the financial security which goes against the basic tenet of financial planning. In my personal view none are as suitable as accessing monies held in an unused pension fund. If a client were advised to take out a mortgage to invest in a pension, that would be deemed totally unsuitable. This is what is being effectively suggested here – take out a mortgage and retain the investment in the [DB scheme]."

443. The GT assessor went on to suggest that the Suitability Report should have considered the option of taking money from the existing DC scheme. However, as Ms Dunne pointed out under cross-examination, any drawdown from the DC scheme would have been taxable (we add that, given the client's existing income, the tax rate would have been at least 40%). As a result, to obtain the same net investment amount as provided by the TFC of £46,452, he would have had to withdraw £77,420 from the DC scheme instead of leaving it to grow essentially tax free within the pension wrapper.

444. Before giving advice, Ms Dunne had told the relevant person at HDC "it might be better to look at a SSAS [Small Self Administered Scheme] and make a loan to the business, which would be far more tax efficient". However, the Suitability Report did not discuss that option and there is no information on the file explaining why this was the case. Under cross-examination, Mr Pritchard criticised Ms Dunne for not having included that option within the Suitability Report. Ms Dunne did not remember what had happened (which is unsurprising given that ten years have passed) but suggested that it might have been omitted because the IFA had said a SSAS would not be appropriate. That too would be unsurprising, as a SSAS is more complicated than a personal pension, and normally requires the individual to have ongoing involvement in the scheme administration. However, even if Ms Dunne had included that option in the Suitability Report, that would not have changed her advice that transferring *out* of the DB scheme was suitable.

445. We therefore agree with Ms Dunne that the Pension Transfer was in the client's best interest and suitable because:

(1) the client and his wife were expecting to work until aged 67, so income from the DB scheme when he was 65 was not required (and would be taxable);

(2) he already had significant money in the DC scheme which could be used to provide a pension;

(3) they also had £200k of equity in their home;

(4) the critical yield was extremely low, indicating a generous transfer value;

(5) the transfer met the client's objectives of being able to access his pension fund on a flexible basis and improving the death benefits; and

(6) putting the TFC into the business (which was providing the family income) was an investment, not revenue expenditure. There was no reasonable alternative source of that extra investment for the reasons given by Ms Dunne, and waiting for the TFC from the DB scheme would delay the benefit to the business for a further ten years.

446. Ms Dunne's failure to consider the funds/charges in the DC scheme, i.e. the TII issue, did not change that outcome.

Client N

447. The client was aged 60; he was the director of a company providing legal advisory services which had been running for twelve years. He took a salary which varied from £11k to £1k pcm, but at the time of the PRQ in 2016, it was £2.5k pcm ie £30k pa. His wife earned £6k pa. Their expenditure exceeded their income by around £1.4k pcm; the PRQ said this was caused by "living costs" (which did not include a mortgage or loan payments). The shortfall had to date been met by savings but there was nothing remaining.

448. The client had a DB scheme with a NRD of 62, but earlier retirement was possible subject to the consent of his former employer and the pension trustee. If he retired now, he would receive a pension of £38,700, or £29,150 plus TFC of £194,300. The CETV was in excess of £1.27m; the critical yield required for a joint life annuity at age 60 was 21.7%, which was extremely high.

449. The client completed the PRQ on the basis that he wanted to access the TFC and take an income from the balance of the transferred funds because (a) his savings were running out; (b) he had an outstanding tax bill of £11k which he could not pay; (c) he wanted to carry out some home improvements; and (d) he wanted to control the income he received from the scheme.

450. He ticked the boxes on the PRQ which said "I have little in the way of other assets or pensions to fund my retirement" and "inflation-proofing my income is important to me"; when asked to rate the degree of risk he was willing to take in his financial affairs, he ticked the "extremely low risk" box, later adding that he considered "security to be generally more important than increasing my income". Consistently with those statements, he also said he was "prepared to forego potentially large gains if it means the value of my retirement fund is secure" and he strongly disagreed with the statement: "I can tolerate the risk of large losses in my pension fund in order to increase the potential returns". In answer to the question "if you had a portfolio of investments which dropped in value over a 1 year period, what loss would you be comfortable with" he crossed out all the options and wrote "none".

451. The GT assessor found that the advice to transfer was unsuitable given the client's risk profile; the lack of any other pension provision or assets, and the fact that the DB scheme would pay him an indexed annual pension in less than two years of £29,150 (or £2.5k pcm) plus TFC of £194,300. Ms Dunne disagreed, saying the pension income would have been insufficient on an ongoing basis to cover his monthly shortfall.

452. We agree with the GT assessor. Early retirement was possible with the consent of the trustees; on the reasonable assumption that this would have been granted, the pension income of £2.5k was more than the client required to meet the monthly shortfall, and the TFC would have paid his tax bill and allowed him to carry out his planned home improvements. In contrast, moving the fund to a DC scheme clearly did not match the client's risk profile, while the critical yield was very high, indicating a low transfer value. Our conclusion would have been the same irrespective of the TII issue.

Client O

453. The client was 55 years old and married with one adult child; she earned a salary of £11,580 pa and her husband earned £23k. They had no other income**.** There was a surplus of

income over expenditure each month of £700. Their home was worth £300k with a mortgage (the amount of which was not identified) and they had ISAs of £35k**.** She had DC pensions worth £29.5k and he had DC pensions worth £74k. They both wanted to retire at 60. She said she would ideally like her pension to be inflation-proofed and described her attitude to risk as "low to moderate".

454. She had a DB scheme which had been contracted out; it was projected to provide an indexed pension at age 60 of £18,563, or a lower pension of £15,749 plus TFC of £104,039. If she died first, her spouse would receive a two-thirds pension**.** The CETV was £682,217.

455. The client's objectives were to:

(1) take TFC of £10k for home improvements;

(2) have flexible access to her pension funds; and

(3) to change the death benefits so that her husband would have a lump sum rather than a pension if she predeceased him (and if not, that a lump sum would be paid to her daughter).

456. We agree with the GT assessor, Ms Williams, that Ms Dunne should not have given advice in the absence of information about the amount of the mortgage and about the client's state pension entitlements. We also agree that the advice to transfer was unsuitable, because:

(1) The couple had very little provision for retirement other than the DB scheme; the amount in the DC schemes was relatively low, and as the DB scheme had been contracted out, this would reduce the client's state pension.

(2) There was no need for the TFC: the couple had a surplus of income over expenditure which could have been used to pay for the £10k of unspecified home improvements, or money could have been withdrawn from the ISAs.

(3) As Ms Dunne acknowledged in her Suitability Report, the improved death benefits could have been achieved by life cover; the client had sufficient income to pay the premiums and she was in good health, so the premiums were likely to have been reasonable.

457. Ms Dunne's failure to consider the funds/charges in the DC scheme, i.e. the TII issue would not have changed the outcome.

Our conclusions on the "unsuitable files" and on the Sample overall

458. For the reasons set out above, we have found that in four out of five of these cases, the clients received unsuitable advice.

459. Overall, we have found that out of the Sample of 16 cases, Ms Dunne's transfer advice was suitable in ten cases and unsuitable in six cases. Thus, 62.5% of the Sample clients were given suitable advice, and 37.5% were not.

QUANTIFICATION

460. Ms Dunne's Decision Notice said:

> "…during the course of its file review exercise in 2019-2020, the Authority found that all 17 files it reviewed were non-compliant with regulatory rules and guidance relating to the suitability of Pension Transfer advice…"

461. Mr Fenech's Decision Notice similarly said:

> "All 17 files were therefore considered to be non-compliant with the Authority's COBS rules because HDIFA either failed to obtain the information necessary to advise the customer or the advice provided to the

> customer was unsuitable, and in none of the files reviewed was the advice given considered suitable."

462. The Authority therefore based the Decision Notices in part on their assessment that the advice reviewed by GT was 100% non-compliant, either because Ms Dunne had insufficient information to provide advice on suitability, or because she had wrongly advised that a Pension Transfer was suitable when it was unsuitable. The Authority then extrapolated from that result to find that all of Ms Dunne's client advice was similarly non-compliant.

463. We have come to a very different result as to the suitability of the advice in the Sample. However, before deciding how that outcome maps across to the whole population of Ms Dunne's files, we considered the Authority's two earlier file reviews, one of which had been carried out in 2017 by Supervision ("the Supervision Review") and one which had been carried out by Enforcement in 2019 ("the Enforcement Review"); we also considered the evidence relied on by the Authority relating to FSCS claims.

The Supervision Review

464. As set out earlier in this decision, in 2017 Supervision carried out a review of eight files, and told the Applicants that five were suitable, two were unclear and one was unsuitable, see §209.

465. Although those outcomes were subsequently amended to take into account the TII model (see §212), we have used the original figures, both because of the limitation issue and because the Authority originally considered that five were suitable (despite the lack of information about the receiving scheme). That was consistent with the position set out in the 2014 Thematic Review that "a disclosure failing would not necessarily result in a suitability failing where there is no material impact on the outcome for the member", see §141.

466. Mr Pritchard said that the Authority had disregarded the Supervision Review because it had been carried out using the IAAT and not the pension-specific DBAAT, which was only developed subsequently. Mr dos Santos and Mr Cherry did not ask us to make findings of fact about the eight clients considered as part of the Supervision Review, but submitted that as the files were not only reviewed by the Authority but also quality controlled by qualified PTSs, the Tribunal should have regard to their conclusions. We agree.

467. The outcome of the Supervision Review was that 62% of the files were found to contain suitable advice; those findings are almost identical to those we have made following our review of the Sample.

The Enforcement Review

468. As explained at §234, between 30 April and 6 June 2019, Enforcement reviewed a random sample of Ms Dunne's files; the five files selected were assessed by Mr Dilip Vekariya and quality controlled by Mr Stephen Bell, both of whom had received training in relation to assessing Pension Transfers. Having used the DBAAT, they found that the advice given to three of the clients was "suitable" and that the advice given to two clients was "unsuitable", so 60% and 40% respectively.

469. We asked the parties if they were placing reliance on the Enforcement Review. Mr Pritchard was clear that the Authority had disregarded it, on the basis that neither Mr Vekariya or Mr Bell were PTSs. Mr dos Santos and Mr Cherry again said that they were not asking the Tribunal to make findings of fact about the five clients considered as part of that Review, but submitted that the conclusions were relevant, because the Authority had used the same tool – the DBAAT – and the reviews had been carried out by trained members of the Authority's staff, who had concluded that three out of the five were suitable.

470. Mr dos Santos then submitted that these files should be taken into account when the Tribunal calculated the overall percentages: in other words, that we should not simply extrapolate from the Sample of 16 but should add these further five files to make a total of 21.

471. We disagree: the Sample had been selected from the total population. The five files in the Enforcement Review were a *separate* random sample from the *same* population[12], and it would be wrong to add them together and then extrapolate from the total of 21 files.

472. Nevertheless, we agreed with the Applicants that the overall outcome of the Enforcement Review was relevant: it was based on a random sample and carried out by trained staff using the same DBAAT tool, and had found that 60% of the advice given was suitable. This is almost the same as the conclusions of the Supervision Review, and our own findings having considered the files in the Sample.

FSCS

473. In May 2021, some four months before Enforcement opened its investigation into the Applicants, the Authority sent Ms Dunne a letter asking for the contact details of all her clients between 1 April 2015 to 30 September 2018 (we observe that these dates were not the same as either Applicant's relevant period).

474. The letter went on to say that the Authority intended to write to Ms Dunne's clients and "highlight our work and concerns with the suitability of DB advice provided by FSML and invite any customers concerned with the advice they received to contact the FSCS".

475. The Authority provided the Tribunal with a schedule of 18 claims made to the FSCS relating to advice provided by Ms Dunne, of which ten had resulted in a payment; Mr Pritchard relied on this FSCS schedule in his submissions.

476. However, we were provided with no evidence on any of the following:

(1) the date on which that advice was provided by Ms Dunne (i.e. whether it was within the relevant period);

(2) the clients on the claims schedule (i.e. whether they were in the Sample);

(3) whether the Authority did write to all the 353 clients[13] who received Pension Transfer advice from Ms Dunne during the relevant period, inviting them to write to the FSCS; and

(4) if so whether those 353 letters resulted in ten successful claims.

477. We were thus unable to place any weight on the FSCS schedule, and have not taken it into account in our decision.

Quantification

478. As a result of our 16 file reviews, we have found that Ms Dunne advised six clients to make a Pension Transfer when that advice was unsuitable; those figures are consistent with the outcomes of the Supervision Review and the Enforcement Review.

479. Using Dr Purdon's Table, it follows that we can be 95% confident that between 18% and 62% of Ms Dunne's clients were advised to transfer when that advice was unsuitable. Responsibility for that wide confidence interval of 44% (from 18% to 62%) lies at the door of the Authority, for the following reasons:

[12] It is true that the population was not completely identical, because the eight files considered in the Supervision Review had been excluded from the Sample but included in the Enforcement Review, but that difference is immaterial given the total number of files.

[13] The figure from §311: 345 files plus the 8 removed because they were reviewed by Supervision.

(1) the Authority agreed with Dr Purdon on 22 May 2019 that in respect of firms such as Ms Dunne's which were already under investigation, it would "identify a sample of files necessary to achieve 95% confidence to a 15% margin of error";

(2) it also agreed with Dr Purdon that it would carry out that exercise in two stages, initially reviewing the Table A sample of 20 files, with the remaining 19 files being added if that was considered necessary following the initial review;

(3) when the Authority sent Dr Purdon the original results of GT's review, Dr Purdon said they could be 95% confident that between 39% and 79% of the total population was non-compliant; this was well outside the agreed 15% margin of error;

(4) the Authority did not then extend the sample, even on a precautionary basis, but instead "recalibrated" the outcomes, with the result that 100% of the files were categorised as "non-compliant"; and

(5) contrary to its usual policy, the Authority did not send Ms Dunne's comments on those "recalibrated" files back to the original GT reviewers (see §322ff).

480. It was common ground, and we agree, that the Sample was statistically valid and so can be used as the basis for extrapolation to the total population of Ms Dunne's files. In reliance on our reviews (the outcomes of which are consistent with the Supervision Review and the Enforcement Review) we find as a fact that at least 18% of the total population of Ms Dunne's clients were given advice to carry out a Pension Transfer when that advice was unsuitable. The Authority has not proved that Ms Dunne gave unsuitable Pension Transfer advice to any higher percentage of her clients, and we make no related finding.

Negligence

481. The Authority's case was that Ms Dunne was negligent in advising clients to make a Pension Transfer, when it was not suitable for the client to make that Transfer. In relation to at least 18% of her clients, we agree: her standard of conduct in advising those clients fell below that which was reasonable for an experienced professional with many years' experience in her field. This represents a culpable failure to exercise due skill, care and diligence.

OTHER FAILINGS?

482. We have so far considered whether Ms Dunne had sufficient information to give advice, and if so, whether the advice was suitable. But that was not the only issue. The Authority's position, as set out in the Decision Notices and as supplemented by Mr Pritchard, was that Ms Dunne had breached SoP 2 because:

(1) the Initial Reports were completed and issued by HDC and not by Ms Dunne;

(2) she had issued some Suitability Reports without having checked them;

(3) she had sometimes sent Confirmation Letters and Advice Declarations to the ceding scheme before the Suitability Reports to the client;

(4) she had failed to:

(a) communicate information to clients in a way which was clear, fair and not misleading, such that clients were not placed in an adequately informed position from which to make a decision to transfer;

(b) sufficiently tailor her Suitability Reports to individual clients and used generic standardised reasons in purporting to explain why a recommendation to transfer out of a DB Pension Scheme was suitable. Suitability Reports nominally compiled for different clients were substantially identical in content;

(c) gather all necessary information regarding her customers at the fact-finding stage, including details of their financial situation, investment and specific retirement objectives, and Attitude to Risk; and

(d) assess properly, on the basis of the information obtained, or give due consideration to, her customers' financial situation, their retirement needs and whether they could financially bear the risks associated with the Pension Transfer.

483. For the reasons set out below, we agree with the Authority that there were a number of serious issues in relation to communications with the clients and the content of the Suitability Reports. However, we begin with some positive findings.

The information gathered

484. Each of Ms Dunne's files contained around 1,500 to 2,000 pages, including extensive information about the clients, their partners and other related family members, their assets, income and their expectations. HDC asked for more information in almost all cases in addition to that provided by the IFA, and continued to press for further facts where responses remained incomplete. The level of detail can be seen from our summaries of the cases in the Sample.

485. It is of course true that Ms Dunne did not know the funds into which the Pension Transfer would be invested, but the Authority is out of time to rely on that issue, at least in relation to the penalty charged on Ms Dunne. This is thus not a case, like that described in *Fox-Bryant v FCA* [2024] UKUT 357 (TCC) ("*Fox-Bryant*"), where important information was routinely omitted, see for example [65] and [208] of that judgment**.** When Ms Hill carried out her review, she concluded that "very complete information appears to have been requested and received from the scheme" and "there is also a good level of accuracy within the documentation".

486. We move on to consider the criticisms made of Ms Dunne's approach, other than in relation to the TII issue and the provision of unsuitable advice, about which we have already made findings.

Retirement objectives, needs and income

487. As can be seen from the list of points cited from the Decision Notice at §482, the Authority decided that Ms Dunne had breached SoP 2 because she had routinely failed to gather information about the clients' retirement objectives, their retirement needs and their "anticipated income needs during retirement". Ms Dunne said this was unfair, because those requirements were first articulated in CP 17/16, which had been issued the day before the end of her relevant period.

488. Ms Dunne is right that these requirements were not explicit until the publication of CP 17/16. This stated at least five times that it was providing "clarity" to the Authority's earlier rules and guidance; it specified that the new approach would "provide advisers with a framework which better enables them to give the right advice"; said that "the clarity provided by this consultation should better equip advisers to give the right advice", and would "help advisers assess suitability and to clarify our expectation", see §215ff.

489. It is however clear from our review of the Sample that retirement-related issues required consideration in some cases under the existing COBS rules, see Clients H, K, L and O. We nevertheless agree with Ms Dunne that she did not breach SoP 2 because she did not *routinely* include these retirement elements in her Suitability Reports, given that the Authority itself accepted that its guidance on this point had been unclear.

The HDC covering letter

490. HDC was unregulated but carried out the activities we described at §99ff. We make the following further findings of fact:

(1) The TVAS and Initial Reports were prepared by HDC and sent to the IFA for discussion with the client. Although the Initial Reports stated that HDC was not regulated and that the Initial Reports were "not designed to meet [the Authority's] requirements in relation to Pension Transfer Advice", they were issued with a standard covering letter which said "overall, we recommend that a transfer proceeds and so we need to move forward with the advice process".

(2) That covering letter continued by saying:

> "you need to consider whether transferring your pension is the most appropriate way of achieving your aims. We suggest that you discuss these options and any other alternatives available to you with [the IFA] before making a final decision."

(3) It then added "you should now meet with the client and discuss the Initial Report. During that discussion you will agree whether or not to proceed with a transfer…"

491. It was, however, not for HDC to give pre-emptive advice that the transfer was suitable, nor should the IFA and the client have been told to decide whether to make the transfer. It was Ms Dunne's responsibility to give that advice. As the owner and director of HDC, she received Pension Transfer work via that company. She had a responsibility to ensure that its communications accurately described her own responsibilities, and the covering letter to the Initial Reports did not do that.

The Suitability Reports from February 2017

492. HDC drafted the Suitability Reports, which were always issued under Ms Dunne's name. We begin by making findings of fact which were not in dispute:

(1) In 2012, HDIFA was providing Suitability Reports in relation to around 40 Pension Transfers per year. At this time, Ms Dunne worked from home with a part-time assistant and a photocopier.

(2) By June 2017, HDC employed around 20 staff in addition to Ms Dunne herself.

(3) In the relevant period of 26 months, HDIFA issued 360 Suitability Reports, around 166 per year.

493. In her witness statement Ms Dunne said that by June 2017, two HDC employees had acquired the AF3 qualification in pension planning, but they were not PTSs. In her oral evidence she said that those two employees had acquired the AF3 qualification by February 2017. That evidence was not challenged, and did not contradict that in her witness statement, and we accept it.

494. There was inconsistent evidence as to the extent of Ms Dunne's involvement in the Suitability Reports. In her witness statement, Ms Dunne said:

> "Until February 2017, I personally reviewed and approved all the suitability reports before they were sent. After that, it became impractical for me to do all of them. We agreed I would review one in ten."

495. Under cross-examination from Mr dos Santos, she said that until February 2017 she went through the Suitability Reports "line by line", and after that date, she got HDC staff "to do the proofread" but still "turned [her] mind to review the advice". When Mr Pritchard pressed her on this point, Ms Dunne said that from February 2017 she was "involved throughout the process of gathering the data, discussing the options and putting together the Suitability Report" and "reviewed every single one". That evidence directly contradicted what she had said in her witness statement.

496. In order to decide whether Ms Dunne's witness statement was correct, or whether her oral evidence was correct, we considered the client files which underpinned the Suitability Reports dated after January 2017 (those for Clients B, C, E and I, as the rest were issued before that date).

(1) The file for Client B had no emails to or from Ms Dunne, and no file notes written by Ms Dunne about the client; all correspondence with the IFA had been completed by HDC employees, and the same was true of all other documentation.

(2) The file for Client C had a series of emails between Ms Dunne and the IFA about the tax paid on pension contributions, but these predated the TVAS and thus the Suitability Report.

(3) The file for Client E contained an email from Ms Dunne to the IFA about FSML's suspension, but all other emails were to and from HDC employees, as were the file notes.

(4) The file for Client I had a detailed note from Ms Dunne dated 17 March 2017 with comments on the TVAS. It ended with the words:

> "Having reviewed the TVAS prepared by the team, together with the information regarding the client circumstances in terms of capacity for loss, attitude to risk and aims and intentions, provided by you I'm satisfied a transfer is suitable."

(5) The Initial Report for that Client was dated 21 March 2017 and the Suitability Report was issued on 16 June 2017. Although Ms Dunne reviewed the TVAS, there is no evidence on file that she reviewed the Suitability Report.

497. We find as a fact on the balance of probabilities, taking into account that evidence and the wording of the witness statement (which was signed with a statement of truth) that after February 2017 Ms Dunne did not review all the Suitability Reports but only 10% of them.

498. COBS 19.1.1R required that:

> "If an individual who is not a pension transfer specialist gives a personal recommendation about a pension transfer or pension opt-out on a firm's behalf, the firm must ensure that the recommendation is checked by a pension transfer specialist."

499. Although by February 2017, two of HDC's employees had obtained the AF3 qualification, none was a PTS. Ms Dunne was therefore required to check every single one of the Suitability Reports, but did not do so. That was a breach of COBS 19.1.1R.

500. We return to Ms Dunne's change of evidence at §633, in the context of dishonesty.

Errors in the Suitability Reports

501. Some of the Suitability Reports contained inconsistencies and/or errors. For example:

(1) Ms Dunne accepted that the Suitability Report for Client K contained conflicting information, stating in one part that the client intended to "retire now" and in another that he had "no intentions of retiring yet".

(2) In the Suitability Reports for Clients H and L, Ms Dunne had assumed that the clients would receive a full state pension, when the evidence on file showed that the DB scheme in question had been contracted out.

(3) The "capacity for loss" part of Client O's Suitability Report had taken into account possible royalties. Ms Dunne agreed with Mr Pritchard that it was only after the GT assessor had criticised her references to those royalties (long after the issuance of the

Suitability Report) that she did some online research and identified that they had nil value.

(4) Ms Dunne omitted one of the pension funds, valued at over £1.1m, from Client G's Suitability Report.

502. We find, based on these and other inconsistencies and contradictions, that Ms Dunne did not carefully review the Suitability Reports before they were issued. This was a breach of the requirement that she act "professionally" as required by COBS 2.1.1R. In *Fox-Bryant,* the Tribunal said at [192] that pension transfers require "rigorous fact-finding and conservative, careful advice": it is the professional obligation of a PTS such as Ms Dunne to carry out that "rigorous fact-finding" and ensure that those facts are correctly recorded in the suitability reports.

Unnecessary information

503. It was common ground that the Suitability Reports were completed based on two templates. We add the following findings of fact:

(1) All the Suitability Reports were lengthy: for example, that for Client B was 55 pages and attached a "Pension Transfer Analysis" of 23 further pages. As the Applicants agreed at the meeting with the Authority on 15 June 2017, the Suitability Reports were "far too long and need streamlining".

(2) All the Suitability Reports included largely generic paragraphs, including some or all of the following:

(a) a section on indexation, which began (our emphasis) "Your [DB] pension, once in payment, *may also be* inflation protected", followed by a complex description of the rules which applied at different times, whereas the client needed to know if the DB pension *was* index-linked and if so on what basis;

(b) around two pages about personal pensions, SIPPs and Group Personal Pensions, without that information being tailored to the client;

(c) a page on contracting out and guaranteed minimum pensions, but without any explanation as to why that made any difference to the client;

(d) six pages on annuities, which were of marginal relevance in almost all cases;

(e) multiple references to the LTA, including in cases where the client's funds were well below that threshold;

(f) half a page explaining commutation factors, instead of simply setting out the TFC available from the ceding scheme; and

(g) a paragraph on setting up a discretionary trust and another on leaving the pension fund to a Nominated Beneficiary via a Nominee Account; neither was likely to be relevant.

504. We agree with Mr Pritchard that the use of templated passages which were not tailored to the customer "made the Suitability Reports unclear and risked obscuring important information". However, it was not the case that "Suitability Reports nominally compiled for different customers were substantially identical in content", as the Authority stated was the position in the Decision Notice. Each was individualised and took into account the information provided in the PRQs and that separately supplied by the IFAs.

Information about the disadvantages of the Pension Transfer

505. COBS 9.4.7R(3) provided that a Suitability Report must "explain any possible disadvantages of the transaction for the client"; COBS 19.1.2R required that it compare the benefits of the transfer with those of the ceding scheme, and must draw the client's attention to "factors that do and do not support the firm's advice". As part of this, COBS 19.1.7AG obliged the adviser "clearly [to] inform the retail client about the loss of the safeguarded benefits and the consequent transfer of risk" from the DB scheme to the client. The Authority's position was that Ms Dunne had not satisfied those requirements.

Findings of fact

506. Ms Dunne's Suitability Reports all began with an Executive Summary. The second paragraph read:

> "Generally, it is accepted that transferring from a Defined Benefit scheme, which is a type of Safeguarded Benefit, is unlikely to be suitable as the member is giving up secured guaranteed benefits in return for those which are dependent on investment return and annuity rates."

507. However, the Executive Summary did not explain why that was the position, but instead described the benefits of the Pension Transfer.

508. The Suitability Reports for the four Sample clients issued after January 2017 included a new final paragraph which read (emboldening in original):

> "As set out at the start of this Executive Summary, transferring from a Defined Benefit scheme, which is a type of Safeguarded Benefit, is unlikely to be suitable. This is because you will be giving up secured certain benefits in return for those which are dependent on investment return and annuity rates. **By transferring, you are accepting the investment and longevity risk alongside the possibility that the products accessible now may not be offered when you do actually retire.**"

509. Even in those cases, the intervening paragraphs (which covered almost four pages) did not set out the benefits offered by the ceding scheme, but instead focussed entirely on the advantages of making the transfer.

510. The benefits which would be lost on transfer were not set out until at around page 20, and then by reference to the TVAS, which was attached as an Appendix. The following paragraphs are complex and difficult to follow. Although there is more information later in the Suitability Reports, that too interwove the TFC available on a transfer with that available from the ceding scheme, and included complicated passages about commutation and changes introduced on 6 April 2006.

511. In order for the client to understand what was being given up by the Pension Transfer, the Suitability Report had to set out (a) exactly what the particular client would receive on retirement; (b) whether it was possible to take the DB pension sooner; (c) the amount of TFC available; (d) clear information about the rate of indexation; (d) the early retirement and death benefits; and (e) spousal pensions, where relevant. Although that information was present in the Suitability Reports, it was not emphasised and was sometimes difficult to locate.

512. Although Ms Dunne therefore complied with COBS 9.4.7R(3), because the Suitability Reports did "explain any possible disadvantages of the transaction for the client", and also compared benefits of the Pension Transfer with those of the ceding scheme, as required by COBS 19.1.2R; she did not draw the client's attention to factors that did not support the Pension Transfer, in breach of COBS 19.1.2R(3); and she did not comply with the requirement in COBS

19.1.7AG to "clearly inform the retail client about the loss of the safeguarded benefits and the consequent transfer of risk".

Provided late

513. The Pension Schemes Act 2015 came into force on 6 April 2015, on the same day as the Transitional Provisions and Appropriate Independent Advice Regulations 2015 ("the Independent Advice Regs"). Those provisions were therefore in force during the whole of the Applicants' relevant periods.

514. Section 48 of that Act is headed "independent advice in respect of conversions and transfers: Great Britain", and subsection (1) reads:

> "Where a member of a pension scheme has subsisting rights in respect of any safeguarded benefits, or a survivor of a member has subsisting rights in respect of any safeguarded benefits, the trustees or managers must check that the member or survivor has received appropriate independent advice before—
>
> (a) …
>
> (b) making a transfer payment in respect of any of the benefits with a view to acquiring a right or entitlement to flexible benefits for the member or survivor under another pension scheme;
>
> (c) paying a lump sum that would be an uncrystallised funds pension lump sum in respect of any of the benefits."

515. That provision prevented the ceding scheme from making a Pension Transfer unless and until it had received confirmation that the member had received "appropriate independent advice". Reg 7 of the Independent Advice Regs is headed "Form of confirmation of appropriate independent advice" and relevantly provides as follows:

> "Confirmation from the member or survivor that appropriate independent advice has been received must be in the form of a statement in writing from the authorised independent adviser providing the advice confirming—
>
> (a) that advice has been provided which is specific to the type of transaction proposed by the member or survivor;
>
> (b) that the adviser has permission under Part 4A of the Financial Services and Markets Act 2000, or resulting from any other provision of that Act, to carry on the regulated activity in article 53E of the Regulated Activities Order…"

Findings of fact

516. The Suitability Reports for Clients B, C and O said, in the Executive Summary:

> "In practice, this transfer has already been arranged and this Suitability Report is designed to formally confirm why it was agreed this was the most appropriate action for you at this time."

517. Client N's Executive Summary had almost identical wording, other than that the words "has already been arranged" was replaced by "is already being arranged".

518. In each of those cases, the ceding scheme had been provided with a Confirmation Letter from HDIFA before the Suitability Report had been issued to the client. The Confirmation Letters began:

> "Based on our Suitability Report, the above client has decided [s/he] would like to transfer the pension benefits [s/he] has in the [ceding scheme] to [the receiving scheme]."

519. Attached to the Confirmation Letter was a second letter, headed "Advice Declaration", signed by Ms Dunne, which began:

> "I – Heather Dunne of HDIFA – can confirm that [client] has taken advice from myself when considering the transfer from the [ceding scheme], which is a Safeguarded Benefit scheme, to [receiving scheme], which is a Flexible Benefit arrangement.
>
> I have confirmed within my recommendation that the transfer is in the client's best interest and therefore the most suitable option for their needs. The advice and recommendation I have provided are specific to this transaction."

Ms Dunne's position

520. When cross-examined by Mr Pritchard about these Confirmation Letters and Advice Declarations, Ms Dunne said:

> "There's no requirement for the suitability report to be issued prior to the transfer at that time. It was best practice. It was what we did most of the time, but on occasions, because of the three-month deadline and the guarantee deadline, we would have to submit the documentation earlier."

521. She also said that providing the Confirmation Letter to the ceding scheme in advance of the Suitability Report being issued protected the client from the risk of "financial detriment" if a new transfer value had to be obtained. In her view, it was "semantics" to suggest that the Confirmation Letters and Advice Declarations were wrong, because although the Suitability Reports had not been issued, the client "was taking advice" and there had been "discussions back and forth between us and the introducing adviser".

Discussion

522. Ms Dunne is correct that during the relevant period, COBS 9.4.4R provided only that the suitability reports had to be provided "no later than the fourteenth day after the contract is concluded", where "the contract" was that between the client and the receiving scheme. In 2020, COBS was amended to read "a firm must provide the suitability report to the client…in the case of a pension transfer or pension conversion, in good time before the transaction is effected…"

523. By the end of the hearing, it was common ground that during the relevant period, an adviser could provide the "appropriate independent advice" required by the Pensions Schemes Act, the Independent Advice Regs and COBS 9.4.4R in a less formal way, including orally: for example by saying:

> "I recommend you do the transfer and I've based it on gathering all the necessary information in order to give suitable advice."

524. However, we agree with the Authority that this had not happened in relation to Clients B, C, O and N, because *Ms Dunne* had not provided any advice to that effect. All that had happened was that the IFA had received the Initial Report, which included *HDC's* advice that the transfer was suitable, see §490(1), and the IFA had discussed that Initial Report with the client.

525. In consequence, these four clients will have carried out their Pension Transfers before they received their Suitability Report, the purpose of which was to make a recommendation for the client to consider. By triggering the transfer before the client had received the Suitability Report, the client was committed to what Ms Dunne accepted was "an irreversible investment decision" without being in a fully informed position.

526. That approach cannot be justified on the basis that a new transfer value might be required, or by the fact that obtaining that further value would involve a further (usually small) fee to the

ceding scheme. We return to the Confirmation Letters in the context of dishonesty at the end of this decision, see §620ff.

The role of the IFA

527. Ms Dunne relied in part on the fact that the Suitability Reports were not delivered directly to the client, but were sent to the IFA, who then discussed and explained them to the client. Mr Cherry emphasised that as regulated finance professionals acting in the client's best interest, the IFAs would explain to the client any parts of the Suitability Report which might be unclear or confusing. He said that the IFAs had "a separate obligation to make sure that the client understood the information that was being presented".

528. Mr Pritchard criticised that submission, saying that Ms Dunne was:

> "the only one in this process who's qualified to give that advice, is pushing on to the IFA a role that they're not qualified and not permitted to do, which is to give the advice, and…to police how clear the advice is that the clients are receiving."

529. We accept that in practice the IFAs will have assisted the clients to understand the Suitability Reports, but we agree with Mr Pritchard that Ms Dunne cannot abdicate her responsibility to the IFAs: she alone was required to advise on suitability and explain her conclusions in a way that the client could understand.

Conclusion on other failings

530. On the basis of the foregoing, we agree with the Authority that, in addition to breaching SoP 2 by providing unsuitable advice in at least 18% of cases, Ms Dunne also breached that Principle for the following further reasons:

(1) She allowed her company HDC to issue an Initial Report in which it (a) gave advice as to the suitability of Pension Transfers when it was not a regulated body, and (b) told the IFA and the client to make the transfer decision based on the Initial Report. This was a breach of COBS 19.1.1R, which required personal recommendations given by an individual who is not a personal transfer specialist to be "checked by a pension transfer specialist".

(2) Until February 2017, she reviewed all the Suitability Reports, but not with the care which was required, so that some Reports contained inconsistencies and/or errors. That was a breach of COBS 4.2R, which required communications with clients to be fair, clear and not misleading.

(3) After that date, she reviewed only 10% of the Suitability Reports, and so failed to comply with COBS 19.1.1R.

(4) Ms Dunne failed to gather the information necessary to give Pension Transfer advice in five of the Sample cases (Clients D, H, K, L and O), and this was a breach of COBS 9.2.1R.

(5) All the Suitability Reports included templated passages which were not tailored to the customer; these made the Reports unclear and risked obscuring important matters. In addition, information about what was being given up by the Pension Transfer was often hard to locate, and more prominence was given to the benefits of the transfer. That too was a breach of COBS 4.2R.

(6) In four of the 16 cases, Ms Dunne told the ceding scheme that she had advised the client that a Pension Transfer was suitable, before the Suitability Report had been issued and so triggered the transfer before the client had seen her written advice. Although this

was not a breach of COBS, it misled the DB scheme, which initiated the transfer before the client had received Ms Dunne's advice.

531. We agree with the Authority that in the above respects, Ms Dunne's conduct fell below that which was reasonable for an experienced professional with many years' experience in her field. Her breach of SoP 2 in those respects was therefore negligent.

OVERALL CONCLUSION ON MS DUNNE AND PRINCIPLE 2

532. Ms Dunne breached Principle 2 in that:

(1) she advised at least 18% of her clients to make a Pension Transfer, when that advice was not suitable; and

(2) there were systemic issues with all the Suitability Reports, and additional specific failings in some cases.

533. However, the Authority has not proved that Ms Dunne gave unsuitable Pension Transfer advice to more than 18% of her clients, and we have disagreed with some of the Authority's conclusions about the content of the Suitability Reports.

PART FIVE: MR FENECH – STATEMENT OF PRINCIPLE 7

534. The Authority issued its Decision Notice to Mr Fenech on the basis that he had breached SoPs 1 and 7. This part of our judgment relates to the alleged breach of SoP 7; we consider the alleged breaches of SoP 1 at Parts 6 and 7.

STATEMENT OF PRINCIPLE 7

535. During the relevant period, SoP 7 read:

> "an approved person performing an accountable higher management function must take reasonable steps to ensure that the business of the firm for which they are responsible in their accountable function complies with the relevant requirements and standards of the regulatory system."

536. The term "accountable higher management functions" included any Authority controlled function that was a "significant influence function". The Authority's Supervision Manual ("SUP") which relates to Appointed Representatives, provided at SUP 10A.5.3:

> "A significant-influence function, in relation to the carrying on of a regulated activity by an appointed representative, means a function that is likely to enable the person responsible for its performance to exercise a significant influence on the conduct of the appointed representative's affairs, so far as relating to the activity."

537. As the owner and director of FSML, which was Ms Dunne's principal, Mr Fenech thus held an "accountable higher management functions" and so was required to comply with SoP 7.

538. APER contained guidance as to the conduct which the Authority considers contravenes SoP 7; this included the following examples, with which we agree (our emphasis):

(1) Failing to take reasonable steps **to implement adequate and appropriate systems of control** to comply with the relevant requirements and standards of the regulatory system in respect of the regulated activities of the firm in question (APER 4.7.3G).

(2) Failing to take reasonable steps to **monitor compliance** with the relevant requirements and standards of the regulatory system in respect of the regulated activities of the firm in question (APER 4.7.4G).

539. SUP 12.4.2R read (our emphasis)

> "Before a firm appoints a person as an appointed representative…and **on a continuing basis**, it must establish on reasonable grounds that:
>
> (1)-(2) …
>
> (3) the firm has adequate:
>
> (a) controls over the person's regulated activities for which the firm has responsibility…"

540. In *Reynolds v FCA* [2017] UKUT 0313 (TCC) ("*Reynolds*"), the UT said this about the responsibility of the principal for the acts of its AR:

> "26. …the Authority has through its regulatory requirements imposed responsibility on a firm which is a principal of an appointed representative for the acts and omissions of the appointed representative. As is clear from paragraph 12.1.3 of the Authority's Supervision Manual (SUP), the main purpose of the Authority's rules and guidance in this area is to place responsibility on the principal firm for seeking to ensure that its appointed representatives are fit and proper to deal with customers in its name and to ensure that customers dealing with its appointed representatives are afforded the same level of protection as if they had dealt with the principal firm itself.
>
> 27. In particular, the effect of SUP 12.3.1G and 12.3.2G is that the act or omission of an appointed representative, in respect of the business for which the principal has accepted responsibility, is treated as the act or omission of the principal itself. As the Authority observed in this case…the principal has full regulatory responsibility (including for any liabilities that might arise) for ensuring that the appointed representative complies with the Authority's rules: a breach by the appointed representative is regarded as a breach by the principal firm."

THE POSITION OF THE PARTIES

541. The Authority's case was that Mr Fenech had breached SoP 7, and so acted negligently, because he failed to maintain adequate controls over Ms Dunne's business for which FSML was responsible as principal. Mr Fenech's position was that he had carried out an appropriate level of supervision and maintained adequate controls, taking into account Ms Dunne's qualifications and her experience.

542. As with Ms Dunne, the Authority accepted it was unable to impose a penalty on Mr Fenech for any alleged supervisory failures related to Ms Dunne's operation of the TII model, because that action was barred by limitation. The Decision Notice issued to Mr Fenech said:

> "The Authority accepts that it is time-barred from taking disciplinary action in respect of Mr Fenech's oversight of HDIFA's deficient two-adviser advice model, because it became aware that HDIFA was operating that model in July 2015."

APPROPRIATE SUPERVISION AND CONTROL

543. We have already found as facts that there were the following issues with Ms Dunne's work:

(1) In at least 18% of cases, the advice was unsuitable.

(2) The increasing volume of work meant that after February 2017, Ms Dunne only reviewed 10% of the Suitability Reports.

(3) Some client files contained inconsistencies and contradictions.

(4) The Suitability Reports were far too long and contained generic paragraphs, some of which were not tailored to the client.

(5) Although information about the disadvantages of the Pension Transfer was present in the Suitability Reports, those disadvantages were not emphasised and were sometimes difficult to locate.

544. In relation to Mr Fenech's supervision of Ms Dunne, we have already found that:

(1) Ms Dunne was highly experienced. By the time she became an AR for FSML, she had worked in the industry for 27 years, and been authorised and approved by the Authority more than 40 times.

(2) Ms Dunne had repeatedly said she would welcome a review of the approach she was taking, for example in August 2012, February 2014, and February 2016.

(3) She told Mr Fenech at the very beginning of their relationship that her work "causes major concerns for most people".

(4) In April 2013, Mr Fenech arranged for CEI to audit her work. Although no material concerns were identified, on 13 October 2014 (before the beginning of the relevant period), Ms Dunne told Mr Fenech that the audit had been "cursory" in nature.

(5) Despite Mr Fenech repeatedly telling Ms Dunne that a regular process would be introduced, there were no further reviews. In December 2014, Mr Fenech even made regular file reviews a condition of Ms Dunne remaining as an AR, but nothing happened.

545. We agree with Mr Pritchard that Ms Dunne's business "effectively operated in a silo without any meaningful compliance oversight". Under cross-examination, Mr Fenech conceded that (a) his checks had been inadequate, and (b) the only formal external review of Ms Dunne's files was that carried out by Ms Hill in May 2017, two months after he had provided Supervision with eight of Ms Dunne's files.

546. For the reasons set out above, and as conceded by Mr Fenech, he did not adequately supervise Ms Dunne and his breach of SoP 7 was negligent.

PART SIX: MR FENECH – RECKLESSNESS

547. The Decision Notice states that Mr Fenech breached SoP 1 because he "recklessly" permitted Ms Dunne to continue to use her TII model "despite concerns being raised" by Mr Ellis.

THE PRINCIPLE

548. SoP 1 reads: "an approved person must act with integrity in carrying out his accountable functions". In *Seiler v FCA* [2023] UKUT 00133 ("*Seiler*") at [42], the UT summarised the earlier case law, and relevantly said:

> "(1) There is no strict definition of what constitutes acting with integrity. It is a fact specific exercise.
>
> (2) …
>
> (3) Acting recklessly is another example of a lack of integrity not involving dishonesty. A person acts recklessly with respect to a result if he is aware of a risk that it will occur and it is unreasonable to take that risk having regard to the circumstances as he knows or believes them to be.
>
> (4) …
>
> (5) There are both subjective and objective elements to the test of what constitutes a lack of integrity. The test is essentially objective but nevertheless involves having regard to the state of mind of the actor as well as the facts which the person concerned knew."

549. Subparagraph (3) above was subsequently endorsed by the Court of Appeal in *Markou v FCA* [2024] EWCA Civ 1575 at [37].

550. The UT also said in *Seiler* at [46] that:

> "The subjective element focuses on the state of knowledge of the individual concerned as to the risks concerned. The objective element focuses on the question as to whether it was reasonable for the person concerned to have ignored the risk. Clearly, in considering a person's state of awareness in relation to a risk, it is appropriate to have regard to what would reasonably have been appreciated or understood by persons in the same position as the individual in question."

551. The UT continued at [49]:

> "…a finding that a person lacks integrity denotes a failing of their ethical compass…even serious errors can be made by a person whose ethical compass is sound. In those circumstances, the person concerned may have acted negligently but he or she could not be said to have acted without integrity."

LIMITATION

552. As noted at §542, the Authority had accepted in the context of SoP 7 that it was prevented by limitation from taking any action against Mr Fenech in relation to his oversight of the TII model, because the Authority had been aware that Ms Dunne was operating that model more than six years before the issuance of the Warning Notice.

553. However, the Decision Notice continued:

> "Mr Fenech's reckless breach of Statement of Principle 1, as set out in this Notice, is separate and different from that misconduct. The Authority was not aware until October 2020 of the concerns raised by the compliance consultant [Mr Ellis], and subsequently by himself[14], and so was not aware until then that Mr Fenech had not acted on those concerns. This conduct was reckless and involved a lack of integrity, and so was conduct of a different nature to that which the Authority accepts is time-barred."

554. In other words, the Authority's position was as follows:

(1) It is out of time to take action against Mr Fenech's misconduct in not supervising Ms Dunne, so enabling her to continue to operate the TII model.

(2) Nevertheless, once Mr Fenech had received advice from Mr Ellis, Mr Fenech was committing a different type of misconduct, that of recklessly failing to act on the advice received about the TII model.

(3) The Authority was not out of time to take action in relation to that separate misconduct because it only became aware of Mr Ellis's advice in October 2020.

555. Mr dos Santos vigorously challenged that approach. He said the alleged recklessness was rooted in and derived from the TII model, which the Authority knew about well before 6 March 2017, and it could not be severed from those roots so as to stand independently.

556. We decided to approach this issue by first deciding whether Mr Fenech was reckless, and that if the answer to that question was yes, we would go on to decide whether the Authority was out of time to rely on that misconduct in relation to the imposition of a penalty.

[14] This appears to be a reference to Mr Fenech's letter in February 2016, which we consider at §562.

RECKLESSNESS

557. The Authority's position as set out in the Decision Notice was that Mr Fenech was reckless because he "unreasonably disregarded the concerns raised [by Mr Ellis], which he should have regarded as red flags", and in consequence "took no steps to stop HDIFA from operating its deficient two-adviser model", instead allowing Ms Dunne to continue to operate in that way "until the Authority intervened in June 2017".

558. The Decision Notice continued by saying that Mr Fenech "was reckless as to the consequences for HDIFA's customers and unreasonably exposed them to a significant risk that pension funds would be transferred out of their [DB pension scheme] into investments which were unsuitable for them". As set out in *Seiler,* Mr Fenech will therefore have been reckless if (a) he was aware of that risk and (b) acted unreasonably in taking that risk, having regard to the circumstances as he knew or believed them to be.

559. We considered the position at three points during the relevant period:

(1) when Mr Ellis corresponded with Ms Dunne in January 2015;

(2) when Mr Fenech wrote to Ms Dunne in February 2016; and

(3) after the 2017 Alert.

Awareness of risk: January 2015

560. We have already found as facts that on 3 and 4 January 2015 the following exchanges took place between Mr Ellis and Ms Dunne, all of which were copied to Mr Fenech:

(1) Mr Ellis sent Ms Dunne a list of amendments to her presentation pack. These included "Transfer advice cannot be given in isolation. Investment advice must be considered by HD" and Mr Ellis added links to the 2013 and 2014 Alerts.

(2) Ms Dunne rejected Mr Ellis's view, on the basis that:

(a) her TII model had been approved by the Authority;

(b) the investment advice was provided by regulated IFAs;

(c) the 2013 and 2014 Alerts related to investments into unregulated products, a market in which she did not operate; and

(d) her critical yield calculations were compliant with the Authority's intentions when the relevant rules were introduced.

(3) Mr Ellis asked for copies of Ms Dunne's communications with the Authority, but Ms Dunne did not provide them.

561. Taking into account the above, together with Mr Fenech's evidence, we find that he did not act unreasonably because:

(1) He knew there was a risk that Mr Ellis was right that the TII model was non-compliant, but he did not know whether Mr Ellis was right or Ms Dunne was right. Given that both were experienced PTSs, and Mr Fenech was not, that uncertainty was reasonable.

(2) Mr Fenech's understanding that the 2013 and 2014 Alerts related to investments in unregulated products was consistent with the headings of both documents: the former was entitled "Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP", and the latter "Pension transfers or switches with a view to investing pension monies into unregulated products through SIPPs - Further alert". Moreover, the 2014 Alert began by saying (our emphasis) that "firms *within this*

market should carefully consider" the guidance there set out, and ended by warning "if you continue to operate *in this area*, you must have a robust and compliant advisory process in place".

(3) Mr Ellis's reference to the Alerts was made in the context of the presentation, but he said the following day "With regard to the presentation providing it is in the name of HDC and there is no reference to HD…you can say what you like".

(4) Mr Ellis also only included links to the Alerts and did not cite the particular paragraphs on which he was relying.

(5) Although, as Mr Fenech accepted under cross-examination, he knew that omitting charges from the critical yield calculations meant they would "necessarily be understated", and that in consequence there was "potentially" a risk that customers would make Pension Transfers on the basis of non-compliant advice, he did not also know there was in consequence "a significant risk that pension funds would be transferred out of their [DB pension scheme] into investments which were unsuitable for them", as the Authority alleges was the case. That is because Mr Fenech's view of the critical yield calculation was similar to that of Ms Dunne, see §258ff. He said that for most clients who were considering transferring to a DC scheme with drawdown, critical yield was "an almost arbitrary figure" which was "almost meaningless". That this was not an unreasonable view for a person in Mr Fenech's position can be seen from the Authority's own discussion of the critical yield calculation in CP 17/16, see §261.

Awareness of risk: February 2016

562. As we have already found, Mr Fenech wrote to Ms Dunne on 26 February 2016 after receiving a further FOS complaint. He said "…the regulator has made it absolutely clear that we have a duty of care to ensure that the ultimate investment is suitable to the client and forms part of the overall transfer advice process" and he told Ms Dunne she had to ensure she was "comfortable in principle that the intended investment to be recommended by the introducing IFA is indeed appropriate and suitable to the client". Mr Pritchard placed significant weight on this letter.

563. However, it was followed by the exchange set out at §180ff, in which Ms Dunne resisted Mr Fenech's amendment to her processes on the basis that she was not authorised to give investment advice and so was not qualified to assess whether the end investment was suitable for the client. Mr Fenech then in terms accepted Ms Dunne's position, saying:

> "Rather than worrying about reporting to us on what you believe has been invested in normal investments (model portfolios, life office pension funds, acquisition of commercial property or appointed to a discretionary manager), maybe the focus can be on those that are not normal investments?".

564. Mr Fenech was also reassured by the fact that Ms Dunne was working with regulated IFAs who had to comply with the relevant rules and guidance. His unchallenged evidence was that:

> "I considered that the two-advisor model added an additional layer of protection to retail clients as HDIFA was not providing investment advice and nor was it qualified or sufficiently experienced to provide investment advice. HDIFA was focussing on the suitability of a [Pension Transfer] with reference to the overall investment strategy and the IFAs providing the investment advice. The IFAs did not simply introduce HDIFA to the client, they remained involved in providing ongoing advice, dialogue and clarification throughout the entire process."

565. In summary, Mr Fenech accepted Ms Dunne's view that:

(1) other than ensuring that the end investments were not in unusual or unregulated products, it was not necessary to amend the TII model; and

(2) the client's investment risk was being managed by the IFA.

566. Given that the Authority accepts that a two-adviser model was not *per se* deficient, that was not an unreasonable view for a person in Mr Fenech's position to take.

Awareness of risk: January 2017

567. We have already found as follows:

(1) On 24 January 2017, the Authority published the 2017 Alert.

(2) Having read the Alert, Ms Dunne told Mr Fenech she would incorporate charges in the TVAS, but would "still use a nil charge version in the initial report stage enabling [her] to continue to evaluate transfer values".

(3) By 1 February 2017, Mr Fenech had reviewed three of Ms Dunne's recent files, all of which *predated* the 2017 Alert. In relation to the absence of investment charges and ongoing adviser remuneration. Mr Fenech told her that "this is going to be an area which we will need to change immediately".

(4) On 22 March 2017, he reiterated that all advice "has to be cognitive of the type of intended investment" and that the costs of the investments had to be incorporated in the Suitability Reports.

(5) In May 2017, he engaged Ms Hill to carry out a review of Ms Dunne's files. The Tribunal was provided with the details relating to only one of the files she assessed; this appears to relate to a Suitability Report issued on 21 February 2017, so after the publication of the 2017 Alert. She identified "the key risk" in Ms Dunne's advice process as being the absence of information about the investment strategy, together with the inclusion in the TVAS of "either nil charges or just the product charge and the cash fund charge". Her report was provided to Mr Fenech no earlier than June 2017.

568. It is clear from the above that following the 2017 Alert, Mr Fenech instructed Ms Dunne to change her approach, and was told she had done so. We find as a fact that he did not know, until he received Ms Hill's report (no earlier than June 2017), that she had not implemented the changes she had promised to make.

Conclusion

569. Taking all the above into account, we find that, although Mr Fenech was aware throughout his relevant period that Ms Dunne did not include information about the receiving fund, including its charges, in her Suitability Reports, it was not until the issuance of the 2017 Alert that he knew this was incorrect. Ms Dunne then told him that she had changed her approach, and he did not know until after the end of his relevant period that she had not implemented the changes.

570. In the period before the publication of the 2017 Alert, it was therefore not reckless for Mr Fenech to fail to treat Mr Ellis's advice as a "red flag" and require Ms Dunne to change her TII model so as to include details of the receiving scheme, including the charges. In January 2017 he realised he had been wrong, but was told and believed Ms Dunne had changed her approach. His earlier view had been mistaken, not reckless: there was no failure of his "ethical compass".

OBSERVATIONS ON LIMITATION

571. As Mr Fenech was not reckless, the Authority could not impose a penalty on him for that "misconduct". It was therefore not necessary for us to decide whether that part of the Authority's case was barred by limitation.

PART SEVEN: DISHONESTY

572. The last part of our decision concerns the allegations of dishonesty made against both Applicants for signing a backdated AR agreement.

THE LEGISLATION

573. FSMA s 39 provides as follows (our emphasis):

> "(1) If a person (other than an authorised person)—
>
> (a) is a **party to a contract** with an authorised person ("his principal") which—
>
> (i) permits or requires him to carry on business of a prescribed description, and
>
> (ii) complies with such requirements as may be prescribed, and
>
> (b) is someone for whose activities in carrying on the whole or part of that business his principal **has accepted responsibility in writing**, he is exempt from the general prohibition in relation to any regulated activity comprised in the carrying on of that business for which his principal has accepted responsibility."

574. It was thus a requirement of Ms Dunne's appointment as an AR for FSML that there be a written contract between them, under which FSML "accepted responsibility in writing" for the business she was carrying out as its representative.

575. The Authority's Supervision Manual at 12.2.1G repeats that statutory requirement, specifying at (2)(c) that:

> "…the principal must have accepted responsibility, in writing, for the authorised activities of the person in carrying on the whole, or part, of the business specified in the contract."

THE ALLEGATIONS

576. Mr Fenech's Decision Notice stated that he failed to act with integrity in breach of SoP 1 for the following reason:

> "…by deliberately providing the Authority with a copy of an Appointed Representative agreement between HDIFA and FSML which he had signed and backdated to create the false impression that a written agreement had been in place since 30 August 2012, the date that HDIFA was initially appointed as an AR of FSML. However, the agreement was only agreed and signed by Mr Fenech and Ms Dunne on 22 June 2017, after the Authority had intervened and had requested to see a copy of the signed AR agreement."

577. Ms Dunne's Decision Notice said she had failed to act with integrity because she had been "knowingly concerned" and "knowingly involved" in the provision of that backdated agreement, and was thus guilty of misconduct by reference to FSMA s 66A. That section is headed "Misconduct: action by the FCA", and so far as relevant reads (emphasis added):

> "(1) For the purposes of action by the FCA under section 66, a person is guilty of misconduct if any of conditions A to C is met in relation to the person.
>
> (2) Condition A is that…

(3) Condition B is that—

(a) the person has at any time been **knowingly concerned in a contravention** of a relevant requirement by an authorised person, and

(b) at that time the person was—

(i) an approved person in relation to the authorised person…"

578. The Authority's Statement of Case said Ms Dunne had been "knowingly involved in the provision of the Backdated Agreement", but also said: "her actions were deliberate and dishonest in respect of provision of the Backdated Agreement". Mr Pritchard's skeleton similarly stated that Ms Dunne was "dishonest" and "knowingly involved" in Mr Fenech's dishonesty.

579. Mr Cherry made some initial submissions to the effect that being "knowingly involved" or "knowingly concerned" was not the same as being dishonest, and that the Authority had changed its case after the issuance of the Decision Notice. However, when asked by the Tribunal to explain the difference between being dishonest and being knowingly involved in dishonesty, he was unable to do so, saying "it is difficult to articulate that there is a clear difference". Mr Pritchard confirmed that the Authority's case rested on Ms Dunne's dishonesty, and we have thus made our findings on that basis, and have not sought to distinguish between dishonesty and being knowingly involved (or concerned) in dishonesty.

FINDINGS OF FACT

580. As we have already found, on 23 January 2015 Mr Fenech wrote to Ms Dunne about recovering the compensation FSML had to pay as the result of the Mr T complaint (see §168). In the same letter, Mr Fenech said:

> "…an 'AR Agreement' does not currently exist between you and FSML and indeed this in itself could give way to further regulatory and or legal implications. An AR agreement is currently being drafted and will be implemented shortly."

581. On 28 January 2015, Mr Ellis emailed a draft AR agreement to Mr Fenech with a covering email which said:

> "Herewith a draft which will need to be gone through with a fine tooth comb to ensure that you are happy with the content and conditions. I have put in the date the appointment happened. It has not been looked at by a lawyer and we cannot vouch for its enforceability in law. But it is a starting point."

582. The draft agreement began as follows:

> "Financial Solutions Midhurst Ltd, ("FSML") whose registered office is, Avenue House Southgate Chichester West Sussex PO19 1ES whose Financial Conduct Authority ("FCA") (FCA FRN is 45957) hereby appoints Heather Dunne, sole trader ("the firm") and known as HDIFA which operates from The Stables Lynx Park Business Centre Colliers Green Cranbrook Kent (FCA FRN 524600) as an appointed representative ("AR") subject to the following terms and conditions."

583. Under the heading "Interpretation", the first paragraph read:

> "Expressions used in this agreement shall (unless the context otherwise requires) have the meanings attributed to them in the FCA (previously known as the Financial Services Authority) rules and any subsequent regulator that may replace the FCA."

584. Clause 3 read "This agreement shall take effect from the 31st August 2012".

585. The draft ended with a space for Ms Dunne to sign and date, and a space for Mr Fenech to sign and date. Mr Ellis accepted under cross-examination that he had not told Mr Fenech that the agreement should be dated when it was signed. Ms Dunne was not provided with the draft agreement at that time.

586. Just over a year later, Mr Fenech sent his letter of 26 February 2016, to which we have already referred at §179. He said "I will draft an up-to-date appointed representative contract which will be sent to you, and we will arrange for signing by Friday 5th March", but that too did not happen.

587. As we have previously found, see §209(4), at the meeting with the Authority on 15 June 2017, a "voluntary" suspension of business was agreed. On the following day, Friday 16 June 2017, Ms Bauld emailed Mr Fenech setting out a list of further information which was to be sent to the Authority by Tuesday 20 June; this included a copy of the AR agreement.

588. Mr Fenech replied the next morning, saying he was away from the office for two days, and had a client's funeral on the Wednesday, so would respond to Ms Bauld's letter by close of business on Friday 23 June.

589. At the same time as Mr Fenech was dealing with the Authority's visit and its aftermath, he was also having to respond to significant health issues within his immediate family, as well as being the primary carer for his elderly father, who lived alone in Malta and was suffering from a terminal health condition. This was therefore a stressful period and Mr Fenech was under a lot of pressure.

590. He looked for the AR agreement, which he thought had previously been finalised, but was only able to locate Mr Ellis's draft, and he panicked. Both he and Ms Dunne knew the Authority was unlikely to lift the suspension unless it received the outstanding information. They were both concerned about the future of their firms, which had been developed over many years. Ms Dunne was also worried about her clients, who risked being unable to make their Pension Transfers at the CETVs offered by the ceding schemes within the relevant deadlines if the suspension remained in place, and she was anxious about her staff, who were dependent on her business and to whom she felt a moral responsibility.

591. Although they both knew that it was a regulatory requirement that there be a written agreement in place, Ms Dunne viewed its provision as being "one small part of the overall picture" and as "a sort of paperwork documentary exercise". Mr Fenech's position was similar: he said:

> "I wanted to provide the Authority with a piece of information that I saw in June 2017 as an administrative requirement. I placed no weight on the importance of the AR agreement in the eyes of the Authority."

592. On Thursday 22 June 2017, Mr Fenech sent Ms Dunne a draft agreement, which was almost the same as that previously written by Mr Ellis[15]: in particular, it included the same address for Ms Dunne, and the same references to the FCA, and stated "This agreement shall take effect from 30th August 2012".

593. The differences between Mr Ellis's draft and the one now sent to Ms Dunne included the following:

(1) There was no heading on Mr Ellis' draft, whereas the amended version was headed "This agreement is made on the 30th day of August 2012".

[15] The agreement (and the related email exchanges) contain a number of typographical errors which we have not replicated in this decision.

(2) No dates were printed at the end of Mr Ellis' draft, whereas in this version the date 30 August 2012 had been typed next to the spaces for signatures.

594. Some two hours after receiving the draft, Ms Dunne replied to Mr Fenech. She suggested a number of changes, the first two of which related to her address and the use of the term "FCA". She told Mr Fenech that her address in 2012 had been different (and she provided her old address); she also said that "FCA is not defined and in August 2012 it was the FSA". Later in the email she said (Mr Pritchard's emphasis):

> "I think it's worth correcting at least the first two points, because those make it abundantly clear it's a document produced after the event, **which is the last thing you want to do**."

595. Mr Fenech then replaced Ms Dunne's current address with that which had been correct in 2012, and he also replaced the references to the FCA by references to the FSA.

596. The draft Mr Fenech had sent to Ms Dunne also said at Clause 13:

> "All investment business procured by the AR will be transacted on the terms which have been agreed between the principal and the AR and are contained within this contract."

597. Clause 15 read:

> "Within two weeks of the end of each calendar quarter, the AR will remit to the Principal 15% of all fees (or commissions) earned by the AR in the preceding calendar quarter in respect of the pension business carried out in accordance with this agreement by the AR."

598. When Ms Dunne sent her comments back to Mr Fenech, she said in relation to those Clauses:

> "It does not actually reflect our financial relationship correctly, though that is less significant for the purpose, I would have thought it would make sense for it to refer to there being separate agreements in that respect."

599. Mr Fenech responded by saying that the text of those Clauses "will suffice for now". In answer to a question from the Tribunal, Ms Dunne explained that she had been worried in case Mr Fenech subsequently relied on these Clauses to require her to pay 15% to FSML, which was more than she had ever paid. Mr Fenech accepted under cross-examination that Clause 15 was "not an accurate reflection of the business" and that it was "false".

600. Clause 16 said:

> "The AR will be subject to strict compliance monitoring procedures which will include, submission of files for monitoring purposes and compliance visits at intervals to be determined at the sole discretion of the principal."

601. Clause 17 began by saying "All compliance and monitoring visits will be carried out by the principal or any other person so instructed by the principal…"

602. Mr Fenech accepted under cross-examination that Ms Dunne was not "subject to strict compliance monitoring procedures" and that this Clause was also "inaccurate". Ms Dunne disagreed, saying that the whole point of compliance was that it was tailored to the person concerned.

603. With the exception of Clause 15 about the financial arrangements, Ms Dunne considered that the agreement set out the actual agreement between the parties, whereas Mr Fenech said that "it was not an accurate reflection of our arrangement".

604. Having considered the agreement together with our other findings, we agree with Ms Dunne: apart from Clause 15, the agreement broadly reflected the actual arrangements between the Applicants. It was always part of their joint intention that Mr Fenech would carry out compliance monitoring including file reviews carried out by an external firm (see for example §95 and §121) and the fact that a clause is not performed (the monitoring was not "strict") does not mean it was not an agreed term. In addition, the compliance monitoring was also expressed to be "at the sole discretion of the principal", and so was unparticularised.

605. Both Ms Dunne and Mr Fenech signed the AR agreement next to the date "30 August 2012". Mr Fenech sent it to the Authority shortly afterwards, along with the other requested information: his email said:

> "Please find attached a copy of the current agreement, which is due to be revised extensively as discussed."

606. Almost a year later, on 1 May 2018, Enforcement wrote to Mr Fenech requiring him to provide certain information, including:

> "Any agreements between Financial Solutions and Heather Dunne IFA (HDIFA) setting out the terms of HDIFA's position as an Appointed Representative of Financial Solutions."

607. Attached to the letter was an Annex which stated that it was a criminal offence under FSMA s 177(3) and (4) to "falsify, conceal, destroy or otherwise dispose of a document which you know or suspect is, or would be, relevant to the investigation".

608. By this time, Mr Fenech had instructed lawyers and they drafted a response to the Authority on FSML's behalf. On 22 May 2018, the lawyers provided the response to the Authority; in relation to the AR agreement, it said:

> "Please find enclosed a copy of the Appointed Representative agreement confirming the terms of the contract between Financial Solutions Midhurst Limited ("FSML") and HDIFA since 30.08.12 which was signed on 20.06.17 and provided to FCA Supervision on 22.06.17."

609. The Authority was thus aware from that date that the AR agreement had been backdated.

DISHONESTY

610. It was common ground that the test we had to apply in deciding whether Mr Fenech and/or Ms Dunne were dishonest was that set out in *Ivey v Genting Casinos Ltd* [2017] UKSC 67 at [74] *per* Lord Hughes (emphases added):

> "…When dishonesty is in question the fact-finding tribunal must **first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts**. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, **the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people**. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

Mr Fenech

611. Under cross-examination by Mr Pritchard, Mr Fenech made a series of admissions. He accepted he had been "wrong" to provide the Authority with a backdated agreement; that the agreement was "misleading" because a person looking at that document would not have

realised it hadn't been signed in August 2012, and finally that sending the Authority a backdated agreement "was dishonest".

612. However, as Mr dos Santos rightly emphasised, it did not necessarily follow from Mr Fenech's admission that the legal test for dishonesty has been satisfied. On the basis of our earlier findings of fact taken together with his evidence given under cross-examination, we find that Mr Fenech knew that:

(1) the AR agreement had not been signed in 2012 but had instead been signed in June 2017;

(2) signing the document next to the 2012 date would give the Authority the incorrect impression that it had been signed in 2012;

(3) it was a regulatory requirement that a principal had to have a written agreement with an AR;

(4) failing to have a written agreement in place was a breach of that regulatory requirement;

(5) telling the Authority that the agreement had only been signed after the June 2017 meeting would have been unhelpful to his and Ms Dunne's objective of lifting the suspension; and

(6) backdating the agreement would avoid that further problem with the Authority.

613. Having established Mr Fenech's "state of knowledge and belief as to the facts", we agree with Mr Pritchard that ordinary decent people would find that Mr Fenech's behaviour in backdating the agreement was dishonest, as he himself accepted.

614. As the Authority recognised at APER 3.1.3G (see §70), it is also important to take into account "all the circumstances". The context of Mr Fenech's dishonesty is therefore also relevant. On the basis of our earlier findings of fact, we further find that:

(1) At the relevant time, Mr Fenech was under considerable personal stress relating to his immediate family and his father's terminal illness; this was exacerbated by the meeting with the Authority and the suspension of the business.

(2) He was also under tight time pressure to respond to the Authority: by the time he replied to Ms Bauld, her original deadline had already been exceeded by two days because of his absence and his client's funeral.

(3) Although Mr Fenech knew that having a written agreement was a regulatory requirement, he considered it to be an administrative issue rather than a matter of substance.

(4) With the exception of the paragraph on financial matters (with which the Authority was unlikely to be concerned) the written contract broadly represented the agreement between the parties which had been in place since 2012.

615. Mr Pritchard did not identify any other examples of Mr Fenech being dishonest, and his character witnesses variously said he was "scrupulously honest"; acted with "selflessness and integrity", and demonstrated "trustworthiness, transparency, integrity and commitment". We find that his backdating of the agreement was a one-off action which was out of character.

616. Both Mr dos Santos and Mr Pritchard asked us to take into account the fact that it was Mr Fenech who informed the Authority about the backdating. Mr dos Santos said that this had been voluntary, and indicated Mr Fenech's honesty, while Mr Pritchard emphasised that, had Mr Fenech failed to tell the truth at that point, he would have committed a criminal offence.

On balance, we decided to place no weight on Mr Fenech's subsequent correction of the position when deciding whether he had acted with integrity.

Ms Dunne

617. Unlike Mr Fenech, Ms Dunne did not accept she had acted dishonestly by working with Mr Fenech to produce a backdated agreement which she knew would be given to the Authority. However, her "state of knowledge and belief as to the facts" was the same as that of Mr Fenech, and in particular it was Ms Dunne who pointed out to Mr Fenech that including her current address and the term "FCA" would "make it abundantly clear it's a document produced after the event, which is the last thing you want to do". We agree with Mr Pritchard that ordinary decent people would find that her behaviour was dishonest.

618. As regards the context, the points at §614(3) and §614(4) apply to Ms Dunne as they do to Mr Fenech. In addition, she too was under pressure to comply with the Authority's requirements, in her case not only because of the effect on her business, but also because of the possible damage to her clients and staff, for whom she felt responsible.

619. Mr Pritchard submitted that Ms Dunne was dishonest in two other respects, the first of which concerned the Confirmation Letters she issued to ceding schemes, and the second related to the evidence in her witness statement about unregulated investments. We also considered Ms Dunne's change to her evidence about reviewing the Suitability Reports, and the statements given by her character witnesses.

Provision of Confirmation Letters and Advice Declarations

620. As we have already found, Ms Dunne sometimes confirmed to ceding schemes that she had advised the clients that the Pension Transfer was suitable and in their best interests, when she had not yet done so, by providing Confirmation Letters and Advice Declarations before the Suitability Reports had been issued, see §513ff above.

621. Mr Pritchard submitted that these documents contained "false statements" which gave the "untrue impression" that Ms Dunne had provided advice by way of Suitability Reports, and that "based on" those Reports, clients had decided to make the Pension Transfers.

622. There is no dispute that Ms Dunne knew that:

(1) her statements that the clients had received the Suitability Reports were untrue;

(2) her statements that the clients had decided, "based on" the Suitability Reports, to make the Pension Transfers, was also untrue;

(3) the Confirmation Letters and the Advice Declarations would mislead the ceding schemes;

(4) as a result, the ceding schemes would release the funds to the receiving schemes; and

(5) the ceding schemes would not have taken that action had they known the true situation.

623. We agree with Mr Pritchard that ordinary decent people would consider that it was dishonest of Ms Dunne to make these untrue statements in the Confirmation Letters and the Advice Declarations. However, those people would also have recognised, as we do, that Ms Dunne was motivated by a desire to help her clients, who would have had to spend time and money on a fresh Pension Transfer application, which might have resulted in a lower CETV (although it could of course have been higher, as happened in the case of Client I).

Witness evidence about unregulated products

624. Ms Dunne's witness statement included the following paragraph regarding the 2013 Alert:

> "…long before the 2013 Alert was published, I had terminated my relationships with the handful of agents who had referred such cases to me. I had also reviewed my relationship, process and procedures with my only introducing adviser operating in the non-reg space…I never contemplated that the end destination of the pension transfer assets would be non-reg investments and, as I described above, at no stage did I have any belief, knowledge or expectation that my IA would be providing such advice either."

625. Mr Fenech gave his oral evidence before Ms Dunne. Mr Pritchard took him to an email he had received from Ms Dunne on 28 February 2014, which said she was working with an IFA who might recommend that clients invest their Pension Transfers in unregulated as well as regulated investments. Mr Fenech accepted that Ms Dunne had been "advising at least one client who was transferring their pensions into unregulated investments".

626. When Ms Dunne entered the witness box, Mr Cherry asked her: "do you confirm that the contents of this statement are true and correct to the best of your knowledge and belief", and Ms Dunne gave that confirmation. However, she was also not asked (as often happens) whether there was anything she wanted to change.

627. In the course of cross-examination, Mr Pritchard asked Ms Dunne why she had not corrected the above passage from her witness statement. She said:

> "Because I knew you'd ask me the question and I would explain to you that I meant exclusively non-reg investments."

628. Ms Dunne went on to say that the witness statement would have been correct had she inserted the word "exclusively", in other words, she had not advised clients to transfer **all** their pension fund into unregulated investments: she told Mr Pritchard that she had therefore only "missed a word out".

629. That evidence has to be understood in the context of the wording used in the 2013 Alert which referred (our emphasis) to "financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest **wholly or primarily** in high risk, often highly illiquid unregulated investments"; it also said that some customers "have transferred out of more traditional pension schemes and invested their retirement savings **wholly** in unregulated assets via SIPPs".

630. Mr Pritchard submitted that Ms Dunne had been dishonest in failing to correct her evidence when she entered the witness box; she had instead confirmed that the witness statement was "true and correct to the best of [her] knowledge and belief". Mr Pritchard said that knowing he was going to ask about unregulated investments was "not a good reason to confirm the truthfulness of a knowingly untrue statement", adding that "it begs the question as to what would have happened if [Ms Dunne] had not been challenged on that part of her statement".

631. We disagree with Mr Pritchard. Ms Dunne knew from the documentary evidence and from his cross-examination of Mr Fenech, that there was an error in her witness statement. Ordinary decent people would find that she did not correct that error because she knew the position was already clear, and because she also knew Mr Pritchard would in any event ask her about unregulated investments. In consequence her failure to correct her evidence was not dishonest.

632. We add that, had Ms Dunne not been cross-examined, there was no risk that the Tribunal would have been misled. We would have taken into account all the evidence, applied the principles in *Gestmin*, and found on the basis of the contemporaneous documentation that in 2014 Ms Dunne was still working with at least one IFA who might advise his clients to invest in an unregulated product. In other words, we would have made the exact same finding as that set out earlier in our decision, see §113.

Change of evidence about reviewing Suitability Reports

633. As we have already explained (see §448ff) Ms Dunne said in her witness statement that from February 2017 she only reviewed 10% of the Suitability Reports. Under cross-examination she changed that evidence, saying she "reviewed every single one", and thus directly contradicted her witness statement.

634. We have found that the witness statement was correct (see §497), and it follows that Ms Dunne's oral evidence was not true. Although not relied on by Mr Pritchard in his submissions about Ms Dunne's dishonesty, the point nevertheless has to be considered by the Tribunal, see *FCA v Hobbs* [2013] EWCA Civ 918 at [29]-[39].

635. However, in *Hobbs* the applicant had had "a fair opportunity to address the allegation that he had been guilty of…lying". In contrast, Mr Pritchard did not put to Ms Dunne that her change of evidence was dishonest, and he did not rely on that point in his closing submissions, so Mr Cherry too did not address it. In our judgment it would therefore be unfair for us to make a finding of dishonesty in relation to her change of evidence on this point.

The "character" witnesses

636. Two "character" witnesses provided supportive evidence for Ms Dunne. One, Mr Simon Webb, said she was "totally trustworthy and scrupulously honest" and that she "acts above all with integrity and honesty". The other, Mr James Mackay, said she was "trustworthy and honest to a fault" and a "decent, highly ethical and honest woman". That evidence was not challenged and we accepted it.

Conclusion on Ms Dunne

637. We have found that Ms Dunne, like Mr Fenech, acted dishonestly when she worked with him to backdate the AR agreement, but as we said above, that action has to be seen in context. We have also found that she was dishonest in sending the Confirmation Letters and Advice Declarations to the ceding schemes, albeit she was motivated by a desire to assist her clients. Those findings have to be balanced against the evidence given by Mr Webb and Mr Mackay that this dishonesty was out of character. On balance, we declined to make any wider finding.

OVERALL CONCLUSION

638. For the reasons set out in this judgment, we have found that:

(1) Mr Fenech breached SoP 7 because he failed to ensure adequate management and oversight of Ms Dunne, and he breached SoP 1 because he dishonestly provided a backdated agreement to the Authority. However, that action was an isolated incident at a time of great stress, and was out of character.

(2) Ms Dunne breached SoP 2 because she provided unsuitable Pension Transfer advice to at least 18% of her clients, and because of the other failings summarised at §530. She breached SoP 1 because she worked with Mr Fenech to provide the backdated agreement to the Authority, and that was dishonest. She also acted dishonestly in knowingly providing confirmations to the ceding schemes about her Pension Transfer advice, when that advice had not yet been provided. In relation to the former, Ms Dunne acted under pressure, and in relation to the latter, her aim was to assist her clients.

APPEAL RIGHTS

639. Our decision on the penalties and prohibition notices consequential on our findings has been deferred to a further hearing to take place in June 2026. The parties' rights of appeal against this judgment are coterminous with their appeal rights against that later judgment; the same applies to their appeal rights against the earlier PTR decision published as *Fenech and Dunne v FCA* [2026] UKUT 00020 (TCC). In other words, time will not begin to run until the parties receive written notice of our decision following the June hearing.

ANNE REDSTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 27 APRIL 2026