OPINION

1. I am asked to advise the FCA in connection with its review of the current guidance on redress for pension transfers, where the advice to transfer has not been in accordance with the suitability requirements of COBS 9 and COBS19.1, or has otherwise been in breach of a common law duty of care. I am instructed to consider:

(a) the approach which a Court would take the computation of loss in such cases;
(b) the extent to which the FCA's proposed new rules[1] correspond to the likely approach which a Court would take; and
(c) the suitability of the proposed new rules to meet the second of the FCA's objectives ("Objective 2") for the review exercise which reads as follows:

> "To put a consumer, so far as possible, back in the position they would have been in but for the act or omission by the firm. This should be achieved by providing redress that, if assumed to be invested in their personal pension, should enable the value of the personal pension to reach a size at retirement that enables the consumer to acquire the same benefits, including a guaranteed lifetime income, as they would have received from their defined benefit pension scheme and any other benefits that would have been payable from the DB scheme (eg spousal benefits)."

I am asked to pay particular attention to the issues raised by amendments to the pensions legislation and its related tax regime in recent years. I am also asked to comment, from a legal perspective, on the current proposals for a revised basis of computation.

2. Although it is, of course, necessary for the FCA to take full account of the way that mis-selling claims might be compensated by a Court, and the bases on which they might be compensated, the FCA is not constrained to replicate the Court's approach when making rules which require firms to implement redress for consumers. While the basic object of the Court

[1] See the draft Pension Transfer Redress Instrument 2022

process and the redress rules are the same (namely to put the consumer so far as possible in the financial position they would have been in had the breach not occurred) the context in which that object is to be attained is quite different. Most obviously, in a redress situation the adjudication of the appropriate compensation falls to be undertaken by the defaulting party, not by an independent adjudicator. The FCA has broad regulatory powers to compel firms to undertake particular actions, which would not be available to a Court, although the FCA has no power to dictate the conduct of other parties, such as the consumer or the trustees of a pension scheme.

3. This Opinion is organised as follows:

A The general principles of law applicable to compensation for financial loss.

B How those general principles might be applied to the particular circumstances which arise in pension mis-selling cases.

C An evaluation of proposed new rules in the light of Objective 2.

A The general principles of law applicable to compensation for financial loss

4. For the most part, these principles are uncontroversial, and I do not discuss them in detail. I discuss these principles under the following headings:

(1) The compensatory principle – putting the claimant in the position they would have been in if the breach had not occurred.

(2) The date for assessment of damages.

(3) The cash basis for compensation.

(4) The proper approach to assessing what the claimant would have done if the correct advice had been given.

(5) The duty to mitigate.

(6) Restricting compensation – remoteness of loss and loss outside the scope of the relevant duty.

(1) The compensatory principle – putting client in position he would have been in if the breach had not occurred.

5. Previous guidance on pension transfers has formulated the basis of compensation in terms of putting the consumer in the position in which they would have been if the non-compliant advice had not been given - eg FG17/9[2], Paragraph 4 ,which states that the objective of redress is:

> "to put the consumer, so far as possible, into the position they would have been in if the non-compliant or unsuitable advice had not been given or the breach had not occurred.

This might be described as the negative formulation of the basis of compensation. There is, however, a positive way in which the basis of compensation might be formulated namely:

> "to put the consumer in so far as possible, into the position they would have been in if the firm had complied with their regulatory duties."

The negative formulation asks "what would have happened if the non-compliant advice had not been given?" whereas the positive formulation asks "what would have happened if compliant advice had been given?"

6. In many pension mis-selling cases the likelihood is that the liability to pay compensation, and its quantum, will be the same whichever basis of compensation is selected. Thus, where the customer transfers their pension on the basis of non-compliant advice which recommends transferring, the chances are that whether they received no advice at all, or whether they received a positive recommendation not to transfer, the customer would not have transferred in either case. They will thus, on any view, be entitled to compensation based on the loss they have suffered as a result of transferring. Nonetheless it is important that the basis of compensation be formulated correctly, if only to cater those cases where the formulation may make a difference to the outcome.

7. As currently formulated, COBS 9 and COBS 19.1 impose a number of positive obligations on the firm, the most relevant of which is the duty to make a personal recommendation (as set out in COBS 9.2.1R and 19.1.1CR). The existence of this duty requires

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[2] "Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers" (October 2017, updated March 2022).
https://www.fca.org.uk/publication/finalised-guidance/fg17-9.pdf

that the liability of the firm should be assessed by reference to what they should have done, in compliance with that duty. It is not enough for the firm to avoid harm by making no personal recommendation.

8. Where a regulatory duty gives rise to a right enforceable by an individual litigant, its breach is often described as a statutory tort. But that does not mean that the tortious measure of damages will be appropriate, where the statutory duty is a duty to undertake positive action, as opposed to a duty to avoid taking harmful action. A claim based on breach of a positive regulatory duty must adopt the same approach to damages as a contract claim, because, as in contract, there is an obligation to provide services to a certain standard. In the case of pension transfers that means assessing loss on the basis that the advice which COBS mandates was given properly, and not defectively.

9. A claim based on breach of a duty to advise in accordance with the requirements of COBS19 will therefore require the Court:

(a) to determine on the balance of probabilities what the reasonably competent, and regulatory compliant advice should have been

(b) to determine what would have happened such advice had been given

and

(c) to assess the difference between the consumer's current financial position and what it would have been if reasonably competent and regulatory compliant advice had been given.

(2) The date for assessment of damages.

10. Generally speaking, damages are assessed at trial. The Court's order will usually make no provision for waiting to see how things turn out. This means that the claimant cannot come back for a second bite of the cherry if it turns out the damages initially assessed turn out to be insufficient; nor can damages be clawed back if they later turn out to have overcompensated the claimant. Generally speaking, while the Court may be able to compute fairly exactly the financial loss suffered before the date on which damages are assessed, it

then has to put a value on the claimant's future loss while taking into account a potentially wide range of contingencies which might or might not occur in the future.

11. There are special rules for the award of damages in personal injuries cases - it is possible to award damages by way of periodical payments under the Damages Act 1996 or provisional damages under section 32A of the Senior Courts Act 1981. It would be possible for the FCA's rules on redress also to depart from the Courts' general approach of awarding damages on a one-off basis if that were thought appropriate. I deal with this question below (paragraph 40ff).

12. Translating the Court's approach of awarding damages as at the date of trial into the redress context would mean requiring compensation to be assessed as at the conclusion of the redress process. In the proposed rules this is done by reference to "the valuation date". This seems to me to be an entirely appropriate approach.

13. Where damages are awarded as at the date of trial, they will generally carry interest for the period between the date of the award and the date of payment, in order to preserve their value in the intervening period. This objective is achieved in the proposed rules by means of the requirement to enhance the compensation relating to the loss in value of benefits to reflect the loss of investment returns between the valuation date and the date of payment.

(3) The cash basis of compensation

14. What I mean by this is that the Court will generally assess damages in a cash sum which the claimant can spend as he likes. When ordering compensatory damages, the Court will not usually require a defendant to take a particular course of action in order to compensate a claimant. Nor would the Court insist on a claimant spending the damages in a particular way. Thus, if a claimant is compensated in damages by reference to the cost of replacing a damaged asset, the court will not require the claimant to purchase a replacement asset with the damages. If they want to spend the damages on something else entirely, they may do so. That said, if the claimant wishes the damages to be paid a third party, and it is of no disadvantage to the defendant to make that payment, rather than a payment directly to

the claimant, then I would expect the court to order the damages to be paid at the claimant's direction.

15. Mis-selling cases raise the question whether compensation awarded should be paid to the consumer outright, or paid into his DC arrangement. In the case of *Adams v Options UK Personal Pensions* [2021] EWCA Civ 1188 the Court of Appeal ordered compensation to be paid into the claimant consumer's existing pension arrangement. The defendant objected to making a payment direct to the claimant, and the claimant agreed to accept a payment into his SIPP (see para 2 of the judgment). It is not clear that the Court would have ordered the damages to be paid into the SIPP if the claimant had insisted that they were paid to him personally. One reason why the defendant objected to making a direct payment to the claimant was this would cause "tax problems". It is not clear what problems the defendant had in mind, or whether they really existed. But it should be noted that the Court does take account of tax in the computation of damages, having regard to whether the claimant would have paid tax on the sums which they claim to have lost, and whether the damages themselves will be subject to tax in the hands of the defendant. If the most tax efficient basis for computing compensation is to assume it is paid into the DC arrangement, and that that course gives the claimant full compensation at the lowest cost to the defendant, then the principles of the duty of mitigation (see below) may well require the defendant to accept damages computed on the assumption that they are paid into the DC arrangement, rather than some higher level of damages required to compensate them by means of a direct, but less tax efficient payment to themselves. But the rules on mitigation do not compel the claimant to mitigate – they merely mandate the computation of damages on the footing that mitigation has occurred.

16. Here, as elsewhere, there is no reason why the proposed rules cannot take a different approach to the approach taken by the Courts. Thus the rules require that in cases where it is appropriate firms must offer to augment the consumer's DC arrangement. This is the most effective way of putting the consumer back into the position he would have been if the breach had not occurred – ie with a registered pension arrangement of the same value as the one they enjoyed before the transfer.

(4) *The correct approach to* assessing *what the client would have done if the correct advice had been given.*

17. In some cases, pension mis-selling cases being among them, the existence of liability, or the level of damages, may depend upon what action the claimant would have taken if he had been properly advised. The court assesses this question on the balance of probabilities. If it is more likely than not that the claimant would have taken a particular course of action, then damages are assessed on the basis that he or she did take that course of action[3].

18. In order to establish a claim for compensation for negligent or non-compliant advice, the claimant must prove that, had the advice not been negligent or non-compliant, he or she would have acted differently, and ended up in a better financial position as a result. There is no presumption that, if a claimant takes professional advice, they would have followed it, but in most cases it is not difficult for a claimant to establish this element of causation. However, for a claimant who was determined to transfer (and maybe access an immediate PCLS – see below), the personal recommendation mandated by COBS might have been viewed by the claimant as a tiresome formality, rather than a decisive factor in their decision making.

19. As well as needing to determine how the claimant would have acted if appropriate advice had been given, the Court may have to adjudicate on the claimant's likely future course of action when assessing the quantum of damages. In mis-selling cases this issue is most likely to arise in the context of how the claimant would have exercised their options if they had remained in the DB scheme. These options include whether they would have taken a PCLS (see paragraph 31 below), and the date on which they would have retired. Had they remained in the DB scheme they might, in due course, have been offered other choices about their benefits – for example they might have been given the option to transfer their DB benefits into DC arrangement. In all these situations, a Court would have to form a view on the balance of probabilities as to what choices the claimant would have made at the relevant time, and then compute their losses accordingly.

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[3] For a general discussion of this topic see *Allied Maples Group v Simmons and Simmons* [1995] 1 WLR 1602 at 1609-10.

20. Where the quantum of loss is dependent on events outside the control of the claimant, then the Court will adopt a "loss of a chance" approach. That involves determining how the compensation would increase if the event in question occurs, and then discounting the resulting sum to reflect the possibility that it may not occur. Clearly, in mis-selling cases the quantum of loss is dependent on a range of future events outside the control of the claimant – notably investment returns and mortality. But these risks are priced into the investment and actuarial assumptions which a Court would use to compute the loss. There is not, I think, any scope for the application of conventional loss of a chance methodology in these circumstances.

(5) The duty to mitigate

21. After the breach of duty has occurred, a claimant is expected to take any reasonable step available to him in order to mitigate his loss. If there is course of action which is reasonably available to him which would reduce the amount of his loss, and he does not take it, his loss may be calculated as if he had taken it. The law on mitigation is conveniently summarised by Leggatt J in *Thai Airways International Plc v KI Holdings Co* Ltd [2015] EWHC 1250 (Comm) paras [31] to [38]. In essence it means that damages will be assessed on the basis that, since becoming aware of the breach, the claimant has acted, and will in future act, reasonably. Any reasonable level of expense in attempting the mitigation will be taken into account when assessing the quantum of loss.

(6) The scope of duty and remoteness of loss

22. There are three questions to be addressed when seeking to determine whether a contractual counterparty is liable for a particular head of loss

(a) Is the loss caused by the breach?

(b) Is the loss within the rules on remoteness of loss?

(c) Is the loss within the scope of the duty assumed by the defaulting party?

All of these questions must be answered in the affirmative in order for the loss to be recoverable.

23. There is a close relationship between questions (b) and (c) above. A loss flowing from a breach of contract is not too remote if the loss in question (or the type of loss in question) was within the reasonable contemplation of the parties to the contract at the time it was made. As Lord Reid put it in *The Heron II* [1969] 1 AC 350 at page 385:

> "The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."

In cases of tortious negligence remoteness loss is tested by reference to whether the loss was reasonably foreseeable as likely to result from the defendant's negligent act.

24. In mis-selling cases the loss is always likely to be foreseeable, whichever approach is taken. If the consumer transfers out from a DB scheme when it is unsuitable to do so, it is clearly foreseeable that he will end up having a lower level of retirement benefits as a result. So any difference in the value between the DB benefits and the less valuable DC benefits will be recoverable. The probability of some consequential loss will also be foreseeable (and therefore recoverable). This would include items such as the charges and adviser fees which will be incurred in the DC arrangement which would not have been incurred had the consumer remained in the DB scheme.

25. Even if the loss is reasonably foreseeable, or within the reasonable contemplation of the parties it may not be within the scope of the contractual or statutory duty assumed by the party in breach. However, due to the nature of the duties imposed by COBS 9 and COBS 19 it is unlikely, in the context of firms providing pension transfer advice, that liability for losses could be limited in this way under current regulatory rules.

26. Issues of the scope of the duty to advise were considered in the context of negligent and non-compliant advice in *Emptage v FSCS* [2013] EWCA Civ 729. The claimant in Emptage was advised to take out an interest only mortgage and to invest the sum raised in a Spanish property. The advice was negligent. FSCS determined to compensate the claimant for the losses which were directly linked to the taking out of the mortgage, but not for the loss stemming from the investment in the Spanish property. FSCS pointed out that the advice relating to the Spanish property was unregulated advice, and therefore outside the FSCS scheme. It also argued that it had a discretion as to the level of "fair compensation" which it could pay under the scheme, which it had exercised so as to exclude the loss stemming from the Spanish property investment. The FSCS required the claimant to give credit for the sum received under the mortgage.

27. The Administrative Court ([2012] EWHC 2709 (admin)) and the Court of Appeal disagreed. Both courts were of the view that the advice to take out the mortgage and to invest in the Spanish property was a single indivisible whole, and that the loss on the Spanish property was part of the loss caused by the negligent mortgage advice (CA para [20]). It was also held that a decision not to pay compensation relating to the Spanish property was not capable of being a proper exercise of the FSCS's discretion as to how to formulate compensation. The Court of Appeal concluded, in paragraph [25] in these terms:

> "Once it is accepted (as it was) that the breach of duty consisted in recommending a mortgage which was unsuitable because it exposed Ms Emptage to the risk of being unable to repay the loan at maturity, it is difficult to see how it is possible to assess fair compensation without taking into account the loss caused by the occurrence of that risk. Failure to do so inevitably resulted in an award of compensation which bore no relation to the breach of duty or the reason why the mortgage was unsuitable. I do not think that any of the grounds so far put forward by FSCS for rejecting the claim can be justified in terms of an exercise of its discretion."

B How those general principles might be applied to the particular circumstances which arise in pension mis-selling cases.

<u>Preliminary considerations</u>

Actual loss and prospective loss

28. Before considering the compensation issues raised in pensions mis-selling cases it is necessary to be clear about terminology. By "past loss" I mean loss which has been suffered prior to the date of the assessment of loss. By "future loss" I mean loss which has not been suffered as at the date of the assessment. All cases other than where the consumer has died before the date of assessment will have some future loss, but if the pension has not started to be drawn at the assessment date there will probably be no past loss, because the client has not yet received any payments which are lower than they would otherwise be entitled to. I have avoided using the terms "actual loss" and "prospective loss" (which are sometimes employed in this context) because I do not think it is helpful, for present purposes, to employ a term (ie "actual loss") which combines within it both past and future loss.

Valuation bases

29. There are range of bases of valuation typically used to value defined benefits under an occupational pension scheme. As these are referred to below it may be helpful to explain them here (listed in ascending order of magnitude of value for any given benefit):

> Best estimate basis. This aims to fix a sum of cash which, on the basis of middle of the road financial and mortality assumptions, might reasonably expect to generate returns sufficient to meet the annual amounts of benefit payable, with nothing left by the pensioner's death. In reality, the amount generated will be more or less than required, but the best estimate should fall in the middle of the range of possible outcomes. A claimant's cash equivalent transfer value ("CETV") into the DC arrangement will usually have been computed on a "best estimate" basis.
>
> Scheme funding basis. Occupational pension schemes are required by statute to fund their benefits on a "prudent" basis. Valuing on the scheme funding basis is thus akin

to taking the best estimate basis and building in a margin of safety to protect against worse than anticipated outcomes as against the financial and mortality assumptions employed on a best estimate basis.

Gilts matching basis. This is a valuation basis which looks at the cost of replicating the benefits being valued through the purchase of gilts whose yields and redemption values match the payment profile of the benefits being valued. It aims to minimise investment risk, although mortality risk is not negated. For an individual a gilts matched portfolio is unlikely to be practicable, but valuing the benefits using a discount rate derived from gilt yields should give a value which is a proxy for the sum required to provide the anticipated benefits assuming the most conservative and risk free investment strategy.

Buy-out basis. This is the cost, assessed by reference to market rates, of securing the benefits by an annuity contract with an insurance company. This is the most expensive basis of valuation because it not only assumes a gilts-based investment strategy, but also builds in the insurer's premium, which covers its administration costs and the price which it charges for taking on the investment and mortality risks.

DB and DC options

30. One difficulty in comparing the value of the benefits which would have been received from the DB scheme with the value of the DC arrangement is the range of options in the DB scheme which would have been available to the consumer had they remained a member of it. This topic is discussed in more detail below, but it may be helpful to summarise at this point what the options are.

<u>Pension commencement lump sum ("PCLS")</u>

31. In a DB scheme, when a member starts to draw their benefits they have the option to take a pension commencement lump sum ("PCLS"). In effect, the member can commute up

to 25% of their prospective pension into a lump sum, which is paid in cash. For present purposes there two important features of a PCLS to bear in mind:

(1) The factors used to convert the pension into a lump sum are usually disadvantageous to the member, when compared with the cost to the scheme of providing the benefits being commuted. The amount of cash released will almost always be less than the scheme funding basis cost of the benefits, and will often be less than the best estimate basis.

(2) The PCLS is paid tax free, whereas all other payments from the scheme will be taxed at the taxpayer's marginal rate of income tax.

32. Feature (1) means that, in a mis-selling case, where a consumer is yet to retire, his benefits will usually be valued at a lower sum if it is assumed that he takes the lump sum, than if it is assumed that he takes the whole of his pension uncommuted. PCLSs are popular with scheme members, notwithstanding disadvantageous commutation rates, no doubt because the cash and the tax benefit are attractive. But it will not always be a sensible decision for a member to take a PCLS. For example, a member who has downsized his house and has cash to spare, may not find a PCLS so attractive, especially if the pension is less than, or not much more than his income tax personal allowance (so he gets little or no benefit from the tax-free status of the PCLS. By contrast, higher rate taxpayers will usually see a benefit in extracting money from the scheme tax free.

33. A PCLS is also available under a DC arrangement, in that up to 25% of the value of the assets in the DC arrangement may be taken tax free – see paragraph 50 below for further discussion of how this can work in practice.

<u>Uncrystallised funds pension lump sum ("UFPLS")</u>

34. This is a type of lump sum payment which is only available under a DC arrangement. It can only be taken after the age of 55, and while the pension benefits are "uncrystallised" – ie before any PCLS or drawdown has been taken. It is taxed as to 75% at the member's marginal rate of income tax, and as to 25% it is tax free (which mirrors the tax consequences

of taking a PCLS from the arrangement). There are a number of other restrictions as to who can take lump sums of this sort.

35. While such payments are easy to arrange, it is not clear that they offer advantages over the more usual combination of drawdown and PCLS. The latter means of accessing benefits offer more flexibility as to the mix of taxable and non-taxable elements in a lump sum drawdown.

Annuity purchase

36. In a DC arrangement the member has the right to apply the assets in the fund in the purchase of an annuity on the open market. The member has some flexibility over the terms of the annuity which is to be purchased.

Drawdown

37. Since 2006 it has been possible for a DC member, instead of purchasing an annuity, to draw down annual amounts from his DC arrangement. Since 2015, the rules which were formerly in place to ensure that the assets were not exhausted before the member died have been done away with, so a member now has the choice how much to draw down in any year. Income tax is payable on any sums drawn down. A member of a DC scheme can elect how much of their benefits to crystalise each year after attaining age 55. So a member with a DC fund of £1 million could elect to crystallise £200,000 per annum for the first 5 years of his retirement. Within each annual crystallisation, he could take £50,000 as a PCLS, and the rest would be earmarked for drawdown. He would not actually have to take any drawdown benefits, and so could, in effect, enjoy a tax-free income of £50,000 per annum for each of the first 5 years. After 5 years all of his benefits would have to be taken by way of drawdown, and taxed as income. This approach is not available under a DB arrangement, because the rules of the scheme would require the whole pension to be taken at once, so there would be immediate full crystallisation and the whole PCLS would have to be taken at the outset.

The basic approach to valuation

38. The basic comparison to be made is between the value at the assessment date of the past and future benefits foregone in the DB scheme and the value of the DC scheme and any past benefits received from it. What a Court would aim to do is to have two cash sums – one representing the value at the assessment date of the notional past (if any) and future benefits under the DB scheme and one representing the value of past (if any) and future benefits under the DC scheme of which the claimant is now a member.

39. The simplest approach to quantification of loss is to add the DC benefits actually received, with interest, into the DC pot, and likewise add back the value of notional DB benefits which would have been received.

The difference between the Court process and financial redress

40. I have been asked to advise on a how a court would determine compensation for mis-selling claims. However, it is not always possible for a compensation scheme mandated by the FCA, to approach compensation in exactly the way a Court would do so. Thus, the Court process allows for an examination of a claimant's putative intentions on issues such as the retirement date he or she would have selected if they had remained a member of the DB arrangement and whether they would have taken a PCLS. Issues of this sort can be adjudicated upon on a case by case basis, with the evidence in each case carefully tested.

41. By contrast, guidance or rules on financial redress cannot operate on such a detailed case by case basis. The computation of compensation is the responsibility of the firms who gave the defective advice. They need a clear set of rules and guidance, both to enable them to compute compensation on the basis of the information reasonably available to them, and to ensure consistency of treatment. This means that the rules may have to make some assumptions on issues on which a Court would adjudicate, or may have to work on the basis of what the consumer should be presumed to have done, unless evidence exists which displaces the presumption.

42. When considering financial redress rules and guidance, it should be borne in mind that the consumer does not have to accept the compensation which the guidelines generate. If they think that the application of an assumption is inappropriate in their case, they can refuse to accept the offer and attempt to renegotiate with the firm. Ultimately, they may have avenues to seek legal redress if negotiations break down.

43. It should also be borne in mind that financial redress rules and guidance may offer more flexibility than a Court process when it comes to means of delivering compensation.

Particular issues

44. I now turn to look at the way the Court would approach some particular issues of difficulty, and the problems which may arise in translating the Courts approach into guidelines for redress.

What assumption should be made about whether a PCLS would be taken when the member has not yet retired?

45. As explained above, if it is assumed that a member who has not yet retired would, on retirement take a PCLS, it is probable that his DB benefits will have a lower value than would otherwise be the case.

46. If a mis-selling case came before the Court, the Court would decide on the balance of probabilities what that particular claimant would have done. If the claimant claimed that if they were still in the DB scheme at retirement they would not have taken a PCLS, then the Court would have to assess how probable that was, granted their circumstances and needs. Their evidence could also be tested in cross-examination.

47. Detailed evaluation of the consumer's intentions can be more difficult where the compensation is being assessed by a firm which has given negligent or non-compliant advice. There is no possibility of a trial process, and there is not the same opportunity of the sort of finely judged assessment of motivations which a Court would undertake in the course of a

trial[4]. That means that this aspect of compensation must be computed on a more standardised basis. One option is simply to assume that every member will take the PCLS. That assumption corresponds, as I understand it, to evidence which shows that the vast majority of pensioners take a PCLS, regardless of whether it might strictly have been in their financial best interests to do so. Another option is to ask claimants what their intentions would have been if they had remained in the DB scheme, and accept their word. That, however, runs the clear risk (having regard to the evidence of how most pension scheme members behave) that many will be over-compensated. Finally, there could be a middle way, in which it is assumed that all members take the PCLS, unless their personal circumstances demonstrate that, objectively, they would be ill-advised to do so, and that therefore they probably will not do so.

<u>Retirement date</u>

48. The date on which a consumer is assumed to have retired from the DB scheme can affect the value to be placed on the benefits which they could have accessed from the scheme. Typically, early retirement benefits in a DB scheme will be reduced to reflect the fact that they will be in payment for a longer period. In principle they should be reduced on an actuarially neutral basis, but in reality that may not be the case. Certainly, there is a likelihood that the basis of actuarial reduction will not exactly correspond to the post retirement discount rate adopted for compensation purposes, so even if the scheme is discounting early retirement benefits on an actuarially neutral basis, early retirement may still generate a different value for the putative DB benefits for compensation purposes when compared with the value as at normal retirement date.

49. Where the choice of retirement date really matters is where one of the candidates for the assumed retirement date would fall before the valuation date. In that situation the benefits payable prior to the valuation date from the DC scheme would have to be added back into the value of the DC arrangement, and the putative DB benefits would have to be

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4 Although firms are required to investigate complaints competently, diligently and impartially, obtaining additional information as necessary (DISP 1.4.1R(1)).

added back into the comparative value for the DB benefits. But the post retirement discount rate would only be applied to the DB benefits which remain to be paid after the valuation date. That is a perfectly proper approach to take, if the assumed retirement date can indeed be justified. It is the approach which will routinely be taken for any consumer where valuation occurs after the date of their assumed retirement. But in some cases there is an alternative possible assumed retirement date which falls after the valuation date. Where that happens there can be a dramatic difference in the amount of compensation payable as between the two potential assumed retirement dates.

50. This difference is most clearly illustrated by the so-called PCLS only cases. These cases concern consumers who were wrongly advised to transfer to a DC arrangement with a view to taking a PCLS at an early date. One of the differences between DC and DB arrangements is that under a DC arrangement it is possible to take a PCLS at any date from age 55, while deferring the date on which any pension is drawn down. Under a DB arrangement it is not possible to take a PCLS and then defer taking a pension – a PCLS can only be taken as at the date the pension is put into payment. In a PCLS only case, the member leaves their DB arrangement with a view to taking an immediate PCLS at, say age 55, but then defers drawing any pension payments until later – perhaps when they actually stop working at, say, age 65. There are therefore two candidates for the retirement age which one might assume had the claimant stayed in the DB scheme – the date they took the PCLS, or the date on which they intend to start drawing their pension.

51. If the former date is selected, then the DB scheme benefits will be valued on the basis of a PCLS taken at age 55, and (actuarially reduced) instalments of pension paid from age 55 up to the valuation date. The future DB benefits will be valued as at the valuation date on the basis that a PCLS has already been paid out of them, and on the basis that the remaining pension instalments will have been actuarially reduced as a result of having been taken from age 55. If the latter date in this example is selected, then the DB benefits will be valued on the basis that they will not be accessed until age 65. The future instalments of pension will not be assessed as if they had been actuarially reduced, and the PCLS will not be treated as having been taken at age 55 (although the benefits in the DB scheme will be valued on the

basis of a discount which assumes that the PCLS will be taken at age 65[5]). The evidence suggests that the latter form of valuation will yield a significantly higher figure for the value of the DB benefits (and therefore a significantly higher level of loss) than the former. In other words, the increase in value of the DB benefits resulting from the combined effect of the removal of the actuarial reduction and the assumption that no PCLS is taken until age 65 will more than offset the value derived from adding back the amount of the PCLS and the arrears of pension taken before the valuation date, which are implicit in assuming the earlier retirement date.

52. How then would the Court approach the question of the assumed retirement date in a PCLS only case? The complication is that, as noted above, the DC arrangement offers options which the DB benefit does not. In a case where the consumer takes a PCLS from his DC arrangement, and immediately commences drawdown, it may be a reasonable assumption that they would have taken their putative DB PCLS and pension at the same date. But in a PCLS only case, had the consumer stayed with the DB arrangement they would have been told that they could either take both a PCLS and a pension at 55, or at later age, but that they could not take the PCLS at the former age and the pension at the later age. In this situation it is clearly not safe to assume, without more information, that the consumer would have selected the earlier and not the later retirement age.

53. Here again we come up against the question as to whether, for the purposes of financial compensation rules and guidance, one should make a generalised assumption about the conduct of consumers. Before making such an assumption, it must be borne in mind that before one gets to the assessment of loss, it has already been determined that the consumer would have rationally followed the appropriate advice, had it been given, and stayed in the DB scheme. It seems to me that there is an inconsistency between assuming that a consumer would respond rationally to the appropriate advice by staying in the DB scheme, but then make an irrational and financially damaging use of their rights under that scheme. Of course, it is always possible that a consumer may have had an absolutely pressing requirement for capital at age 55, and no means of accessing it other than via the pension scheme. In that rare

[5] Or has been taken at that age where the valuation date is after the claimant has attained 65.

case (which I understand does not fit the fact pattern of the PCLS only cases of which FCA is aware) the advising firm may have a reasonable case for saying that the advice to transfer to a DC arrangement was not defective, especially as the consumer might get a larger PCLS from a DC arrangement than from their DB scheme (25% of a CETV might be greater than the commutation value of 25% of a heavily actuarially reduced pension). The number of cases where the consumer has such a pressing need for cash, but the advice to transfer is still incorrect, must be very small indeed. It would certainly not be appropriate to make an assumption about retirement ages in the DB arrangement based on situations of that sort.

54. That conclusion raises the question of whether any other assumption should be made. For a consumer who has not yet accessed his DC funds at all, it would seem reasonable to assume that they would have retired from the DB scheme at normal retirement age (ie the lowest age at which they could have retired without consent and without a reduction for early payment). But what of the consumer who has accessed their DC funds? Granted that simply taking a PCLS should not be taken as an indicator of the retirement date which would have been adopted by the consumer had they stayed in the DB scheme, should any other type of access to DC assets be taken as such an indicator?

55. I think the only alternative approach to one which adopts NRD in the DB scheme in all cases is an approach which adopts a presumption in favour of that date, but permits it to be displaced in favour of an earlier date where the evidence of the consumer's circumstances, intentions and pattern of drawdown payments shows that they would probably have retired from the DB scheme at an earlier age.

56. In summary, the question here is therefore whether:

(a) one takes the approach that taking benefits from a DC arrangement is no reliable guide to how a member would behave if he had remained a member of the DB scheme, and therefore NRD in the DB scheme should be used as the assumed date of retirement in all cases, or

(b) one starts with a presumption in favour of NRD in the DB scheme, but allows it to be displaced in an appropriate case.

The proposed rules take the latter approach, which seems most likely to deliver the correct result across the generality of cases.

Discount rates

57. Discount rates serve the following purposes:

(a) to place a value on the consumer's putative DB benefits as at the assumed date of their retirement (or as at the computation date where the assumed date of retirement has already occurred) ("the post-retirement discount rate"), and

(b) where the assumed retirement date has not already occurred, to translate the value of the putative DB benefits as at the assumed retirement date into a present value as at the computation date (the "pre-retirement discount rate").

58. While expert actuarial advice is required to determine the specific discount rates to use, there is a prior legal issue as to the general basis on which the valuation of the DB benefits is to be undertaken (see paragraph 29 above for a range of options).

59. As noted in paragraph 10, usually when valuing the loss of a future income stream the Court will adopt a best estimate basis, looking to ensure that it neither over-compensates, nor under-compensates the claimant. There is therefore an argument that such an approach should be taken to valuing the loss of the future DB benefits (ie in fixing the post-retirement discount rate). However, such an approach fails to take account of the fact that the lost DB benefits would, in some measure, have been guaranteed. Although not as secure as an annuity, DB benefits have the backing of the funds of the pension scheme and the contribution covenant of the employers. Although these can sometime prove insufficient, leading to a scheme failure, there is always the PPF standing behind the scheme. Although PPF compensation is not a complete protection (it offers cover for about 80% of a pre-retirement member's benefits and about 90% of pensioner's benefits, and is subject to a compensation cap[6]), overall there is a significant element of guarantee built into a DB pension scheme which is wholly lacking in a DC arrangement.

6 Although the cap is being phased out by the PPF following the Court of Appeal's decision in *Secretary of State for Work and Pensions v Hughes* [2021] EWCA Civ 1093.

60. It could be argued that paying more than the best estimate value is likely to lead to overcompensation. But I do not think that would be the correct way of looking at the issue. One reason why the transfer advice may be judged to be defective is that it failed to take proper account of the value to the consumer of the benefit security offered by the DB arrangement. Any approach to compensation which fails to price in the value of the security will not accurately reflect the loss which has been caused by the defective advice. In reality, what a consumer has lost is not simply an income stream, but an asset. Once one looks at the consumer's rights under a DB stream as an asset, then one has to place a value on that asset, and it becomes clear that part of that value is represented by the element of security it provides. The starting point for the Court in valuing an asset is to look for its replacement cost in the market. There is, of course, no market in DB benefits. The closest the market has to offer is an annuity. However, using the annuity basis of valuation could risk overvaluing the consumer's DB benefits, because they would not, in fact have been annuitised, and would not have enjoyed the effectively 100% protection which that status would have attracted. A possible approach would therefore be to adjust the discount rate to a level somewhere between best estimate and buy-out – ie something around gilts matching.

61. The best argument for compensating the consumer on the basis of the cost of buying an annuity is to say that part of what the DB scheme offered was the payment of a pension which would have required no management or investment decisions on the part of the consumer. Any fund made up of damages which needed to be invested to produce an annual pension on a drawdown basis would require regular input and decision making on the part of the consumer. The only way to replicate this aspect of the DB scheme pension without exposing the consumer to that responsibility would be to put them in funds to purchase an annuity[7]. The proposed rules proceed on the basis that the consumer should be compensated on the basis of the estimated cost of replicating the "lost" benefits by means of an annuity. That seems to me to be a justifiable approach for the reason just given.

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[7] This was the basis of compensation which the parties agreed on in *Walker v International Alliance Group plc* [2007] EWHC 1858 (ch)

62. The pre-retirement discount rate raises different issues. The approach of the current guidance, and of the proposed rules and guidance, takes as its starting point for computing the discount rate the assumed return which the consumer could obtain on the investment of their DC fund, from the valuation date down to the assumed retirement date[8]. This assumed return is then used to discount the putative DB benefits from the assumed retirement date down to the valuation date. This discount rate will be a higher rate than the post-retirement discount rate, because it is reasonable to assume that pre-retirement the consumer will have an element of equity investment in their DC portfolio. It will therefore generate a lower value for the putative DB benefits as at the valuation date than would have been the case if the post-retirement discount rate had been also used for the pre-retirement period.

63. There is, I think a question here as to whether a Court would use a discount rate based on assumed DC returns for the pre-retirement period, granted that had the consumer stayed in the DB scheme he would have run no more risk in the pre-retirement period than the post-retirement period. If it is appropriate to assume a very low risk investment strategy after retirement, is it right assume a somewhat higher risk strategy beforehand? The argument against using the same discount rate pre-retirement as post retirement is that it risks overcompensation, because the consumer will have a fund of investments which they ought to be able to invest in such a way as to generate a return, pre-retirement, which exceeds the return implied in the post-retirement discount rate. There is no obvious answer to this question, and I think the approach taken in the proposed rules and guidance strikes a reasonable balance between the interests of the consumer, and those of the firms.

Pre-retirement discount rates in particular circumstances

64. It should be borne in mind that the pre-retirement discount rate is being applied to two different amounts – the investments which are already in the consumer's DC arrangement, and the cash sum which is to be paid by way of compensation. As to the latter, the consumer will be able (with the benefit of professional advice) to invest it in a way which

8 This assumed return would also be available to be earned from any compensation payable as at the valuation date.

reflects the assumptions underlying the discount rate. But it is possible, in some cases, that the investments in the existing DC arrangement will not be capable of being switched into a portfolio which is capable of replicating the return implicit in the pre-retirement discount rate. This can happen, for example, where the consumer has transferred their DB benefits into an offshore arrangement with poorly performing and largely illiquid assets.

65. In that situation, the assets are likely to have been valued to reflect their poor past performance and illiquidity. So the loss to the consumer from their unsuitable investment portfolio which has occurred before the computation date will be factored into the loss computation. It would then appear to risk under-compensating the consumer to assume, in the period from the computation date down the date of their retirement, that the portfolio could generate the level of return implicit in the pre-retirement discount rate, when in reality that is simply not achievable. In this sort of case, therefore, the standard pre-retirement discount rate may not be appropriate, as it may lead to under-compensation.

Liability of the adviser for the consumer’s past poor investment choices

66. Of course, the adviser in such a situation may take the view that it should not be responsible for the losses caused by the consumer’s investment choices, and that therefore the standard pre-retirement discount rate should be used in these circumstances. Logically, if the adviser is not responsible for those losses, the value of the DC arrangement should also be increased to reflect a reasonable level of return, and not the sub-optimal level produced by the consumer’s investment choices.

67. If the poor investment strategy is due to the adviser’s own advice there can of course be no argument that it is liable for past poor performance, and for any adjustment to pre-retirement discount rate which results from the illiquidity of the consumer’s portfolio. However, in some cases the transfer advice and the advice on the investment of the DC arrangement are given by two different parties. The investment advice may be given by an unregulated offshore entity. This raises the question whether party who gives the defective transfer advice is also liable for losses caused by poor investment advice.

68. The starting point must be the terms of the adviser's obligations under COBS an 19[9]. COBS 9 and 19 in particular are important because they show that the firm is under a duty (a) to ascertain and advise in respect of the actual DC arrangement to which the consumer is proposing to transfer and (b) to ascertain that the client understands the risk of transferring to a DC arrangement (which must include the risk that they will make inappropriate investment choices –the specific reference to the customer's "vulnerability" should be noted). This shows the scope of the statutory duty, and that fact that it extends to protecting the customer (via the personal recommendation) against an inappropriate level of risk.

69. There can be no doubt as a matter of "but for" causation that losses due to inappropriate investments are caused by the firm's breach of duty (because but for the transfer the losses would not have been incurred). Equally it is foreseeable that the customer might end up incurring losses of this sort if advised to transfer inappropriately. That leaves the firm having to argue that the customer's decision to make inappropriate investment choices, or to incur excessive charges, is an intervening cause which breaks the chain of causation. But that cannot be the case where the inappropriate investments or the excessive charges are incurred in the DC arrangement to which the customer transfers, because the firm is obliged to advise on suitability with this particular arrangement in mind. The new intervening cause argument may have more traction where the customer initially transfers to a standard DC arrangement, and is only later persuaded by a third party to transfer to an inappropriate arrangement. But even there, it is likely to be hard for the firm to argue that it should not be liable for a subsequent poor investment decision by the customer, when they are specifically required to give advice which takes into account that risk.

70. Also relevant here is the reasoning in the *Emptage* case (see para 26 above). It must have been in the contemplation of the adviser at the time the advice was given that there was a risk that the DC benefits would end up producing lower benefits than the DB arrangement. If the consumer was wrongly advised to transfer, they would be exposed to that risk as a result of the defective advice. An element of the risk to which the consumer

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9 And see also the relevant FCA guidance at https://www.fca.org.uk/news/news-stories/advising-pension-transfers-our-expectations

would be exposed would be the risk that they would, as an amateur investor, make the wrong investment choices – even if they took apparently competent investment advice. So, loss exacerbated by bad investment decisions is still loss which the adviser should reasonably have contemplated.

71. In my opinion, in cases where the consumer has invested their DC arrangement in an inappropriate manner, which cannot, post compensation, be switched to a more appropriate investment profile, it may not be appropriate to use the standard pre-retirement discount rate. Only if it is clear that the adviser is not liable for the inappropriate investment choices of the consumer will it be appropriate to use the standard pre-retirement discount rate, in a situation in which the consumer's existing DC arrangement assets may be incapable of generating the level of return implicit in the discount rate. Cases in which the adviser bears no responsibility for the inappropriate investment choices of the consumer are likely to be rare. Where they do exist, the adviser ought to be entitled to adjust the value of the DC assets at the date of computation to eliminate that part of the loss due to investment choices for which it is not responsible.

Investment adviser fees and product charges

72. The requirement for mitigation, discussed in paragraph 21 above, has implications for the assessment of compensation. These implications concern the cost of engaging investment advisers to assist in the management of the claimant's DC assets. No such advice is required under a DB arrangement, so the cost of engaging an adviser is potentially a cost to be added to the loss computation, when comparing the values of the putative DB and DC arrangements.

73. As part of the consumer's duty to mitigate their loss, they are under an obligation to take reasonable steps to grow the value of their DC funds. The pre-retirement discount rate assumes that they will do so. In so doing they are, in principle, entitled to recover any costs reasonably incurred in attempting to mitigate. For this reason, if the claimant has engaged an investment adviser, the claimant's reasonable costs of doing so in the period from the date of transfer to the valuation date should be included in the loss computation.

74. Looking at the prospective loss computation, and assuming that this is based on a reasonable rate of return on the claimant's DC funds, in principle the claimant ought to be allowed something for the reasonable cost of any investment advice reasonably required to enable them to generate the assumed return. This reasonable allowance could be built into the discount rate.

75. It is only the reasonable costs of investment advice which should be allowed in the loss computation. If the consumer has incurred (or is proposing to incur) investment adviser costs in excess of what is reasonable, having regard to the amounts under management and the investment objectives, then that excess should not be allowed.

76. In addition to investment adviser fees, a consumer will have to incur charges levied by the DC arrangement administrator. As with investment adviser fees these will vary. Again, the consumer should be compensated for a reasonable level of charges which must be incurred under the DC arrangement. The consumer ought not to be able to recover unreasonably large charges, that is to say charges at a level which is higher than a level reasonably necessary to earn a return which ought at least to match that implicit in the pre-retirement discount rate.

77. If the consumer is locked into a DC arrangement which cannot be exited, and that arrangement involves what might otherwise be regarded as unreasonably high charges then, as in the case of a consumer who is locked into poor investment returns, it may be appropriate to compensate for the unreasonably high returns where the adviser was ultimately responsible for the consumer being locked into the DC arrangement in question.

<u>Compensation payable over time and the use of escrow accounts</u>

78. As noted above, outside personal injury claims, a Court will look for finality in making an order for damages. In exceptional cases it may defer the assessment, or the final assessment of the quantum of loss, but it will not, and cannot, order that the defendant pay compensation as and when necessary on an ongoing and open ended basis. There is,

however, no reason in principle why a scheme for financial compensation should not require firms to enter into such arrangements. In theory they have the attraction that over time no more and no less than the appropriate amount of compensation is paid, thus avoiding the inevitable risk entailed in a one-off cash payment that will prove in the long term be either too much or too little, and hardly ever exactly right.

79. It does seem to me, however, that there are significant practical disadvantages in such arrangements. First, it means that the consumer and the firm have to engage in a long-term relationship, with the capacity for continuing disagreements. Second it means that either the firm gets to decide when and how much compensation is due under the arrangement (which the consumer might reasonably object to) or the operation of the ongoing relationship has to be policed by a third party (in which case who should that be, who is going to pay for it and what are the ground rules going to be?). Thirdly, if the firm fails, the claimant might be left with incomplete compensation and have to pursue a fresh claim through FSCS (and be subject to the FSCS compensation limit) unless some form of security is put in place.

80. It is, in my opinion, open to FCA to sanction the use of escrow mechanisms and other forms of compensation subject to adjustment over time as a means of delivering redress compensation, but there are clearly policy issues around whether this would in fact be appropriate, and, if it is to be permitted, some work to be done on the precise terms on which an escrow might implemented.

C An evaluation of the proposed rules and guidance in the light of Objective 2.

81. I propose to discuss the issues raised under this heading under various topics which include all those discussed in under the heading “Particular issues” in section B (para 44 onwards).

The basic objective of redress

82. The definition of ‘redress offer’ in the proposed rules and guidance does not replicate the provision in the current guidance quoted in paragraph 5 above. Instead it simply refer to loss suffered “as a result of non-compliant pension transfer advice” (see rule 4.1.1(15)). The

proposed rules then require firms to "offer redress that, as far as possible, puts the consumer into the position they would have been in if they had received complaint pension transfer advice" (4.3.23). This is an acceptable approach.

What assumption should be made about whether a PCLS would be taken when the consumer has not yet retired?

83. The proposed rules and guidance require an assumption that a PCLS will be taken by all consumers, save in specified circumstances (see 4.4.6(4)R and 4.5.4G). Where the assumption applies there is a standardised adjustment built into the post-retirement discount rate. The circumstances in which the assumption is not to be made cover the situations in which it would be clearly inappropriate to make the assumption, based on the consumers own past actions or their objective circumstances. It is not open to a consumer to contend that the adviser should not apply the assumption, simply on the basis of the consumer's professed intention not to take the PCLS and absent compelling supporting evidence. I think it is reasonable to take that approach, granted the difficulty in requiring the firm to adjudicate on such evidence.

Retirement date

84. The ascertainment of the consumer's assumed retirement date from the DB Scheme is dealt with at 4.3.12 to 4.3.16 of the proposed rules and guidance. This proceeds on the basis of a rebuttable presumption that the consumer would have retired at the normal retirement date in the DB scheme (4.3.13). This presumption can be rebutted where it can be shown that it is more likely than not that the consumer would have retired on an alternative date (4.3.14G). Unlike the PCLS assumption referred to above, there are no limits on the evidence which can be considered when addressing this issue. The proposed rules and guidance offer examples of evidence which might show that an alternative date would have been chosen, and also specify types of evidence which would not support such a conclusion (4.3.15G and 4.316G).

85. In my view, the presumption is fair to consumers and will give an appropriate level of compensation where there is no evidence to displace it. The adviser will have to justify, by reference to evidence, the use of any earlier date, which (as explained above) will tend to reduce the level of redress compensation. The approach of taking the earliest date at which the consumer accessed their DC benefits (eg by taking a PCLS), is rightly not endorsed. By itself, taking a PCLS will not displace the presumption in favour of the DB normal retirement date.

Discount rates

86. The post-retirement discount rate is based on annuity pricing. This will certainly provide full compensation for consumers. There is an argument that they are being overcompensated, but the purchase of an annuity is in reality the only option which will place the consumer in a position in which they will automatically receive the level of pension which would have been available from the DB scheme.

87. The pre-retirement discount rate is based on an assumed rate of return which is 50% of the return on equities. Subject to the point made in the following paragraphs, this is a reasonable rate of return to assume the consumer will be able to secure from the assets at their disposal.

Pre-retirement discount rates in particular circumstances

88. No special rule is proposed for situations in which the pre-retirement discount rate cannot be achieved by the consumer because of the asset allocation in their existing DC arrangement. Instead, this situation would fall within 4.2.5G of the proposed rules as an individual circumstance not specifically addressed in the rules, and the assumptions guidance given in Annex 1 2.2G, so the firm would have to make special provision for it.

Liability of the adviser for the consumer's past poor investment choices

89. As noted above, where the consumer has made poor investment choices which have caused loss to their DC fund, and are impacting their ability to achieve a reasonable return for the future, the adviser who gave non-compliant or negligent advice to transfer will probably be responsible for the loss caused by the poor investment choices. 4.4.12 of the proposed rules and guidance simply takes the value of the consumers DC arrangement at the computation date. It makes no allowance for the adviser arguing that the value has been depressed by actions of the consumer for which it is not responsible. Furthermore, as noted above, the pre-retirement discount rate at present makes no allowance for the poor state of investment of the DC arrangement – in this respect the adviser is not made responsible for the loss.

Adviser fees and c*harges levied within the DC Arrangement.*

90. The proposed rules make provision for compensating consumers for the cost of initial advice on the investment of the their redress compensation and their existing DC arrangement, together with compensation for the ongoing DC arrangement charges levied down to retirement date, and the ongoing cost of investment advice[10]. The initial advice compensation is computed on a set percentage of the aggregate value of the compensation and the assets in the consumer's existing DC arrangement, with a maximum and a minimum amount to be payable. The DC arrangement costs and the ongoing advice costs are set by reference to default percentage charging rates which are netted off against the pre-retirement discount rate. This, again, has the effect of awarding compensation for these costs by refence to the aggregate value of the existing DC pot and the redress compensation.

91. On the basis that the computation factors in the proposed rules are based on market rates, I think the proposed rules provide a reasonable basis for compensating for these heads of consequential loss. The only situation which the proposed rules do not specifically cater for is the possibility that the customer is locked into a DC arrangement with higher than market rate charges due to the fault of the adviser. This situation would fall within 4.2.5G of

[10] DISP App 4, 4.4.19, 4.5.15, Annex 8.1.

the proposed rules as an individual circumstance not specifically addressed in the guidance, so the firm would have to make special provision for it.

The use of escrow accounts

92. This is not at present contemplated as a method of meeting compensation requirements.

Michael Furness QC

Wilberforce Chambers

31 July 2022