DRN-4757972

The complaint

Mr B and Mrs B ('the complainants') say Wills & Trusts Independent Financial Planning Limited ('W&T') mismanaged their investments – held within the pension, General Investment Account ('GIA') and Individual Savings Account ('ISA') elements of their overall portfolio – between January 2020 and October 2021 (which they refer to as 'the critical period'). They held individual pension accounts, they jointly held the GIA, and Mrs B held the ISA. In summary, they say W&T did as follows:

- Allowed their portfolio, through mismanagement, to underperform; which resulted in a financial loss of around £100,000; and which contrasted with the gains achieved in the W&T core generic/model 'Protect' 'Enjoy' and 'Grow' (or 'PEG') portfolios upon which their portfolio was based. [*issue 1*]

- Mishandled and delayed the migration of their portfolio, from the Transact investment platform to the Multrees investment platform, between November 2020 and April 2021, leading to a missed/postponed portfolio rebalancing in January 2021 and leading directly to some (or a large part) of their financial loss. [*issue 2*]

- Failed to fulfil its contractual (and regulatory) responsibility to keep them fully informed and advised about their portfolio's valuations and performance (including performance in comparison with relevant benchmark portfolios). [*issue 3*]

- Failed to fulfil its promises and its contractual responsibility to be open and transparent about the fees associated with their portfolio. [*issue 4*]

The complainants also referred to, and provided updates on, issues they say have arisen after the critical period, and especially since May 2022.

They said their named adviser within W&T left and was not replaced; they were told information about their portfolio's performance and values had been inaccurate; they were told the terminations of W&T's contracts with Multrees and with James Hay (the pension provider for the Multrees platform) were imminent, and that W&T was to withdraw from its investment management service; they were yet to hear from the new firm that was supposed to take over the service; W&T did not appear willing to address their issues any further; and there were indications that they were being excluded from its full service (including exclusion from a meeting, to which others were invited, about transition of the service) – '*the updates*'.

The complainants say they terminated W&T's service, as of October 2023, due to their experiences in the updates.

What happened

I issued a Provisional Decision ('PD') in this case on 11 March 2024. Both parties have received the PD and will be familiar with its contents. I will not repeat all those contents in this decision, but I will refer to most of them.

With regards to the complaint's background, the PD mainly said –

"*The complainants have presented the following context for the complaint issues (1 to 4) summarised above:*

- *They became a family client of W&T in 2017, after their meeting with its principal in February that year and after discussions and correspondence with him thereafter.*

- *On 31 March that year it sent them a detailed Wealth Management Plan ('WMP') recommending the family client service, investment of their portfolio in a WRAP account on the Transact platform and investment management from W&T (with requests for their approval before the execution of investment decisions). They agreed with the WMP and, on 4 May that year, signed the family client agreement.*

- *In July 2018 they received notice that W&T had created a new company – 'Trust DFM' (owned, they were told, by the same staff shareholders/owners of W&T) – that would undertake the discretionary management of their portfolio on the Transact platform. However, W&T's Investment Committee was to continue overseeing its management and W&T was to continue giving its advice on the market and on changes made to the portfolio in response to market conditions. The new service was to become effective from September 2018.*

- *They agreed to proceed with W&T's recommendation of Trust DFM's service, in their belief at the time – and subsequently supported by the terms of the new client agreement they sighed in June 2021 – that whilst it might be a separate entity it was wholly controlled by W&T. The new agreement confirms that they have no direct contract with Trust DFM, instead W&T is Trust DFM's client and it (W&T) acts as their agent in instructing Trust DFM on their portfolio.*

- *In September 2020 W&T recommended movement of their portfolio away from Transact and to the Multrees platform (with James Hay as the pension provider on the platform), which it said it had created (and was to be administered and maintained by Multrees) to serve its clients' investment needs. They agreed to this in the same month. W&T's and Trust DFM's roles remained unchanged. In this respect, W&T also promised to review the platform every six months, and that if it was found to be lacking their investments would be moved.*

Within the above background, the complainants say they believed W&T controlled Trust DFM; and that, as their agent, it was responsible for prioritising their interests at all times in its dealings with Trust DFM concerning their portfolio. They also say it was duty bound to avoid creating or encouraging conflicts of interests in this respect.

W&T disputes the complaint.

It has offered £200 to the complainants in recognition of problems they faced in receiving Quarterly Scorecards ('QSs', 90 days portfolio reviews) for their portfolio – this being relevant to issues 2 and 3. However, it rejects their overall allegation that it is responsible for the loss that they claim.

In a nutshell, it says their portfolio was discretionarily managed by a separate and distinct firm (Trust DFM), that it obtained and shared information from Trust DFM to address all their questions and concerns, and that, other than its shortcoming in the QSs issue, it has done nothing wrong in its advisory service to the complainants.

The matter was referred to our service and addressed by one of our investigators. With

regards to the updates, she informed the complainants that they would need to pursue the associated matters as a new complaint. They have confirmed that they understand this. With regards to the present complaint, she concluded that W&T should not have to do more than meet the £200 compensation offer it has made to them, and that the offer is in addition to a previous payment of £450 that has been made to them.

The complainants and the investigator engaged in lengthy correspondence leading, and subsequent, to presentation of her views on the complaint.

Overall and in conclusion, she mainly found that W&T's advice on their portfolio was suitable, the losses relevant to the critical period were within the range of losses they were prepared to tolerate in their Attitude To Risk ('ATR') profiles, the amount of cash held in the portfolio was a matter for Trust DFM's discretion, their portfolio's performance did not match that of W&T's generic portfolios because theirs was constituted and, overall, behaved differently, the rebalancing of their portfolio was another matter for Trust DFM's discretion so it was outside W&T's control, W&T took steps to mitigate the effects of the QSs issue and the issue of specific periodic portfolio statements not being properly reported, and W&T explained its fees at the outset of its service in 2017.

The complainants disagree with the investigator's key findings. They submitted very detailed responses (including rebuttals) to all relevant aspects of the findings, and they asked for an Ombudsman's decision. They mainly said:

- *The investigator failed to address what they consider to be the core part of their complaint – that being issue 1 (as summarised above).*

- *She was also wrong in the following respects –*

    - *Referring to Trust DFM as an external firm that made the decisions about the portfolio's investment …*

    - *Her finding about the postponed rebalancing …*

    - *The investigator misguided herself on the facts related to their portfolio.*

    - *At the outset, the WMP was followed, that recommended a portfolio split between W&T's generic (and non-bespoke) 'low risk' (40%), 'medium risk' (40%), and 'high risk' (20%) funds, to reflect their medium ATR at the time. In 2018, based on an ATR reassessment and a reasoned agreement to slightly increase their portfolio's risk profile, the low-risk fund allocation was reduced by 10% and the high-risk fund allocation was increased by the same. Any changes within the generic funds were mirrored in their portfolio.*

    - *The PEG portfolios were then introduced to substitute the risk rated funds. They too ranged from low (Protect) to medium (Enjoy) to high (Grow) in terms of risk profiles. The same approach broadly applied whereby, and in the main, any changes in the PEG portfolios were mirrored in theirs. Between early 2019 and May 2021, based on another ATR reassessment, they were invested in the generic Enjoy portfolio which, as W&T affirmed, had a moderate risk profile and suited their ATR at the time.*

    - *From May 2021 – after experiencing and discussing concerns about underperformance in their portfolio between 2019 and 2020, and based on W&T's advice – their pensions were invested in its generic 'Cultivate' fund and the ISA and GIA elements of their portfolio were invested in the generic*

'Amplify' fund. Both funds/portfolios were within the medium/moderate risk profile (as advised by W&T). The funds used blended percentage components of the core PEG portfolios. Cultivate had 75% of Enjoy and 25% of Grow, and Amplify had 25% of Protect, 25% of Enjoy and 50% of Grow.

- *These facts show that the investigator was completely wrong to find that their portfolio was bespoke …*
- *Also in the above context, it was wrong for the investigator to find that high risk losses were acceptable to them and to their ATR …*
- *The postponed rebalancing also meant the cash holding in their portfolio stayed at the level of 10% between January and May 2021, whilst other Trust DFM (but non-W&T) clients enjoyed the rebalancing and had their portfolios' cash holdings reduced to 2% …*
- *W&T recommended the platform migration in September 2020. Transfer of the ISA and GIA components of their portfolio did not begin until 21 November 2020, and did not conclude until 14 January 2021. Transfer of their pensions and cash holding was not completed until April 2021. Throughout these periods they had no online access to their portfolio's value. There is evidence in which W&T's principal concedes that the migration was mishandled, as well as evidence of W&T misleading them in the matter. The investigator did not properly address any of these aspects of their complaint.*
- *Between September 2020 and September 2022 their insight into the values and performance of their portfolio was significantly hindered by late, incomplete and inaccurate QSs from W&T ...*
- *Issue 4 mainly concerns W&T's failure to present them with information about the fees associated with their portfolio in monetary terms, as opposed to the percentage terms it used, and that the investigator referred to ...*
- *The £450 payment has been misrepresented in the investigator's findings. It was completely unrelated to their complaint. It was an erroneous payment into their portfolio that W&T decided not to recover, with reasons. Then it transpired that Multrees had corrected and deducted the payment anyway, so it is no longer in their portfolio. They understood that Trust DFM was liaising with Multrees to reverse the correction, but they have had no update on that.*
- *The conclusion that the £200 offer is fair and reasonable has not been reasoned ...*"

"*The case was referred to an Ombudsman – to me. I made additional enquiries, directed at both parties. Two of our investigators have helped me to liaise with and to obtain responses from them. My enquiries were conveyed as follows –*

"The ombudsman has explained that full and evidenced clarity on the relationships between W&T, Trust DFM and the complainants is important, and the facts appear to be clear, but documentary evidence seems to have gaps. Therefore, could either or both parties please send us a copy of the following:

- *All correspondence after the signed client agreement of 2017 (which we already have and doesn't need to be re-sent) in which the new service/arrangement involving Trust DFM and involving discretionary management of the complainants' portfolio, and the*

terms of the new service/arrangement, were introduced, agreed, and discussed (at any time before or after agreement).

- *Any and all client agreements signed by the complainants after the 2017 agreement.*

- *The complainants say W&T acted as their agents in relation to Trust DFM. If, separate to the client agreements, there is documentation about such agency (or about its terms) could either or both please send us a copy.*

- *Please could W&T send us evidence of the operational contract, agreement and/or memorandum of understanding between it and Trust DFM (and any other relevant documentation about the terms of its working relationship with Trust DFM)*."

Both parties helpfully responded.

W&T sent us copies of – its letter to the complainants dated 14 July 2018 introducing and recommending Trust DFM's service (with their signed acceptance dated 31 July 2018); its letter to them in 2019 seeking their agreement with the newly introduced (at the time) PEG portfolios (with their signed acceptance dated 7 April 2019); and its agreement with Trust DFM dated 2 June 2020. These three documents were shared with the complainants. In response, they noted that they already had their copies of the first two (and had shared them with us), including the complete/fuller version of the 2019 letter.

W&T said it gave the complainants advice in the arrangement, and portfolio changes and rebalancing were done through Trust DFM. It added that the two firms did not cross over, other than sharing the same ownership, and that Trust DFM had its own separate regulated status.

The complainants repeated some of their previous submissions. They also provided additional information (and evidence) and comments of W&T's disclosures.

Concerning the Multrees platform recommendation in 2020, they say they have learnt about new and relevant information that shows they were misled in the recommendation and that the platform migration was indeed detrimental to their portfolio.

In the main, they say – contrary to W&T's 2020 representations about Multrees having 'exceptional' experience in building and maintaining platforms, they have been informed by other financial advisers that Multrees was relatively unknown in the UK (whereas Transact was at the forefront of platform providers); by July 2023 W&T's email to them confirmed that it had lost confidence in the platform and was terminating its contract with Multrees, given their inability to provide the level of service and accuracy needed; these and other facts on the matter suggest that W&T knew or ought to have known about the limitations and inabilities of the Multrees platform at the outset or early into its operation, but failed to review it and move their portfolio as it undertook to do; and further documentation from 2020 (a 'Custody by Multrees' document and a 'Multrees Stocks and Shares ISA Terms and Conditions' document) suggest that Multrees/the platform was in fact distinct and independent from W&T (and was not owned by W&T).

They also refer to evidence from the Transact platform (where they, and their new adviser, have returned their portfolios to since leaving W&T) about what happened during the migration of their portfolio to Multrees.

They say the evidence, which they shared with us, shows the following – Multrees could not facilitate electronic transfers, so each transfer had to be processed manually; this meant 891 individual transfer cases, in tranches, each requiring a manually processed Stock Transfer

Form ('STF'); and issues and delays arose in these processes.

The complainants argue that this shows the Multrees platform never had the capability to undertake the bulk transfers that W&T arranged, that wider evidence suggests it knew this beforehand during a trial run prior to the delayed bulk transfers; that it unreasonably subjected their portfolio to a foreseeable problematic migration nevertheless; and that it compounded the matter by making the unreasonable decision to deprive their portfolio of participation in the January 2021 Trust DFM rebalancing because of the delayed migration.

With regards to the June 2020 agreement between W&T and Trust DFM, they highlighted the following – there is a need for evidence from W&T on when it accepted the agreement and when it came into force; the agreement treats W&T as the platform provider's client and, with regards to Trust DFM, as agent of W&T's clients; it gave Trust DFM full discretion to review, change and rebalance its model portfolios; it delegated all the portfolios' investment dealing, execution, custody, administration and reporting responsibilities to the platform provider; and it provided that the agreement would end automatically in the event that W&T's relationship with the platform provider ends.

In the main, they argue that this shows – Multrees was always an independent platform provider (not merely the 'administrator' of W&T's/Trust DFM's platform, as W&T misrepresented); in the arrangement, W&T retained sole responsibility for advising them; it represented them, as their agent, to Multrees and Trust DFM, but such agency was never explained to or agreed by them at the time; the agency provision was first included in the new terms of service they agreed in 2021, a year after W&T had already been acting as their agent without their agreement; with Trust DFM having full discretion to review, change and rebalance its model portfolios, this left W&T with an advisory role only; this conflicted with its representation to them that its investment committee oversaw and determined such management decisions; this was not the arrangement presented to them; and it was/is not the arrangement they agreed to.

The complainants shared communications from 2021 in which W&T introduced its newly launched (at the time) accountancy and solicitors firms, and explained its "A Client of ONE is a Client of ALL" approach, whereby clients (and information about them) were to be shared by all three firms (including W&T's financial advice firm). Three client agreements were presented for this purpose and the complainants completed them. They sent us a copy of the agreement for W&T (that is, the financial advice firm) they signed on 6 July 2021.

They noted that, contrary to what they had been told when Trust DFM was recommended to them in 2018 – that it was wholly owned by W&T – in a July 2023 email W&T told them, for the first time, that Trust DFM was actually only part owned by W&T, with the other part owned by other financial adviser firms who used its service. Until a communication in April 2022, they say they had been unaware that Trust DFM serviced non-W&T clients, and this communication informed them of that – the recommendation in 2018 did not.

The complainants submit that the sum of the above means W&T had no meaningful control over the Multrees platform and none over Trust DFM, yet it misrepresented to them that it had control over both. They were therefore misled from the outset and did not agree to the type of arrangement(s) that followed."

The PD's findings included the following –

"*I agree with the investigator with regards to the updates and the need for the complainants to consider pursuing them as a separate complaint. My view in this respect has already been shared with them. As such, this decision does not address the updates. It focuses only on issues 1 to 4 and the facts and submissions relevant to them.*

Having reviewed the case and especially after considering more recent information that has been disclosed by both parties I find myself taking an approach to the complaint that differs from the investigator's, and reaching conclusions that also differ from hers. Hence this PD."

"*The laws and rules relevant to W&T's role and responsibilities towards the complainants ought not to be disputed. They are, in the main, those clearly stated in the relevant parts of the regulator's Handbook. Its responsibilities to make suitable recommendations to clients and to abide by the 'client's best interests rule' are set out in the Conduct of Business Sourcebook ('COBS') section of the Handbook, at COBS 10 and COBS 2 respectively.*

Furthermore, W&T will be aware of the Handbook's Principles for Businesses. Principles 2, 3 and 6 require, in broad terms, firms to conduct their services with due skill, care and diligence, to make reasonable efforts to manage and control their affairs responsibly and effectively, and to uphold their customers' interests and treat them fairly. To provide added context, there is case law – Ouseley J, in R (British Bankers Association) v Financial Services Authority [2011] EWHC 999 (Admin) – that confirms The Principles are ever present requirements firms must comply with.

The above provisions played an important role in defining W&T's responsibilities towards the complainants. With them in mind, my main provisional conclusions are that –

- *The critical period happened after W&T's introduction and recommendation to the complainants of Trust DFM's service;*
- *around half-way through the critical period was its recommendation to them of their portfolio's migration to the Multrees platform;*
- *both recommendations were accepted as presented, but they appear to have been significantly misrepresented by W&T;*
- *but for the misrepresentations, there is enough evidence to conclude that the complainants would probably not have agreed to either;*
- *but for the misrepresentations (especially about Trust DFM's service), they would probably also have avoided the experiences they complain about in issues 1 to 4;*
- *the misrepresentations breached the aforementioned COBS rules and Principles, and caused direct detriments to the complainants.*

Due to these findings, and as will become clear in the analysis below, I have not found it necessary to draw any focused conclusions on issues 1 to 4. On balance, I consider that the events in these issues would not have happened if Trust DFM's service and the Multrees platform had not been misrepresented to the complainants in the beginning.

Both parties began with the agreed WMP. It is a very detailed document – 100 pages (including the recommended funds' factsheets). In terms of W&T's active portfolio management under the WMP, it gave advice and recommendations for investment changes, its provided monitoring and 'tilting' of asset and risk allocations, and it rebalanced the portfolio (with the arrangement to do so once or twice a year depending on circumstances). Execution of investment related decisions in this service required the complainants' approval. Overall, it appears to have been an arrangement in which W&T sought to provide as much of the benefits of discretionary management as it could fit within an active advised management service.

No complaint has been made about W&T's operation of the WMP or about its management of the complainants' portfolio under the WMP. Therefore, the implication is that the complainants had and have no issues about their portfolio during this period.

In 2018, when Trust DFM's service was introduced and recommended to them, they were told – their existing portfolio in the WRAP account on the Transact platform would remain unchanged (other than Trust DFM being put in place on the platform as the portfolio's manager); the reasons for which the portfolio was in the WRAP account on the Transact platform remained unaffected and unchanged; the 30/40/30 (low/medium/high) risk management profile for the portfolio at the time remained unchanged; the discretionary basis of Trust DFM's service meant investment decisions would no longer require their approval; however, their portfolio "… will still be managed by the existing investment committee and team, via the existing Advance Investment Strategy, details of which have been provided to you previously in your Wealth Management Plan …"; and there was no increase in fees.

The complainants were therefore led to believe that little had changed, other than the introduction of Trust DFM (which the letter of 14 July 2018 said W&T 'wholly owned') and the loss of their right to approve investment decisions (in return for the benefits of discretionary management). Fees remained unchanged, as did the portfolio, its risk management profile, and its home in the WRAP account on the Transact platform. Despite Trust DFM's discretionary management, even W&T's investment committee's role remained unchanged. The committee (and team) were to continue managing the portfolio through the agreed and existing Advance Investment Strategy.

The above is what was presented to the complainants and is what they agreed.

The following subsequently emerged in conflict with, or having been omitted from, what they were presented with and agreed in 2018.

<u>The agency-based arrangement</u>

No new terms or agreement document was executed in 2018. As stated in the background section above, I asked both parties to provide evidence of any and all client agreements after 2017. The earliest such agreement, which might be viewed as a form of client agreement, is the PEG related agreement in 2019, but that is irrelevant for present purposes because it relates only to the introduction of the PEG model portfolios. Then there is the updated client agreement of July 2021, which covered the full terms of service and is relevant for present purposes.

As the complainants have highlighted, the 2021 agreement refers to the agency-based arrangement concerning Trust DFM.

This information was omitted from the 2018 introduction and recommendation, and I have not seen evidence from that time or before the 2021 agreement in which this arrangement was brough to the complainants' attention. Given the manner in which the 2018 recommendation presented Trust DFM as being under W&T's control, the 2021 declaration of the agency-based arrangement arguably stood in conflict with that.

The need for W&T to act as an agent in facing Trust DFM could not reasonably have been implicit (or foreseen) in circumstances where it presented itself as being in full control of Trust DFM (and its investment committee as being in full control of the investment management decisions). In practical terms, W&T and Trust DFM were essentially presented as joint principals and the complainants were direct clients of the former, so there was no reason to expect a role for an agent.

Up to July 2021, the agency-based arrangement appears to have been concealed from and/or misrepresented to the complainants. W&T was/is responsible for that, and its actions (or inactions) in this respect amount to significant failings in its obligations to make suitable recommendations to them under COBS 10. A recommendation that omits, conceals and/or

misrepresents a material factor such as an agency arrangement required for the operation of a recommended discretionary management service cannot reasonably be viewed as suitable. The same amount to failings in its responsibilities under the client's best interests rule and the Principles mentioned above (particularly Principle 6).

The facts show that by the time they became aware of the arrangement, they were well into the critical period with urgent matters to prioritise, address and mitigate in their engagements with W&T, and that around the same time they raised the dissatisfactions that led to their complaints. As such, I do not consider that they accepted or affirmed W&T's omission and/or misrepresentation in this matter.

Ownership and Independence of Trust DFM

Trust DFM had freedom to define its ownership as it wished, within the laws and rules relevant to that. W&T also had freedom to determine any role it wished to play in that ownership. I do not intend to suggest or find otherwise. The issue I am addressing is still about the representations made to the complainants that induced them to accept the recommendation to use Trust DFM.

The idea was initiated by W&T. The preamble in its 2018 letter explained how the creation of Trust DFM was a project it had been working on. At the time, the complainants had not asked to move to a different arrangement or to a different firm. Both parties had been working under the WMP for just over a year and, as I said above, there had been no issues. The relationship was relatively new and, overall, available evidence suggests the complainants were content to proceed with it as it was.

In the above context, they say they placed significant weight on the recommendation's references to W&T owning Trust DFM. I accept this assertion, and I am persuaded that they used this understanding as grounds on which to convert their contentment in the pre-existing arrangement to agreement with the new recommended arrangement with Trust DFM. As they have stated, and as the wording of the recommendation directly led them to believe, they were still engaged mainly with W&T, and Trust DFM was simply a subsidiary that it wholly owned and that had been set up in order to meet regulatory requirements for the provision of discretionary investment management services (which is what the letter said).

In other words, their reasonable conclusion was that their portfolio was not being managed by a new unknown firm, it was still being managed by W&T alongside its wholly owned subsidiary.

Five years after the 2018 recommendation, in a July 2023 email from W&T to the complainants, it was confirmed to them (for the first time, it appears) that W&T did not wholly own Trust DFM, and that it was partly owned by other financial advisers who used its service. Around a year before that, in an email of 20 April 2022, W&T had confirmed the following to them (also for the first time, it appears) – "Trust DFM is a separate firm, and it does have other advisor clients outside of Wills & Trusts".

Just as it had discretion to define its ownership, Trust DFM had the same to define its clientele, and I do not intend to suggest otherwise. However, the 2022 notice appears to have confirmed an independence in its position that was not previously apparent to the complainants. The 2021 notice of the agency-based arrangement possibly gave an indication of this, but the 2022 notice was confirmation that Trust DFM was a separate firm that served clients outside W&T, and the 2023 notice confirmed its ownership was partly outside of W&T – all of which conflicted with the 2018 recommendation of Trust DFM as a W&T subsidiary wholly owned by W&T for the purpose of servicing W&T clients.

Overall and on balance, I do not consider that the complainants would have agreed to the recommendation if they were fully informed, as they should have been, about how Trust DFM was owned (or was to be owned) and how it was to operate (including full information about, and/or disclosure of, W&T's terms of operation with Trust DFM). I address the latter in the next sub-section. With regards to the former, Trust DFM's incorporation documents suggest it began as an entity owned by W&T, so it appears that this changed over time. However, I still consider that W&T ought to have given the complainants prior notice when this became liable to change – in order for them to make an informed decision on what to do with their portfolio before it changed. It did not do this.

Their 2018 agreement with the recommendation was based on their reliance upon W&T's ownership of Trust DFM, so prior notice of change in this respect was material to their position in the arrangement. In simple terms, they neither asked for nor wanted the management of their portfolio to end up with a new firm that was not one and the same (essentially) as W&T; yet that appears to have been what the recommendation led them into; and W&T appears to have done nothing to protect them from that – which was not in their best interest.

<u>W&T's terms of operation with Trust DFM</u>

The theme in the findings above continues in this sub-section too.

The complainants are now aware of the terms that existed in the relationship between W&T and Trust DFM. We recently shared a copy of the terms document with them. I have not seen evidence that they previously had sight of it. It is signed (and dated 2 June 2020) by W&T. They have asked for evidence of when the terms within it became effective. I invite W&T to comment on this. Unless it comments with a specific evidenced date in this respect, I consider it reasonable to draw the inference and conclusion that the 2020 document presented the same terms that were in place from the outset of its arrangement with Trust DFM. It is arguably inconceivable that an arrangement that was operating before 2020 had no terms until 2020.

The document refers to the agency-based arrangement (with W&T as its clients' agent). It reserved Trust DFM's right to decline any agent firm's application for its services. It confirms that only the agent firms are Trust DFM's clients. There are provisions confirming that agent firms were responsible for arranging their own access to the platform and for advising their clients; that Trust DFM's responsibilities included the following –

"Our role in the provision of the Trust DFM Model Portfolio Service is to construct the Trust DFM Model Portfolios with asset allocations designed to represent certain investment objectives and risk profiles as set out in our published fact sheets for the Trust DFM Model Portfolios, and to select the investments to populate each Trust DFM Model Portfolio at our discretion (subject to Platform Available Investments) ..."

"We shall review the Trust DFM Model Portfolios periodically as we consider appropriate … we may instruct changes to the asset allocation and/or investments selected, and/or instruct a rebalancing of Trust DFM Model Portfolios. In respect of each of your clients, you acknowledge and agree that, as your client's adviser, you are responsible for ensuring that our and your respective responsibilities under these Terms of Business are fully explained to your client …";

and that Trust DFM's responsibilities excluded the following –

"… our role does not extend to execution, dealing, custody and administration in relation to investments in Trust DFM Model Portfolios (including the implementation of depreciate

instructions to change or rebalance Trust DFM Model Portfolios) … The Platform Provider will be responsible for executing transactions to fulfil instructions we have given to it … You acknowledge and agree that we have no responsibility with regard to transaction reporting requirements."

The above is not the arrangement that was recommended to the complainants in 2018. In the document, Trust DFM gave no preferential or deferential treatment to W&T (and/or its clients) or, it appears, to anyone. The document also expresses no superiority in W&T within the relationship. In broad terms, the document sets out provisions for Trust DFM to behave completely independently in all aspects of its operations and responsibilities.

Crucially, the document confirms that Trust DFM had full control and full decision-making powers in the discretionary management of its model portfolios and, as a result, in its portfolio management service. Contrary to the 2018 recommendation, W&T's investment committee had no share in those powers and no role in making those decisions.

It appears that the arrangement with Trust DFM was never – and was never intended to be – what the 2018 recommendation presented to the complainants. Trust DFM was a separate and independent firm beyond W&T's operational control, it had full discretion and investment decision making powers for its model portfolios, and it operated its discretionary portfolio management service as it saw fit (within the relevant regulatory rules). Its service was not subject to oversight and/or decisions from W&T's investment committee.

For the reasons already addressed, and the findings reached in the three sub-sections above, I am satisfied that the complainants would not have agreed to a recommendation in 2018 that set out the full and accurate terms of the Trust DFM proposal; they were misled by W&T to agree the recommendation; and the recommendation was unsuitable and contrary to their best interest.

<u>The Multrees Platform</u>

Overall, on balance and for the reasons submitted by the complainants (and summarised in the background section above), I accept their argument about the indications W&T had that the Multrees platform was probably unfit for purpose, around the same times it was saying the opposite in its recommendation and processing the delayed and problematic migration.

Even if its September 2020 migration recommendation was made in good faith and even if I discount what has been said about its experience of the platform in an early trial run, it still committed a wrongdoing in the matter.

Migration to the new platform was its unsolicited recommendation. W&T had to ensure it was suitable for the complainants and was in their best interest.

In the recommendation, it described the platform as belonging to Trust DFM, which it said was the investment management side of its company. Later in the letter it referred to it in the terms of "building our own platform". I note the complainants' arguments about this misrepresenting a platform that they say was actually operated by Multrees as an independent platform provider. However, I consider that argument to be not as relevant to the complaint as the issue of the platform's suitability (and their best interest in the matter).

The recommendation acknowledged that W&T kept suitability of the platform it used and platforms in the marketplace under regular review, and that it had looked at all relevant alternatives at the time (including the existing Transact platform). It also promised to review suitability of the Multrees platform every six months and to move the complainants' portfolio if it found something more appropriate.

The platform migration was sold as being better for the complainants. It should not be ignored that they did not need to move their portfolio away from Transact, and they had not complained about their portfolio being on Transact. It is also noteworthy that W&T's recommendation letter made no mention of problems with Transact. It simply considered that having its own platform was better for its operations and for the complainants (and its other clients). The recommendation was not in response to a problem with Transact, there was no such problem, instead it was a W&T initiative aimed at serving its clients better.

In the above context, and retaining in mind the complainants' best interest, the thinking behind W&T's reaction to the problems that were faced at the outset of their portfolio's migration – those being, as confirmed by Transact, the Multrees platform's incapability to process electronic transfers, the need to apply individual manual transfers (in tranches) and STFs, and the problems encountered in doing so – is unclear.

This was not an all or nothing affair. There were no problems in having the complainants' portfolio on the Transact platform, so instead of forcing it through a migration elsewhere that appears to have been instantly problematic – and continued to be so – it ought reasonably to have shared full details of the problems with them and recommended remaining with or returning to, whichever was applicable at the time, Transact.

The 'FAQs' attached to the recommendation confirmed that it was an option for clients to reject the migration and discuss their position with W&T. It referred to the risk that, in doing so, a client might miss out on lower fees/charges with Multrees, but it was nevertheless possible to reject the migration and retain the status quo. The complainants agreed to migrate their portfolio because they had trust and belief in the recommendation, but this option meant it was equally possible for them to remain with or return to Transact in the face of the immediate and continuing migration problems and delays.

If, as it appears, the Multrees platform was already displaying technical limitations at the outset, I consider that to have been enough to signal to W&T that it probably was not in the complainants' best interest to move their portfolio away from Transact. Given that it was sold as a move to something better, the move appears to have begun with indications that the destination was potentially not something better.

W&T's failure in this respect was indeed compounded – as the complainants have argued – by its decision to exclude their portfolio from the Trust DFM rebalancing in January 2021. The reason for that appears to have been the very same problematic delayed migration that should have prompted its advice to remain with or return to Transact. It did not give such advice, and then it knowing deprived the portfolio of a management benefit (the rebalancing). Ultimately the portfolio suffered, and comparisons between its performance and those of the rebalanced model portfolios on which it was based illustrates this.

This appears to have been another matter that was misrepresented to the complainants, and/or in which W&T failed to give suitable advice, from the moment the migration started facing problems due to the new platform's limitations, possibly earlier and thereafter. However, as I address next, the complainants would probably not have faced this 2020/2021 situation at all but for the misrepresented and unsuitable Trust DFM recommendation in 2018.

<u>Provisional Conclusions</u>

If the full and accurate characteristics of the recommended Trust DFM discretionary portfolio management service – including its underlying agency-based arrangement, its ownership and independence, and the terms on which W&T was engaged with the service – had been

disclosed by W&T to the complainants at the outset, I find that they would have probably rejected the recommendation. The reasons for this finding are as treated above, so I do not need to repeat them.

Available evidence supports the conclusion that, at the time (in 2018), usage of the recommended Trust DFM service was the direction of travel for W&T, and that would have probably meant a change in its own service model whereby it would not duplicate work that it sought to move over to Trust DFM. There is enough evidence to be taken from correspondence at the time to support the probability of this finding. For this reason, I consider it more likely (than not) that if the complainants had rejected the recommendation it probably would not have been possible for the parties to continue the arrangement they had under the WMP – or such continuation would probably not have been agreed.

Nothing I have seen and considered about the complainants suggests they would have compromised themselves unduly just to stick with W&T, at any cost, so I do not expect that they would have changed their mind about rejecting the recommendation simply because the potential alternative was to lose W&T. After all, as I said earlier, it was a relatively new relationship at the time – slightly over a year old – so there was no element of a desire to continue a longstanding relationship with W&T bearing weight upon them.

Overall, on balance and for the above reasons, I consider that full, accurate and suitable advice from W&T about the 2018 recommendation would probably have led to the end of its relationship with the complainants. Therefore, all complaint related events thereafter, including those within the critical period and in issues 1 to 4, would probably not have happened.

I also consider that the root cause of the claims in issues 1 and 4 was the misrepresented – and therefore unsuitable – 2018 recommendation. The complainants' management related expectations of W&T during the critical period (and within the issues) were, in the main and in reality, beyond its powers, but they reasonably considered otherwise because they had been led to believe W&T remained in control of their portfolio. W&T might argue that they did not initially make a complaint about 'suitability'. However, our service has an inquisitorial remit that allows us to look into and determine root cause issues, and submissions from the complainants in recent times, as they discovered more about matters related to their complaint, have made the consideration of suitability inevitable in key aspects of their case.

I provisionally uphold the complaint for all the reasons above, on the grounds of W&T's fundamental wrongdoings in its July 2018 recommendation and on the basis that, with full, accurate and suitable advice, the complainants would have moved their portfolio to a new firm by 1 September 2018 – the recommendation said the Trust DFM arrangement was to become effective on this date."

The PD invited comments from both parties. It also shared the redress provisions intended for a final decision, should the PD's findings and conclusions be retained in the final decision. Both parties were invited to comment on them too.

W&T's solicitors and the complainants made submissions in response to the PD.

W&T's solicitors mainly said –

- "… *the factual basis for the findings against W&T – and therefore the decision to uphold the … complaint – is incorrect*". The contents of W&T's 2018 recommendation to the complainants "… *exactly reflected the 2018 position and therefore there cannot have been any misrepresentation*", so the PD's findings to the contrary are wrong and they must fall away.

- The PD appears to have assumed that Trust DFM's client base in 2022 and its ownership in 2023 reflected its client base and ownership at the time of the 2018 recommendation. That assumption is incorrect.

- W&T and Trust DFM were in common ownership in 2018 (owned by exactly the same shareholders); confirmation statements for both [copies of which were enclosed] proves this; ownership of Trust DFM was later modestly extended, in January 2023, to include a handful of third-party shareholders, who were allocated new shares accounting for 5.8% of the voting shares and 4.7% of the overall shares; the effect of this was negligible; the extension of Trust DFM's client base to a small number of adviser clients had no impact on the investment proposition provided to the complainants; they received the same service they would have received if there had been no such extension; due to the change in client base, it made more sense to use an agency-based arrangement; that progressed to a formal launch of the arrangement in 2021; and the arrangement was disclosed in the updated client agreement of July 2021.

- The PD is wrong to say the agency-based arrangement appeared to have been concealed from or misrepresented to the complainants prior to July 2021. Given that the arrangement did not arise until 2021, it stands to reason that this could not have been the case.

- For the above reasons, the disclosed agency-based arrangement is irrelevant to determination of the complaint.

- The 2018 recommendation involved no change to the service received by the complainants. W&T's investment committee "*still sat and was still chaired*" by W&T's principal; the same process for making decisions applied and the recommendations simply came through Trust DFM; and no issues in the service to the complainants arose between 2018 and 2020.

- For all the above reasons, the statement in the PD that says – "… *I am satisfied that the complainants would not have agreed to a recommendation in 2018 that set out the full and accurate terms of the Trust DFM proposal; they were misled by W&T to agree the recommendation* …" – is baseless. For the same reasons, the complainants would have followed the recommendation in any event and "… *there is no basis to consider that the involvement of Trust DFM per se provides any reason to uphold* …" the complaint. "*For good order* …", even if they had declined the recommendation, it would have been open to them to continue the pre-existing arrangement with W&T, which a small number of clients did. As such, the PD is also wrong to conclude that their relationship with W&T would have ended if they declined the recommendation.

- W&T maintains that it did not misrepresent the Multrees platform. It accepts the platform did not operate as intended or as hoped for, but that does not automatically amount to misrepresentation. Its recommendation was a valid and more bespoke alternative to the "… *somewhat one-dimensional and functional (though perfectly operable) Transact platform*". The Multrees platform was planned and recommended in good faith and on the basis of information received from Multrees. Migration to it was based on due diligence conducted by W&T and appropriate timelines and plans it put in place.

- "*It is accepted that migration delays were a factor in W&T clients being excluded from*

the Trust DFM rebalancing exercise in January 2021 and that, had there been no platform transfer, this exclusion would not have happened. However, that is not the fault of W&T and it should not be held responsible for any resulting losses."

- *"… the rebalancing exercise would still involve retaining large temporary cash positions. Given the market volatility in early 2021, it would not have been appropriate to reinvest fully in one go. The accepted methodology of a gradual reinvestment across a period of time would always be appropriate*."

- "*If FOS considers that, even though there was no 2018 misrepresentation,* [the complainants] *were disadvantaged by moving to the Platform and missing out on the January 2021 rebalancing, the redress methodology would be to calculate the loss caused … by reason of being excluded from the January 2021 rebalancing, up to the point of any further rebalancing (which we understand would happen quarterly) to bring the portfolio in line with the DFM's recommendations. That is a straightforward calculation and it is accepted that any loss resulting from that period of not being rebalanced should then be brought up to date, whether by reference to the performance of the balance of the portfolio or by the application of the relevant FTSE Private Investor index*."

- "*… the "end date" of the calculation could not be correct in any event, as the portfolio does not still exist. It was moved away to a new adviser … in 2023.*"

The complainants made submissions about the intended redress that I shared in the PD.

They mainly said I should consider the following – reference to examples, on our website, of how redress should be calculated; where withdrawals are to be deducted from the 'fair value', clarification on if the deductions are to be made when withdrawal payments were made or when assets were liquidated to fund those payments; time limits for W&T's calculation of redress and for their consideration of the calculation; provision for a further final decision on redress, or nomination of an independent party to conduct the calculation (along with an order on who bears the costs of this) if the calculation cannot be agreed between the parties; a deadline for the redress payment; and reconsideration, if possible, of the intended award for distress, trouble and inconvenience, with a view to increasing it.

To support their request for an increase in the aforementioned award, they referred to the overall impact, from the case, having lasted six years since 2018; to the considerable time, effort and persistence they have invested over time in trying to get matters properly addressed, accurately disclosed and resolved; to facing obstacles and problems from W&T throughout; and to personal information about detriments to their health and wellbeing caused by the entire affair.

The complainants also said they agree with redress being applied to their portfolio as a whole, without having to treat the pension components separately; and that they note and accept the compensation limits applicable to our service's redress awards (as I explained in the PD).

Their comments about the PD's findings (on merits), and W&T's position, were mainly as follows –

- Given the circumstances that induced them to accept the 2018 recommendation, they should have been informed about how Trust DFM was owned (or how it was to be owned), as the PD found. The personal-professional relationship they had created with W&T's principal from the outset onwards – after he had been highly

recommended to them by a mutual party, after he had made a good impression on them (also at the outset), and given that he personally conducted the role as their adviser – was a very important part of why they were with W&T. Hence their reliance on his assurance that nothing would change from the 2018 recommendation. To give this added context, they never met anyone connected to the day to day management of Trust DFM.

- "*If in 2018 or at any time thereafter* [they] *had been told that the investment decisions … were to be made by a body of people whom* [they] *had never met, to whom* [they] *had no access and who would have decision making powers that could not be challenged or at least influenced by Wills & Trust then …* [they] *would have had a very serious discussion about this .. and would almost certainly (unless the position could be changed) have looked to move* [their] *portfolio elsewhere*."

- Furthermore, in the FAQs attached to the 2018 recommendation one of the answers confirmed that if they declined the recommendation W&T would "… *need to consider the possibility of investments which aren't reviewed as frequently and rely on one to one meeting's being held regularly to review your fund holdings* manually", and that "*This may be less effective than what we have recommended here*". In other words, in declining the recommendation they would have received a lesser and more onerous service. This too would have led them to move their portfolio elsewhere.

- W&T never *advised* them of any ownership change, instead they became aware of the change through complaint correspondence.

- The extension in Trust DFM's client base made a difference, as it meant parties outside of W&T (and its clients) potentially stood to influence the investment decision making process.

- The misrepresentation is not limited to what happened in 2018, it extends to them being misled to believe the relationship between W&T and Trust DFM thereafter remained as it had been described in 2018. Instead, and unknown to them, that was not the case.

- There is correspondence that shows the investment committee in W&T had a counterpart in Trust DFM that became visible around 2020. It was the Trust DFM counterpart that made the investment decisions, and it is probable that this had been the case since Trust DFM's entry in 2018. This conclusion is supported by the terms of arrangement with Trust DFM which gave it autonomy in its operation. They were uninformed and unaware of the agency basis at the time (in 2018 and 2020) and they continued to believe, as they had been told, that the investment committee in W&T (not in Trust DFM) made the investment decisions.

- The June 2020 agreement between W&T and Trust DFM confirms the agency-based arrangement having been established; they (the complainants) had not seen this agreement until it was disclosed to them in early 2024; the June 2021 client agreement that was sent to them included a clause that said – "*In some circumstances we may need to act as your 'agent' in relation to the part of your portfolio held with a DFM. This means that you will not have a direct contractual relationship with the DFM and the DFM will instead treat our firm as its client. Before setting up this type of arrangement we will explain the implications to you*" [the complainants' emphasis]; however, contrary to the emphasised sentence, the arrangement had already been set up, and that had happened a year *before* they were made aware of it; furthermore, its implications were never explained to them;

they believed, at the time, such explanation would happen when an agency basis was to be introduced and that none was yet in place.

- The above is compounded by the fact that in its 2020 agreement with Trust DFM, W&T warranted that its client had "… *appointed* [W&T] *as its agent with express authority to agree to these Terms of Business and provide all ongoing instructions relating to the Trust DFM Model Portfolios on its behalf*". At no time has W&T approached them with the offer to be their agent, and at no time have they given it express authority to agree the agency terms of business.

- If I am minded to reverse my findings on misrepresentation, then it is important that I give focused treatment to each of issues 1 to 4 – which then become more relevant – given that the PD did not do that. In doing so, and in addressing issue 1, there are grounds to consider looking into W&T's responsibility, as their adviser, to keep the suitability (for them) of the Trust DFM service under review, and into whether (or not) any failure to do so amounts to a failure (to uphold their best interests) on its part that makes it responsible for their losses.

- With regards to the Multrees platform, migration of their portfolio to it was W&T's initiative, despite the fact that the Transact platform was functional and working well (which is more than can be said of what the Multrees platform turned out to be). The migration delays and resulting consequences in their portfolio (including missing out on the effects of the January 2021 rebalancing) were/are W&T's responsibility. Furthermore, W&T failed to keep suitability of the Multrees platform under review, which is what it promised to do.

What I've decided – and why

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

I have reviewed the complaint, the submissions made within it (including those made by both parties in response to the PD) and the PD. Having done so, I have not been persuaded to depart from the main findings and conclusions in the PD. I retain those findings and conclusions, and I incorporate them into this decision.

W&T's solicitors' submissions against the PD have not persuaded me, and I address them next.

Submissions on Ownership and Client Base

The PD said the following –

"*Trust DFM had freedom to define its ownership as it wished, within the laws and rules relevant to that. W&T also had freedom to determine any role it wished to play in that ownership. I do not intend to suggest or find otherwise. The issue I am addressing is still about the representations made to the complainants that induced them to accept the recommendation to use Trust DFM.*"

The PD summarised how the complainants accepted the Trust DFM recommendation. Evidence supports the complainants' additional comments about the very important role their personal-professional relationship with W&T's principal played in their decision to have their portfolio in W&T's care. That extended to the trust and confidence they placed in his (the principal's) recommendation of the Trust DFM service and in the associated assurances he gave them. As I set out in the PD, those assurances included the representation that W&T

owned Trust DFM. The complainants also appear to have been led to believe that the latter operated exclusively for the former.

In relation to the 2022 notice to the complainants about Trust DFM having clients outside W&T and the 2023 notice to them that W&T did not wholly own Trust DFM, W&T's solicitors have said I "… *appear to have assumed that the position in 2022/23 must have been the position in 2018 and therefore that W&T misrepresented the nature of Trust DFM* …" and that "*This is simply incorrect*". In other words, they say the PD appears to have wrongly assumed that Trust DFM's client base in 2022 and its ownership in 2023 were the same as they were at the time of the 2018 recommendation.

These submissions are incorrect.

With regards to ownership, the PD said –

"… *Trust DFM's incorporation documents suggest it began as an entity owned by W&T, so it appears that this changed over time. However, I still consider that W&T ought to have given the complainants prior notice when this became liable to change – in order for them to make an informed decision on what to do with their portfolio before it changed. It did not do this.*"

and

"*Their 2018 agreement with the recommendation was based on their reliance upon W&T's ownership of Trust DFM, so prior notice of change in this respect was material to their position in the arrangement. In simple terms, they neither asked for nor wanted the management of their portfolio to end up with a new firm that was not one and the same (essentially) as W&T; yet that appears to have been what the recommendation led them into; and W&T appears to have done nothing to protect them from that – which was not in their best interest.*"

The above, in the PD, already reflected Trust DFM's ownership at the outset and the change in its ownership over time. Key findings on the issue were that no prior notice of the change was given to the complainants, that such notice should have been given to them because of the circumstances in which they accepted the Trust DFM recommendation and that depriving them that notice was not in their best interest (which W&T was obliged to uphold). Despite their explanations of how and why Trust DFM's ownership changed, nothing W&T's solicitors have said dilutes or defeats these findings.

With regards to client base, the PD said –

"… *in an email of 20 April 2022, W&T had confirmed the following to them (also for the first time, it appears) – "Trust DFM is a separate firm, and it does have other advisor clients outside of Wills & Trusts".*

Just as it had discretion to define its ownership, Trust DFM had the same to define its clientele, and I do not intend to suggest otherwise. However, the 2022 notice appears to have confirmed an independence in its position that was not previously apparent to the complainants. The 2021 notice of the agency-based arrangement possibly gave an indication of this, but the 2022 notice was confirmation that Trust DFM was a separate firm that served clients outside W&T, and the 2023 notice confirmed its ownership was partly outside of W&T – all of which conflicted with the 2018 recommendation of Trust DFM as a W&T subsidiary wholly owned by W&T for the purpose of servicing W&T clients." [my emphasis]

A key finding above was that Trust DFM's independence and its service to clients outside

W&T were *not previously apparent* to the complainants until confirmed in the 2022 notice. The issue addressed was, and remains, about the complainants having been led by the 2018 recommendation to believe Trust DFM was created and existed to serve W&T clients – its principal's recommendation letter said it was created "… *to manage your money – and my money, and all the money of the Wills & Trust team*" – and then learning in 2022 that this was not the case.

The conclusions reached on the ownership issue can be extended to the client base issue too. Given the circumstances in which the complainants accepted the 2018 recommendation, prior notice about the extension of Trust DFM's client base should have been given to them – to allow for consideration of whether (or not) it made a difference to them, having previously believed the service was exclusive to W&T and its clients. That did not happen. With evidence of how much they valued the somewhat exclusive nature of their relationship with W&T and its principal, had they been given such notice it is more likely (than not) the client base extension would, at least, have prompted their review of whether (or not) to remain with the Trust DFM service.

It is unhelpful to argue or suggest that the extension made no difference to the arrangement. There was a difference. Trust DFM previously serviced W&T clients, then it extended its service to cater for non-W&T clients also. For the reasons given in the above paragraph, it was for the complainants (not W&T) to determine if that change was or was not acceptable to them. The portfolio belonged to them, not to W&T. If, as evidence shows (or, at least, suggests), they did not want a discretionary investment manager that was not exclusive to W&T clients they were entitled to prior notice of the client base extension in order to consider taking their portfolio elsewhere.

Submissions on the Agency Based Arrangement

W&T's solicitors say the extension of Trust DFM's client base evolved into the formal launch of the agency based arrangement in 2021, that the arrangement was disclosed to the complainants in the updated client agreement of July 2021 and that the PD was therefore wrong to say the agency-based arrangement appeared to have been concealed from or misrepresented to them prior to July 2021. Essentially, they argue that the arrangement was disclosed as, or around the time, it was launched, so it could not have been misrepresented or concealed. For these reasons, they also say the issue is irrelevant to the complaint.

These submissions are also incorrect.

The PD said the following –

"*The complainants are now aware of the terms that existed in the relationship between W&T and Trust DFM. We recently shared a copy of the terms document with them. I have not seen evidence that they previously had sight of it. It is signed (and dated 2 June 2020) by W&T. They have asked for evidence of when the terms within it became effective. I invite W&T to comment on this. Unless it comments with a specific evidenced date in this respect, I consider it reasonable to draw the inference and conclusion that the 2020 document presented the same terms that were in place from the outset of its arrangement with Trust DFM. It is arguably inconceivable that an arrangement that was operating before 2020 had no terms until 2020.*" [my emphasis]

I do not appear to have received the comment from W&T that was invited in the quote above. On balance, and for the reason given in the quote, I retain the view that it is reasonable to draw the inference and conclusion that the terms in the 2020 document reflect those that were in place from the outset of W&T's arrangement with Trust DFM.

As I also explained in the PD, the 2020 agreement confirms the existence and application of the agency based arrangement at the time, so it is wrong to say or suggest that it was launched in 2021 or that it did not exist before 2021. For the reasons given above, it probably existed earlier (formally or informally) and was probably applied from the outset of the W&T/Trust DFM relationship in 2018.

The 2021 updated client agreement did not actually disclose *application* of the agency basis in the complainants' case. As they have pointed out, the "Discretionary Fund Manager" section of the agreement stated no more than the following (on the matter) –

"*In some circumstances we may need to act as your 'agent' in relation to the part of your portfolio held with a DFM. This means that you will not have a direct contractual relationship with the DFM and the DFM will instead treat our firm as its client. Before setting up this type of arrangement we will explain the implications to you*." [my emphasis]

The above notified the complainants of scope for and the possibility of an agency arrangement, not that one already existed. I have not seen evidence that they were ever given notice by W&T that one was to be introduced or that, as promised in the sentence emphasised above, they received an explanation of its implications. Therefore, the agency, on behalf of the complainants, that W&T appears to have introduced and conducted in its relationship with Trust DFM happened without prior notice to the complainants, without an explanation to them of its implications, and therefore in breach of the above term.

Furthermore, as the complainants have pointed out, it happened without their express consent to the introduction and application of such agency.

W&T might argue that their consent was not required after the 2021 updated client agreement, or that it was implicit in their signing of the agreement. I disagree.

The agreement refers to the possible need for an agency arrangement and to W&T's obligation to explain the implications to the complainants *before* setting it up. Therefore, the agreement recognised the need for them to be informed about such implications before the arrangement could be created. It follows, logically, that they had to agree and/or be comfortable with those implications, once they were well informed about them, before the arrangement was set up. It is inconceivable that the 2021 agreement could have lawfully bound them to an agency arrangement the details and implications of which had not been disclosed. In other words, I consider it a fair interpretation that a form of consent was required from them before the arrangement could be set up.

I acknowledge the complainants' observation on the warranty W&T gave Trust DFM about having been appointed, with express authority, to stand as agent – in this case, to stand as agent for the complainants. It is a valid observation, given that W&T had no such appointment and authority from the complainants. However, I do not need to address this further as it is mainly a matter for Trust DFM, to whom the warranty was given.

W&T's Other Submissions

- It is incorrect to say or suggest that the Trust DFM arrangement involved no change to the service received by the complainants. The PD set out the recommendation as it was sold to them and as they accepted it, and it addressed the important grounds on which the reality of the Trust DFM arrangement – including recent awareness of important information derived from the 2020 agreement – mismatched what they were told to induce them into the arrangement. In the sections above, I have explained why W&T's submissions about ownership, client base and its agency role do not alter the PD's findings.

- W&T's solicitors say its investment committee continued to sit and make investment decisions in the Trust DFM arrangement. The PD quoted explicit terms in the 2020 agreement that confirm something different. Those terms are in the contents of the PD I quoted above. They give support to the PD's findings, amongst others, that –

  "… *Trust DFM gave no preferential or deferential treatment to W&T (and/or its clients) or, it appears, to anyone.*"

  "*Crucially, the document confirms that Trust DFM had full control and full decision-making powers in the discretionary management of its model portfolios and, as a result, in its portfolio management service. Contrary to the 2018 recommendation, W&T's investment committee had no share in those powers and no role in making those decisions.*"

  "*Its service was not subject to oversight and/or decisions from W&T's investment committee.*"

- For the reasons already given in the PD and those addressed in this decision, the PD's finding that says – "… *I am satisfied that the complainants would not have agreed to a recommendation in 2018 that set out the full and accurate terms of the Trust DFM proposal; they were misled by W&T to agree the recommendation* …" – is *not* baseless. It is supported by facts and the balance of evidence. Reasons already given in the PD, and those addressed in this decision, also explain why the complainants would probably not have followed the 2018 recommendation, but for the misrepresentation, and why matters related to the involvement of Trust DFM give reasons to uphold the complaint.

- W&T's solicitors say that even if the complainants had declined the recommendation, it would have been open to them to continue the pre-existing arrangement with W&T, so that would not have come to an end. Their reasons appear to be limited to the option of remaining with W&T being available and their claim that some clients did that at the time. I have not seen evidence of the latter. With regards to the former, I acknowledge that the option to remain with W&T was available to the complainants in 2018. However, the PD addressed the probable reality of that option by making the following findings –

  "*Available evidence supports the conclusion that, at the time (in 2018), usage of the recommended Trust DFM service was the direction of travel for W&T, and that would have probably meant a change in its own service model whereby it would not duplicate work that it sought to move over to Trust DFM. There is enough evidence to be taken from correspondence at the time to support the probability of this finding. For this reason, I consider it more likely (than not) that if the complainants had rejected the recommendation it probably would not have been possible for the parties to continue the arrangement they had under the WMP – or such continuation would probably not have been agreed.*

  Nothing I have seen and considered about the complainants suggests they would have compromised themselves unduly just to stick with W&T, at any cost, so I do not expect that they would have changed their mind about rejecting the recommendation simply because the potential alternative was to lose W&T. After all, as I said earlier, it was a relatively new relationship at the time – slightly over a year old – so there was no element of a desire to continue a longstanding relationship with W&T bearing weight upon them."

I have not seen evidence that says these findings are wrong. In addition, I agree with the complainants' point about W&T's description of the option in the 2018 recommendation's Q&A response. It depicted the likelihood of a lesser service which, for reasons similar to those in the quote above, they have said they were unlikely to accept. On balance and for the reasons already given in the PD (and above), I agree with their assertion in this respect.

- On balance, I do not consider that W&T's solicitors have said anything that persuades me to change the PD's findings on the Multrees platform migration issue. They do not appear to dispute evidence of the migration problems confirmed by Transact, and they accept that the Multrees platform did not operate as hoped for.

  They also accept that the migration delays were a factor in W&T clients being excluded from the January 2021 Trust DFM rebalancing exercise. That was inherently detrimental. The complainants' portfolio missed out on an important part of the discretionary management service that it was entitled to. W&T's solicitors argue that *"… the rebalancing exercise would still involve retaining large temporary cash positions. Given the market volatility in early 2021, it would not have been appropriate to reinvest fully in one go. The accepted methodology of a gradual reinvestment across a period of time would always be appropriate*." This argument appears to ignore evidence that the rebalancing *reduced* cash holdings to 2% for non-W&T client portfolios, whilst the cash holding in the complainants' portfolio – which was not rebalanced – remained at 10%. This meant more of their portfolio was deprived exposure to the chance of growth than was the case for the rebalanced non-W&T portfolios.

  As quoted above, the PD set out reasons why W&T's reaction to the migration problems was not in the complainants' best interests, and what it ought reasonably to have done to uphold those interests. The PD also noted its failure to keep the recommended migration under review.

- W&T's solicitors' submission about an alternative form of redress, in the absence of a misrepresentation finding, falls away, because I retain the misrepresentation findings in the PD (for the reasons given above and in the PD). With regards to redress, they also say "… *the "end date" of the calculation could not be correct in any event, as the portfolio does not still exist. It was moved away to a new adviser … in 2023.*" The PD gave an indication of my intended redress provisions, including text that gave the reason for the end date to be used. The same reason will be explained in the redress section below, and it addresses the point about the portfolio having been moved to a new adviser in 2023.

The Complainants' Submissions

I will address the submissions related to redress in the next section that deals with compensation.

In terms of merit, I consider that most of the complainants' comments have been addressed, directly or indirectly, in the PD's findings and in my responses (above) to W&T's solicitors' comments. Two comments that have not been addressed are those about the investment committee counterpart in Trust DFM and their request for focused treatment of issues 1 to 4 (including the sub-issue, in issue 1, about W&T keeping the suitability of the Trust DFM service under review) if I reverse the PD's findings on misrepresentation.

I have considered the evidence they referred to with regards to existence of a distinct investment committee in Trust DFM, separate from that in W&T. It is evidence of

correspondence from officials in both firms and how, over time, the credentials stated in the correspondence changed to show the investment committee counterpart in Trust DFM. Reference to the correspondence is accompanied by the complainants' analysis of the relevant officials' roles. I agree that, overall, the evidence supports the conclusion they have reached. However, for the same purpose, there is already stronger evidence in the 2020 agreement confirming Trust DFM's complete independence in making investment decisions – which I addressed in the PD and above.

The complainants are correct to say the PD did not give focused treatment to issues 1 to 4 and that such treatment would be required if I reversed the findings on misrepresentation. I agree. I indirectly acknowledged this in the PD where I explained that I had taken a different approach towards the complaint which, for the reasons I gave, did not require detailed consideration of issues 1 to 4. Therefore, it is reasonable to expect that but for that approach I would need to give each of those issues detailed consideration. However, as I have set out above, I am retaining the PD's findings on misrepresentation and the conclusion that those findings are enough to uphold the complaint. Therefore, it remains unnecessary to address issues 1 to 4 in detail.

Conclusion

For the reasons given in the PD and above, I uphold the complaint.

Putting things right

First, I address the complainants' submissions on redress.

I have noted their confirmation that redress does not need to be applied separately to the pension components of their portfolio and that they accept the notice given in the PD of the compensation limits applicable to our redress awards. Reference to guidance, on our website, for the calculation of redress can only benefit both parties, so I will include this in the provisions below. Such reference does not change the intended redress orders (or their effect) I shared in the PD.

Our usual practice is to expect the payment of redress within 28 days of the respondent firm being informed that the complainant has accepted a decision. This will be reflected below, but it must be noted that our service does not have payment enforcement powers. The expectation also makes it implicit that W&T should conduct and conclude the redress calculation within the same 28 days. The end date for redress in this case is the *date of settlement*. It is obviously in the complainants' interest for payment not to be unduly delayed. It is also likely to be in W&T's interest because delayed settlement, and therefore extension of the end date, potentially increases the amount of redress to be paid.

I understand the complainants' point about specifying where the deductions of withdrawals are to be applied to the *fair value*. There can be gaps between when assets in a portfolio are liquidated for withdrawals and when those withdrawals happen. However, I am satisfied with retaining the provision I shared in the PD, whereby I said such deductions, if applied periodically, should each be made in the calculation of fair value *"… at the point it was actually paid so it ceases to accrue any return in the calculation from that point on*" [my emphasis]. What I shared, as also in the orders below, gave W&T the option of totalling all withdrawal related payments and deducting the total at the end. If this allows for a simpler calculation I will accept it.

Our service can sometimes provide some assistance to help parties conclude the calculation and payment of redress between them. However, this has a limited scope because we do not have enforcement powers. In the present case, the responsibilities are as set out below

– W&T is ordered to conduct the calculations (and make payment) and the complainants are ordered to give their cooperation for that purpose. If the calculation/redress payment amount is disputed and cannot be resolved amicably, the complainants can consider taking action in the courts to enforce this decision (and any part of the redress/compensation orders within it that they consider has been unmet or miscalculated). The same consideration for them applies in the event of delayed payment or not payment of redress/compensation.

I do not consider that the present case needs an independent professional party to calculate redress. What I order below is in line with our standard approach for remedying investment loss and, in many other cases, such orders have commonly been successfully executed and completed between the parties.

This is my 'final' decision for the complaint, so I cannot issue another decision, for the sake of redress, after the present.

I have reconsidered the intended award for distress, trouble and inconvenience that I shared in the PD. That award was in the value of £750, increased from the investigator's proposal of £200. I am not persuaded the change the award.

I have taken on board the grounds presented by the complainants and I empathise with the impacts they have described – most of which, especially those related to their health, strike me as being of a personal/private nature, so I will not disclose them in this decision without a need to do so.

I agree that the effects of the misrepresentation began in 2018 and continued in the years that followed. However, it is also the case that they were previously unknown, until indications of them began to emerge, mainly from the 2022 information suggesting Trust DFM's extended client base, then the 2023 information suggesting its extended ownership, and then the early 2024 disclosure of the terms of operation between W&T and Trust DFM. I appreciate some terms in the 2021 updated client agreement might have given slight indications in this respect, but the main disclosures were between 2022 and 2024.

I also appreciate that the distress, trouble and inconvenience caused to the complainants in the case is not limited to the effects of the misrepresentation. It also relates to the claims they have made under issues 1 to 4. Even though I have not addressed those issues with focus, I have found that they probably would not have had the experiences they had in those issues – based on the facts of those experiences – but for the misrepresentation by W&T. Therefore, I can consider the award in this context too – which I did in the PD and have done in this decision.

Having said all the above, distinctions must be drawn between redress for financial loss, an award for distress, trouble and inconvenience, and punishment to W&T. The last is outside my remit, so nothing I order is punitive. The award is only about providing financial compensation to the complainants for a broad assessment of the complaint related distress, trouble and inconvenience caused to them.

The main form of compensation to them, that covers the main/financial effect of their experiences, is redress for financial loss. The award for distress, trouble and inconvenience is secondary. Where a case presents evidence of substantial or significant impact on the complainant(s), our service's guidance suggests that awards in the range above £750 would usually be prompted by additional evidence, in the relevant period, of serious disruption to daily life and/or even potentially serious offence or humiliation. I am not persuaded that these additional detriments have been sufficiently established in this case.

Overall, I acknowledge that the complainants have been significantly impacted, overall, by their experiences in the case. However, redress should, in the main, compensate for that, and I do not consider I can reasonably award more than £750 for distress, trouble and inconvenience in the circumstances (and with regard to guidance for our approach to such awards).

fair compensation

My aim is to put the complainants as close as possible to the position they would now be in if they had been given full, accurate and suitable advice in the July 2018 recommendation. For the reasons given in the PD and above, I consider that they would have probably behaved differently, that they would have probably rejected the Trust DFM service recommendation and instead moved their portfolio to a new firm by 1 September 2018.

It is not possible to say precisely how their portfolio would have been invested under advice and management from a new firm, but I am satisfied that what I have set out below is fair and reasonable given their circumstances and joint investor profile at the time.

The start date for the calculation of redress will be 1 September 2018. As I said in the PD –

"*I provisionally uphold the complaint for all the reasons above, on the grounds of W&T's fundamental wrongdoings in its July 2018 recommendation and on the basis that, with full, accurate and suitable advice, the complainants would have moved their portfolio to a new firm by 1 September 2018 – the recommendation said the Trust DFM arrangement was to become effective on this date*."

The end date will be the date of settlement. The effect of W&T's unsuitable advice in July 2018 includes the Trust DFM managed portfolio which would otherwise not have existed, its performance thereafter, any 'lost value' (including any losses incurred during the critical period), and any loss of potential returns, to date, on such lost value. Therefore, the effect presently continues, despite movement of the portfolio to a new firm in October last year. The redress calculation must fairly reflect this, so it must be conducted to the date of settlement.

The above addresses W&T's solicitors' argument about the end date.

The complainants are ordered to engage meaningfully and co-operatively with W&T to provide it with all information and documentation, reasonably required for its calculation of redress, which it does not already have. They noted in their comments that they will do so.

To assist W&T in its calculation of redress, it is invited to consider guidance on our website at the following link –

https://www.financial-ombudsman.org.uk/businesses/resolving-complaint/understanding-compensation/compensation-investment-complaints

what must W&T do?

To compensate the complainants fairly, W&T must do the following:

- Compare the performance of their portfolio with that of the benchmark shown below. If the fair value is greater than the actual value the difference must be paid to them in compensation. If the actual value is greater than the fair value, no compensation is payable.

- Pay any interest set out below. Income tax may be payable on any interest paid. If W&T is required by HM Revenue & Customs to deduct income tax from the interest, it must tell the complainants the deduction amount and give them a tax deduction certificate if they asks for one, for them to reclaim the tax from HM Revenue & Customs if appropriate.

- Pay them £750 for the distress, trouble and inconvenience they have been caused. I have seen evidence confirming that the £450 payment mentioned by the investigator is irrelevant to the complaint. Their experiences leading to the complaint have resulted from W&T failing to meet the reasonable trust and confidence they had in it and their reasonable reliance upon it to act in their best interest. Being let down in these respects undoubtedly caused them a notable amount of distress, trouble and inconvenience. I consider that £750 is fair compensation to them for that – separate and distinct from redress for financial loss.

- Provide the calculation of the compensation to them in a clear and simple format.

investment name	Status	benchmark	from ("start date")	to ("end date")	additional interest
The complainants' [formerly W&T/WMP, then Trust DFM] joint portfolio	Still exists	FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index	1 September 2018	date of settlement	not applicable

actual value

This means the actual amount payable from the investment at the end date.

fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any additional sum paid into the investment should be added to the fair value calculation from the point in time when it was actually paid in.

Any withdrawal, income or other payment out of the investment should be deducted from the fair value at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I will accept if W&T totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

- In 2018 the complainants had the 30/40/30 (low/medium/high) risk profile for their portfolio. This essentially meant an overall moderate/balanced risk profile..

- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices

with different asset classes, mainly UK equities and government bonds. It is a fair benchmark measure for investors, with a moderate/balanced risk profile, who were prepared to take some risk to get a higher return. It broadly reflects the sort of returns the complainants could have had from a suitably managed portfolio between the start and end dates.

compensation limits

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, £160,000, £350,000, £355,000, £375,000 or £415,000 (depending on when the complaint event occurred and when the complaint was referred to us) plus any interest that I consider appropriate. If fair compensation exceeds the compensation limit the respondent firm may be asked to pay the balance. Payment of such balance is not part of my determination or award. It is not binding on the respondent firm and it is unlikely that a complainant can accept my decision and go to court to ask for such balance. A complainant may therefore want to consider getting independent legal advice in this respect before deciding whether to accept the decision.

In the complainants' case, the complaint events began in 2018 (before 1 April 2019) and the complaint was referred to us after 1 April 2022 but before 1 April 2023, so the applicable compensation limit would be £170,000.

decision and award

I uphold the complainants' complaint on the grounds stated above. Fair compensation must be calculated as I have also stated above. My decision is that W&T must pay them the amount produced by that calculation up to the relevant limit. W&T should make this payment within 28 days of its receipt of confirmation that the complainants have accepted this decision.

recommendation

If the amount produced by the calculation of fair compensation is above the relevant limit, I recommend that W&T pays them the balance. This recommendation is not part of my determination or award. W&T does not have to do what I recommend.

My final decision

For the reasons given above, I uphold Mr B's and Mrs B's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to accept or reject my decision before 27 May 2024.

Roy Kuku
Ombudsman