DRN-3423152

The complaint

Mr C complains, with the help of a representative, that London & Colonial Services Limited ('L&C') failed to undertake sufficient due diligence when accepting his Self-Invested Personal Pension ("SIPP") application and allowing his subsequent investment.

What happened

Involved Parties

London & Colonial Services Limited

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

The Alliance Partnership s.r.o. ('Alliance Partnership')

Alliance Partnership was an EEA authorised financial advisory firm based in the Czech Republic. Alliance Partnership had passported into the UK under the Insurance Mediation Directive (IMD') and, at the relevant date, was permitted to carry out some regulated activities in the UK. The Financial Conduct Authority (FCA) register shows that Alliance Partnership had passported permissions in the UK from 19 November 2008 and that a supervisory run off has been in place since 6 April 2021.

Royal London 360

Royal London 360 is registered in the Isle of Man. It provided a wrapper to invest in a number of funds with a number of fund providers. Mr C invested in several holdings within the Royal London 360 investment platform.

Pensionloans4you.com

Pensionloans4u.com is a Czech-based broker and it entered into a loan agreement with Mr C. This was for an interest-free loan of £5,700 and this was repayable in full at the end of the term – either when Mr C accessed the 25% tax-free cash lump sum from his pension or else when he transferred his pension funds to another broker.

The loan Mr C received from Pensionloans4u.com was used to help him with starting a new business. Pensionsloans4U.com also referred Mr C on to Alliance Partnership.

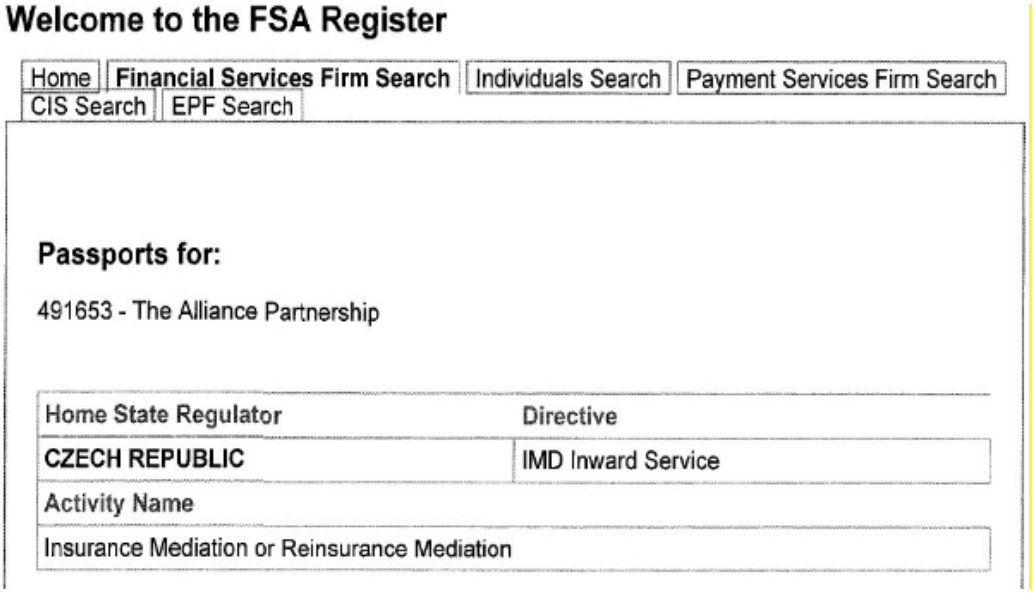
L&C and Alliance Partnership's relationship

As part of our investigation, L&C was asked a series of detailed questions about the due diligence it undertook into the introducer (which in this complaint was Alliance Partnership) and into the investment(s) that were made with monies in the SIPP. Some of the questions asked included: details about the levels of business L&C received from the introducer, whether there was an agreement in place between L&C and the introducer, what due

diligence it did on the introducer, what it's understanding of the introducer's business model was, whether it undertook any ongoing checks on the introducer, why any agreement in effect between it and the introducer ended, what proportion of business it received from the introducer involved transfers from occupational pension schemes and copies of correspondence relating to any due diligence it conducted on the investments made by the consumer.

Having asked L&C for this information, we subsequently chased it for a reply, but we've not received a substantive response to our enquiries from L&C.

So, L&C has provided us with very little information about its relationship with Alliance Partnership. However, on a previous case L&C provided us with the below screenshot from 26 November 2010, to show us how the register looked when it checked before accepting business from Alliance Partnership:



Welcome to the FSA Register

Home | **Financial Services Firm Search** | Individuals Search | Payment Services Firm Search | CIS Search | EPF Search

Passports for:

491653 - The Alliance Partnership

Home State Regulator	Directive
CZECH REPUBLIC	IMD Inward Service
Activity Name	
Insurance Mediation or Reinsurance Mediation	

I think it's likely that L&C's relationship with Alliance Partnership began around the date of the above screenshot. And I think it's likely its relationship with Alliance Partnership ended towards the end of 2011 based on correspondence received by Mr C.

What happened

Mr C has told us that the transaction came about after he contacted PensionLoans4u.com to enquire about releasing funds from his pension having come across an advert.

PensionLoans4u.com introduced Mr C to Alliance Partnership. At the time he didn't have any intention of transferring his pensions. Alliance Partnership advised him that by moving his pensions and investing in offshore investments Mr C could release some funds from his pension and obtain a better return.

Mr C says that he was a retail client and had a limited understanding of the investments made. He told us that he requested a low-medium risk portfolio and thought his capital was protected. He understood that the payment he received was a loan that would be paid off by the returns on his investment.

The terms of the loan between Mr C and PensionLoans4u.com were signed on 22 February 2011. The security listed is "*the pension fund lump sum drawdown*." It also noted:

> *"The client has been offered an amount of £5,700 from his/her pension fund prior to the age of 55. The client fully understands that no interest shall be payable on this amount but the original amount advanced is repayable in full when the client enters into pension 25% tax free lump sum draw down. The client agrees to pay PensionLoans4u.com the full and original amount advanced within 30 days of pension lump sum drawdown. Should the client wish to move his pension fund under the servicing of another broker then the original amount advanced is immediately repayable to PensionLoans4u.com."*

The completed SIPP application form confirmed that the adviser in respect of the SIPP was Alliance Partnership. The adviser remuneration payable was listed as 6% initial and 1% ongoing. Alliance Partnership was also listed as the investment manager in respect of the SIPP. The application was signed by Mr C on 24 February 2011. The investment platform was listed as Royal London 360. The SIPP application form was submitted to L&C by Alliance Partnership. The platform application form also lists Alliance Partnership as Mr C's financial adviser.

The SIPP was opened in March 2011, and by May 2011 just over £57,000 was transferred into the newly established SIPP. Funds were transferred from a number of pension plans including: a stakeholder plan with Standard Life (£8,167.26), a pension plan with Sun Life (£10,679.65), and a personal pension plan with HSBC (£38,154.71).

Initial adviser remuneration was paid to Alliance Partnership by L&C in respect of Mr C's SIPP.

Around the same time, a Royal London 360 illustration was produced, this confirmed that the initial remuneration payable to Alliance Partnership was 7.5% with renewal remuneration of 1%. This also set out that there was an early surrender fee at day one of 10.75% of the higher of the initial investment amount or current policy value, the surrender fee reduced to zero over ten years.

The underlying investments were applied for in May 2011, the application form for this also listed Alliance Partnership as the investment adviser. The funds were invested via an offshore bond and subsequently invested in a few holdings.

On 21 November 2011, L&C wrote to Mr C explaining that it no longer had a business relationship with Alliance Partnership and would not be able to accept instructions from it.

In December 2011, Alliance Partnership wrote to Mr C after L&C had ended its relationship with Alliance Partnership and also confirmed that L&C would no longer accept instructions from it. Alliance Partnership claimed that L&C had undervalued certain investments. Alliance Partnership's proposed solution was:

> *"Upon your request we can move your pension away from London Colonial to one of our other premium UK or Isle of Man SIPP providers which will mean we can still manage your investments. This would be processed as an "in specie transfer" free of charge to you and would mean that only your pensions trustee (London Colonial) would change, but your investment would remain the same without loss. This will ensure that your pension fund will continue to grow which at the end of the day is our main priority…"*

Mr C didn't proceed with this proposed course of action.

Royal London 360 sent Mr C a valuation statement in August 2013, this stated that the value of the policy was down by just under 40%.

On 27 October 2015, L&C issued to Mr C a closing transaction statement and asset valuation. Around £22,000 was transferred out of Mr C's SIPP to another pension arrangement.

Background to the complaint

Mr C raised a complaint against L&C in 2019. Unhappy with its response, he referred his complaint to this service. One of our investigators looked into the complaint and concluded that it should be upheld. Briefly, she found that:

- The complaint had been made in time.
- Alliance Partnership passported in permissions to undertake certain types of activities within the UK.
- Alliance Partnership was undertaking pension related activities in the UK.
- L&C should have considered whether Alliance Partnership had the appropriate permissions to carry out pension related activities.
- Alliance Partnership didn't have the requisite permissions to undertake the relevant activities.
- L&C should have refused to accept Mr C's application on this basis.
- L&C should have had other concerns:
    - It's not clear how UK based consumers came to receive advice from this Czech-based firm which was passported in to undertake insurance and reinsurance activities.
    - The remuneration being charged by Alliance Partnership was very high.
    - There was significant risk of consumer detriment in Mr C receiving advice from a Czech-based firm and investing the bulk of that in offshore investments.

Mr C accepted the investigator's assessment. L&C requested and were granted extensions to respond but despite that have to date failed to provide any response.

Because agreement couldn't be reached, the complaint has been escalated to me for a decision.

An investigator sent both Mr C and L&C an email on my behalf explaining that I was minded to uphold Mr C's complaint for the same reasons as set out in the investigator's view. I said:

> *"I'm minded to uphold Mr C's complaint for the same reasons as set out by the investigator and award compensation broadly along the same lines. But, I do think that the money Mr C's received in connection with the transaction needs to be taken into account.*
>
> *Mr C received around 10% of the value of his pension at the time from a broker connected to Alliance Partnership. The transaction was set up as a loan, which Mr C had to repay if he switched servicing agents on his pension or at the point, he withdraws tax-free cash from his pension. I haven't seen anything that would indicate that Mr C has repaid the loan even though he has long since changed servicing agents. If Mr C hadn't gone ahead with this transaction, I don't think he would have received this money and if he hasn't repaid it to date, I think it's very unlikely he will be required to in the future.*

This means that Mr C has received a gain from the transaction about which he now complains that needs to be accounted for in the redress methodology. So, if Mr C hasn't repaid the monies he received in connection with the transaction, these will need to be treated as a notional deduction from the calculation of what his pension monies would have been worth at the date they were transferred away from London & Colonial (the deduction will need to take place as at the date Mr C received the funds). If Mr C has in fact repaid the loan, then no deduction will need to be made in respect of the loan."

Neither L&C or Mr C responded to the email. So, it isn't clear whether or not Mr C has repaid the loan he received in connection with this transaction.

What I've decided – and why

Jurisdiction

L&C has not responded to the investigator's view, so it isn't apparent whether it agrees with the investigator's conclusion that this complaint was made in time. As L&C has not clarified this, for the sake of completeness, I've first considered jurisdiction. And, as I've explained below, I agree with what the investigator has said about this.

I've considered all the evidence and arguments in order to decide whether we can consider Mr C's complaint.

Has the complaint been brought in time?

We can't consider all complaints brought to this service. Before we can consider something, we need to check, by reference to the FCA's DISP Rules and the legislation from which those rules are derived, whether the complaint is one we have the power to look at and whether it's a complaint we should consider.

I've carefully considered these rules when deciding Mr C's complaint.

DISP 2.8.2 sets out that:

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

…

(2) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;

unless:

(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2R or DISP 2.8.7R was as a result of exceptional circumstances;

…"

This means that, we *can't* consider a complaint where it's been brought:

- More than six years after the event took place; *or (if later)*
- More than three years after the complainant became aware, or *ought reasonably* to have become aware, that they had cause for complaint; unless
- The business consents to us looking into the complaint despite it having been brought out of time; or
- Exceptional circumstances apply, for example, where the complainant has been incapacitated – and, as a result of this, was unable to bring the complaint to this service within the applicable time limits.

Mr C referred this complaint to L&C on 10 September 2019, the complaint raised was fairly technical and went into quite a lot of detail. There are various strands to Mr C's complaint but, overall, the crux of the complaint is that L&C didn't carry out sufficient checks when it accepted Mr C's business from Alliance Partnership and that insufficient due diligence was undertaken on investments made within the SIPP.

The SIPP was established in 2011 and monies were transferred into the SIPP and invested in the Royal London 360 wrapper shortly thereafter. All of which occurred more than six years before Mr C referred his complaint to either L&C or us.

So, I've gone on to consider whether Mr C referred his complaint more than three years from the date on which he either was aware, or ought reasonably to have become aware, he had cause for complaint. And when I say here cause for complaint, I mean cause to make *this* complaint about *this* respondent firm, L&C, not just knowledge of cause to complain about anyone at all.

There are a number of points that I think are relevant to this discussion:

- In order to be aware of cause for complaint the complainant should reasonably know there's a problem, that they have or may suffer loss, and that someone else is responsible for the problem – and, who that someone is. So, to have knowledge of cause for complaint about L&C, Mr C needs to be aware, or should reasonably be aware, that there's a problem which has caused, or may cause, him loss and that L&C is responsible.

- Mr C transferred around £57,000 into his SIPP in 2011. And, by 2015, around £22,000 was transferred away from Mr C's SIPP. I think the level of losses suffered in the space of a few years would have been disconcerting to most ordinary retail investors in Mr C's position. Mr C, in my view, ought reasonably to have become aware that something had gone wrong by this stage. I think it's unlikely this is what Mr C was expecting, or what he would have thought was reasonable performance for investments made via his pension.

- I think that the information sent to Mr C meant he was aware, or should reasonably have been aware, that there was a problem with his pension and that he'd been caused some loss or damage.

- There's nothing I've seen that was sent to Mr C more than three years before his complaint was referred to L&C that links L&C to the losses his pension monies had suffered. I think it's worth highlighting that Mr C wasn't advised by L&C about setting up the SIPP or the suitability of investments. And I think the obvious first thought when losses were suffered would have been that his financial advisers might have given poor advice. There's nothing in the correspondence sent to Mr C that would indicate to a reasonable retail investor in Mr C's position that L&C had responsibility for the position Mr C was in – the position of having a SIPP with investments in it that had performed badly.

- I haven't seen any evidence that Mr C had been told by any third party, and more than three years prior to his raising a complaint with L&C in 2019, that L&C may have done something wrong and might be wholly or partly responsible for the position he was in.

- The regulator published reports on the results of two thematic reviews on SIPP operators in 2009 and 2012, issued guidance for SIPP operators in 2013 and wrote to the CEOs of SIPP operators in 2014. A common theme of those communications is that the regulator considered that SIPP operators had obligations in relation to their customers even where they don't give advice, and that many SIPP operators had a poor understanding of those obligations.

- In the circumstances I don't consider that Mr C should have had an understanding of the obligations SIPP providers were under *more than* three years before Mr C referred his complaint to L&C.

I've carefully considered all the evidence we've been provided and, on balance, I think Mr C's individual circumstances were such that a reasonable investor in his position wouldn't have concluded that his SIPP operator had done something wrong more than three years before Mr C's complaint was raised with L&C.

Like the investigator, I don't think that Mr C was aware (or ought reasonably to have become aware) that he had cause for complaint against L&C more than three years before his complaint was referred to L&C.

So, I'm satisfied this complaint has been brought in time and that it's one we can consider.

Merits of this complaint

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

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

In deciding what's fair and reasonable in the circumstances, it's appropriate to take an inquisitorial approach. And, ultimately, what I'll be looking at here is whether L&C took reasonable care, acted with due diligence and treated Mr C fairly, in accordance with his best interests. And what I think's fair and reasonable in light of that. And I think the key issue in Mr C's complaint is whether it was fair and reasonable for L&C to have accepted

Mr C's SIPP application in the first place. As part of that, I need to consider whether L&C carried out appropriate due diligence checks on Alliance Partnership before deciding to accept Mr C's SIPP application from it.

Relevant considerations

I've carefully taken account of the relevant considerations to decide what's fair and reasonable in the circumstances of this complaint.

In my view, the FCA's Principles for Businesses are of particular relevance. The Principles for Businesses, which are set out in the FCA's Handbook "*are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G). Principles 2, 3 and 6 provide:

> *"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*
>
> *Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.*
>
> *Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."*

I've carefully considered the relevant law and what this says about the application of the FCA's Principles. In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) ('BBA') Ouseley J said at paragraph 162:

> *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."*

And at paragraph 77 of BBA Ouseley J said:

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

In *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) ('BBSAL'), Berkeley Burke brought a judicial review claim challenging the decision of an ombudsman who'd upheld a consumer's complaint against it. The ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and hadn't treated its client fairly.

Jacobs J, having set out some paragraphs of BBA including paragraph 162 set out above, said (at paragraph 104 of BBSAL):

> *"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles-based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."*

The BBSAL judgment also considers section 228 of FSMA and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the ombudsman in that complaint, which I've described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what's fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in BBSAL. I'm therefore satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

On 18 May 2020, the High Court handed down its judgment in the case of *Adams v Options SIPP* [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. I've taken account of both these judgments when making this decision on Mr C's case.

I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Options SIPP. And, HHJ Dight didn't consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of the judgments say anything about how the Principles apply to an ombudsman's consideration of a complaint. But, to be clear, I don't say this means Adams isn't a relevant consideration at all. As noted above, I've taken account of both judgments when making this decision on Mr C's case.

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

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

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

> *"In my judgment in order to identify the extent of the duty imposed by Rule 2.1.1 one has to identify the relevant factual context, because it is apparent from the submissions of each of the parties that the context has an impact on the ascertainment of the extent of the duty. The key fact, perhaps composite fact, in the context is the agreement into which the parties entered, which defined their roles and functions in the transaction."*

I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr C's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, as HHJ Dight noted, he wasn't asked to consider the question of due diligence *before* Options SIPP agreed to accept the store pods investment into its SIPP. The facts of the case were also different.

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

I think it's also important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I'm required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in Adams v Options SIPP. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I also want to emphasise that I don't say that L&C was under any obligation to advise Mr C on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising on the merits of investing and/or transferring to the SIPP. So, to be clear, I've proceeded on the understanding L&C wasn't obliged – and wasn't able – to give advice to Mr C on the suitability of its SIPP or the investments Mr C made within his SIPP. But I'm satisfied L&C's obligations included deciding whether to accept introductions of business from particular businesses and/or whether to accept particular investments into its SIPP.

Having carefully considered the relevant considerations I'm satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, L&C should have carried out due diligence on Alliance Partnership to the sort of standard which was consistent with good industry practice and its regulatory obligations at the time. And that L&C should also have carried out due diligence on any investments to be held within the SIPP which was consistent with good industry practice and its regulatory obligations at the time. L&C should have used the knowledge it gained from that due diligence to decide whether to accept or reject a referral of business or a particular investment.

The regulatory publications

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

- The 2009 and 2012 Thematic Review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 *"Dear CEO"* letter.

The 2009 Thematic Review Report

The 2009 report included the following statement:

> *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its clients and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.*
>
> *It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.*
> *…*
> *We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate SIPPs that are unsuitable or detrimental to clients.*
>
> *Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their customers' interests in this respect, with reference to Principle 3 of the Principles for Businesses ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').*
>
> *The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:*
>
> - *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*
>
> - *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*
>
> - *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*

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

- *Identifying instances of clients waiving their cancellation rights, and the reasons for this."*

The later publications

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

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

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

> ***"Relationships between firms that advise and introduce prospective members and SIPP operators***
>
> *Examples of good practice we observed during our work with SIPP operators include the following:*
>
> - *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un-authorised business warnings.*
>
> - *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
>
> - *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of*

investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.

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

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

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

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

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

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

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

*"**Due diligence***

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

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

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

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

    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*

    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

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

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

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

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

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

- *correctly establishing and understanding the nature of an investment*

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

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

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

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

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

I acknowledge that the 2009 report (and the 2012 report and the *"Dear CEO"* letter) aren't formal guidance (whereas the 2013 finalised guidance is). However, in my view the fact that the reports and *"Dear CEO"* letter didn't constitute formal (i.e. statutory) guidance doesn't mean their importance or relevance should be underestimated.

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

It's relevant that when deciding what amounted to have been good industry practice in the BBSAL case, the ombudsman found that *"the regulator's reports, guidance and letter go a long way to clarify what should be regarded as good practice and what should not."* And the judge in BBSAL endorsed the lawfulness of the approach taken by the ombudsman.

And I don't think the fact the publications, (other than the 2009 Thematic Review Report), post-date the events that took place in relation to Mr C's complaint, mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

It's also clear from the text of the 2009 and 2012 Thematic Review Reports (and the *"Dear CEO"* letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it's clear the standards themselves hadn't changed.

The judge in the *Adams* case didn't consider the 2012 Thematic Review Report, 2013 SIPP operator guidance and 2014 *"Dear CEO"* letter to be of relevance to his consideration of Mr Adams' claim. But it doesn't follow that those publications are irrelevant to my consideration of what's fair and reasonable in the circumstances of this complaint. I'm required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time.

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

That doesn't mean that in considering what's fair and reasonable, I'll only consider L&C's actions with these documents in mind. The reports, *"Dear CEO"* letter and guidance gave non-exhaustive examples of good industry practice. They didn't say the suggestions given were the limit of what a SIPP operator should do. As the annex to the *"Dear CEO"* letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

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

Further, even if I considered that any publications or guidance that post-dated the events subject of this complaint don't help to clarify the type of good industry practice that existed at the relevant time (which I don't), that doesn't alter my view on what I consider to have been good industry practice at the time. That's because I find that the 2009 Report together with the Principles provide a very clear indication of what L&C could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting Mr C's introduction from Alliance Partnership.

Ultimately, in determining this complaint, I need to consider whether L&C complied with its regulatory obligations as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due

regards to the interests of its customers, to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I'm looking to the Principles and the publications listed above to provide an indication of what L&C could have done to comply with its regulatory obligations.

What did L&C's obligations mean in practice?

In this case, the business L&C was conducting was its operation of SIPPs. I'm satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business.

The regulatory publications provided some examples of good industry practice observed by the FSA and FCA during their work with SIPP operators including being satisfied that a particular introducer is appropriate to deal with.

As I explain further below, I think L&C ought to have identified that Alliance Partnership was most likely carrying out regulated activities relating to arranging and advising on investments.

Alliance Partnership's regulatory status

Under Article 2 of the Insurance Mediation Directive 2002/92/EC, *"insurance mediation"* and *"reinsurance mediation"* are defined as:

> *"3. 'insurance mediation' means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim.*
> *…*
> *4. 'reinsurance mediation' means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of reinsurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim."*

In the FSA's consultation paper 201, entitled *"Implementation of the Insurance Mediation Directive for Long-term insurance business"* it's stated (on page 7):

> *"We are implementing the IMD for general insurance and pure protection business… from January 2005 (when they will require authorisation).*
>
> *Unlike general insurance and pure protection policies, the sale of life and pensions policies is already regulated. Life and pensions intermediaries must be authorised by us and are subject to our regulation."*

Chapter 12 of the FCA's Perimeter Guidance Manual ('PERG') offers guidance to persons, such as L&C, running personal pension schemes. The guidance in place at the time the application was made for Mr C's SIPP confirms that a personal pension scheme, for the purpose of regulated activities (PERG 12.2):

> *"…is defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the Regulated Activities Order) as any scheme other than an occupational pension scheme (OPS) or a stakeholder pension scheme that is to provide benefits for people:*
>
> - *on retirement; or*

- *on reaching a particular age; or*
- *on termination of service in an employment".*

It goes on to say:

> *"This will include self-invested personal pension schemes ('SIPPs') as well as personal pensions provided to consumers by product companies such as insurers, unit trust managers, contractual scheme managers or deposit takers (including free-standing voluntary contribution schemes)".*

So, under the Regulated Activities Order, a SIPP is a personal pension scheme. Article 82 of the Regulated Activities Order (Part III Specified Investments) provides that rights under a personal pension scheme are a specified investment.

L&C itself had regulatory permission to establish and operate personal pension schemes – a regulated activity under Article 52 of the Regulated Activities Order.

At the time of Mr C's application, SUP App 3 of the regulator's Handbook set out guidance on passporting issues and SUP App 3.9.7G provided the following table of permissible activities under Article 2(3) of the Insurance Mediation Directive in terms of the attendant Regulated Activities Order Article number:

Table 2B: Insurance Mediation Directive Activities		**Part II RAO Activities**	**Part III RAO Investments**
1.	Introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance.	Articles 25, 53 and 64	Articles 75, 89 (see Note 1)
2.	Concluding contracts of insurance	Articles 21, 25, 53 and 64	Articles 75, 89
3.	Assisting in the administration and performance of contracts of insurance, in particular in the event of a claim.	Articles 39A, 64	Articles 75, 89

The guidance in SUP 13A.1.2G of the Handbook at the time of Mr C's application for the SIPP explains that an EEA firm wishing to carry on activities in the UK which are outside the scope of its EEA rights (i.e. its passporting rights) will require a *"top-up"* permission under Part IV of the Act (the Act being FSMA). In other words, it needs *"top-up"* permissions from the regulator to carry on regulated activities which aren't covered by its IMD passport rights.

The relevant rules regarding *"top-up"* permissions could be found in the Handbook at SUP 13A.7. SUP 13A.7.1G states (as at 2011):

> *"If a person established in the EEA:*
>
> *(1) does not have an EEA right;*
>
> *(2) does not have permission as a UCITS qualifier; and*
>
> *(3) does not have, or does not wish to exercise, a Treaty right (see SUP 13A.3.4 G to SUP 13A.3.11 G);*

to carry on a particular regulated activity in the United Kingdom, it must seek Part IV permission from the FSA to do so (see the FSA website "How do I get authorised": http://www.fsa.gov.uk/Pages/Doing/how/index.shtml). This might arise if the activity itself is outside the scope of the Single Market Directives, or where the activity is included in the scope of a Single Market Directive but is not covered by the EEA firm's Home State authorisation. If a person also qualifies for authorisation under Schedules 3, 4 or 5 of the Act as a result of its other activities, the Part IV permission is referred to in the Handbook as a top-up permission."

In the glossary section of the regulator's Handbook EEA authorisation is defined as:

"(in accordance with paragraph 6 of Schedule 3 to the Act (EEA Passport Rights)):

(a) in relation to an IMD insurance intermediary or an IMD reinsurance intermediary, registration with its Home State regulator under article 3 of the Insurance Mediation Directive;

(b) in relation to any other EEA firm, authorisation granted to an EEA firm by its Home State regulator for the purpose of the relevant Single Market Directive."

The guidance at SUP App 3 of the FSA Handbook (which I've set out above) was readily available in 2011 and clearly illustrated that EEA-authorised firms may only carry out specified regulated activities in the UK if they have the relevant EEA passport rights.

In this case the regulated activities in question didn't fall under IMD passporting, and they required FSA permission for Alliance Partnership to conduct them in the UK. L&C, acting in accordance with its own regulatory obligations, should have ensured it understood the relevant rules, guidance and legislation I've referred to above, (or sought advice on this, to ensure it could gain the proper understanding), when considering whether to accept business from Alliance Partnership, which was an EEA firm passporting into the UK. It should therefore have known – or have checked and discovered – that a business based in the Czech Republic that was EEA-authorised needed to have *"top-up"* permissions to give advice and make arrangements in relation to personal pensions in the UK. And that *"top-up"* permissions had to be granted by the the UK regulator, then the FSA.

The activities undertaken by Alliance Partnership

I think the available evidence indicates Alliance Partnership was carrying out regulated activities. Rights under a personal pension scheme are a security and relevant investment. Under Article 25(1) of the Regulated Activity Order ('RAO'), making arrangements for another person to buy and sell these types of investments is a regulated activity. And under Article 25(2) of the RAO, making arrangements with a view to a person who participates in the arrangements buying and selling these types of investments is also a regulated activity.

In my view, Alliance Partnership was carrying out regulated activities within Article 25 of the RAO – and this ought to have been clear to L&C at the time.

The regulator's Perimeter Guidance Manual says the following about Article 25(1):

"The activity of arranging (bringing about) deals in investments is aimed at arrangements that would have the direct effect that a particular transaction is concluded (that is, arrangements that bring it about)."

It then says the following about Article 25(2):

> *"The activity of making arrangements with a view to transactions in investments is concerned with arrangements of an ongoing nature whose purpose is to facilitate the entering into of transactions by other parties. This activity has a potentially broad scope and typically applies in one of two scenarios. These are where a person provides arrangements of some kind:*
>
> 1. *to enable or assist investors to deal with or through a particular firm (such as the arrangements made by introducers); or*
>
> 2. *to facilitate the entering into of transactions directly by the parties (such as multilateral trading facilities of any kind …exchanges, clearing houses and service companies (for example, persons who provide communication facilities for the routing of orders or the negotiation of transactions))."*

I think Alliance Partnership's activities here amounted to the regulated activity of *"making arrangements"* for the SIPP under one or other or both of the Article 25 provisions.

But even if I thought that Alliance Partnership wasn't acting beyond its permissions by making arrangements (which I don't), I think it was also undertaking another regulated activity for which it didn't have the requisite permissions. I say this because, I think Alliance Partnership was advising on Mr C's pension switches.

Under the RAO, a SIPP is a personal pension scheme. Article 82 of the RAO (Part III Specified Investments) provides that rights under a personal pension scheme are a specified investment. Article 82 investments aren't covered by the IMD.

At the point of the SIPP application, Alliance Partnership was listed as being the *"IFA"* and an *"investment manager"*. The stated remuneration in the form was to be paid to the *"financial adviser"*. Further, from his complaint to L&C and submissions to us, I'm also satisfied that Mr C understood Alliance Partnership to be acting as his financial adviser. And I think that L&C also understood this to be the case.

Taking everything into account, I think L&C's understanding at the time of the transaction that's the subject of this complaint was that Alliance Partnership was giving advice on the switches to the SIPP, and the initial investment of monies post-transfer, and that it was permitted to do so. L&C should reasonably have understood the applicable regulations and, therefore, have readily identified that Alliance Partnership was carrying out regulated activities without the requisite permissions from the regulator and that there was a clear risk of consumer detriment in accepting introductions in these circumstances. Because Alliance Partnership, holding only IMD permissions, was advising on article 82 investments.

I don't find it plausible that Alliance Partnership's advice was limited to advising on the Royal London 360 wrapper/or the investments within it. Indeed, the available paperwork indicates that it wasn't. That advice was only made possible by way of the pension switches into the L&C SIPP. That was the source of the monies in respect of which the Royal London 360 advice was being given, *but for* the switches, the investment advice wouldn't have been possible because there wouldn't have been funds available for investment – any separation of the two under the circumstances would be artificial.

I'm satisfied that Alliance Partnership was appointed as Mr C's financial adviser in respect of his SIPP as noted on the SIPP application form. And that it was providing him with advice in respect of this transaction.

Overall, I'm satisfied that Alliance Partnership was advising on the pension switches and that L&C understood this to be the case or would have understood this to be the case if it had undertaken sufficient due diligence into Alliance Partnership.

All in all, I think it's fair and reasonable to say that L&C, had it acted in accordance with its regulatory obligations and the standards of good practice at the time, ought to have known Alliance Partnership was carrying out regulated activities relating to arranging and advising in relation to personal pensions in the UK, for which it didn't have the requisite permissions. In turn, taking everything into account, it wasn't fair and reasonable for L&C to accept Mr C's application in such circumstances.

Checks L&C undertook on Alliance Partnership

As mentioned earlier, as part of our investigation L&C was asked a series of questions about the due diligence it undertook into Alliance Partnership but we've not received a substantive response from L&C to those enquiries.

Under DISP 3.5.9 (3) R I may *"reach a decision on the basis of what has been supplied and take account of the failure by a party to provide information requested."*

I think the regulatory publications I've referenced earlier in this decision show that it was good practice to confirm both initially, and on an ongoing basis, that introducers that advise clients have the appropriate regulatory permissions. And I think that's applicable whether an advisory firm is UK based or else if it's passporting into the UK.

On a previous case L&C provided us with a 26 November 2010 screenshot of a page from Alliance Partnership's entry on the FSA register. But that page wasn't *all* that L&C should have checked, as that page wouldn't have been sufficient for L&C to be able to conclude that Alliance Partnership had the required *"top-up"* permissions to advise on, or arrange, personal pensions in the UK. So, I think it's fair to say L&C ought to have checked Alliance Partnership's Permission page. Had it done so I'm satisfied it's *most likely* that it would have discovered that Alliance Partnership didn't have the necessary top-up permissions.

In the unlikely eventuality that the register didn't make it clear whether Alliance Partnership had the necessary top-up permissions. For example, if the Permission page had erroneously been left blank, L&C ought to have taken further steps to independently verify what the correct position was – for example by contacting the FSA. And I think the FSA would have confirmed whether Alliance Partnership held any *"top-up"* permissions.

Alternatively, if L&C was unable to independently verify Alliance Partnership's permissions, I think it's fair and reasonable to say that L&C should have then concluded that it was unsafe to proceed with accepting business from Alliance Partnership in those circumstances. In my opinion, it wasn't reasonable, and it wasn't in-line with L&C's regulatory obligations, for it to proceed with accepting business from Alliance Partnership if the position wasn't clear.

Summary

So, to summarise, I think that Alliance Partnership carried on activities for which it didn't have regulatory permission in the UK. I think it advised Mr C to switch to the SIPP from his existing pension plans and made arrangements for the switches to take place.

In the circumstances, I think L&C should have known what activities Alliance Partnership was carrying out and that it didn't have the regulatory permissions to do so. Acting fairly and reasonably, I think that L&C should have rejected this business. I think it's fair and reasonable to uphold this complaint on this basis alone. However, for completeness, I've

also gone on to consider what other conclusions L&C should have drawn if acting fairly and reasonably.

The nature of the introduction from Alliance Partnership (anomalous features)

There were anomalous features in the business Alliance Partnership introduced to L&C that ought to have given rise to concerns about the risk of significant consumer detriment.

The domicile of Alliance Partnership:

Pension business from a UK client, advised by a Czech advisory firm despite no obvious connection with the country, going into a SIPP to invest through a wrapper based offshore is anomalous in and of itself.

The fact that Alliance Partnership was domiciled *outside the United Kingdom* was a conspicuous and anomalous feature, in light of the business it referred to L&C. In my view that fact ought to have highlighted the need to make sure the EEA firm had the correct permission to conduct the business being proposed – i.e., a heightened check on the firm's permissions (as above).

Adviser remuneration:

Alliance Partnership received an initial payment of 6% of the monies Mr C invested with L&C. On top of this, Alliance Partnership would also receive an annual investment adviser fee of 1% of the policy value.

I consider the level of remuneration paid to Alliance Partnership in this case to have been an anomalous feature. While there's no absolute benchmark for reasonable adviser charging, it's my view that a 6% initial, and 1% ongoing, fee in these circumstances was higher than what I would consider to be reasonable. And, at the very least, I think that L&C ought to have flagged at outset that the initial charges imposed on Mr C's pension monies were potentially high.

In this case, Alliance Partnership also received remuneration from the investment provider at a rate of 7.5% initial and 1% ongoing, in addition to the remuneration L&C was paying to it. This meant that in within a year of this transaction Mr C lost around 15% of his pension to adviser remuneration alone.

Summary

In summary, I'm satisfied L&C either knew, or ought to have known if it acted fairly and reasonably to meet its regulatory obligations that:

- Alliance Partnership was undertaking regulated activities beyond the scope of its permissions.
- The domicile of Alliance Partnership, as opposed to the consumer Alliance Partnership introduced to L&C, was an anomalous feature.
- The high level of remuneration Alliance Partnership was taking was an anomalous feature.

And I don't think it was fair and reasonable for L&C to accept Mr C's application in such circumstances.

To be clear, I've focused on what I consider to be the main failure on L&C's part here – it's failure to ensure that Alliance Partnership had the requisite permissions to be undertaking the activities it was undertaking in relation to the business it was introducing to L&C.

In conclusion

L&C ought to have identified that Alliance Partnership needed *"top-up"* permissions to advise on and make arrangements for personal pensions in the UK, and taken all the steps available to it to independently verify that Alliance Partnership had the required permissions to give advice or make arrangements for personal pensions in the UK.

Had it done so, I'm satisfied that L&C would have established Alliance Partnership didn't have the permissions it required, or that it was unable to confirm whether Alliance Partnership had the required permissions.

In either event, it wasn't in accordance with its regulatory obligations or good industry practice for L&C to proceed to accept business from Alliance Partnership.

Additionally, L&C ought to have considered the anomalous features of this business I've outlined above. These were further factors relevant to L&C's acceptance of Mr C's application which emphasised the need for adequate due diligence to be carried out on Alliance Partnership.

I'm therefore satisfied it's fair and reasonable to conclude that L&C shouldn't have accepted Mr C's application from Alliance Partnership.

Due diligence on the underlying investments

In light of my conclusions about L&C's regulatory obligations to carry out sufficient due diligence on introducers – and, given my finding that in the circumstances of this complaint L&C failed to comply with these obligations – I've not considered L&C's obligations under the Principles in respect of carrying out sufficient due diligence on the underlying investments. It's my view that had L&C complied with its obligations under the Principles to carry out sufficient due diligence checks on Alliance Partnership, then this arrangement wouldn't have come about in the first place.

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

In its response to Mr C's complaint L&C said that it was obliged to proceed in accordance with COBS 11.2.19R.

Before considering this point, I think it's important for me to reiterate that, it wasn't fair and reasonable, for L&C to have accepted Mr C's application from Alliance Partnership in the first place. So, in my opinion, Mr C's SIPP shouldn't have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity shouldn't have arisen at all.

COBS 11.2.19R

I note that L&C made the point that COBS 11.2.19R obliged it to execute investment instructions. It effectively says that once the SIPP has been established, it's required to execute the specific instructions of its client.

However, in the circumstances it's my view that the crux of the issue in this complaint is whether L&C should have accepted the SIPP application from Alliance Partnership and established Mr C's SIPP in the first place.

An argument about having to execute the transaction as a result of COBS 11.2.19R was considered and rejected by the judge in BBSAL. In that case Jacobs J said:

> *"The heading to COBS 11.2.1R shows that it is concerned with the manner in which orders are to be executed: i.e. on terms most favourable to the client. This is consistent with the heading to COBS 11.2 as a whole, namely: "Best execution". The text of COBS 11.2.1R is to the same effect. The expression "when executing orders" indicates that it is looking at the moment when the firm comes to execute the order, and the way in which the firm must then conduct itself. It is concerned with the "mechanics" of execution; a conclusion reached, albeit in a different context, in Bailey & Anr v Barclays Bank [2014] EWHC 2882 (QB), paras [34] – [35]. It is not addressing an anterior question, namely whether a particular order should be executed at all. I agree with the FCA's submission that COBS 11.2 is a section of the Handbook concerned with the method of execution of client orders, and is designed to achieve a high quality of execution. It presupposes that there is an order being executed, and refers to the factors that must be taken into account when deciding how best to execute the order. It has nothing to do with the question of whether or not the order should be accepted in the first place."*

And I don't think that L&C's argument on this point is relevant to its obligations under the Principles to decide whether to accept an application to open a SIPP in the first place or to make the initial investments.

Indemnity

I think L&C ought to have been cautious about accepting Mr C's application even though he had signed an indemnity. L&C had to act in a way that was consistent with the regulatory obligations I've set out in this decision.

My remit is to make a decision on what I think is fair and reasonable in all the circumstances. And my view is that it's fair and reasonable to say that just having Mr C sign an indemnity declaration wasn't an effective way for L&C to meet its regulatory obligations to treat him fairly, given the concerns L&C ought to have had about accepting business from Alliance Partnership.

L&C knew that Mr C had signed a form intended to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on such an indemnity when L&C knew, or ought to have known, Mr C's dealings with Alliance Partnership were putting him at significant risk wasn't the fair and reasonable thing to do. Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse to accept Mr C's application.

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

For the reasons I've explained above, I'm satisfied L&C ought to have rejected Mr C's application from Alliance Partnership. If that had happened, then I think it's *most likely* the contractual obligations between L&C and Mr C under the newly established SIPP would

never have arisen. And it wouldn't be fair or reasonable to say the contract between Mr C and L&C meant L&C could ignore all red flags and proceed with Mr C's business regardless.

So, I'm satisfied that Mr C's SIPP shouldn't have been established and the opportunity to execute the initial investment instructions or proceed in reliance on an indemnity shouldn't have arisen at all. And I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for L&C to proceed with Mr C's application.

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

Would the business have still gone ahead if L&C had refused the application?

Mr C went through a process with Alliance Partnership that culminated in his completing paperwork to set up a new L&C SIPP and with the expectancy that monies from his existing pension plans would be transferred into the newly established SIPP. Having gone to the time and effort of doing this, I think it's *most likely* that if the L&C SIPP wasn't then established, and if his pension monies weren't then transferred to L&C, that Mr C would have wanted to find out why from Alliance Partnership and L&C.

And I think it's fair and reasonable to conclude that one or more of the parties involved would have explained to Mr C that his application hadn't been accepted as Alliance Partnership didn't have the necessary permissions it needed to provide the advice, or alternatively as L&C wasn't satisfied that Alliance Partnership had the necessary *"top-up"* permissions to provide the advice. And that Mr C wouldn't then have continued to accept or act on pensions advice provided by Alliance Partnership.

Further, I think it's very unlikely that advice from a business that did have the necessary permissions would have resulted in Mr C taking the same course of action. I think it's reasonable to say that a business that had the necessary permissions would have given suitable advice.

In Adams v Options SIPP, the judge found that Mr Adams would have proceeded with the transaction regardless. HHJ Dight says (at paragraph 32):

> *"The Claimant knew that it was a high risk and speculative investment but nevertheless decided to proceed with it, because of the cash incentive."*

But, in this case, I'm not satisfied that Mr C proceeded in the knowledge that the investments he was making were high risk and speculative, and that he was determined to move forward with the transaction in order to take advantage of a cash incentive offered by Alliance Partnership. Based on what Mr C has told us he proceeded on the understanding that his pensions monies would be invested in a low to medium risk portfolio, that his capital would be secure and that he would achieve a better return by transferring.

Mr C did receive some money in connection with this transaction, this was structured as a loan rather than a cash incentive. He entered into a loan agreement, this was for a sum equivalent to about 10% of the monies transferred into the SIPP and Mr C signed a loan agreement for this in February 2011.

The agreement explained that the loan was repayable in full. In my opinion, the repayable loan Mr C received from a third-party firm isn't the same as the type of cash incentive that was paid to Mr Adams in the Adams v Options case. And I think this case is very different from that of Mr Adams.

In any event, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mr C's application from Alliance Partnership, the transaction wouldn't still have gone ahead. That said, I think Mr C has received monies he wouldn't have received had he not gone ahead with the transaction. Whilst, as above, this was structured as a loan, we don't currently know if Mr C has repaid these monies. If Mr C hasn't repaid the monies to date, I think it is fair to assume that he will not now be required to repay these, in which case these will need to be taken into account in the loss calculation I direct L&C to undertake. Given that the position is unknown, I've accounted for both possibilities in the "putting things right" section of this decision below.

L&C might argue that another SIPP operator would have accepted Mr C's application from Alliance Partnership, if it had declined it. But I don't think it's fair and reasonable to say that L&C shouldn't compensate Mr C for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore *wouldn't* have accepted Mr C's application from Alliance Partnership.

Further, and in any eventuality, even if another SIPP provider had been willing to accept Mr C's application from Alliance Partnership, that process would still have needed Mr C to be willing to continue to do business with Alliance Partnership after L&C had rejected his application for another application to proceed. And, for the reasons I've given above, I'm not satisfied that Mr C would have continued to accept or act on pension advice from Alliance Partnership in such circumstances.

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mr C's application from Alliance Partnership, the transaction wouldn't have gone ahead.

The involvement of Alliance Partnership

In this decision I'm considering Mr C's complaint about L&C. While it may be the case that Alliance Partnership gave unsuitable advice to Mr C, L&C had its own distinct set of obligations when considering whether to accept Mr C's application for a SIPP.

Alliance Partnership had a responsibility not to conduct regulated business that went beyond the scope of its permissions. L&C wasn't required to ensure Alliance Partnership complied with that responsibility. But L&C had its own distinct regulatory obligations under the Principles. And this included to check that firms introducing advised business to it had the regulatory permissions to be doing so. In my view, L&C failed to comply with these obligations in this case.

I'm satisfied that if L&C had carried out sufficient due diligence on Alliance Partnership and acted in accordance with good practice and its regulatory obligations by independently checking Alliance Partnership's permissions before accepting business from it, L&C wouldn't have done any SIPP business with Alliance Partnership in the first place.

I also think that if Mr C had been told that Alliance Partnership was acting outside its permissions in giving pension advice, or alternatively that L&C wasn't satisfied that Alliance Partnership had the necessary *"top-up"* permissions to provide such advice, he wouldn't have continued to accept or act on advice from it. And, having taken into account all the circumstances of this case, it's my view that it's fair and reasonable to hold L&C responsible for its failure to identify that Alliance Partnership didn't have the required *"top-up"* permissions to be giving advice and making arrangements on personal pensions in the UK.

The DISP rules set out that when an ombudsman's determination includes a money award, then that money award may be such amount as the ombudsman considers to be fair compensation for financial loss, whether or not a court would award compensation (DISP 3.7.2R).

As I set out above, in my opinion it's fair and reasonable in the circumstances of this case to hold L&C accountable for its own failure to comply with the relevant regulatory obligations and to treat Mr C fairly.

The starting point, therefore, is that it would be fair to require L&C to pay Mr C compensation for the loss he's suffered as a result of L&C's failings. I've considered whether there's any reason why it wouldn't be fair to ask L&C to compensate Mr C for his loss, including if it would be fair to hold another party liable in full or in part. And I'm satisfied it's appropriate and fair in the circumstances for L&C to compensate Mr C to the full extent of the financial losses he's suffered due to its failings.

I accept that it may be the case that Alliance Partnership is responsible for initiating the course of action that led to Mr C's loss. However, it's also the case that if L&C had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr C wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

If it wishes, L&C can have the option to take an assignment of any rights of action Mr C has against Alliance Partnership in respect of the events this complaint concerns *before* compensation is paid. And the compensation can be made contingent upon Mr C's acceptance of this term.

The key point here is that but for L&C's failings, Mr C wouldn't have suffered the loss he's suffered. So, even if an assignment of action against Alliance Partnership proves worthless, this wouldn't lead me to change my overall view on this point. And I'm satisfied that it's appropriate and fair in the circumstances for L&C to compensate Mr C to the full extent of the financial losses he's suffered due to *its* failings, and notwithstanding any failings by Alliance Partnership. And, taking into account the combination of factors I've set out above, I'm not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that L&C is liable to pay to Mr C.

Mr C taking responsibility for his own investment decisions

I'm satisfied that it wouldn't be fair or reasonable to say Mr C's actions mean he should bear the loss arising as a result of L&C's failings.

Mr C took advice from an authorised adviser (albeit one acting outside the permissions it held) and used the services of a regulated personal pension provider, L&C.

I'm satisfied that if L&C had undertaken reasonable due diligence measures and drawn appropriate conclusions about the business Alliance Partnership was undertaking (acting beyond its permissions) that L&C shouldn't have accepted Mr C's business from Alliance Partnership.

And I think that in the circumstances, for all the reasons given, it's fair to say L&C should compensate Mr C for the losses he's suffered, including any charges that were suffered as a result of realising monies from Royal London 360. But for L&C's failings, Mr C wouldn't have switched to the L&C SIPP or invested through the Royal London 360 wrapper in the first place. And I don't think it would be fair to say in the circumstances that Mr C should suffer the loss because he ultimately instructed those investments be effected.

Putting things right

My aim is to return Mr C to the position he would now be in but for what I consider to be L&C's failure to carry out adequate due diligence checks before accepting his SIPP application.

Prior to transferring to L&C, Mr C's monies were held in several pension plans, but for L&C accepting Mr C's business from Alliance Partnership, I think Mr C would most likely simply have remained invested in those pension plans.

Similarly, if Mr C had sought advice from a different adviser, who had the necessary permissions, I think it's *most likely* the advice would have been to stay in his existing pension plans. I think it's unlikely that another adviser, acting properly, would have advised Mr C to transfer into the L&C SIPP and invest in/through the Royal London 360 arrangement.

So, if L&C hadn't accepted Mr C's application, I think Mr C would have remained with his previous providers. However, I cannot be certain that a value will be obtainable for what the previous policies would have been worth as at 27 October 2015 (when Mr C transferred his pension monies away from L&C). I'm satisfied what I've set out below is fair and reasonable, taking this into account.

What must L&C do?

To compensate Mr C fairly, L&C must:

- Compare the performance of Mr C's investment with the notional value if it had remained with the previous providers. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.

- L&C should also add any interest set out below to the compensation payable.

- L&C should pay into Mr C's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If L&C is unable to pay the total amount into Mr C's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr C won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Mr C's actual or expected marginal rate of tax at his selected retirement age.

- For example, if Mr C is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr C would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

- Pay to Mr C £350 for the distress and inconvenience caused by the loss of a

significant amount of his pension funds.

Income tax may be payable on any interest paid. If L&C deducts income tax from the interest it should tell Mr C how much has been taken off. L&C should give Mr C a tax deduction certificate in respect of interest if Mr C asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
L&C SIPP	No longer in force	Notional values from previous providers	Date of investment	27 October 2015 (the date monies were transferred away)	8% simple per year on any loss from the end date to the date of settlement

Actual value

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

Notional Value

This is the value of Mr C's investment had it remained with the previous providers until the end date. In other words, this is the combined notional value of Mr C's previous pension plans as at 27 October 2015, and assuming they hadn't been transferred to the L&C SIPP. L&C should request that the previous providers calculate these notional values and it should then add these values together.

If the previous providers are unable to calculate notional values, L&C will need to determine a fair value for Mr C's investment instead, using this benchmark: For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr C wanted his monies to be invested in a low to medium risk portfolio.
- If the previous providers are unable to calculate notional values, then I consider the measure below is appropriate.
- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.
- 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's a fair measure for someone who was prepared to take some risk to get a higher return.

- Based on his submissions, I consider that Mr C's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr C into that position. It does not mean that Mr C would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr C could have obtained from investments in line with his risk attitude, as described in his submissions to this service.

Treatment of the monies Mr C received as a loan in connection with this transaction

If Mr C has repaid the monies paid to him as a loan in connection with this transaction (as I understand it, this was an amount of £5,700), then no further action needs to be taken in relation to this and L&C should undertake the calculation as set out above without adjustment for these funds.

If Mr C hasn't repaid this, then the funds he received in connection with this transaction will need to be taken into account.

L&C should ask the previous pension providers to treat the amount Mr C received as a notional deduction from their notional calculations as at the date Mr C received the £5,700. There are three separate ceding pension providers, I think the fairest way to deal with this, is for the sum received to be split three ways, so each provider is asked to calculate the notional value on the basis that a notional withdrawal of £1,900 was made.

If L&C is unable to obtain, or there are any difficulties in obtaining, notional values from the ceding pension providers and it calculates the notional value of Mr C's pension by using the benchmark set out above, then it should treat the amount Mr C received as a notional withdrawal from the calculation, as at the date he received the funds.

Alternatively, for ease, L&C may choose to simply deduct £5,700 from the overall loss position established.

Mr C should confirm the correct position in respect of the £5,700 within 14 days of acceptance of my final decision.

My final decision

I uphold the complaint. My decision is that London & Colonial Services Limited must pay the amount calculated as set out above.

London & Colonial Services Limited must provide details of its calculation to Mr C in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 28 April 2023.

Nicola Curnow
Ombudsman