DRN-3423176

The complaint

Miss Q complains that London & Colonial Services Limited ('L&C') shouldn't have accepted her application for a Self-Invested Personal Pension ('SIPP') from The Alliance Partnership s.r.o. ('TAP'). Miss Q complains that TAP was unregulated and that insufficient due diligence was undertaken on investments that were made within her SIPP.

What happened

Involved Parties

London & Colonial Services Limited

L&C's 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.

TAP's an EEA authorised financial advisory firm based in the Czech Republic. TAP 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 FCA register shows that TAP had passported permissions in the UK from 19 November 2008 and that a supervisory run off has been in place since 6 April 2021.

Hansard Europe Limited

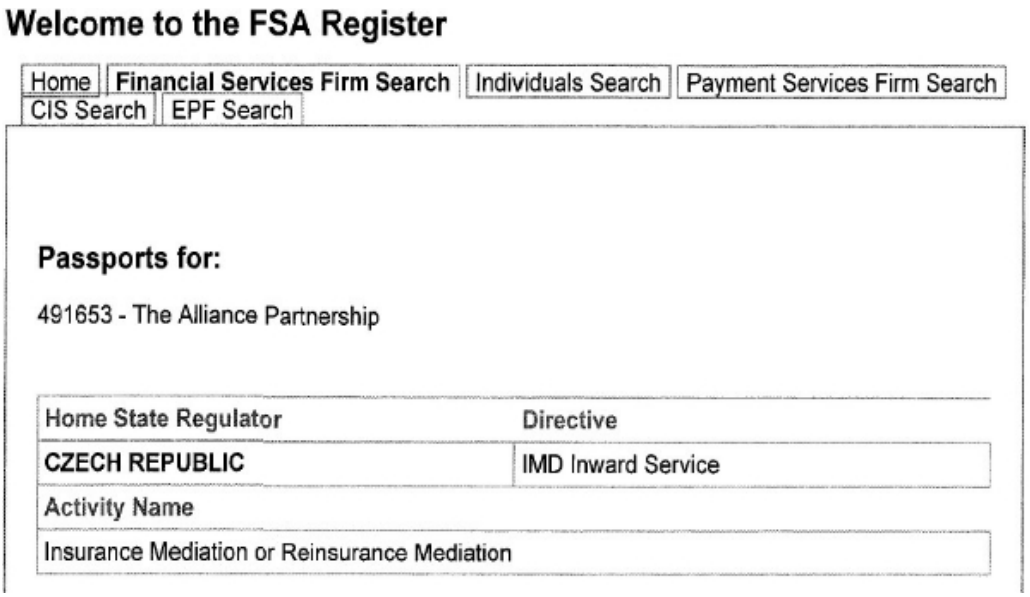
Hansard Europe Limited ('Hansard') was registered in Dublin. It provided a product through which investors could invest in a number of holdings.

L&C and TAP'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 TAP) 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's provided us with very little information about its relationship with TAP. 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 TAP:



I think it's likely that that L&C's relationship with TAP began around the date of the above screenshot. And I think it's likely its relationship with TAP ended towards the end of 2011. I say this because L&C wrote to Miss Q in November 2011 and informed her that it no longer had a relationship with TAP. And that it wouldn't be able to accept any instructions on Miss Q's pension arrangements from Mr G.

What happened

Miss Q's representatives say that TAP advised her to open the L&C SIPP and to transfer existing pension monies into that arrangement.

Miss Q had signed the L&C SIPP application form in March 2011. In the form Mr G ("Mrs" G appears to be stated in the form but the first and surname appear to be those of Mr G) is recorded as the IFA contact and the IFA firm is recorded as:

"THE ALLIANCE PARTNERSHIP LTD 26780267 PO BOX 267, Goole, East Yorkshire, DN14 4AX."

The FSA authorisation number given for the firm, 26780267, is an identification number linked to TAP in the Czech Republic.

The application form records the remuneration to be paid to the adviser as 6% initial and 1% ongoing and that TAP was to be the investment manager.

It was also stated in the form that monies were to be transferred in from existing pension plans and £40,000 was to be initially invested in the Hansard Signature Bond.

L&C wrote to TAP and Miss Q on 15 April 2011 to confirm the SIPP had been established.

Mr G of TAP certified a copy of identity documents for Miss Q on 26 April 2011. And a letter was sent to L&C in May 2011 explaining that an application for Miss Q was enclosed, that L&C should keep the identity documents to send on to Hansard and that a fund adviser form was attached for signature, which was also to be forwarded on to Hansard.

L&C sent a Proposal Form for a Signature Bond Plus investment to Hansard on 18 May 2011.

On Miss Q's Hansard *"Proposal Form"*, the independent financial adviser is recorded as Mr G of TAP. A representative of L&C has signed the form on 18 May 2011, it's noted that this is *"For and on behalf of London & Colonial Services at the direction of* (Miss Q)*."* It's also noted that the *"country of point of sale"* is the UK and that the selling broker is Mr G. Mr G's signed the form on 7 April 2011 and it's recorded that he's regulated/authorised by the Czech National Bank.

Hansard wrote to L&C on 27 May 2011 to confirm that Miss Q's application had been processed.

Hansard Portfolio Bond deal instruction forms ('dealing sheets') were also completed. The forms state they're from TAP. A TAP adviser is named in the forms along with details of the investments to be purchased. The forms have been signed by L&C *"For and on behalf of London & Colonial Services Ltd at the direction of* (Miss Q)*."*

On 21 November 2011, L&C wrote to Miss Q and informed her that it no longer had a relationship with TAP. And that it wouldn't be able to accept any instructions on Miss Q's pension arrangements from Mr G.

In January 2012, L&C received correspondence from a different advisory firm, 1 Stop Financial Services. This included a series of questions and a letter of authority from Miss Q.

A little while later, in February 2012, monies were realised from the Hansard Signature Bond Plus investment. The bulk of the monies realised were then reinvested in a Carbon Credits holding.

L&C sent Miss Q a statement in April 2012, this valued her SIPP at around £25,000.

A transaction history shows that a little over £36,000 was transferred into Miss Q's L&C SIPP in April 2011, there were then further transfers in of a little under £2,600 in May 2011. And a little under £35,000 was invested into the Hansard Signature Bond Plus investment in May 2011. Adviser fees of a little over £2,300 were paid to TAP in May 2011.

A little under £25,000 was realised from the Hansard Signature Bond Plus investment in February 2012, with a little under £24,000 of this being reinvested in the Carbon Advice Group shortly thereafter.

Miss Q complained to L&C through a representative, a claims management company ('CMC'), in February 2020. In response to the complaint L&C said, amongst other things, that:

- Hansard Europe Limited is regulated by the Central Bank of Ireland.
- The Irish financial regulator is a regulator of parallel standards to the Financial Conduct Authority ('FCA').
- Miss Q's adviser had sent it an investment application form that Miss Q completed, this included a signed declaration confirming that Miss Q had read, and agreed to, the risks of investing.
- It provides execution-only SIPP administration services and it's complied with its regulatory and contractual obligations.
- It complied with its requirement under the Conduct of Business Sourcebook ('COBS') Rules, specifically COBS 11.2.19, to execute Miss Q's instructions.
- While Miss Q believed it shouldn't have accepted business from TAP, it was Miss Q's decision to use TAP.
- It isn't permitted to provide advice or comment on the suitability of establishing a SIPP, transferring pensions, or the investments made with SIPP monies.

- It isn't permitted to comment on the suitability of a customer's choice of introducer.
- It completed due diligence on TAP including obtaining a completed introducer profile.
- Company checks and a signed Terms of Business were in place before L&C accepted Miss Q's application form.
- There was no reason for it to believe that it shouldn't accept introductions from TAP and doing so was within the regulatory rules that were in place.
- Miss Q was fully aware that TAP wasn't a regulated firm.
- TAP had no involvement in Miss Q's decision to disinvest from the Hansard Signature Bond Plus investment and reinvest monies into Carbon Credits.
- L&C provided Miss Q with information about her Hansard Signature Bond Plus investment, this included information about penalties for encashing the investment early and it was Miss Q's decision to accept these penalties.
- Miss Q was guided by L&C to obtain regulated financial advice if she was unsure of any of the documentation, or information she received.

Our investigator's view

One of our investigators reviewed Miss Q's complaint. The investigator explained to the parties that she'd identified that Miss Q had made two separate complaints in her submissions.

The first complaint, which this decision concerns, addresses the issues Miss Q's raised around the establishment of the SIPP and the transfer of monies into the SIPP, along with the investment of the transferred monies into the Hansard Signature Bond Plus wrapper.

The second complaint, considered elsewhere, addresses concerns Miss Q's raised around a Carbon Credits investment that was made after Miss Q's investment with Hansard was realised.

The investigator concluded that Miss Q's first complaint, the one I'm considering here, should be upheld. She said that the complaint had been raised in time and that L&C, as a SIPP operator, should have known that TAP was carrying out activities that it didn't have the necessary permissions to perform in the UK. And that L&C shouldn't have accepted Miss Q's introduction from TAP.

Our investigator also thought there were anomalous features to the business being introduced by TAP which meant that, it wasn't fair and reasonable for L&C to accept business from TAP. Our investigator concluded that it was fair and reasonable for L&C to compensate Miss Q for her financial loss.

L&C replied to the investigator's view to request an extension to respond, but no further submissions from L&C were forthcoming.

In response to the investigator's view Miss Q said that she was happy with the findings but that she'd prefer for the redress to be paid directly to her rather than into the SIPP.

Because agreement couldn't be reached, this complaint's been passed to me for review.

What I've decided – and why

As a preliminary point, I should emphasise that in this decision I'm only considering Miss Q's complaint about the establishment of the SIPP and the transfer of monies into the SIPP, along with the initial investment of the transferred monies. As the investigator explained,

we've set up a second complaint to look at the concerns Miss Q's raised around a Carbon Credits investment that was made at a later date in 2012.

jurisdiction

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

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

The rules I must follow in determining whether we can consider this complaint are set out in the Dispute Resolution ('DISP') rules, published as part of the FCA's Handbook.

Has the complaint been brought in time?

The section of the rules that applies to this complaint means that, unless L&C consents, we can't look into this complaint if it's been brought:

- more than six years after the event complained of;
- or, if later, more than three years after Miss Q was aware – or ought reasonably to have become aware – she had cause for complaint;
    - unless the complaint was brought within the time limits, and there's a written acknowledgement or some other record of it having been received; or
    - unless, in the view of the Ombudsman, the failure to comply with the time limits was as a result of exceptional circumstances.

Miss Q's representatives referred this complaint to L&C in February 2020, the complaint they raised was fairly technical and went into quite a lot of detail. There are various strands to Miss Q's complaint but, overall, the crux of the complaint is that L&C didn't carry out sufficient checks when it accepted Miss Q's business from TAP and that insufficient due diligence was undertaken on investments made within the SIPP.

The SIPP was in force by April 2011 and monies were transferred into the SIPP and invested in the Hansard Signature Bond Plus wrapper shortly thereafter. All of which occurred more than six years before Miss Q had referred her complaint to either L&C or us.

So, I've also gone on to consider whether Miss Q referred her complaint more than three years from the date on which she either was aware, or ought reasonably to have become aware, she 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, Miss Q needs to be aware, or should reasonably be aware, that there's a problem which has caused, or may cause, her loss and that L&C's responsible.

- Miss Q transferred around £38,500 into her SIPP in 2011 and a little under £35,000 was invested into the Hansard Signature Bond Plus investment in May 2011. A little under £25,000 was realised from that investment in February 2012 and in April 2012 Miss Q received an annual statement that valued her SIPP at around £25,000. I think the level of losses suffered in a year would have been disconcerting to most ordinary retail investors in Miss Q's position. And the information Miss Q was sent would, in my view, have made them think that something had gone wrong, or might be going wrong, in relation to their pension. I think it's unlikely this is what Miss Q was expecting, or what she would have thought was reasonable for her investments.

- I accept that the information sent to Miss Q meant she was aware, or should reasonably have been aware, that there was a problem with her pension and that she'd been caused some loss or damage.

- There's nothing I've seen that was sent to Miss Q more than three years before her complaint was referred to L&C that links L&C to the losses her pension monies had suffered. Like the investigator, I think it's worth highlighting that Miss Q 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 her financial advisers might have given poor advice. In my view, there's nothing in the correspondence sent to Miss Q that would indicate to a reasonable retail investor in Miss Q's position that L&C had responsibility for the position Miss Q was in – the position of having a SIPP with investments in it that were performing badly.

- I've seen no evidence that Miss Q had been told by any third party, and more than three years prior to her CMC raising a complaint with L&C in February 2020, that L&C may have done something wrong and might be wholly or partly responsible for the position she 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 CEO's 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 Miss Q should have had an understanding of the obligations SIPP providers were under more than three years before Miss Q referred her complaint to L&C.

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

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

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

merits

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 Miss Q fairly, in accordance with her best interests. And what I think's fair and reasonable in light of that. And I think the key issue in Miss Q's complaint is whether it was fair and reasonable for L&C to have accepted Miss Q's SIPP application in the first place. So, I need to consider whether L&C carried out appropriate due diligence checks on TAP before deciding to accept Miss Q'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 Miss Q'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 Miss Q'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 Miss Q'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 Miss Q'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 Miss Q 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 Miss Q on the suitability of its SIPP or the investments Miss Q made within her 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 TAP 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 Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*

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

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

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

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

The later publications

In the October 2013 finalised SIPP operator guidance, the 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's 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 Miss Q'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 Miss Q. It's accepted L&C wasn't required to give advice to Miss Q, 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 Miss Q's introduction from TAP.

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 TAP was most likely carrying out regulated activities relating to arranging and advising on investments.

TAP'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 Miss Q'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 Miss Q'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 2 **Activities** 2		**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 Miss Q'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 April 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 at April 2011) 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 TAP 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 TAP, 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 TAP

I think the available evidence indicates TAP 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, TAP 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 TAP'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 TAP 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 TAP was advising on Miss Q's pension switch.

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, TAP was listed as being the *"IFA"* and an *"investment manager"*. The given remuneration in the form was to be paid to the *"financial adviser"*. Further, from her complaint to L&C, I'm also satisfied that Miss Q understood TAP to be acting as her financial adviser.

And I think that L&C also understood this to be the case. I say that because in its final response letter to Miss Q, L&C's said that:

> *"The Application Form confirmed that she had appointed The Alliance Partnership Limited, as her financial adviser and that she intended to transfer her* (existing pension plans) *into a London & Colonial SIPP following the advice* (Miss Q) *received from* (Mr G) *of The Alliance Partnership Limited.* (Miss Q) *also stated on her application form that she had decided,* ***prior*** *to approaching London & Colonial that she wished to invest her funds into the Hansard Signature Bond, following* (Mr G's) *advice."*

So, I think L&C's understanding at the time of the transaction that's the subject of this complaint was that TAP was giving advice on the switch 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 TAP 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 TAP, holding only IMD permissions, was advising on article 82 investments.

I think L&C should have been aware that TAP was giving advice on the switch to its SIPP, in addition to advising on investments. It's difficult to see otherwise how people were ending up

in its SIPP. I haven't seen any evidence to show L&C took steps to understand how the business was coming about in the alternative.

I don't find it plausible that TAP's advice was limited to advising on the Hansard Signature Bond Plus wrapper/or the investments within it. That advice was only made possible by way of the pension switch into the L&C SIPP. That was the source of the monies in respect of which the Hansard Signature Bond Plus advice was being given, *but for* the switch 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 TAP was appointed as Miss Q's financial adviser in respect of her SIPP as noted on the SIPP application form. And that it was providing her with advice in respect of this transaction.

Taking everything into account I'm satisfied that TAP was advising on the pension switch 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 TAP.

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 TAP 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 Miss Q's application in such circumstances.

Checks L&C undertook on TAP

As mentioned earlier, as part of our investigation L&C was asked a series of questions about the due diligence it undertook into TAP 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 TAP'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 TAP 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 TAP's Permission page. Had it done so I'm satisfied it's *most likely* that it would have discovered that TAP didn't have the necessary top-up permissions.

In the unlikely eventuality that the register didn't make it clear whether TAP 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 TAP held any *"top-up"* permissions.

Alternatively, if L&C was unable to independently verify TAP'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 TAP 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 TAP if the position wasn't clear.

Summary

So, to summarise, I think that TAP carried on activities for which it didn't have regulatory permission in the UK. I think it advised Miss Q to switch to the SIPP from her existing pension plans and made arrangements for the switch to take place.

In the circumstances, I think L&C should have known what activities TAP 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 TAP (anomalous features)

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

The domicile of TAP:

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 (in this case in Dublin) is anomalous in and of itself.

The fact that TAP 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:

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

I consider the level of remuneration paid to TAP 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'd 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 Miss Q's pension monies were potentially high.

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:

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

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

In conclusion

L&C ought to have identified that TAP 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 TAP 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 TAP didn't have the permissions it required, or that it was unable to confirm whether TAP 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 TAP.

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 Miss Q's application which emphasised the need for adequate due diligence to be carried out on TAP.

It's fair and reasonable in the circumstances of this case to conclude that none of the points L&C's raised in its response to Miss Q's complaint are factors which mitigate its decision to accept Miss Q's application from TAP.

I'm therefore satisfied it's fair and reasonable to conclude that L&C shouldn't have accepted Miss Q's application from TAP.

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 TAP, 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 Miss Q's application?

In its response to Miss Q's complaint L&C's 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 Miss Q's application from TAP in the first place. So in my opinion, Miss Q'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's 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 TAP and established Miss Q'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 Hansard Signature Bond Plus investment.

Indemnity

I think L&C ought to have been cautious about accepting Miss Q's application even though she'd 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 Miss Q sign an indemnity declaration wasn't an effective way for L&C to meet its regulatory obligations to treat her fairly, given the concerns L&C ought to have had about accepting business from TAP.

L&C knew that Miss Q had signed a form intended to indemnify it against losses that arose from acting on her instructions. And, in my opinion, relying on such an indemnity when L&C knew, or ought to have known, Miss Q's dealings with TAP were putting her 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 Miss Q's application.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Miss Q signed meant that L&C could ignore its duty to treat her fairly. To be clear, I'm satisfied that 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 Miss Q's application from TAP. If that had happened, then I think it's *most likely* the contractual obligations between L&C and Miss Q under the newly established SIPP would never have

arisen. And it wouldn't be fair or reasonable to say the contract between Miss Q and L&C meant L&C could ignore all red flags and proceed with Miss Q's business regardless.

So, I'm satisfied that Miss Q'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 Miss Q's application.

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

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

Miss Q went through a process with TAP that culminated in her completing paperwork to set up a new L&C SIPP and with the expectancy that monies from her existing pension plan would be transferred into the newly established SIPP. Having gone to the time and effort of doing this, I think it's *most likely* that if the L&C SIPP wasn't then established, and if her pension monies weren't then transferred to L&C, that Miss Q would have wanted to find out why from TAP 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 Miss Q that her application hadn't been accepted as TAP didn't have the necessary permissions it needed to provide the advice, or alternatively as L&C wasn't satisfied that TAP had the necessary *"top-up"* permissions to provide the advice. And that Miss Q wouldn't then have continued to accept or act on pensions advice provided by TAP.

Further, I think it's very unlikely that advice from a business that did have the necessary permissions would have resulted in Miss Q 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 Miss Q proceeded in the knowledge that the investment she was making was high risk and speculative and that she was determined to move forward with the transaction in order to take advantage of a cash incentive offered by TAP.

I've not seen any evidence to show Miss Q was paid a cash incentive. It therefore cannot be said she was *"incentivised"* to enter into the transaction. And, on balance, I'm satisfied that Miss Q, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for herself. So, in my opinion, this case is very different from that of Mr Adams.

L&C might argue that another SIPP operator would have accepted Miss Q's application from TAP, had it declined it. But I don't think it's fair and reasonable to say that L&C shouldn't compensate Miss Q for her 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 Miss Q's application from TAP.

Further, and in any eventuality, even if another SIPP provider had been willing to accept

Miss Q's application from TAP, that process would still have needed Miss Q to be willing to continue to do business with TAP after L&C had rejected her application for another application to proceed. And, for the reasons I've given above, I'm not satisfied that Miss Q would have continued to accept or act on pensions advice from TAP in such circumstances.

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

The involvement of TAP

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

TAP had a responsibility not to conduct regulated business that went beyond the scope of its permissions. L&C wasn't required to ensure TAP 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's failed to comply with these obligations in this case.

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

I'm also satisfied that if Miss Q had been told that TAP was acting outside its permissions in giving pensions advice, or alternatively that L&C wasn't satisfied that TAP had the necessary *"top-up"* permissions to provide such advice, she 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 TAP 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 Miss Q fairly.

The starting point therefore, is that it would be fair to require L&C to pay Miss Q compensation for the loss she'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 Miss Q for her 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 Miss Q to the full extent of the financial losses she's suffered due to its failings.

I accept that it may be the case that TAP is responsible for initiating the course of action that led to Miss Q'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 Miss Q wouldn't have come about in the first place, and the loss she's suffered could have been avoided.

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

The key point here is that but for L&C's failings, Miss Q wouldn't have suffered the loss she's suffered. So, even if an assignment of action against TAP 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 Miss Q to the full extent of the financial losses she's suffered due to its failings, and notwithstanding any failings by TAP. 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's liable to pay to Miss Q.

Miss Q taking responsibility for her own investment decisions

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

Miss Q 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 TAP was undertaking (acting beyond its permission) that L&C shouldn't have accepted Miss Q's business from TAP.

And I think that in the circumstances, for all the reasons given, it's fair to say L&C should compensate Miss Q for the losses she's suffered, including any charges that were suffered as a result of realising monies from the Hansard Signature Bond Plus investment. But for L&C's failings, Miss Q wouldn't have switched to the L&C SIPP or invested through the Hansard Signature Bond Plus wrapper in the first place. And I don't think it would be fair to say in the circumstances that Miss Q should suffer the loss because she ultimately instructed those investments that I'm considering here to be effected.

Putting things right

My aim is to return Miss Q to the position she'd now be in but for what I consider to be L&C's failure to carry out adequate due diligence checks before accepting her SIPP application.

Prior to transferring to L&C, Miss Q's monies were held in several pension plans, but for TAP contacting Miss Q and L&C accepting Miss Q's business from TAP I think Miss Q would simply have remained invested in those pension plans.

Similarly, if Miss Q 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 her existing pension plans. I think it's unlikely that another adviser, acting properly, would have advised Miss Q to transfer into the L&C SIPP and invest in/through the Hansard Signature Bond Plus wrapper.

So, if L&C hadn't accepted Miss Q's application, I think Miss Q would have remained with her previous providers. However, I cannot be certain that a value will be obtainable for what the previous policies would have been worth. I'm satisfied what I've set out below is fair and reasonable, taking this into account.

What must L&C do?

To compensate Miss Q fairly, London & Colonial Services Limited must:

- Compare the performance of Miss Q's SIPP 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's a loss and compensation is payable.

- L&C should add interest as set out below.

- If there's a loss, L&C should pay into a pension plan for Miss Q so as to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

- If L&C's unable to pay the compensation into a pension plan for Miss Q, it should pay that amount direct to her. But had it been possible to pay into a plan, it would have provided a taxable income. Therefore the compensation 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 HM Revenue & Customs ('HMRC'), so Miss Q won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Miss Q's actual or expected marginal rate of tax at her selected retirement age.

- It's reasonable to assume that Miss Q's likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Miss Q would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

- Pay £300 to Miss Q directly. In addition to the financial loss that Miss Q's experienced as a result of the problems with her pension, I think the losses suffered to the portion of Miss Q's pension provisions that this decision concerns has caused Miss Q distress. And I think that it's fair for L&C to compensate her for this as well.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Monies transferred into the L&C SIPP from Miss Q's previous pension	No longer in force	Combined notional values from previous providers	Date of investment	Date monies were realised from the Hansard Signature Bond Plus	8% simple per year on any loss from the end date to the date of settlement

plans.				wrapper (I understand this was on 22 February 2012)	

Actual value

This means the actual amount paid from the investment at the end date. In this complaint this is the current value of Miss Q's SIPP as at 22 February 2012, immediately after monies had been realised from the Hansard Signature Bond Plus investment.

Notional Value

This is the value of Miss Q's pension had it remained invested with the previous providers until the end date. L&C should request that the previous providers calculate this value.

Any additional sums Miss Q paid into the L&C SIPP from outset through until 22 February 2012, should be added to the *notional value* calculation from the point in time when they were actually paid in.

Any withdrawals from the L&C SIPP from outset through until 22 February 2012 should be deducted from the notional value calculation at the point they were actually paid, so that they cease to accrue any return in the calculation from that point on. To be clear this doesn't include SIPP charges or fees paid to third parties like TAP.

If there's a large number of regular payments, to keep calculations simpler, I'll accept if L&C totals all those payments and deducts that figure at the end to determine the notional value instead of deducting periodically.

If the previous providers are unable to calculate a notional value, L&C will need to determine a fair value for Miss Q'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.

The information about the average rate can be found on the Bank of England's website by searching for 'quoted household interest rates' and then clicking on the related link to their database, or by entering this address www.bankofengland.co.uk/boeapps/database, clicking on: Interest & exchange rates data / Quoted household interest rates / Deposit rates - Fixed rate bonds / 1 year (IUMWTFA) and then exporting the source data.

Why is this remedy suitable?

I've chosen this method of compensation because:

- If the previous providers are unable to calculate a notional value, then I consider the measure below is appropriate.

- 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.

- The mix and diversification provided by using a benchmark of the FTSE UK Private Investors Income total return index for half the investment and the average rate for the fixed rate bonds for the other half of the investment would be a fair measure for comparison for what Miss Q's monies might have been worth if they'd not been transferred into the SIPP.

If L&C pays the full calculated redress, and elects to take an assignment of any rights of action Miss Q has against TAP in respect of the events this complaint concerns (so in respect of the establishment of the SIPP, pension switches and investment of monies in/through the Hansard Signature Bond Plus wrapper) before paying compensation, it must first provide a draft of the assignment to Miss Q for her consideration and agreement. Any expenses incurred for the drafting of the assignment should be met by L&C.

My final decision

For the reasons given, my final decision is that I uphold Miss Q's complaint against London & Colonial Services Limited. And I require London & Colonial Services Limited to pay Miss Q the compensation amount as set out in the steps above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss Q to accept or reject my decision before 30 September 2022.

Alex Mann
Ombudsman