DRN-4109978

The complaint

Mr H complains that London & Colonial Services Ltd ('L&C') allowed his self-invested personal pension ('SIPP') to be invested in an investment which caused him to lose a significant amount of money. Mr H wants L&C to pay him compensation for the loss.

Options UK Personal Pensions LLP ('Options') has been dealing with the complaint on behalf of L&C. Options is part of the same group of companies as L&C. Throughout this decision I've referred to the business as L&C.

What happened

Mr H had a defined benefit pension from a former employer. He said a financial adviser visited him at home and said he could help Mr H get a '*better investment*' on his pension now that he had left his employer. Mr H said:

> '*[The adviser] explained about the need for sustainable energy and that a new form of sustainable energy could be sourced from Bio plants that were grown in Cambodia.*'

Mr H signed a SIPP application form on 20 September 2011 to transfer his pension into a SIPP with L&C and to invest the funds inside the SIPP in an '*Agroforestry Lease'* offered by Sustainable Agroenergy PLC ('SA'). The investment involved leasing plots of land in Cambodia from SA and letting them to a Cambodian company connected to SA. According to agreements Mr H signed, the plots were planted with jatropha trees. And he was to receive 50% of the revenue the Cambodian company would generate by harvesting seeds from the trees on his plots to make bio-fuel.

Mr H's SIPP application form listed his financial advisers as RealSIPP LLP ('RealSIPP') and CIB Life & Pensions Ltd ('CIB'). It provided FSA authorisation numbers for both and contact details for RealSIPP. RealSIPP was an appointed representative of CIB from 6 April 2010 to 4 June 2015. CIB was an authorised firm until 4 June 2015. The form didn't say whether Mr H received financial advice from the advisers. Boxes were ticked on the form to say Mr H wanted to manage the fund himself and wanted L&C to act on instructions from his financial adviser.

L&C acknowledged the SIPP application in letters dated 23 September 2011. On the same day L&C wrote to Mr H's pension provider asking it to transfer Mr H's pension entitlement to L&C. The cash value of Mr H's pension entitlement was about £39,000. That amount was transferred on 24 October 2011. The following day L&C sent about £35,000 to SA to purchase an agroforestry lease for Mr H's SIPP.

In November 2011 the Serious Fraud Office ('SFO') opened a criminal investigation into SA. In February 2012 a court froze SA's assets. And in March 2012 SA entered receivership. The SFO later brought charges and three men were found guilty and given prison sentences. The SFO investigation had focused on the sale and promotion of SA's products, including the one Mr H invested in. The SFO found that investors had been deliberately misled about the nature of the investment and a person responsible for sales had obtained commission rates of 65% of the amounts invested. It also noted that SA was effectively insolvent by mid-2011.

In April 2012 the administrator for SA (Chantrey Vellacott DFK) wrote to investors saying SA had no title to the land being invested in and no way its business model could work, and most of the land was unsuitable for jatropha trees. The administrator said investors had been promised returns of 5% in the first year, 12% in the second year, and 20% in the third and subsequent years.

From 2012 L&C produced annual statements which showed Mr H's investment in SA was valued at nil. L&C continued to take its annual fee from the cash in Mr H's account until 2015 when it wrote to him saying it couldn't collect its fee and Mr H couldn't take any benefits from the SIPP because the SIPP had insufficient cash and the investment was '*currently illiquid*'. L&C said that it had '*never been involved with, nor … in any way responsible for the choice of the investment or the difficulties arising in connection with it*', but that L&C still needed its fee for operating the SIPP. L&C said it would accrue the fees due to it and to Mr H's financial adviser and it would deduct the fees from Mr H's SIPP when the investment became liquid enough.

Mr H later told us the SFO informed him of the investigation into SA and L&C sent him six-monthly SIPP statements '*even after I had no investment*'. He said he contacted L&C to ask it to stop charging fees and pay him the balance of the cash in his SIPP account, which he said was about £2,500. He said L&C refused to stop taking fees because the SIPP was still active and told Mr H he could use the account to make further investments but he couldn't close it.

Mr H later told us:

> '*I believed at the time London and Colonial were only the receiver of the money acting like a bank I did not understand they had any obligation regarding the investment and believed initially when I was first informed of the investigation that the only ones accountable where the individuals who had set up Sustainable Agroenergy and they were now under investigation, and facing criminal charges based on the information I was sent at the time from the Serious Crime Agency [sic] and the updates on their platform. I only sought legal advice at a later stage when I saw similar stories of other people who had lost their investment on social media and after the investigation completed and the confiscation order in 2016* '.

Mr H further said:

> '*I contacted a solicitor after the legal case had been settled as it was at this point it was confirmed the investment did not exist, I was initial contacted on several occasions by Chantler Vellacott [sic] who was aware of the investigation sometime during late 2014-2015 however they required an upfront fee which I was not able to afford and therefore never contacted them. I then became aware of solicitors who would take on a case based on no win no fee and I believe this is when I had an initial conversation with a solicitor at the end of 2015 early 2016, however I don't recall what action the solicitor did on my behalf, nor do I have any correspondence. At the time there was a lot of social media posts about claiming payment protection where it had been mis-sold and I became aware later in the year that individuals could complain directly with the financial ombudsman and that it may be possible to bring a complaint against the financial adviser who was listed on the London and Colonial statements as Real Sipp LLP. I logged a complaint directly with the financial ombudsman after sending letters of complaint to Real Sipp without any response, I was advised by the financial ombudsman to make take* [sic] *the complaint directly to*

the pension ombudsman which I did and the complaint file was transferred over the pension ombudsman. I was eventually awarded part of my investment through the compensation scheme. The complaint was against Agro Energy and the Financial adviser Real Sipp LLP.'

On 17 January 2016 Mr H signed a form for a representative to investigate advice he'd received to transfer his pension and invest in SA. The representative asked L&C for some information which L&C provided.

On 5 July 2016 L&C wrote to M H saying:

> *'…[SA] has unfortunately encountered serious trading difficulties. In the absence of any recognised market there appears to be no reference from which to establish a value or even any market or means to achieve a sale.'*

L&C said it was terminating Mr H's SIPP agreement because the SIPP had very little cash and the SA investment had no realistic prospect of being sold.

Mr H said the SFO made him aware of the outcome of a confiscation order in August 2016 which he said was when he '*knew no monies would be payable*'. He said:

> '*I then followed the governments [sic] online advise, making a formal complaint [about] the financial adviser Real Sipp waiting the required time for a response, which was never received then raising it with the financial ombudsman, once I receive the advice from the financial [ombudsman] to contact the pensions ombudsman I did.*'

On 28 February 2018 Mr H submitted a claim to the Financial Services Compensation Scheme ('FSCS') about the actions of CIB (the principal firm for which Real SIPP had been an appointed representative). FSCS upheld his claim on 8 August 2018 and paid him compensation up to the applicable limit. FSCS later reassigned rights back to Mr H to pursue compensation from L&C.

Mr H's complaint about L&C

Mr H said he became aware in 2019 that he could make a complaint against L&C after he made an enquiry to a new representative after seeing a post on social media about complaints to L&C about SIPPs. He said he contacted the new representative in December 2019 and '*Up until this point I believed I had done all I could in trying to get some of the money back via the FSCS*'.

On 24 January 2020 Mr H filled out a '*Claimant fact find*' document for the new representative. The representative wrote a complaint to L&C on Mr H's behalf dated 30 October 2020. L&C said it received the complaint on 9 November 2020. In summary the complaint said L&C had a duty to protect its customers which it had not met by facilitating Mr H's investment in a product that was illiquid, high-risk and complex. The complaint made reference to the Principles for Businesses from the FCA Handbook. It said that by not identifying and acting on the risk of detriment to Mr H, L&C had failed to follow Principles 2, 3 and 6. It also said L&C facilitated a '*shoe-horning*' approach by RealSIPP.

Mr H wanted L&C to take ownership of the investment and put him in the position he would've been in had he not transferred his pension to the SIPP and made the investment. And he wanted compensation for the worry and distress he suffered.

L&C said in reply that Mr H's complaint was out of time according to the rules in the DISP section of the FCA Handbook. L&C said Mr H complained more than six years after his SIPP and investment were set up and more than three years after he would have been aware of his cause for complaint. L&C said its annual statements from 2012 to 2015 had shown Mr H's investment was valued at nil which had put Mr H '*on notice*' to raise any concerns he had about financial loss and lack of liquidity in the investment.

Mr H referred his complaint to us in January 2021. In summary his representative said:

- L&C hadn't taken into account Mr H's communication needs and treated him fairly and it had failed to act in line with Principles 1, 6 and 7.
- L&C didn't put Mr H '*on notice*' because it didn't make clear to him at any point that he could complain against L&C for his investment loss.
- Mr H didn't know he could hold L&C responsible for what happened. If L&C had treated Mr H fairly it would have told him he could complain about L&C.

One of our investigators looked into the complaint. She asked L&C about its relationship with Real SIPP, including any checks it did on Real SIPP, and any due diligence it did on the SA investment. L&C didn't provide any information in response.

Our investigator's view

The investigator concluded that the complaint wasn't out of time. She disagreed with L&C that Mr H would or should have been aware of his cause for complaint more than three years before he complained. She said Mr H's complaint was about L&C allowing the investment to be held in the SIPP, not the failure of the investment itself. She took the view that a consumer could not reasonably be expected to be aware of the due diligence obligations of SIPP providers. She said the earliest time Mr H was likely to have been aware of the responsibilities of SIPP providers was when he appointed a representative in 2018.

Having taken the view that the complaint was in our jurisdiction, the investigator also said the complaint should be upheld because L&C hadn't done enough due diligence on the SA investment. She drew negative conclusions from the fact L&C hadn't provided any evidence to show what due diligence it carried out. And she said L&C should've obtained and considered information about the title of the land which it agreed to lease on behalf of Mr H. And by not doing so it had caused Mr H a financial loss by allowing an investment it shouldn't have allowed. The investigator said Mr H wouldn't have invested in the fraudulent scheme if L&C had not allowed it; he would most likely have left his pension where it was. The investigator said L&C should:

1. Calculate the loss Mr H suffered as a result of making the transfer
2. Take ownership of the SA investment if possible
3. Pay Mr H £500 for distress and inconvenience.

L&C didn't accept the investigator's view. It said the complaint was out of time. In summary L&C said Mr H would've been aware he had cause for complaint more than three years before he complained in November 2020. L&C said he would only have appointed a representative to help if he was aware of his cause for complaint, so appointing a representative in 2018 couldn't have triggered his awareness. L&C said again that its statements ought to have made Mr H aware something had '*gone wrong*' and that he might have a complaint against L&C. And it said Mr H would've received other information too which should've alerted him to his complaint. For example, the administrator for SA wrote to investors in April 2012 saying SA had no title to the land being invested in and no way its business model could work, and most of the land was unsuitable for jatropha trees. L&C said individuals involved in SA were convicted in December 2014. So by the end of 2014 at the latest Mr H ought to have known SA had no title to the land, his investment had no value, and the investment was a sham run by fraudsters. L&C said this ought to have alerted him to any alleged due diligence failings.

On the merits of the complaint L&C's representative said the complaint shouldn't be upheld. I've summarised some of L&C's key points below (and have carefully considered the response in full):

- L&C recalled that a regulated third-party trustee was responsible for investigating title and '*ensuring that this was obtained by the investors*'. L&C was investigating this and would provide any relevant documents (but they haven't been provided).

- The view that Mr H wouldn't have transferred his pension were it not for L&C's failure wasn't supported by contemporaneous evidence. Other SIPP operators were legitimately accepting such investments at the time. Mr H hadn't said he wouldn't have made the investment had L&C refused it. And if L&C had refused the investment it couldn't have told him why because that would have constituted investment advice, so Mr H would still most likely have made the investment.

- The investigator diverged without explanation from the decision in the broadly similar case of *Adams v Options SIPP UK LLP (formerly Carey Pensions UK LLP) [2002] EWHC 1229 (Ch).*

- The investigator didn't explain why the Principles were relied on rather than *Adams*, despite *Adams* being a better foundation for considering a complaint against a SIPP provider.

- Mr H's complaint can't be upheld based on a breach of the Principles because the Principles can't give rise to a cause of action at law.

- The ambit and application of the Principles, and such duties as may be imposed by them, must be construed in light of COBS, L&C's regulatory permissions, L&C's contractual arrangements, and the general principle in section 1C of the Financial Services and Markets Act 2000 ('FSMA') that consumers should take responsibility for their decisions.

- *Adams* [163] made clear standards imposed after the event couldn't be applied.

- The FSA's 2009 thematic review has no bearing on the construction of the principles because the review can't found a claim for compensation.

- L&C's relationship with Mr H was similar to the relationship between SIPP operator and client in *Adams* where the judge found the limits of the SIPP operator's role had been clear. And the criticism that the judge did direct to the SIPP operator in *Adams* (for accepting business from an unregulated introducer) didn't apply in Mr H's case because Mr H received advice and explicitly asked L&C to follow his instructions.

- L&C wasn't responsible for due diligence outside the limits of its role as defined in its contractual documents, limited by what was agreed by the parties and what Mr H expected of L&C. Like the SIPP operator in *Adams*, L&C was clear about the limits of its role and put in place appropriate documentation so each party understood those limits. Mr H knew L&C would act on an execution only basis and would accept no responsibility for the quality of the investment.

- To do what the investigator expected of L&C to safeguard consumers, L&C would have to give investment advice which it wasn't authorised to do.

- L&C had never given advice about whether to transfer pension entitlements or make an investment, and never been authorised to do so.

- The 2012 administrator's report wasn't publicly available until after Mr H's SIPP and investment had been set up. Information in it was only relevant if it could've been ascertained with a reasonable level of due diligence at the time of the transaction.

- Being allegedly high-risk didn't make SA manifestly unsuitable. Suitability depends on the circumstances of the consumer which L&C was under no obligation to ascertain.

- L&C wasn't obligated to scrutinise an investment to the level of a management receiver. A reasonable level of due diligence wouldn't have identified the concerns in the administrator's report. Specialist knowledge was presumably required to know that '*the land is unsuitable for the growing of Jatropha*'.

- Mr H took advice on the investment. The advice from Real SIPP and Mr H's claim to FSCS show that responsibility for Mr H's loss doesn't sit with L&C.

- It's unfair to regard an execution-only SIPP provider as responsible for a consumer's investment choice. Its business is structured on the basis that it's not investigating the quality of the investment or warning or advising clients about whether a SIPP or investment is suitable or appropriate for the client. Its fees and charges are based on execution-only services. And where a consumer chooses an execution-only service, it would be unfair if the SIPP provider couldn't rely on express representations made by the consumer when signing the contract documentation.

Our investigator considered the response from L&C and issued a further view. On the time limit for making a complaint she said information about his investments failing wouldn't indicate to a retail customer like Mr H that he had cause to complain about due diligence by his SIPP provider. On the merits of the complaint she said her reasoning had changed but she still thought the complaint should be upheld. She acknowledged the 2012 administrator's report post-dated Mr H's SIPP and investment, but said L&C still would have identified concerns with the investment if it had acted fairly and reasonably to Mr H by carrying out some checks on the investment. The investigator noted that L&C hadn't provided any evidence of due diligence. She mentioned some examples of checks which would, if done, have alerted L&C to problems with the SA investment. She said if L&C had done reasonable checks its reasonable conclusion would've been that the investment shouldn't have been on its list of permitted investments for the SIPP Mr H opened. She said that was because:

- There was a risk the investment might be fraudulent – it wasn't clear how such high returns could be offered.

- There was no independent verification that SA's assets were real and secure, or the investment operated as claimed.

- The land leases, if they existed, might've been difficult to independently value. And there might have been no market for them. So Mr H might not have been able to take benefits from his pension, or make changes to it, if he wanted to.

- The investment in SA would allow Mr H's SIPP to become a vehicle for a high-risk and speculative investment which wasn't a secure asset and could've been a scam.

The investigator said in these circumstances L&C should've given particularly careful thought to accepting the investment because it ought to have known there was a high chance of consumer detriment. And it wasn't fair to conclude L&C had acted with due skill, care and diligence or treated Mr H fairly by accepting the SIPP.

L&C replied saying again the complaint was out of time and that the points it raised on merits in its previous response hadn't been addressed.

I note L&C hasn't provided the evidence we've requested as part of our investigation of Mr H's complaint. The evidence I've considered in reaching this decision includes information provided to this service by L&C as part of our investigation of another complaint (which was the subject of published decision reference DRN-3587366) in which RealSIPP introduced a consumer to L&C. I've summarised this evidence below.

L&C told us that by applying to be an intermediary, RealSIPP agreed to be bound by the terms of The Intermediary Agreement for Non-Insured Contracts. I've seen copies of the L&C intermediary applications that CIB and RealSIPP signed on 13 September 2010 to confirm this, and I've also seen a copy of the agreement.

L&C also gave us copies of print outs from the FSA register showing that as at November 2011 RealSIPP was an appointed representative of CIB. And CIB's permissions included advising on pension transfers and pension opt outs.

I've also seen L&C's '*Open Pension Brochure*' which relates to the SIPP Mr H opened. Amongst other things, the document says, '*The L&C Open Pension is not appropriate for everybody and it is essential that you obtain financial advice before entering into one*'. The document also says L&C has no responsibility for investment decisions. But that it'll ensure assets are correctly registered and comply with HMRC rules and regulations.

And I've seen that archived versions of RealSIPP's website (www.realsipp.com) from 3 February 2011 and 3 January 2012 said RealSIPP didn't provide advice and instead only provided '*generic information on the considerations and risks associated with property investment*'. It said:

> '*If you are in any doubt over your chosen investment and it's suitability to your needs and circumstances you should seek professional advice from a suitably qualified Independent Financial Adviser.'*

Because no agreement could be reached on Mr H's complaint, the complaint was passed to me to review afresh and make a decision.

I issued a provisional decision and invited Mr H and L& C to comment on why I thought the complaint was not time barred, why I thought Mr H's complaint should be upheld and how I thought L&C should put things right.

Mr H said he agreed with my provisional decision. L&C said it disagreed with my provisional decision and disagreed that the complaint was in time. L&C's solicitors provided comments on behalf of L&C but only in relation to jurisdiction.

Jurisdiction

In summary, L&C said the following in response to my provisional decision:

- To be aware (or in a position where they ought to be aware) of their cause for complaint, consumers didn't need to fully understand what had happened or what they could do about it; they needed simply to know enough for it to be reasonable to investigate further.

- The three-year limit was intended to allow investigations to take place and such matters to be established.
- Mr H knew much earlier than November 2017 that something had gone wrong. By 2014 at the latest he knew that:
    - title had not been obtained in respect of any parcels of land in Cambodia;
    - his investment had no value; and
    - the investment itself was a sham and the individuals behind it were convicted fraudsters.
- It was wrong to say the complainant wouldn't have been aware of his cause for complaint (and ought not to have been aware) until he was aware of some very specific information about the due diligence obligations of a SIPP provider.
- It's '*beyond comprehension*' that Mr H's discussions with a representative in 2016 wouldn't have included the role of L&C when the representative said it was investigating advice Mr H had received.

As I said in my provisional decision, the time limits for bringing a complaint to the Financial Ombudsman service are set out in the DISP section of the FCA Handbook. At the time Mr H referred his complaint to us, DISP 2.8.2R said the following:

> '*The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
>
> *(1) more than six months after the date on which the respondent sent the complainant its final response, … or*
>
> *(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*'

In thinking about when Mr H was aware, or ought reasonably to have been aware, that he had cause for complaint, I've considered how '*cause for complaint*' should be interpreted in the context of the FCA Handbook.

On interpreting the Handbook generally Singh LJ said the following in *The Official Receiver v Shop Direct Finance Company Limited* [EWCA] Civ 367:

> '*44. The FCA Handbook is similar in its drafting style to the Financial Services Authority's Client Assets Sourcebook (CASS), which was considered by this Court*

in Re Lehman Brothers International (Europe) (No 2) [2010] EWCA Civ 917; [2011] 2 BCLC 184

46. For present purposes I derive the following propositions from the judgments in Re Lehman Brothers:

(1) Ultimately it is the actual wording of a provision that must govern any decision as to its effect.

(2) The Handbook should be read as a whole, taking an holistic and iterative approach, so that a preliminary view on one provision can be tested by reference to the rest of the relevant provisions.

(3) The provision should be construed in the light of its overall purpose.

(4) It should be construed on the basis that it is intended to produce a practical and commercially sensible result. The rules should be taken to be grounded in reality. The court should keep in proportion any drafting infelicities.'

And in relation to DISP2.8.2R Nugee LJ said the following:

'*155. The resemblance to the ordinary limitation periods for claims in negligence where there is also a primary period of 6 years (under s. 2 of the Limitation Act 1980 ("LA 1980")) and a secondary period of 3 years from the date of the claimant's actual or constructive knowledge (under s. 14A LA 1980) is striking. We have in fact been shown evidence that this is not a coincidence, but even without this material (which is of doubtful admissibility) it would have been a reasonable assumption that the general structure was modelled on the LA 1980 provisions and was designed to do the same thing in general terms.*

156. What then is the purpose of having these two time-limits? The purpose of an ordinary limitation period is to prevent stale claims from being litigated, the period of 6 years being fixed as a generally reasonable period to bring a claim. This explains the primary period. But as is well-known that could and did lead to some claimants who had suffered latent injury or damage finding that they had lost their rights to sue before they even knew, or could reasonably be expected to know, that they had been injured or suffered loss. Provision was therefore made, first in ss. 11 and 14 LA 1980 (applicable to claims for personal injury) and subsequently in s. 14A LA 1980 (applicable to other claims in negligence), for the claimant to have 3 years from his date of knowledge to bring a claim. The purpose of this is obvious. It was to remedy the injustice of a claimant's claim being time-barred before they knew, or could reasonably be expected to know, that they had a claim. On the other hand the selection of a (relatively short) 3 year time period shows that another purpose was to provide that once they did, or should, have that knowledge they should get on with the claim and bring proceedings reasonably promptly. Precisely the same in my view applies to the secondary time-limit in DISP 2.8.2R(2)(b). The purpose of the rule is to prevent a complainant from losing the right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware.'

The Handbook includes the following rule (GEN 2.2.1R):

'*Every provision in the Handbook must be interpreted in the light of its purpose.*'

And guidance in the same section says the purpose of any provision in the Handbook is to be gathered from the text of the provision in question and its context amongst other relevant provisions (GEN 2.2.2(G)).

The Handbook also says (GEN 2.2.7(R)):

> '*In the Handbook …*
>
> *(1) an expression in italics which is defined in the Glossary has the meaning given there; and*
>
> *(2) an expression in italics which relates to an expression defined in the Glossary must be interpreted accordingly*.' (GEN2.2.7(R))

The term '*cause for complaint*' is not defined in the FCA's glossary. But where DISP says the Ombudsman cannot consider a complaint if it is out of time, the word '*complaint*' is in italics. So it is a defined term in the FCA Glossary and must be treated accordingly.

And where that section of the Handbook says it sets out how complaints are to be dealt with by respondents, '*complaint*' is again in italics. So again it is a defined term.

So although the term '*cause for complaint*' isn't in italics in the FCA Handbook, it appears as part of the rule that sets out what '*complaints*' (in italics) the Ombudsman cannot consider. And it's reasonable to infer in light of the above rules and guidance on interpreting the Handbook that the Handbook's definition of the word '*complaint*' was intended to apply to that phrase.

For the purposes of DISP the FCA Handbook defines '*complaint*' as follows:

> '*Any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service…which:*
>
> *(a) Alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and*
>
> *(b) Relates to an activity of that respondent, or any other respondent with whom that respondent has some connection in marketing or providing financial services or products …which comes under the jurisdiction of the Financial Ombudsman Service.*'

And '*respondent*' (which is italicised) means a regulated firm covered by the jurisdiction of the Financial Ombudsman Service.

So the Glossary definition of complaint requires that the act or omission complained of must relate to an activity of '***that*** *respondent*' or firm (my emphasis).

And so the material points required for Mr H to have awareness of a cause for complaint include:

- awareness of a problem
- awareness that the problem had or may have caused him material loss, and
- awareness that the problem was or may have been caused by an act or omission of

L&C (the respondent in this complaint).

It's therefore my view that it's necessary for Mr H to have had an awareness (within the meaning of the rule) that related to L&C, not just awareness of a problem that had caused a loss. Knowledge of a loss alone is not enough. It can't be assumed that upon obtaining knowledge of a loss a consumer had knowledge of its cause. And I don't accept that the three year time limit necessarily means knowledge of a loss means the consumer has three years to make enquiries to discover all parties who might be responsible, failing which they run out of time to make a complaint. As Nugee LJ said in *The Official Receiver* case '*the purpose of the rule is to prevent a complainant from losing the right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware.*'

I don't think Mr H would need to have understood the details of the SIPP provider's obligations to have been aware (or in a position whereby he ought reasonably to have been aware) of his cause for complaint. But I think Mr H would've needed to have actual or constructive awareness that an act or omission by L&C had a causative role in the loss. And I don't think there was any information available to Mr H before February 2016 that ought reasonably to have made him aware that he could attribute his problem to acts or omissions by L&C.

It's Mr H's position that he followed the situation with SA: the arrests and criminal case and the confiscation case. People connected to SA were convicted in late 2014 and the SFO announced at that time that it would seek confiscation orders against them. Confiscation orders were made in 2016.

Mr H has said that in 2014-2015 he was approached by '*Chantler Vellacott*' who asked for money up front. I think Mr H is confusing things here. Chantrey Vellacott was the receiver for SA and I am not aware of it suggesting to creditors of SA that they might have claims against any third parties such as L&C, or seeking upfront fees for acting in such claims. And there is nothing to show that any firm, or any other party seeking upfront fees in 2014-2015, was doing so in any way that would have meant Mr H was aware or ought reasonably to have been aware that the loss he had suffered could be attributed to some fault on the part of L&C.

Mr H has said he became aware of solicitors who would act on a no-win-no-fee basis after '*the legal case*' had been settled. He said he had an initial conversation with them but doesn't now recall what action they took on his behalf. Nor does he have any correspondence from them. This initial contact seems to have been in late 2015 or early 2016 (even though the confiscation case was not concluded until later in 2016). The solicitors wrote to L&C in January 2016. They said they'd been instructed to investigate the advice Mr H had received to transfer his pension into a SIPP. They asked for information from L&C and said nothing that indicated they considered L&C had been or might have been at fault or that they were investigating that possibility. They made no mention of L&C having any responsibility for Mr H's loss.

I accept Mr H's evidence is not clear in all respects but that's not surprising and his confusion on some points of detail doesn't fatally undermine his version of events which is that he wasn't aware he had a complaint against L&C until 2019. He says until then he thought he'd done all he could to get his money back by pursuing a claim against the adviser to the FSCS.

L&C says it's beyond comprehension that in 2016 Mr H's solicitors wouldn't have made him aware of the role L&C had to play. I disagree that it's beyond comprehension that the solicitors wouldn't have made Mr H aware of the role L&C had to play in the loss he'd suffered, or put another way, why L&C might be responsible for Mr H's loss. The reality of situations such as this is that claims professionals don't necessarily advise their clients in a reactive way after the clients have sought them out. Rather it is often the case that when issues arise which affect groups of consumers some legal firms and claims management companies advertise their services to potential clients from amongst those groups, typically on a no-win-no-fee basis. And such firms will not necessarily provide holistic advice to their clients but rather will have a particular claim they are advising clients to make.

In 2015 and 2016 claims against SIPP operators for due diligence failures were not commonplace. On the other hand claims against advisers for '*mis-selling*' investments were. Such complaints are aimed where the parties' likely responsibility is obvious and easy to understand and the issues are relatively straightforward. It's entirely plausible that in 2016 firms of solicitors and claims management companies were advising clients to make such claims against advisers and not contemplating or advising on alternative or additional potential claims.

It's also the case that Mr H didn't pursue the role of Real SIPP with the solicitors. He said that later in the same year he saw social media posts about claims in respect of mis-sold payment protection insurance and he became aware that he could, himself, complain direct to the Financial Ombudsman Service. He said he wrote a letter of complaint to RealSIPP and referred his complaint to the Financial Ombudsman Service. And certainly the Financial Ombudsman Service does make clear that it's not necessary to use professional representation in complaints against financial firms to this service. The point is Mr H wasn't a client of the solicitors for long and it was reasonable for him to decide he didn't need professional help to pursue his complaint against the adviser.

What all this means is that when Mr H says he wasn't aware he could make a complaint against L&C until 2019 when he saw an online post or advert regarding such claims, despite having been in touch with solicitors in 2016 about a claim against his adviser, I consider this plausible. It's plausible, and I accept it to be the case, that the solicitors didn't make him aware he might have cause for complaint against L&C as well as the adviser. Nor is there anything to suggest the solicitors provided information that ought reasonably to have made Mr H aware he had cause for complaint against L&C.

I've considered whether Mr H acted reasonably in his pursuance of compensation for the loss he knew he'd suffered. And I think he did. He followed the progress of the criminal investigation into the individuals responsible for the SA investment – he said he considered those individuals responsible for his loss and he thought he might be compensated through the court process. When Mr H became aware he could hold the adviser RealSIPP responsible for his loss he pursued a claim against RealSIPP (or its principal CIB Life and Pensions Limited) which was paid by the FSCS. He did this with the help of the solicitors initially and then on his own when he realised he could do so.

Given the problem with the SA investment the obvious people to think had caused the loss were the people who ran SA. And then the people who recommended the SA investment. I'm not aware of anything L&C said or did at the outset of its relationship with Mr H that would've caused him to think it might be responsible if such a problem occurred. Nor am I aware of anything it said or did that would have caused Mr H to think it was responsible once the problem had occurred. In fact, in 2015 when L&C wrote to Mr H to say his investment was illiquid, L&C said it had '*never been involved with, nor … in any way responsible for the choice of the investment or the difficulties arising in connection with it*'. In the circumstances I consider Mr H was acting reasonably in looking to SA and RealSIPP and in not thinking that L&C might also be responsible for his loss, and in not seeking advice about whether he might have cause for complaint against anyone in addition to SA (or those connected to it who were prosecuted) and the adviser.

I don't say Mr H was obligated to seek expert advice from, for example, solicitors in relation to the loss he suffered but he did use solicitors in 2016. It seems clear they advised him he might have cause for complaint about the adviser and that that possibility should be investigated. They probably also made him aware that he did indeed have cause for complaint against Real SIPP when they had obtained the requested information from L&C. It's Mr H's case that they didn't also make him aware he had cause for complaint against L&C. And I accept that's the case. And Mr H isn't to be treated as being aware of things from his solicitors that his solicitors didn't make him aware of.

As I've mentioned, Mr H told us he only became aware he had any basis for complaint about L&C after he saw a social media post or advertisement about complaints to L&C regarding SIPPs in 2019, after he'd concluded his claim against Real SIPP with the FSCS. Again I consider this to be plausible and not contradicted by the documentary evidence. I accept this is the point at which Mr H became aware for the first time that L&C might be responsible for the loss he'd suffered. As result of seeing that social media post or advertisement, Mr H made an enquiry to a new representative in December 2019. Mr H's representative made a complaint to L&C on 30 October 2020, which L&C received on 9 November 2020.

On balance, I consider this complaint was made within three years of the time Mr H became aware, or ought reasonably to have become aware, of his cause for complaint about L&C. I don't think it's reasonable to expect Mr H to have carried out more investigations than he did to find out who was responsible for his loss and how he could claim redress. Although Mr H's awareness of his cause for complaint about L&C took several years to emerge, he was engaged in the matter, took reasonable steps, and didn't simply choose not to pursue any action. On balance, I think it's reasonable to accept Mr H's explanation of events, including that he became aware in 2019 that he had cause for complaint against L&C. And I don't think Mr H ought reasonably to have been aware of his cause for complaint against L&C before then. So I don't think this complaint is out of time. I think it's one this service can consider.

What I've decided – and why

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

And I've taken into account: relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time.

Having done so, I'm upholding Mr H's complaint. I'll explain why.

The purpose of this decision is to set out my findings on what's fair and reasonable, and explain my reasons for reaching those findings, not to offer a point by point response to every submission made by the parties to the complaint. And so, while I have considered all the submissions by both parties, I've focussed here on the points I believe to be key to my decision on what's fair and reasonable in the circumstances.

With that in mind I'll start by setting out what I've identified as the relevant considerations to deciding what's fair and reasonable in this case.

Relevant considerations

The principles

In my view the FCA's Principles for Businesses are of particular relevance to my decision. 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). I consider that the Principles relevant to this complaint include Principles 2, 3 and 6 which say:

> '*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 it says about the application of the 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), Berkeley Burke brought a judicial review claim challenging the decision of an ombudsman who had 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 had not treated its client fairly.

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

‘*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 BBA 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 the Berkeley Burke case upheld the lawfulness of the approach taken by the ombudsman in that complaint, which I have 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.

L&C said a contravention of the Principles can’t in itself give rise to a cause of action at law. That might be true. But I’m dealing with a complaint, not a cause of action. For the reasons I‘ve given, I’m satisfied the Principles are a relevant consideration that I must take into account when deciding this complaint. As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if an ombudsman 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 Berkeley Burke.

L&C suggested *Adams* was a more relevant consideration for Mr H’s case than the Principles. I don’t think the considerations in *Adams* case are analogous to the circumstances in this complaint, in which I’m considering the Principles, amongst other things. But, notwithstanding that, I have taken *Adams* into account. And I’ve taken into account L&C’s contractual relationship with Mr H which L&C said was similar to the relationship that existed in *Adams*.

<u>Regulatory publications</u>

The FCA (and its predecessor, the FSA) has issued the following publications which remind SIPP operators of their obligations and set out how they might achieve the outcomes envisaged by the Principles:

- The 2009 and 2012 thematic review reports
- The October 2013 finalised SIPP operator guidance
- The July 2014 ‘*Dear CEO*’ letter

<u>The 2009 Thematic Review Report</u>

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 clients. 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 member 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 the 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 clients' 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."*

- *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.*

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

<u>The later publications</u>

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

> '*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 clients 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.*

- *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 have considered them in their entirety.

These 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 treats its customers fairly and produces the outcomes envisaged by the Principles.

The publications indicated that the regulatory obligations of SIPP operators included doing due diligence checks on parties who introduce clients to SIPP operators and on the investments that SIPP operators allow to be held in SIPPs.

L&C commented on the relevance of the publications to Mr H's complaint. It said the 2009 report has no bearing on the construction of the Principles because the review can't found a claim for compensation. I acknowledge the 2009 and 2012 reports and the '*Dear CEO*' letter aren't formal guidance (whereas the 2013 finalised guidance is). But the fact those publications didn't constitute formal (i.e. statutory) guidance doesn't mean they're not relevant considerations.

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

The regulator also issued an alert in 2013 about advisers giving advice to consumers on SIPPs without considering the underlying investment to be held in the SIPP. The alert ('*Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP*') set out that this type of restricted advice didn't meet regulatory requirements. It said:

> '*It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes).*
>
> …
>
> *Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.*
>
> *The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes.*'

The alert post-dates the events in this complaint – but, again, it didn't set new standards. It highlighted that advisers using the restricted advice model discussed in the alert generally weren't meeting existing regulatory requirements and set out the regulator's concerns about industry practices at the time.

I note L&C's point that the judge in *Adams* 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 – unlike the court in *Adams*. And, as mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time. 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 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.

L&C also said *Adams* made clear that standards imposed after the event couldn't be applied. The fact the later publications (i.e. those other than the 2009 Thematic Review Report), post-date the events of this complaint doesn't mean the examples of good industry practice they provide were not good practice at the time of the relevant events. It's clear from the text of the 2009 and 2012 reports, (and the 2014 'Dear CEO' letter), that the regulator expected SIPP operators to have incorporated the recommended good industry practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' understanding of how the standards shaped what was expected of them changed over time, it's clear the standards themselves had not changed. The later publications were published after the events subject to this complaint, but the Principles that underpin them existed throughout, as did the obligation to act in accordance with those Principles.

Even if I took the view that publications post-dating the events of this complaint don't help 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 regulatory obligations that existed at the relevant time before allowing the SA investment into the SIPP.

I'm making a decision on what's fair and reasonable in the circumstances of this complaint – and for all the reasons I've set out above I'm satisfied that the Principles and the publications listed above are relevant considerations to that decision. So taking account of the factual context of this case, it's my view that in order for L&C to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into RealSIPP and the business RealSIPP was introducing, both initially and on an ongoing basis.

In deciding what's fair and reasonable in the circumstances, I'll be looking at whether L&C took reasonable care, acted with due diligence and treated Mr H fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mr H's complaint is whether it was fair and reasonable for L&C to have accepted Mr H's SIPP application in the first place. So, I need to consider whether L&C carried out appropriate due diligence checks on RealSIPP and SA before deciding to accept Mr H's SIPP application.

The questions I need to consider are whether L&C ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by RealSIPP and/or investing in SA were being put at significant risk of detriment. And, if so, whether L&C should therefore not have accepted Mr H's application.

<u>The contract between L&C and Mr H</u>

L&C has made a number references to the significance of its contractual relationship with Mr H. My decision is made on the basis that L&C acted purely as a SIPP operator.

I don't say L&C should (or could) have given advice to Mr H or otherwise ensured the suitability of the SIPP or SA investment for him. I accept L&C made it clear to Mr H that it wasn't giving advice and nor was it able to, and that it played an execution-only role in his SIPP investments. And I accept Mr H signed documentation that confirmed, amongst other things, that he took responsibility for any losses arising as a result of L&C acting on his instructions.

I haven't overlooked or discounted the basis on which L&C was appointed. And my decision on what's fair and reasonable in the circumstances of Mr H's case is made with all of this in mind. But I remain satisfied that, to meet its regulatory obligations when conducting its operation of SIPPs business, L&C had to decide whether to accept SIPP applications with the Principles in mind.

I don’t agree with L&C that it couldn’t have rejected applications on the basis of due diligence checks without contravening its regulatory permissions by giving investment advice.

In Adams, the alleged breach of COBS 2.1.1R under consideration was taking into the SIPP a manifestly unsuitable underlying investment, where suitability meant suitability for Mr Adams. The judge didn’t say the SIPP operator wasn’t obliged to give any consideration to whether to accept or reject an application. Only that such consideration didn’t need to include the suitability of the intended investment for the individual investor. It doesn’t follow from this, for example, that the SIPP operator wasn’t obliged to consider whether there was a risk the investment might be fraudulent. And, in my view, refusing to accept an application in such circumstances, is not the same thing as advising Mr H on the merits of investing and/or switching to the SIPP – there is a difference.

The business L&C was conducting was its operation of SIPPs. 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 investment is an appropriate one for a SIPP. So I’m satisfied that, to meet its regulatory obligations and good industry practice, when conducting its business, L&C was required to consider whether to accept or reject particular referrals of business.

L&C’s due diligence

As set out above, to comply with the Principles, L&C needed to conduct its business with due skill, care and diligence; organise and control its affairs responsibly and effectively; and pay due regard to the interests of its clients (including Mr H) and treat them fairly. Its obligations and duties in this respect weren’t prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

Taking account of the factual context of this case, it’s my view that for L&C to meet its regulatory obligations, it should’ve undertaken sufficient due diligence checks to consider whether to accept or reject particular applications. L&C should’ve done due diligence checks on RealSIPP, as the party who introduced Mr H to L&C. And L&C should have done due diligence checks on the SA investment.

Due diligence on RealSIPP

L&C didn’t provide any evidence to show in Mr H’s case what due diligence checks it did on RealSIPP or what conclusions it drew from any checks it did. I’ve looked at evidence L&C gave us on the complaint which was the subject of published decision reference DRN-3587366 which was about L&C accepting an introduction from RealSIPP in November 2011. The evidence L&C gave us in response to that complaint shows that, by the time it accepted Mr H’s application, L&C had:

- checked the FSA register to ensure RealSIPP and its principal were regulated and authorised to give financial advice.
- entered into intermediary agreements with RealSIPP and its principal.

And prior to accepting Mr H’s application L&C also had access to some information about the type and volume of introductions it was receiving from RealSIPP.

L&C told us on that other complaint that it wouldn't have accepted applications from a firm that wasn’t authorised by the FSA. And L&C also told us its directors from around the same period have confirmed its policy was that applicants transferring an occupational pension, as

Mr H was here, had to have had advice made available to them which would, as L&C put it in the other case, '…*(have been) through RealSIPP*.' And that it was then for the applicant to choose whether to take up the intermediary's offer of advice.

These steps go some way towards meeting L&C's regulatory obligations and good industry practice. But I think L&C failed to conduct sufficient due diligence on RealSIPP before accepting business from it, or L&C failed to draw fair and reasonable conclusions from what it did know about RealSIPP. My view is that L&C ought reasonably to have concluded it shouldn't accept business from RealSIPP, and it should have ended its relationship with RealSIPP before Mr H made his application. I say this for the following reasons:

- L&C was aware or should've been aware of potential risks of consumer detriment associated with business introduced by RealSIPP at the outset of its relationship with RealSIPP and by the time of Mr H's application because there was insufficient evidence to show RealSIPP (or any other regulated party) was offering or giving full regulated advice to Mr H (that is advice on the transfer of the pension, the establishment of the SIPP *and* advice on the intended investment).

- The introductions had anomalous features – high-risk business, in relatively high volumes, for unregulated overseas property developments and other esoteric investments. And, even though RealSIPP had the necessary permissions to give full advice on the business it was introducing, it wasn't giving advice on a large proportion of that business.

- L&C should've taken steps to address these risks (or, given these risks, have simply declined to deal further with RealSIPP). Such steps should've involved getting a full understanding of RealSIPP's business model – through requesting information from RealSIPP and through independent checks.

- Such understanding would've revealed there *was* a significant risk of consumer detriment associated with introductions of business from RealSIPP. In the alternative RealSIPP would have been unwilling to answer or fully answer the questions about its business model. In either event L&C should've concluded it shouldn't accept introductions from RealSIPP.

<u>The availability of advice to Mr H</u>

I've seen from evidence provided on the other complaint that L&C entered into intermediary agreements with RealSIPP and its principal CIB. As part of this process, it was open to L&C to mention to RealSIPP any policy requirements it had for full regulated advice to be made available to applicants where introduced business involved occupational pension transfers. L&C could've highlighted this in its intermediary application form, The Intermediary Agreement for Non-Insured Contracts, or in supplementary correspondence with RealSIPP. But I've seen no evidence that L&C mentioned this.

Mr H's SIPP application didn't say whether he had been given advice at the point of sale. I've seen no evidence that Mr H was offered full regulated advice on his transfer to and investment in the SIPP.

Having considered the available evidence I think it's more likely than not that Mr H wasn't offered full regulated advice.

So based on the available evidence I think there was insufficient basis for L&C to reasonably assume that advice had been given or offered to Mr H.

The possibility that full regulated advice hadn't been given or made available was a clear and obvious potential risk of consumer detriment here. Mr H was transferring funds from a defined benefit pension to invest entirely in an esoteric overseas unregulated forestry scheme – a move which was highly unlikely to be suitable for the vast majority of retail clients.

Anomalous features

RealSIPP was introducing consumers who were investing in high risk non-standard assets

RealSIPP had a history of introducing consumers who were all investing in high-risk non-standard esoteric investments, such as unregulated overseas property development and the unregulated overseas forestry scheme that Mr H invested in. As mentioned, I think it's fair to say that such investments are highly unlikely to be suitable for the vast majority of retail clients. They will generally only be suitable for a small proportion of the population – sophisticated and/or high net worth investors. So I think L&C either was aware, or ought reasonably to have been aware that the type of business RealSIPP was introducing was high-risk and therefore carried a potential risk of consumer detriment on this basis too.

High proportion of execution-only business

In addition to the possibility that full regulated advice hadn't been given or made available to Mr H, the available evidence shows L&C was, or should've been, aware that not offering or giving advice was something RealSIPP was doing routinely.

It's clear L&C had access to information about the number and nature of introductions that RealSIPP made, as it's been able to provide us with details about this when requested in relation to the other complaint. An example of good practice identified in the FSA's 2009 Thematic Review Report was:

> '*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.*'

So I don't think simply keeping records without scrutinising that information would be consistent with good industry practice and L&C's regulatory obligations. As the 2009 Thematic Review Report said, the reason the records are important is so potentially unsuitable SIPPs can be identified.

From the figures L&C provided, a little under half the introductions from RealSIPP were transacted as execution-only business (i.e. with no advice being given by RealSIPP). That's a large proportion of the total business RealSIPP introduced, and I think it's likely that RealSIPP had introduced business to L&C without providing advice on a number of occasions before Mr H's introduction.

So I think that, from very early on, L&C was on notice that RealSIPP wasn't a firm that was doing things in a conventional way, despite being the appointed representative of a regulated business that had permission to advise on all the business being introduced. And I think L&C ought to have recognised there was a risk here that RealSIPP might be choosing to introduce some consumers not only without them being given full regulated advice but also without them having been *offered* full regulated advice.

I think this ought to have been a red flag for L&C in its dealings with RealSIPP. It's highly unusual for regulated advice firms to be involved in execution-only transactions involving pension transfers to invest in high-risk esoteric investments, such as unregulated overseas forestry schemes. That's because the risks involved in such transactions are unlikely to be fully understood by most people, without obtaining regulated advice. I think it's fair to say most advice firms decline to be involved in such transactions and certainly don't transact this kind of business in significant volumes.

I think L&C ought to have viewed this as a serious cause for concern – this was a further clear and obvious potential risk of consumer detriment.

Volume of business

During our investigation of the other complaint L&C said 153 members were introduced by RealSIPP and over a quarter of these had an occupational pension scheme. Prior to the consumer's application in the other complaint RealSIPP had introduced 44 applications in about 9 months. I think L&C should've been concerned that such a volume of introductions, relating exclusively to consumers investing in higher-risk esoteric investments, was unusual – particularly from a small financial advice business like RealSIPP. And it should've considered how a small financial advice business introducing this volume of higher-risk business was able to meet regulatory standards.

And I think this concern ought to have been even greater in a case like Mr H's where a defined benefit pension was involved. At the relevant date COBS 19.1.6G stated:

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

While I acknowledge this aims to define the expectation of a regulated financial adviser when determining the suitability of a pension transfer, it emphasises the regulator's concern about the potential detriment such a transaction could expose a consumer to. Given the nature of its business and regulatory status, I'd expect L&C to have been familiar with the guidance contained in COBS – even if the guidance didn't apply directly to L&C.

This was a further clear and obvious potential risk of consumer detriment.

What fair and reasonable steps should L&C have taken in the circumstances?

L&C could simply have concluded that, given the potential risks of consumer detriment – which I think were clear and obvious at the time – it shouldn't accept applications from RealSIPP. That would've been a fair and reasonable step to take in the circumstances. Alternatively, L&C could've taken fair and reasonable steps to address the potential risks of consumer detriment. I've set these out below.

Requesting information directly from RealSIPP

Given the significant potential risk of consumer detriment I think that, as part of its due diligence on RealSIPP, L&C ought to have found out more about how RealSIPP was operating long before it received Mr H's application. And mindful of the type of introductions it was receiving from RealSIPP at the outset, I think it's fair and reasonable to expect L&C, in line with its regulatory obligations, to have made some specific enquiries and obtained information about RealSIPP's business model.

As set out above, the 2009 Thematic Review explained that the regulator would expect SIPP operators to have procedures and controls, and for management information to be gathered and analysed, so as to enable the identification of, amongst other things, '*consumer detriment such as unsuitable SIPPs*'. Further, that this could then be addressed in an appropriate manner '…*for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification'*.

The October 2013 finalised SIPP guidance gave an example of good practice as:

> '*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.*'

And I think that L&C, before accepting further applications from RealSIPP, should've checked with RealSIPP about: how it came into contact with potential clients, what agreements it had in place with its clients, whether all of the clients it was introducing were being offered full regulated advice, what its arrangements with any unregulated businesses promoting investments were, how and why retail clients were interested in making these esoteric investments, whether it was aware of anyone else providing information to clients, how it was able to meet with or speak with all its clients, and what material was being provided to clients by it.

I think it's most likely that if L&C had asked RealSIPP for this information then RealSIPP would've provided a full response to the information sought. And I think it's more likely than not that the position suggested on RealSIPP's website would've been confirmed – i.e. that it didn't provide full advice and only provided '*generic information on the considerations and risks associated with property investment*'.

L&C might say it wasn't required to obtain this information from RealSIPP. But I think this would have been a fair and reasonable step to take, in the circumstances, to meet its regulatory obligations and good industry practice.

<u>Making independent checks</u>

I think, in light of what I've said above, it would also have been fair and reasonable for L&C to have taken independent steps to satisfy itself that full regulated advice was being offered to applicants like Mr H. For example, it could've asked for copies of correspondence in which applicants were being offered advice.

The 2009 Thematic Review Report said:

> '*…we would expect [SIPP operators] 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**.*' (bold my emphasis)

The 2009 Thematic Review Report also said that an example of good practice was:

> '*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.*'

So I think it would've been fair and reasonable for L&C to speak to some applicants, like Mr H, directly and to ask whether they'd been offered full regulated advice on their transactions and/or seek copies of the suitability reports.

L&C might say it couldn't comment on advice without potentially being in breach of its permissions. Again, I confirm that I accept L&C couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps included addressing a potential risk of consumer detriment by speaking to applicants and/or having sight of advice letters, as this could have provided L&C with further insight into RealSIPP's business model, and helped to clarify to L&C whether full regulated advice on the overall proposition was being offered/given. These were fair and reasonable step to take in reaction to the clear and obvious risk of consumer detriment I've mentioned.

<u>Had it taken these fair and reasonable steps, what should L&C have concluded?</u>

If L&C had undertaken these steps I think it ought to have identified, amongst others, the following risks before it received Mr H's application:

- RealSIPP was presenting itself publicly (on its website) as providing only '*generic information on the considerations and risks*' in relation to investments, and not providing advice.

- Consumers were being introduced to L&C without having been offered full regulated advice.

- The other anomalous features I've mentioned *did* carry a significant risk of consumer detriment.

Each of these in isolation is serious, but cumulatively I think they demonstrate that there *was* a significant risk of consumer detriment associated with introductions from RealSIPP. L&C ought to have concluded RealSIPP had a complete disregard for its consumers' best interests, and wasn't meeting many of its regulatory obligations.

Had L&C carried out the due diligence I've mentioned above, I think it should have identified that consumers like Mr H introduced by RealSIPP hadn't been offered, or received, full regulated advice from RealSIPP on their transactions.

As previously stated, RealSIPP said it provided '*generic information*' about investments, rather than advice. And I've seen no evidence suggesting it ever offered full regulated advice to Mr H. This raises significant questions about the motivations and competency of RealSIPP – particularly where consumers were being introduced to it by unregulated businesses.

I think that if L&C had made enquiries with some applicants introduced by RealSIPP at the time, their responses would've been consistent with what RealSIPP (and, where relevant, CIB) had disclosed on its website in relation to the extent of its role.

I therefore think L&C ought to have concluded that RealSIPP clients like Mr H, didn't have full regulated advice made available to them by *any* route. And have viewed this as a significant point of concern. As retail consumers were transferring their existing pension monies to L&C to invest entirely in higher-risk esoteric investments, including unregulated overseas property developments, and unregulated overseas forestry schemes, without the benefit of having been offered full regulated advice, by a business which appeared to be actively avoiding any responsibility to give advice.

With the above in mind, L&C should also have concluded that the overall volume of business and the proportion of consumers who weren't apparently receiving *any* advice raised further serious questions about the motivation and competency of RealSIPP.

As such, I think L&C should have concluded – certainly by the time of Mr H's application and long before it – that it wasn't in accordance with its obligations, or its own policy requirements, to accept introductions from RealSIPP. I therefore conclude that it's fair and reasonable in the circumstances to say that L&C shouldn't have accepted Mr H's application from RealSIPP.

L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr H fairly by accepting his application from RealSIPP. To my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant time, and allowed Mr H to be put at significant risk of detriment as a result.

Due diligence on the SA investment

L&C had a duty to conduct due diligence and give thought to whether an investment itself is acceptable for inclusion in a SIPP. That's consistent with the Principles and the regulators' publications as set out earlier in this decision.

Taking into account the available evidence and the relevant considerations I've described, and what's fair and reasonable in the circumstances of this case my view is that L&C should, at least, have done the following:

- Identified SA as a high-risk, speculative and non-standard investment, so it should have carried out sufficient due diligence

- Considered whether SA was appropriate for a pension scheme

- Ensured the investment was genuine and not a scam, or linked to fraudulent activity

- Independently verified that SA's assets were real and secure, and the investment operated as claimed

- Ensured the investment could be independently valued, both at point of purchase and subsequently

- Ensured Mr H's SIPP wouldn't become a vehicle for a high-risk and speculative investment that wasn't a secure asset and could be a scam.

Had L&C carried out due diligence checks on these points it would have been aware of concerns regarding the SA investment which indicated a significant risk of consumer detriment. I say that because, for example:

- The investment purported to offer a very high return through oil produced by jatropha trees. There appears to be no basis for the high projected return. I don't expect L&C to have been able to say the investment would be successful. But a high projected return without any apparent basis should have given L&C cause to question the investment's credibility.

- There was information available which called into question the viability of the proposed business model (particularly in light of the very high projected returns).

- There was negative commentary in the public domain about investments that purported to offer high returns through investment in jatropha plants. Some of these articles warned investors against being seduced by high returns that might not be achievable, and questioned whether it was possible to make money from growing jatropha at all.

- SA had no track record, and jatropha plants hadn't previously been used to make money on the scale proposed.

- When Mr H made his SIPP application SA's first accounts were overdue and not yet published.

- SA's first accounts had been published (on 6 October 2011) when L&C signed the lease agreement for Mr H's SA investment on 26 October 2011. The accounts were subject to an opinion by an independent auditor on whether the information presented in the financial statements presented fairly the financial position of SA, in accordance with the International Financial Reporting Standards. An unqualified audit opinion would mean the statements gave a true and fair view, or were largely free from material misstatement. But I can see for SA's first published accounts, the auditors issued a qualified opinion, which means there was some limitation or exception to accounting standards. I note the auditor explained '*…we have not obtained all the information and explanations that we consider necessary for the purpose of our audit and adequate accounting records have not been kept by [SA] as required by the Companies Act 2006*'.

- It's not clear how the lease of a parcel of land in Cambodia could be valued or realised.

- The investment was based overseas and would be subject to the domestic laws and regulations that applied to the ownership of land and matters governing investments. That created additional risk.

- The lease and rental agreements L&C signed for the investment didn't specify the location of the plots L&C would lease on behalf of Mr H. They said beneficial ownership of the plots would be evidenced by a Certificate of Leasehold issued by Citadel Trustees and did not offer any evidence of title held by the lessor.

The information that was available to L&C ought to have led L&C to the following conclusions:

- SA didn't have title to the land.

- There was a risk the investment might be fraudulent – it wasn't clear how such high returns could be offered.

- The land leases, if they existed, might have been difficult to independently value, both at point of purchase and subsequently. It was also possible that there might be no market in them. So an investor might not have been able take benefits from their pension, or make changes to it, if they wanted to.

- The investment in SA would allow L&C's clients' SIPPs to become a vehicle for a high-risk and speculative investment that wasn't a secure asset and could have been a scam.

Based on the information L&C provided in connection with Mr H's complaint, I can't see that it carried out any due diligence on the SA investment. L&C said it recalled relying on a regulated third-party to provide information about title to the land that was to be leased under the investment. But it didn't provide evidence of having received any such information. And I don't think L&C can absolve itself of its due diligence obligations by saying responsibility lay with a third party to provide information. If the third party had failed to provide information, L&C still need to do due diligence. And if L&C had received information about the title to land it would've known that SA didn't have title and the investment shouldn't be allowed in Mr H's SIPP.

I don't think L&C would've needed to scrutinise the investment to the level of a management receiver appointed after the investment has failed or that it would've needed specialist knowledge about jatropha trees. Any of the information I've mentioned above would have alerted L&C to the risk of consumer detriment. And the information wouldn't have required specialist knowledge to understand it or an unreasonable level of scrutiny to access it.

I find that in the circumstances of Mr H's complaint L&C didn't carry out due diligence to satisfy its reasonable responsibilities as a SIPP provider. And I'm satisfied that, based on what was known at the time, L&C could've identified the concerns I've mentioned and ought reasonably to have drawn the conclusions I've set out. Had it acted with due skill, care and diligence and treated Mr H fairly, L&C would've identified concerns with the SA investment. And it would've known there was significant risk of consumer detriment. So it shouldn't have allowed the SA investment to be a permitted investment for Mr H's SIPP. I don't say L&C should've known the SA investment was fraudulent at the time – only that it ought to have identified significant points of concern, and these ought to have led it to conclude it shouldn't accept SA investments. It ought to have known there was a high risk of consumer detriment.

To be clear, I'm not making a finding that L&C should've assessed the suitability of the SA investment for Mr H. I accept L&C had no obligation to give advice to Mr H or otherwise ensure the suitability of the investment for him. L&C has said it couldn't have safeguarded consumers in the way our Investigator expected without straying into the territory of providing regulated financial advice. It said L&C had never given advice about whether to transfer pension entitlements or make an investment, and it had never been authorised to do so. But I'm satisfied there's a difference between accepting or rejecting a particular investment for a SIPP and advising on an investment's suitability for an individual investor. And I accept L&C wasn't expected to, and was unable to, advise Mr H on the suitability of the SIPP and/or SA investment for him personally.

L&C said SA allegedly having been high-risk didn't make it manifestly unsuitable. Suitability depends on the circumstances of the consumer which L&C was under no obligation to ascertain. Again, I don't say L&C should have found the investment unsuitable for Mr H personally. But I think it should have found the investment wasn't appropriate for a SIPP.

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

<u>The execution-only business model</u>

L&C has said it's unfair to regard an execution-only SIPP provider as responsible for a consumer's poor investment choice because the provider's business is structured on the basis that it's providing execution-only services. I understand L&C might feel it was difficult to meet its regulatory requirements using its chosen business model. But it doesn't follow that I should ignore those requirements, or regard it as fair and reasonable for L&C to give Mr H less protection than the regulations required.

The involvement of other parties

In this decision I'm considering Mr H's complaint about L&C. But I accept that other regulated parties were involved in the transactions complained about – RealSIPP and CIB. L&C has said responsibility for Mr H's loss lies with RealSIPP and CIB. CIB would be the respondent for complaints about activities RealSIPP undertook as an appointed representative of CIB. But CIB has been dissolved and no longer exists as a regulated business. We also can't look at complaints about SA.

The DISP rules set out that when an Ombudsman's determination includes a money award that award may be such amount as the Ombudsman considers 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 its regulatory obligations, good industry practice and to treat Mr H fairly. So the starting point is that it would be fair to require L&C to pay Mr H compensation for the loss he's suffered as a result of its failings.

I've carefully considered if there's any reason it wouldn't be fair to ask L&C to compensate Mr H for his loss, including whether it'd be fair to hold another party liable in full or in part. And, for the following reasons, I consider it appropriate and fair in the circumstances for L&C to compensate Mr H to the full extent of the financial losses he's suffered due to L&C's failings.

I accept SA, RealSIPP and CIB might have some responsibility for initiating the course of action that led to Mr H's loss. But I'm satisfied 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 H wouldn't have come about, and the loss he's suffered could've been avoided.

Mr H taking responsibility for his own investment decisions

L&C has said the ambit and application of the Principles should be construed in light of Section 1C of FSMA. Section 1C of FSMA requires the FCA to have regard to the general principle that consumers should take responsibility for their decisions, when the FCA is considering what degree of protection for consumers may be appropriate.

I'm satisfied it wouldn't be fair or reasonable to say Mr H should bear responsibility for the loss arising from his SA investment.

Although Mr H signed a form instructing L&C to accept a transfer of his pension and invest it in SA, L&C was still obligated to carry out due diligence on the investment and it's fair and reasonable to expect it to have acted on that obligation. In my view, if L&C had acted in accordance with its regulatory obligations and good industry practice it wouldn't have accepted Mr H's application.

Would Mr H's application have gone ahead elsewhere if L&C had declined it?

L&C has said Mr H would likely have proceeded with the transfer and investment regardless of the actions it took. It said other SIPP providers were accepting such investments at the time. L&C said Mr H hadn't stated that he wouldn't have gone ahead with the investment, and there was no contemporaneous evidence supporting the view that he wouldn't have done it. L&C also said if it had refused the investment it couldn't have told Mr H why because that would have constituted giving investment advice, so Mr H would still most likely have made the investment.

Mr H told us he received an incentive payment of £8,700 for transferring his pension to the SIPP and making the SA investment. We asked Mr H how that payment was explained to him and he said:

> '*I was told by the financial adviser I would receive a small cash value within the first 12/24 months of the investment as an incentive to invest with them. I was not aware of the amount until I received into my bank account.*'

An incentive of that size is a substantial sum and is likely to have been a motivating factor for Mr H to go ahead with the transfer and investment. But Mr H said he didn't know in advance how much he would receive.

I think it's unlikely Mr H was aware that the investment was high-risk. On the '*fact find*' form that Mr H completed for his representative he chose the middle of three options to describe his risk tolerance at the time he applied for the SIPP. This was: '*Medium risk – Balanced: prepared to accept some risk*'. And his representative told us he thought the SA investment was safe. So Mr H was unlikely to have wanted to transfer his defined benefit pension entitlements into a SIPP with an SA investment if his application had been refused by the SIPP provider on the basis that the investment carried a high risk of consumer detriment.

In *Adams* the consumer was warned that his investment was high-risk and speculative. I've seen no evidence of any such warning in Mr H's case. Also, in *Adams* the consumer said he was happy to make a high-risk, speculative investment and that he still would have made the investment if his SIPP provider had warned him about the nature of the investment. HHJ Dight said (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 Mr H proceeded knowing that the investment he was making was high-risk and speculative, or that he was determined to move forward with a high-risk and speculative transaction just in order to take advantage of a cash incentive.

It's also unlikely Mr H was aware that taking that sum from his pension might be viewed by HMRC as an unauthorised payment. In *Adams* the consumer said he knew the incentive payment he received was a breach of HMRC rules but he thought if he put it in his wife's account it would be '*okay*'.

In any case, had L&C acted appropriately and undertaken adequate due diligence then it shouldn't have accepted the application anyway. And had that been the case, the transaction wouldn't have come about in the first place – there wouldn't have been a route to proceed even if an incentive payment was offered to Mr H and even if Mr H wanted to make the transaction because he thought it would improve his financial position.

So in my opinion this case is different from *Adams*. And having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mr H's application from RealSIPP, the transaction this complaint concerns wouldn't still have gone ahead.

I don't think it's fair and reasonable to say L&C shouldn't compensate Mr H for his loss on the basis of speculation that another SIPP operator would've made the same mistakes as I've found L&C did. I think it's fair instead to assume another SIPP provider would've complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr H's application. This would've been the case whether or not L&C had given Mr H its reasons for refusing the investment.

In conclusion

Taking all of the above into consideration, I think in the circumstances of Mr H's complaint it's fair and reasonable for me to conclude that L&C shouldn't have accepted Mr H's application. For the reasons I've set out, I also think it's fair to ask L&C to compensate Mr H for the loss he's suffered.

Putting things right

My aim is to return Mr H to the position he'd 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. I required L&C to calculate fair compensation by comparing the current position to the position Mr H would be in if he hadn't transferred from his defined benefit pension.

I accept Mr H's SIPP has already been closed. So there's no need for me say L&C should take ownership of the SA investment in order for the SIPP to be closed and further SIPP fees prevented. I've assumed the value of the SA investment is nil.

To put things right for Mr H L&C must:

1. I consider Mr H would have remained in his existing occupational pension if L&C hadn't accepted his application. L&C must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4: https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

   This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr H's acceptance of this final decision.

2. If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, L&C should:

   - calculate and offer Mr H redress as a cash lump sum payment,

   - explain to Mr H before starting the redress calculation that:

     - their redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and

     - a straightforward way to invest their redress prudently is to use it to augment their defined contribution pension

   - offer to calculate how much of any redress Mr H receives could be augmented rather than receiving it all as a cash lump sum,

   - if Mr H accepts L&C's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr H for the calculation, even if he ultimately decides not to have any of their redress augmented, and

   - take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty of Mr H's end of year tax position.

Redress paid to Mr H as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Mr H may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr H's likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

Account may be taken of the incentive payment Mr H said he received. This can be taken into account in the calculation on the basis of it having been paid at the outset. The FSCS calculation that we have seen said Mr H received £8,700. And Mr H confirmed to us that he received £8,700.

3. Pay Mr H £500 for the trouble and upset he's suffered.

In addition to the financial loss Mr H suffered as a result of the problems with his pension, I think that the loss of a significant portion of his pension provision has caused Mr H significant upset. Mr H said '*the whole situation … has been very difficult and stressful, knowing I had been scammed … and potential*[ly] *lost my future pension*'. And I think that it's fair for L&C to compensate him for that.

My final decision

For the reasons given, I uphold Mr H's complaint against London & Colonial Services Limited.

Where I uphold a complaint, I can award fair compensation up to £160,000, plus any interest and/or costs I consider appropriate. Where I consider fair compensation requires payment of an amount that might exceed £160,000, I may recommend the business pays the balance.

Determination and award: I require London & Colonial Services Limited to pay Mr H the compensation amount as set out in the steps above, up to a maximum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that London & Colonial Services Limited pays Mr H the balance.

If Mr H accepts my decision, the award is binding on London & Colonial Services Limited. My recommendation is not part of my determination or award. London & Colonial Services Limited doesn't have to do what I recommend. Further, it's unlikely that Mr H can accept my decision and go to Court to ask for the balance. Mr H may want to consider getting independent legal advice before deciding whether to accept this decision

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 6 November 2023.

Lucinda Puls
Ombudsman