DRN-4171163

The complaint

Mr M complains that London & Colonial Services Limited ('L&C') put his pension fund into an investment that later went into receivership. He says L&C should compensate him for his 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. For ease of reference I have referred to L&C throughout this decision.

What happened

The transaction

On 24 January 2012 Mr M signed a SIPP application form to transfer his occupational 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 renting them out to a Cambodian company connected to SA. According to agreements Mr M signed, the plots were planted with jatropha trees. And he was to receive 50% of the gross value of the extracted reserves the Cambodian company would generate by harvesting seeds from the trees on his plots to make bio-fuel.

I said in my provisional decision that I understand that the pension scheme Mr M transferred out of was a defined benefit scheme. Neither party has disagreed with that.

Mr M'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 said Mr M wasn't given advice at the point of sale. It said he would manage the investment himself, as opposed to having a financial adviser manage it or appointing an investment manager. It said fees of £1,000 upfront plus £200 per year would be paid to RealSIPP.

RealSIPP submitted Mr M's SIPP application form to L&C on 27 January 2012. L&C received it on 30 January 2012. L&C said it formally opened Mr M's SIPP on 13 February 2012.

L&C signed lease and rental agreements for the investment on 14 and 16 February 2012. The agreements said Mr M would purchase the lease of 6.8 plots for almost £41,000. They said the plots were held in trust for SA. And after L&C had paid for the plots, the trustee would hold them in trust for the benefit of L&C. The trustee would issue a Certificate of Leasehold which would evidence L&C's beneficial ownership of the land. The terms said L&C could sell the plots back to SA for the original purchase price during years five to ten of the lease. And L&C could offer the lease for sale to a third party at any time.

Prior to these events – in November 2011 – the Serious Fraud Office ('SFO') had 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. Three individuals were found

guilty and given prison sentences. The SFO investigation focused on the sale and promotion of SA's products, including the one Mr M 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 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.

Additional background information

I note that L&C hasn't provided all of the evidence we've requested as part of our investigation of Mr M'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 M 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 HM Revenue & Customs 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, which said RealSIPP didn't provide advice on investments 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.'*

Mr M's complaint

In February 2019 Mr M complained to L&C. His representative said SA was an unregulated, high-risk investment which didn't suit his risk profile, and L&C didn't do enough due diligence on the investment before purchasing it on Mr M's behalf. The representative said the investment wasn't diverse enough and Mr M had been given an '*unbalanced and misleading*' recommendation because he was promised an incentive of £10,000. The representative said Mr M was vulnerable to unsuitable advice because he needed money to pay off debt and L&C failed to record and review the size and type of investment it allowed, failed to identify an anomalous investment, and failed to request a suitability report. It also said L&C charged unnecessary fees.

L&C replied in April 2019. It said it had become aware in early 2013 that SA's parent company was in administration. And it said the directors of the parent company had been convicted of fraud in relation to investment schemes.

It said Mr M's complaint was out of time because L&C had opened his SIPP and made the investment more than six years before he complained, and Mr M would've known more than three years before he complained that the investment wasn't low-risk. It said statements and letters from L&C between August 2014 and July 2016 told Mr M that his investment had no value.

L&C also said that, even if the complaint wasn't out of time, L&C wasn't responsible for Mr M's loss. In summary, L&C said it wasn't responsible for the suitability of Mr M's investment, and that it met its obligations to do due diligence in Mr M's case.

On its role, L&C said, in summary, that:

- It was an execution-only SIPP provider with limited powers under its trust deed to veto clients' investments.

- L&C's role was to satisfy itself that the investment was capable of being held in the SIPP in accordance with trust rules and HMRC regulations.

- L&C didn't provide and wasn't permitted to provide advice. The advisor was responsible for the appropriateness, longevity, sustainability and suitability of the investment in line with the regulator's requirements. Mr M's vulnerability and risk profile and the fact the investment was unregulated weren't relevant to L&C insofar as L&C didn't advise on the investment.

- L&C didn't manage the SIPP or the assets in it. On the application form Mr M confirmed he'd manage the investment himself.

- L&C had always complied with the Conduct of Business (COBS) rules in the Handbook of the regulator, the FCA, including COBS 11.2.19 which said:

  > '*Whenever there is a specific instruction from the client, the firm must execute the order following the specific instruction*
  >
  > *A firm satisfies its obligation under this section to take all reasonable steps to obtain the best possible result for a client to the extent that it executes an order, or a specific aspect of an order, following specific instructions from the client relating to the order or the specific aspect of the order*'

- L&C was aware of references to suitability reports in a 2009 review by then-regulator the FSA, but SIPP operators weren't required to view suitability reports. Suitability, advice and recommendations were a matter between client and adviser.

- FCA guidance in 2013 said SIPP operators weren't responsible for advice from third parties. And COBS 2.4.4 allowed L&C to rely on information provided by another regulated firm (e.g. the investment advice that the investment was suitable).

On due diligence L&C said:

'*In this case, [L&C] ensured that:*

- *Appropriate and relevant due diligence was undertaken both to ensure that title to*

the asset would be obtained and that the [SA] investment proposition could be held in the SIPP

- *The investment was a legitimate business*
- *The investment was secure and that the custody of assets was through a reputable arrangement. [L&C] further ensured that appropriate contractual agreements were drawn up and legally enforceable*
- *The investment was not impaired*
- *The investment could be valued and was capable of being purchased and sold*
- *Clients were introduced by a reputable company and, where appropriate, were warned to take further investment advice before proceeding*'

L&C said it had controls in place to monitor business introduced, and the source and volume of business. And that was under constant review. It said that where it saw anomalies it took appropriate action such as ceasing to accept business.

L&C said that in relation to investments it ensured investment entities existed and where practical it obtained a legal opinion on an investment, and as far as possible it verified claims made about the investment and would not proceed if the adviser was not authorised.

L&C also said the main reason Mr M transferred his pension was to access the funds in his defined pension, and that was shown by documents from the pension administrator which L&C received on 14 December 2011 (which L&C said it enclosed, but which it hasn't provided to this service).

In April 2019 Mr M referred his complaint to us. In summary his representative said the following:

- The SIPP Mr M transferred to was '*totally inappropriate*' for him, a retail client with no experience of investing.
- The investment was esoteric, illiquid and unregulated – inappropriate for a retail investor like Mr M who said he never had money to be adventurous and was always short.
- L&C didn't do the necessary due diligence to ensure it '*knew the client*' and his attitude to risk. The true extent of the risk wasn't disclosed.
- L&C should've been concerned over Mr M's understanding of the situation. Mr M was promised £10,000 to transfer and advised to ignore any advice not to transfer. Mr M was going to use the £10,000 to pay some of his debts.
- L&C failed to record and review the type and size of investment and to identify an anomalous investment.
- Mr M had lost most if not all of his pension. He had been relying on it for retirement.
- Mr M realised there was a problem shortly after he transferred when there was a fraud investigation. He tried to locate his money but eventually gave up because he thought there was nothing he could do. He moved away for a couple of years. Around a year prior to complaining about L&C he made a claim to the Financial

Services Compensation Scheme (FSCS). The FSCS paid him £50,000 compensation and said he had further losses. Mr M then realised he could potentially claim more so he approached the representative he was now using.

One of our investigators reviewed Mr M's complaint. L&C reiterated its position that it had limited powers to veto an investment and it didn't provide advice or comment on the merits of an investment. It added:

> '*Our responsibilities in connection with SIPP investments are to satisfy ourselves, in our capacity as Trustee and hence the potential owner of the investment, that they are allowed within the Trust rules and do not breach HMRC regulations. We also establish what liabilities and responsibilities we would be required to take on as the owner of the asset such as any ongoing financial liabilities which would need to be met from the SIPP fund. On an ongoing basis we maintain records of the pension arrangement including all transactions, monitoring receipt of income due from investments and make appropriate reports to HMRC and the FCA.*'

The investigator asked L&C to provide the findings of its due diligence activities. L&C didn't provide anything in response.

The investigator formed the view that the complaint was in time because Mr M had no reason to know before he said he did that he could have a complaint against L&C for accepting his SIPP application.

In considering the merits of the complaint the investigator said L&C had done some due diligence checks on RealSIPP and it was reasonable for L&C to accept an application from RealSIPP because RealSIPP was an appointed representative of a regulated financial services firm and the investigator couldn't see that there were any warnings from the regulator that should have caused L&C to refuse applications from RealSIPP.

But the investigator took the view that the complaint should be upheld because L&C should've known through due diligence on the SA investment that the investment wasn't appropriate for a SIPP. And so it shouldn't have accepted Mr M's application.

L&C disagreed with the investigator's view that the complaint was in time. L&C didn't comment on the investigator's view of the merits of the complaint.

The investigator asked Mr M about the payment of £10,000 that was mentioned. Mr M said he'd received a letter about the £10,000 but he no longer had the letter. He said the payment was to be an incentive payment but he didn't receive it and the investment provider was under investigation by the SFO.

The investigator asked L&C to provide all of its correspondence to Mr M from 1 January 2012 to 7 February 2016. L&C didn't provide anything in response.

Because no agreement could be reached the case was passed to me for a decision.

My provisional decision

In advance of this final decision, I issued a provisional decision in which I said I thought Mr M's complaint should be upheld.

I also explained in my provisional decision why I was satisfied Mr M's complaint was one this service could consider. In particular, I said the rules in the Dispute Resolution chapter of the FCA Handbook (DISP) say that, unless the business agrees or there are exceptional

circumstances, a complaint is out of time if it's made more than six years after the event complained of or, if later, more than three years after the complainant was aware, or ought reasonably to have become aware, of the cause for complaint. I said Mr M had made his complaint more than six years after the event he complained of, but not more than three years after he was aware or ought reasonably to have become aware of his cause for complaint.

Mr M said he accepted my provisional decision.

L&C said it didn't agree with my provisional decision. In summary, L&C said Mr M was aware there was a problem with his investment in about 2013 – when the fraud investigation came to light – or, at the latest, in 2014 – when he received the first annual statement for his SIPP account, he became aware that RealSIPP didn't hold title to the land, and individuals associated with the investment were convicted. And because he was aware of a problem with his investment, L&C said, Mr M was also aware – or ought reasonably to have become aware – that he had cause for complaint about L&C.

L&C said a consumer is aware – or ought reasonably to be aware – of their cause for complaint if the consumer knows enough for it to be reasonable to investigate further. And to be aware of the cause for complaint, the consumer doesn't need to know the specific details of what happened or what should've happened. L&C said a consumer ought to be aware of concerns around due diligence when they have cause to question whether an investment should have been accepted into a SIPP – and this was the crux of Mr M's complaint. And L&C said, '*Quite simply, there can be no clearer indication of due diligence failings than a failure to obtain title to the investment*'.

On this basis L&C said Mr M's complaint was out of time and couldn't be considered by this service.

Jurisdiction

Before considering the merits of Mr M's complaint, I've considered whether he complained within the time limits allowed for making complaints. I've taken into account the rules in DISP which say that, without the consent of the business involved, and unless there are exceptional circumstances, we can't consider a complaint that is brought to us outside set time limits. DISP 2.8.2R says:

> *The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service … 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;*

And I've taken into account L&C's submissions on the timeliness of Mr M's complaint, and that L&C hasn't consented to us considering the complaint.

Mr M complained to L&C on 7 February 2019. It's not in dispute that he made the complaint more than six years after L&C opened his SIPP and invested his funds, which happened in 2012. The key question for me is whether he made the complaint more than three years

after he was aware, or ought reasonably to have been aware, of his cause for complaint. So I need to determine whether Mr M was aware, or ought reasonably to have been aware, of his cause for complaint before February 2016.

When I say here '*cause for complaint*' I mean cause to make this complaint about L&C, not just cause to complain about anyone at all. To be aware of a cause for complaint, a consumer should be in a position that they can reasonably be expected to know that: there's a problem; they've suffered or might suffer a loss; and someone else is responsible for the problem – and they need to know who that someone is. So to have knowledge of his cause for complaint about L&C, Mr M had to be aware, or in a position where he should reasonably have been aware, that there was a problem which had caused or may have caused him loss and that L&C had responsibility for that problem.

Mr M said he became aware there was a problem with his pension after the fraud investigation began, but he didn't think there was anything he could do. He said it was after he claimed compensation from the FSCS in 2018 that he realised he could potentially make other claims for redress.

Based on what he's told us it's more likely than not that Mr M knew more than three years prior to making his complaint to L&C that his investment had failed and that he had lost the funds he had transferred into the SIPP. But I haven't seen any evidence that Mr M was aware, or ought reasonably to have been aware, that L&C had any responsibility for his loss.

I've seen no evidence Mr M connected L&C to the problem, or that he thought L&C was responsible for the problem that had caused him loss, before February 2016. Further, I do not think a retail investor in Mr M's position, acting reasonably at that time, could reasonably have been expected to make that connection or conclude L&C was or was likely to be responsible for the problem.

I don't think Mr M, or a reasonable retail investor in his position, could reasonably be expected to have been aware before February 2016 of the obligations SIPP providers were under.

In the circumstances I don't consider that Mr M ought to have had an awareness of the sort of obligations SIPP providers were under at any time before late 2018. Up to that point, although there had been some build up in the amount of information about SIPP complaints, including the regulatory publications I've mentioned in this decision, the industry maintained that its obligations were very limited.

I think the position had changed by late 2018 with the unsuccessful judicial review challenge in Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service [2018] EWHC 2878 (Admin) ('BBSAL') which was published on 30 October 2018. After the judgment in BBSAL was published, it could be seen that the industry's previously espoused position that SIPP provider's obligations were very limited might not be the correct view. And that there was also a reasonable body of opinion that SIPP providers did have responsibilities which meant they could, in some circumstances, be held responsible for problems with investments held in SIPPs.

I've carefully considered what L&C said about problems with the investments, including lack of title to the parcels of land in Cambodia. L&C said it was clear by 2014 that there were problems, including that title hadn't been obtained and, '*there can be no clearer indication of due diligence failures than a failure to obtain title to the investment*'.

By 2015 the regulator had published reports on the results of two thematic reviews on SIPP operators (in 2009 and 2012), issued guidance for SIPP operators (in 2013) and written to

the CEOs of SIPP operators (in 2014). A common theme of those communications is the regulator considered a SIPP operator had obligations in relation to its customers even where it does not give advice, and that many SIPP operators had a poor understanding of those obligations. In the circumstances I don't consider either Mr M, or a reasonable retail investor in his position, should reasonably have had an awareness of the obligations SIPP providers were under when Mr M received the information L&C says was enough to make him aware he had cause for complaint.

I don't think Mr M 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 M would've needed to be able to attribute the problem to acts or omissions by L&C. And I don't think there was any information available to Mr M before February 2016 that ought reasonably to have made him aware that he could attribute his problem to the acts or omissions of L&C. In these circumstances, I don't think Mr M was aware, or ought reasonably to have become aware, more than three years before he complained that L&C had any responsibility for his loss. So it's my view that this complaint was made in time and can be considered by the Financial Ombudsman Service.

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.

In considering what's fair and reasonable in all the circumstances of the complaint, 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.

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 are key to my decision on what's fair and reasonable in the circumstances.

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) (BBSAL), 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 which I've 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 BBSAL judgment also considered section 228 of FSMA and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the ombudsman in that complaint, which I 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.

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

The Adams court cases and COBS 2.1.1R

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

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

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

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

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

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

I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr M's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened *after* the contract was entered into. And he wasn't asked to consider the question of due diligence *before* Options SIPP agreed to accept the store pods investment into its SIPP.

And in Mr M's complaint, amongst other things, I'm considering whether L&C ought to have identified that the SA investment involved a significant risk of consumer detriment and, if so, whether it ought to have declined to accept applications to invest in SA *before* it accepted Mr M's application.

The facts of Mr Adams' and Mr M's cases are also different. And I need to construe the duties L&C owed to Mr M under COBS 2.1.1R in light of the specific facts of Mr M's case. So I've considered COBS 2.1.1R – alongside the remainder of the relevant considerations, and within the factual context of Mr M's case, including L&C's role in the transaction.

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

I also want to emphasise that I don't say that L&C was under any obligation to advise Mr M on the SIPP and/or the underlying investments. Refusing to accept an investment in a SIPP and/or rejecting an application isn't the same thing as advising Mr M on the merits of the investment and/or the SIPP.

Overall, I'm satisfied that COBS 2.1.1R is a relevant consideration – but that it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Mr M's case.

Regulatory publications

The FCA (and its predecessor, the FSA) 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 worthy etc).*

The later publications

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 include 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.

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.

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

The judge in *Adams v Options SIPP* ('*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. 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.

I've considered whether it's fair and reasonable for me to take into account the publications that were issued after the events of Mr M's complaint. 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.

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.

To be clear, I don't say the Principles or the publications obligated L&C to ensure the transactions were suitable for Mr M. I accept L&C wasn't required to give advice to Mr M, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But they're evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles. And so it's fair and reasonable for me to take them into account when deciding this complaint.

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.

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

And in determining this complaint, I need to consider whether, in accepting Mr M's application from RealSIPP, L&C complied with its regulatory obligations: to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and treat them fairly; and to act honestly, fairly and professionally. In doing that, I'm looking to the Principles and the publications listed above to provide an indication of what L&C should have done to comply with its regulatory obligations and duties.

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 M 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 M's complaint is whether it was fair and reasonable for L&C to have accepted Mr M'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 M'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 M's application.

The contract between L&C and Mr M

This decision is made on the understanding that L&C acted purely as a SIPP operator. So, I don't say L&C should (or could) have given advice to Mr M or otherwise have ensured the suitability of the SIPP or investments for him. I accept that L&C made it clear to Mr M that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investment. And that forms Mr M signed confirmed, amongst other things, that losses arising as a result of L&C acting on his instructions were his responsibility.

I've not 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 M's case is made with all of this in mind. So, I've proceeded on the understanding that L&C wasn't obliged – and wasn't able – to give advice to Mr M on the suitability of the SIPP or SA investment. 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 introductions of business and/or investments with the Principles in mind. And I don't agree that it couldn't have rejected introductions or applications without contravening its regulatory permissions by giving investment advice.

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

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 it should accept applications from a particular introducer, and being satisfied that a particular investment is an appropriate one to accept. 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 and particular applications for investment in its SIPPs.

L&C was under a regulatory obligation 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 customers (including Mr M) 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.

And I think L&C understood this at the time too, as I've seen on the complaint which was the subject of published decision reference DRN-3587366 that it did more than just check the FSA entries for RealSIPP and CIB to ensure they were regulated to give advice. It also entered into intermediary agreements with those firms. And it's apparent that L&C had access to some information about the type and volume of introductions it was receiving from RealSIPP, as it's previously been able to provide us with information about this when requested.

So, and well before the time of Mr M's application, I think that L&C ought to have understood that its obligations meant that it had a responsibility to carry out appropriate checks on RealSIPP to ensure the quality of the business it was introducing.

And I think L&C also ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments before accepting them into a SIPP. So I'm satisfied that, to meet its regulatory obligations when conducting its business, L&C was also required to consider whether to accept or reject a particular investment (here SA), with the Principles in mind.

My decision on what's fair and reasonable in the circumstances of Mr M's case is made with all of this in mind. I'm satisfied that, to meet its regulatory obligations and standards of good

practice L&C should have carried out due diligence on RealSIPP and SA, before deciding whether to accept or reject particular investments and/or referrals of business.

L&C's due diligence on RealSIPP

L&C didn't provide any evidence to show in Mr M'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 M'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 M'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 in relation to 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 that its directors from around the same period have confirmed its policy was that applicants transferring an occupational pension, as Mr M 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 M made his application. I say this because:

- L&C was aware or should have been aware of potential risks of consumer detriment associated with business introduced by RealSIPP by the time of Mr M's application. There was insufficient evidence to show RealSIPP (or any other regulated party) was offering or giving full regulated advice to Mr M (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 have 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.

The availability of advice to Mr M

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 M's SIPP application made clear that he hadn't been given advice at the point of sale. I've seen no evidence that Mr M was offered full regulated advice on his transfer to and investment in the SIPP. And RealSIPP's website said it didn't '*provide individual financial advice on any of the developments in which clients may wish to invest*.'

Having carefully considered the available evidence I think it's most likely that Mr M 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 M.

The possibility no regulated advice had been given or made available was a clear and obvious potential risk of consumer detriment here. Mr M 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

<u>RealSIPP was introducing consumers who were investing in high-risk non-standard assets</u>

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 M 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.

<u>High proportion of execution-only business</u>

In addition to the possibility that no advice had been given or made available to Mr M, the available evidence shows that L&C was, or should have been, aware that not offering or giving advice was something RealSIPP was doing routinely.

It's clear that 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 I've mentioned. 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 highlighted in the 2009 Thematic Review Report, the reason why the records are important is so that 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 M's introduction.

So I think that, from very early on, L&C was on notice that RealSIPP, although the appointed representative of a regulated business that had permissions to advise on all the business being introduced, wasn't a firm that was doing things in a conventional way. And I think L&C ought to have recognised that 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 that 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 IFA business like RealSIPP. And it should have considered how a small IFA 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 M'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 have been a fair and reasonable step to take in the circumstances. Alternatively, L&C could have 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 M'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 more likely than not that if L&C had asked RealSIPP for this information that RealSIPP would've then provided a full response to the information sought. And I think it's most likely 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 didn't *have* to obtain this information from RealSIPP. But I think this was a fair and reasonable step to take, in the circumstances, to meet its regulatory obligations and good industry practice.

Making independent checks

I think, in light of what I've said above, it would also have been fair and reasonable for L&C to meet its regulatory obligations and good industry practice, to have taken independent steps to satisfy itself that full regulated advice was being offered to applicants like Mr M. 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 M, directly and to ask whether they'd been offered full regulated advice on their transactions and 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 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. This was a fair and reasonable step to take in reaction to the clear and obvious risk of consumer detriment I've mentioned.

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

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

- RealSIPP was presenting itself publicly (on its website) as providing only '*generic information on the considerations and risks*' and not providing advice about '*any of the developments in which clients may wish to invest*'.

- 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 very 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 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 M 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 M. 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 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 M, didn't have full regulated advice made available to them by RealSIPP. 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 an unregulated overseas forestry scheme, 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 M's application – 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 M's application from RealSIPP.

L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr M 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 M to be put at significant risk of detriment as a result.

L&C's due diligence on SA

As I've set out above, I think that if L&C had carried out due diligence on RealSIPP which was consistent with its regulatory obligations and the standards of good practice at the time then it ought to have concluded that it shouldn't accept applications from RealSIPP at all. So I don't necessarily need to consider the due diligence on the SA investment. But I have, for completeness, considered what L&C did and ought to have done and concluded in relation to 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. It's also consistent with HMRC rules that govern what investments can be held in a SIPP.

Despite saying it wasn't responsible for the quality of the SA investment, L&C told Mr M that it did a range of due diligence activities on the SA investment. L&C wrote:

> '*In this case, [L&C] ensured that:*
>
> - *appropriate and relevant due diligence was undertaken both to ensure that title to the asset would be obtained and that the [SA] investment proposition could be held in the SIPP*
> - *the investment was a legitimate business*
> - *the investment was secure and that the custody of assets was through a reputable arrangement. [L&C] further ensured that appropriate contractual agreements were drawn up and legally enforceable*
> - *the investment was not impaired*
> - *the investment could be valued and was capable of being purchased and sold …*'
>
> *… With regards to investment propositions, in addition to the actions above, we establish that the entity exists; where practical we obtain a legal opinion on the investment; and as far as is possible we verify the claims made about the investment …*'

Such actions might have been good practice. But L&C hasn't provided evidence to demonstrate it actually took these actions, or to demonstrate what conclusions it drew from any information arising from the actions. I think if L&C had undertaken adequate checks on the SA investment it would reasonably have concluded that it should not accept Mr M's application to invest in SA.

I say that for the following reasons:

- SA purported to offer a very high return through oil produced by jatropha trees. There appears to have been 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.

- SA's first accounts which had been published on 6 October 2011 were subject to a qualified opinion from the auditors, which means there was some limitation or exception to accounting standards. The auditor said, '*…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 apply 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 M. They said beneficial ownership of the plots would be evidenced by a Certificate of Leasehold and didn't offer any evidence of title held by the lessor.

- SA didn't have title to the land, so if L&C had done the check it said it did on title to the asset it ought to have concluded that title wouldn't be obtained.

The information that was available to L&C, and which would have come to light had L&C done the types of checks it said it did, 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 for them. So an investor might not have been able to 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.

There's a difference between accepting or rejecting a particular investment for a SIPP and advising on its suitability for the individual investor. I accept that L&C wasn't expected to, nor was it able to, give advice to Mr M on the suitability of the SIPP and/or SA investment for him personally. To be clear, I'm not making a finding that L&C should have assessed the suitability of the SA investment for Mr M. I accept L&C had no obligation to give advice to Mr M, or to ensure otherwise the suitability of an investment for him.

So my finding isn't that L&C should have concluded that Mr M wasn't a candidate for high risk investments. It's that L&C should have concluded the SA investment wasn't acceptable for its SIPPs and it thereby failed to treat Mr M fairly or act with due skill, care and diligence when accepting the SA investment into his SIPP.

I think it's important I emphasise here that I'm not saying that L&C should necessarily have discovered everything that later became known had it undertaken sufficient due diligence before accepting the SA investment into its SIPP. But I do think that appropriate checks would have revealed some fundamental issues which were, in and of themselves, sufficient basis for L&C to have declined to accept the SA investment in its SIPPs.

So I'm satisfied L&C should've identified a number of the concerns I've mentioned, and ought to have drawn the conclusion I've set out, based on what was known at the time. L&C ought to have identified significant points of concern, which ought to have led it to conclude it

should not accept the SA investment. It ought to have identified that there was a high risk of consumer detriment here. And it's the failure of L&C's due diligence that's resulted in Mr M being treated unfairly and unreasonably.

To my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant time. I think it's fair and reasonable to conclude that L&C didn't act with due skill, care and diligence, and it didn't treat Mr M fairly, by accepting the SA investment in his SIPP.

Summary of what I've decided and why

I'm upholding Mr M's complaint because L&C didn't do adequate due diligence on RealSIPP and because L&C didn't do adequate due diligence on the SA investment. Either of these failings in isolation would still have led me to conclude that L&C had done something wrong, that it shouldn't have accepted Mr M's business and that it's fair and reasonable in all of the circumstances for this complaint to be upheld.

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

In its response to Mr M's complaint L&C said it was obliged to proceed in accordance with COBS 11.2.19R which obliged it to execute investment instructions. It effectively said that once the SIPP had been established, it was required to execute the specific instructions of its client.

On this point I think it's important for me to reiterate that it wasn't fair and reasonable, for L&C to have accepted Mr M's applications in the first place. So in my opinion, Mr M's SIPP shouldn't have been established and the opportunity to execute investment instructions shouldn't have arisen at all.

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

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

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

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

The involvement of other parties

I've considered the involvement of other parties in Mr M's loss. L&C might say that RealSIPP and its principal, CIB, were responsible for the loss. In this decision I'm considering Mr M's complaint about L&C. But I accept that RealSIPP and CIB were involved in the transaction complained about. 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.

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 its regulatory obligations, good industry practice and to treat Mr M fairly. So the starting point is that it would be fair to require L&C to pay Mr M compensation for the loss he's suffered as a result of its failings.

In the circumstances I consider it fair and reasonable for L&C to compensate Mr M 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 M'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 M wouldn't have come about, and the loss he's suffered could've been avoided.

Mr M taking responsibility for his own investment decisions

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

Although Mr M signed a form instructing L&C to accept a transfer of his pension and invest it in SA, and although the form said Mr M would manage the investment himself, 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, for the reasons given above, if L&C had acted in accordance with its regulatory obligations and good industry practice it wouldn't have accepted applications to invest in SA and it should have stopped accepting applications from RealSIPP *before* it received Mr M's application. So it shouldn't have accepted Mr M's SIPP application.

In my view, if L&C had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted the SA investment into its SIPPs *at all* and it shouldn't have accepted Mr M's introduction from RealSIPP. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr M wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

As I've made clear, L&C needed to carry out appropriate due diligence on the SA investment, and the business being referred to it from RealSIPP, and reach the right conclusions. I think it failed to do this. And merely having Mr M sign forms containing declarations wasn't an effective way of L&C meeting its obligations, or of escaping liability where it failed to meet its obligations.

CIB was a regulated firm with the necessary permissions to advise on the transactions this complaint concerns. And RealSIPP was an appointed representative of CIB. I'm satisfied that in his dealings with it, Mr M trusted RealSIPP to act in his best interests. Mr M also then

used the services of a regulated personal pension provider in L&C. So, overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair to say L&C should compensate Mr M for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr M should suffer the loss because he ultimately instructed the transactions to be effected.

Had L&C declined Mr M's business from RealSIPP, would the transaction he complained about still have gone ahead elsewhere?

I've considered whether, in the circumstances, Mr M would have gone ahead with the transfer and the investment if L&C had refused his application from RealSIPP and/or not accepted the SA investment. In Adams v Options SIPP, the judge found that Mr Adams would've proceeded with the transaction regardless. HHJ Dight says (at paragraph 32):

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

In *Adams* the consumer said he knew the incentive payment he received might be a breach of HMRC rules but he thought if he put it in his wife's account it would be '*okay*'. I've not seen any evidence suggesting that Mr M was aware that receiving a sum to proceed with the transactions might be viewed by HMRC as a breach of its rules.

But I'm satisfied that Mr M was offered an incentive payment of £10,000 to proceed with the transactions. Further, Mr M was having financial difficulties and I accept an incentive of that size could have been a motivating factor for him to go ahead with the transfer and investment. Mr M's representative explained the incentive payment as follows:

> '*[Mr M] was promised £10,000 for signing over his pension to London & Colonial and was told to ignore any other advice not to do so. [Mr M] feels he was vulnerable as he had debts and was going to use the £10,000 to pay of [sic] some of his debts. [Mr M] feels like he was tricked into moving his pension when it was safe where it was.'*

Mr M's representative also told us:

> '*Mr M … received a letter regarding the £10,000 but unfortunately no longer has this. It was an incentive offer and he did not receive any payment and the company was under investigation by the serious fraud office shortly before the payment was promised.*'

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 M'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. But it's been submitted in this case that Mr M had no prior experience of investing, was reliant on his pension fund for his retirement, and that he '*never had any money to be adventurous*'. Overall, and having carefully considered all the submissions that have been made, I'm not satisfied that Mr M proceeded knowing that the investment he was making was high-risk and speculative, and that he was determined to move forward with a high-risk and speculative transaction just in order to take advantage of a cash incentive.

I'm also satisfied that it wouldn't be fair to say Mr M's actions mean he should bear the loss arising as a result of L&C's failings. Had L&C acted in accordance with its regulatory obligations and best practice, it shouldn't have accepted the SA investment into its SIPPs *at all* and it shouldn't have accepted Mr M's introduction from RealSIPP. That should've been

the end of the matter – and if that had happened, I'm satisfied the arrangement for Mr M wouldn't have come about in the first place.

So in my opinion this case is very different from *Adams*. And having carefully considered all the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mr M's application from RealSIPP and hadn't accepted the SA investment into its SIPPs, the transactions this complaint concerns wouldn't have gone ahead.

I've considered whether it's fair and reasonable to conclude that another SIPP operator would've accepted Mr M's application had L&C declined it. But I don't think it's fair and reasonable to say that L&C shouldn't compensate Mr M 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 that another SIPP provider would've complied with its regulatory obligations and acted according to good industry practice, and therefore wouldn't have accepted Mr M's application from RealSIPP.

On balance, I think it's fair and reasonable to direct L&C to pay Mr M compensation in the circumstances. While I accept that other parties might have some responsibility for initiating the course of action that's led to Mr M's loss, I consider that L&C failed to comply with its own regulatory obligations and didn't put a stop to the transactions proceeding when it had the opportunity to do so by declining to accept Mr M's business from RealSIPP or the SA investment in Mr M's SIPP.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr M. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against L&C that requires it to compensate Mr M for the full measure of his loss. L&C accepted Mr M's business from RealSIPP and it accepted the SA investment into Mr M's SIPP and, but for L&C's failings, I'm satisfied that Mr M's pension monies wouldn't have been transferred to L&C or invested in the SA investment.

As such, I'm not asking L&C to account for loss that goes beyond the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter. However, that fact shouldn't impact on Mr M's right to fair compensation from L&C for the full amount of his loss. The key point here is that but for L&C's failings, Mr M wouldn't have suffered the loss he's suffered. As such, I'm of the opinion that it's appropriate and fair in the circumstances for L&C to compensate Mr M to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by other firms involved in the transactions.

I acknowledge that Mr M has received a sum of compensation from the FSCS. However, the terms of his reassignment of rights require him to return any compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required. So I will make no allowance for what he's been paid by the FSCS. It will be for Mr M to make the arrangements to make any repayments he needs to make to the FSCS.

In conclusion

Taking all of the above into consideration, I think that in the circumstances of this case it's fair and reasonable for me to conclude that L&C should have decided not to accept business from RealSIPP and/or to accept the SA investment to be held in its SIPPs *before* it had received Mr M's application from RealSIPP. I conclude that if L&C hadn't accepted Mr M's introduction from RealSIPP and/or the SA investment to be held in its SIPPs, Mr M wouldn't

have established a L&C SIPP, transferred his defined benefit pension monies into it or invested in the SA investment.

I say this having given careful consideration to the *Adams v Options* judgment but also bearing in mind that my role is to reach a decision that's fair and reasonable in the circumstances of the case having taken account of all relevant considerations.

Putting things right

A fair and reasonable outcome would be for L&C to put Mr M, as far as possible, into the position he would now be in but for L&C's due diligence failings. I consider Mr M would have most likely remained in his occupational pension scheme if L&C hadn't accepted his application.

In summary, L&C must:

1. Take ownership of the SA investments if possible

2. Calculate and pay compensation for the loss Mr M's pension provisions have suffered as a result of L&C accepting his application from RealSIPP

3. Pay Mr M £500 for the distress and inconvenience caused by its failure to act fairly and reasonably

I'll explain how L&C should carry out these steps in further detail below.

(1) Take ownership of the SA investments if possible

In order for the SIPP to be closed and further SIPP fees to be prevented, the SA investments need to be removed from Mr M's SIPP. To do this, L&C should calculate an amount it's willing to accept as a commercial value for Mr M's SA investments and pay that sum into Mr M's SIPP and take ownership of the SA investments. The sums paid into the SIPP to purchase the SA investments will then make up part of the current actual value of the SIPP.

If L&C's unwilling or unable to purchase the SA investments, then the actual value of any SA investments it doesn't purchase should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include their being given a nil value for the purposes of ascertaining the current value of Mr M's SIPP.

Provided Mr M is compensated in full then, if L&C doesn't purchase the SA investments, it may ask Mr M to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Mr M may receive from the investments, and any eventual sums he would be able to access from the SIPP. L&C will need to meet any costs in drawing up the undertaking.

If L&C doesn't take ownership of the SA holdings, and they continue to be held in Mr M's SIPP, there'll then be ongoing fees in relation to the administration of the SIPP. Mr M wouldn't be responsible for those fees if L&C hadn't accepted his application from RealSIPP. So, I think it's fair and reasonable for L&C to waive any SIPP fees until such time as Mr M can dispose of the SA investments and close the SIPP.

(2) Calculate and pay compensation for the loss Mr M's pension provisions have suffered as a result of L&C accepting his application from RealSIPP

I said in my provisional decision that L&C should undertake a redress calculation in line with the regulator's pension review guidance. And I said that:

> '*I'm aware that on 2 August 2022, the FCA launched a consultation on changes to this guidance and has set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice. The consultation closed on 27 September 2022 with any changes expected to be implemented in early 2023.*
>
> *In this consultation, the FCA said that it considers that the current methodology in FG17/9 remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress. …*
>
> *The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 during the consultation. But until changes take effect, firms should give customers the option of waiting for their compensation to be calculated in line with any new rules and guidance that may come into force after the consultation has concluded.*
>
> *I think it's fair for me to give Mr M the same choice.*
>
> *I'm satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr M. And, having reviewed the FCA's consultation and its proposed updates to the methodology, I'm satisfied that the proposed changes under consultation would, if ultimately implemented, still reflect a fair way to compensate Mr M in this case.*
>
> *Therefore, if Mr M wishes to have his redress calculated in line with any new or updated guidance and rules, I intend to ask L&C to undertake a redress calculation in line with the updated methodology as soon as any new rules and/or guidance come into effect (rather than to calculate and pay any due compensation now in line with FG17/9). As I have set out above, it is not certain when any updated rules and guidance will come into effect, but the FCA has said that it expects this will be in early 2023.*
>
> *As noted above, the FCA has stated that the aim of any updated guidance and rules would remain the same as in FG17/9, which is to put consumers in the position they would be in if they had remained in their DB scheme (recognising actual reinstatement into the former scheme might not be possible).*'

I asked Mr M to let me know whether he'd wish for redress to be calculated in line with the guidance in FG17/9 or in line with any new rules or guidance that were expected to come into force in early 2023. Further, I also went on to explain that if this complaint wasn't settled by the time any new guidance or rules come into effect, I'd expect L&C to carry out a calculation in line with the updated rules. The updated rules came into effect in April 2023. So, as indicated in my provisional decision, I expect L&C to undertake a redress calculation in line with the updated methodology now the new rules and guidance have come into effect.

A fair and reasonable outcome would be for L&C to put Mr M, as far as possible, into the position he'd now be in if it hadn't accepted his application from RealSIPP. As explained above, had this occurred I consider it's more likely than not Mr M would have remained in his defined benefit pension scheme.

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 M's acceptance of the decision.

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

- always calculate and offer Mr M redress as a cash lump sum payment,
- explain to Mr M before starting the redress calculation that:
    - his 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 his redress prudently is to use it to augment his defined contribution pension
- offer to calculate how much of any redress Mr M receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr M accepts L&C's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr M for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr M's end of year tax position.

Redress paid to Mr M as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, L&C may make a notional deduction to cash lump sum payments to take account of tax that Mr M would otherwise pay on income from his pension. It's reasonable to assume that Mr M is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%. However, if Mr M would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

(3) Pay Mr M £500 for the distress and inconvenience caused by their failure to act fairly and reasonably

Mr M transferred his pension away from a valuable defined benefits pension to a SIPP and had to suffer the loss of those benefits.

I think it's fair to say this would have caused Mr M some distress and inconvenience. He will clearly have been worried that his retirement provision will have been reduced. So, I consider that a payment of £500 is appropriate to compensate for that upset.

The award limit

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

I do not know what award the above calculation might produce. So, whilst I acknowledge that the value of Mr M's original investment was within our award limit, for completeness I have included information below about what ought to happen if fair compensation amounted to more than our award limit.

My final decision

For the reasons given, my final decision is that I uphold Mr M's complaint against London & Colonial Services Limited.

Determination and money award: I uphold Mr M's complaint and require London and Colonial Services Limited to pay Mr M 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 recommend that London and Colonial Services Limited pays Mr M the balance.

If Mr M accepts this decision, the award becomes binding on London and Colonial Services Limited.

My recommendation is not binding. Further, it's unlikely that Mr M can accept my decision and go to court to ask for the balance after the money award has been paid. Mr M may want to consider getting independent legal advice before deciding whether to accept this final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 3 July 2023.

Lucinda Puls
Ombudsman