DRN-4415113

The complaint

Mr I's representative complains about the due diligence London & Colonial Services Limited ('L&C') undertook before accepting Mr I's application. Mr I is being represented by a Claims Management Company ('CMC') who complains on Mr I's behalf that L&C didn't have adequate procedures, systems, and controls in place. And that this resulted in L&C accepting Mr I's Self-Invested Personal Pension ('SIPP') application when it shouldn't have done and allowing him to invest in The Resort Group's ('TRG') Dunas Beach Hotel Resort ('Dunas Beach'). The CMC says Mr I has suffered significant losses as a result of this.

For ease of reference, where I refer to 'Mr I' this includes submissions and evidence submitted on Mr I's behalf by his CMC.

What happened

I issued a provisional decision to this complaint on 23 October 2023. I said in that decision that I was minded to uphold the complaint and gave my reasons for doing so. I have taken into account the submissions in response to my provisional decisions from the parties and their respective representatives, and after taken these and all the other evidence into account, I've reached the same conclusions for the same reasons. Before I explain why, I'll set out the background to this complaint as follows:

L&C

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

C.I.B (Life & Pensions) Limited ('CIB')

CIB was authorised by the regulator who, at the time of the complaint, was the Financial Services Authority ('FSA'), which later became the Financial Conduct Authority ('FCA' - I will refer to both bodies as the 'regulator'). CIB had permissions from the regulator to advise on regulated products and services including giving investment advice and arranging deals in investments such as pensions. In May 2015, CIB went into voluntary liquidation, and was later dissolved.

Real SIPP LLP ('RealSIPP')

RealSIPP was an Appointed Representative ('AR') of CIB from April 2010 to May 2015.

TRG

TRG was founded in 2007. It owned a series of resorts in Cape Verde and it sold luxury hotel rooms to UK consumers, either as whole entities, or a as fractional share ownership in a company. Mr I's complaint relates to the purchase of one of TRG's investments.

The Introduction to the SIPP and TRG investments

Mr I had a deferred (preserved) Defined Benefit pension plan ('DB pension or 'the pension plan') with his former Occupational Pension Scheme provider up until 2011. In July of that year, Mr I, on the advice of CIB, decided to transfer his pension plan to an L&C SIPP, marketed under the name of 'Open Pension'. The transfer of Mr I's DB pension to the SIPP was done in order to purchase an unregulated investment (Dunas Beach) which was sold by TRG.

Mr I has told the Financial Ombudsman that the process started when he was approached by two unregulated introducers in September 2010. Mr I's CMC has said it understands that both of these individuals – who I will refer to as 'Mr F' and 'Mr C' – worked for TRG through another business to sell its (TRG's) products. Mr I said he dealt mainly with Mr F. Mr I also said it was when he met with Mr F that the idea of investing in Dunas Beach was brought up. Mr I added that he does not recall ever meeting an adviser from CIB and/or RealSIPP.

Mr I said that Mr F later persuaded him (Mr I) to transfer his DB pension into the L&C SIPP and to *"go ahead with the investment".* And that Mr F was the one who sold the idea of the TRG (Dunas Beach) investment to him (Mr I) by convincing him that he would get his *"pension money working much harder"* for him than his deferred DB pension. Mr I recalls that whilst there were numerous paperwork and forms to sign, these were all completed by Mr F and/or Mr C and the only thing Mr I did was sign the documents he was given. Mr I said he can't remember being left with any paperwork to take away with him but does say he recalls the documents he signed were presented to him to read before signing.

Following a Subject Access Request ('SAR') to CIB by Mr I's CMC, Mr I was provided with a copy of the 'Reservation Form' which is headed 'Dunas Beach Resort Pension Funded'. This was a TRG Reservation Form and was dated 16 September 2010. Mr I's recollections are that Mr F completed this and other forms. The Reservation Form referred to the same three properties as listed in Mr I's L&C investment form (see further below). The Reservation Form noted the 'Payment Plan Options' chosen by Mr I was '50%'. And the deposit would be funded by *"SIPPS"*.

CIB Advice

In a CIB suitability letter dated 11 July 2011 (the 'suitability letter'), a CIB adviser provided Mr I with advice about whether he should transfer his (Mr I's) DB pension to a SIPP in order that Mr I could invest in the property investments he wanted to purchase. The letter began by saying that: *"Further to our recent correspondence and telephone conversation this afternoon, we have now received sufficient information from you and your pension scheme to report our findings. The letter, together with the attached report and appendices is intended to set out our recommendations and to confirm why they are suited to your needs".*

Under the heading *"Requirements and Needs"*, the suitability letter said:

> *"You wish to purchase an offshore/offplan commercial investment property within a registered pension scheme environment."*
>
> *"You wish to save for your retirement in a tax effective manner. You wish to invest for the long term and do not require access to your funds until your proposed retirement age."*
>
> *"You wish to establish a plan that will allow you to invest either lump sums or a regular amount over the years."*
>
> *"You wish to establish a plan which allows an extremely wide selection of investment vehicles, rather than a limited number of traditional investment funds."*

"You have a preserved benefit from a previous employers final salary scheme, the trustees of which will not allow you to make personal investment choices. You wish to consider transferring a cash benefit from this scheme(s) in order to invest in the offshore property from your chosen developer."

"You are aware that by transferring any such benefits, you will be giving up any right to the benefits preserved for your normal retirement age."

Under the heading *"Summary of Recommendation"* the suitability letter said:

*"We **do not** believe that the use of a SIPP package matches your attitude to investment risk, as confirmed in the fact find, nor will it best meet your agreed objectives and you are not in a position to give up your occupational benefits because (bold CIB's adviser's emphasis):*

- *"You do require the security of guaranteed benefits*
- *The Critical Yield is higher than your attitude to risk would suggest as acceptable*
- *You are able to take early retirement*
- *The overall benefits from your occupational scheme form a significant part of your retirement wealth."*

Amongst other things, under 'Type of Advice' the CIB suitability letter said:

"Whenever possible, we would wish to carry out a complete financial review, but at your explicit request, our advice is restricted to the consideration of transferring an Occupational Pension scheme to a Self Invested Personal Pension to allow you to invest in the offshore development of your choice.

It is important that you note we are only providing limited advice on this matter to provide you with an overall comparison of risks and benefits based on your stated objectives. This report should not be considered as a full analysis of your circumstances or overall financial position."

The suitability letter said its adviser provided a copy of its 'Cost of Services' and 'Client Agreement'. CIB also confirmed its status as Independent Financial Advisers ('IFA'). The CIB suitability letter noted that as set out in the Client Agreement, Mr I would be treated as a 'retail client'. Neither party has provided the Financial Ombudsman with a copy of the CIB Client Agreement.

While I've not seen a copy of the Client Agreement on this case I've seen a document referred to in similar cases called the 'Client Agreement' that was produced by CIB/RealSIPP. And amongst other things, CIB said: "…*we are restricting our services to the establishment and set-up of a specific SIPP to enable commercial property purchase. We will not be providing any advice on the suitability of this package to your own personal circumstances and you should seek professional advice where necessary."*

I've also seen the RealSIPP Key Facts document referred to in the published decision DRN-3587366. Whilst I can't be sure which variant of a Client Agreement and/or Key Facts document Mr I was presented with, I think it's more likely than not from what's been demonstrated about RealSIPP's/CIB's business model, the Client Agreement at best would have explained that CIB (who was acting as the adviser) was limiting its advice to *the establishment and set-up of a specific SIPP.* And that neither RealSIPP nor CIB would be

undertaking to offer any advice on the suitability or otherwise of the unregulated investment(s).

The Financial Ombudsman has also not been provided with a copy of the 'Fact Find Information' – this was the heading as set out in the suitability letter. In the suitability letter under this heading it said: *"A summary of the information established through our communications is set out in the enclosed copy Client Information. This is a form specific to the task of considering your pension options outlined above."* It went on to ask Mr I to check that the 'Client Information' document was accurate and correct.

The suitability letter ended with the printed name of the adviser under 'Yours sincerely' but this letter wasn't signed by him. Under the adviser's name the firm 'C.I.B (Life & Pensions) Ltd' was printed and underlined.

Mr I's CMC said that when Mr I was shown the CIB adviser's name following obtaining the suitability letter through its SAR to CIB, he (Mr I) said he did not recognise the adviser's name and did not (as far as he can recall) have any direct dealings with him. Mr I also said he does not recall receiving the suitability letter and/or being told not to transfer to the SIPP.

In Mr I's case, attached to the suitability letter from CIB was a 'Pensions Report'. The Pensions Report noted the following key points:

- Mr I had an 'Occupational Final Salary Scheme' (the DB Pension) with his former employer which had a Cash Equivalent Transfer Value of £183,055.
- The DB pension had built up a pension benefit of £15,974 per year.
- The DB pension benefits would escalate in line with inflation each year until the pension schemes' normal retirement age of 60. And at that date, Mr I's projected annual pension benefits were due to be £24,333.
- Mr I was able to exchange a portion of his DB pension for a tax free lump sum.
- Mr I could take his retirement benefits early from the age of 55, subject to the agreement of the Trustees of the DB scheme.

CIB said in its Pension Report that it was not able to find out whether the DB pension scheme was fully funded, or whether it faced a current shortfall. It told Mr I that it strongly recommended that he make enquiries into this matter with the Trustees of the scheme, especially if the scheme had closed or the employer had ceased to exist. It should be noted that Mr I's deferred DB pension was with a public sector Occupational Pension Scheme.

The CIB Pensions Report also made the following statements:

> *"You will note from this report that a key element of your decision should be the annual investment return required from an alternative pension plan to match the benefits which would be payable from your occupational scheme. This figure is often referred to a* (sic) *the "Critical Yield"".*
>
> *"To replicate these benefits from a Self Invested Personal Pension plan environment, your Cash Equivalent Transfer Value would need to grow at 11.5% per annum between now and your normal retirement date."*
>
> *"The lower the Critical Yield, the greater the potential for an alternative pension scheme to provide greater benefits. The higher the Critical Yield, the greater risk you are taking of losing final retirement benefits by investing in an alternative pension."*

Under 'Objectives' the Pensions Report noted that Mr I wanted to:

- Purchase an Offshore/Offplan Property as an Investment
- Save for retirement at age 65
- Maximise the tax efficiency of his savings
- Utilise wider investment powers

And that Mr I: *"…also confirmed that to achieve the above objectives you would be prepared to forego the possibility of encashing the* [new] *plan prematurely."*

Under the heading *"Views and Implications of Your Attitude to Risk"* the Pensions Report said:

> *"There is a risk that the amount at retirement will not be as high as you would have received from your current occupational scheme. However, there is also a risk that the benefits guaranteed by your occupational scheme will not provide adequate protection against high inflation as the rate of increase/revaluation may be fixed or limited in nature."*

And

> *"As indicated on your fact find, I understand that your views on investment risk for these monies to be aggressively balanced, rather than totally balanced, cautious, or adventurous. On a scale of 1 to 10 you want this investment to be around seven or eight as defined in the attached risk-rating guide. You want the prospect of the growth offered by equity investments and are prepared to accept the higher risks to income and capital that come from investments that are linked to specific geographic and commercial sectors of the worldwide investments market or to the shares of larger PLCs.*
>
> *This adventurous attitude would not preclude you from considering an offshore/offplan commercial property investment."*

The 'risk rating guide' referred to above, noted that an 'Adventurous Investors Range' was on a scale between four and nine.

The SIPP paperwork

The L&C Open Pension (SIPP) brochure entitled *"Take control of your pension"* said, amongst other things, that: *"…the L&C Open Pension is not appropriate for everybody and it is essential that you obtain financial advice before entering into one. Your own adviser should always be your first point of call for advice about the Open Pension".* The brochure also explained that L&C had no responsibility for investment decisions made by the SIPP holder. But that it would ensure assets are correctly registered and are compliant with HM Revenue & Customs ('HMRC') rules and regulations.

On or around 14 July 2011, Mr I submitted a RealSIPP branded application form to establish an Open Pension SIPP (the 'SIPP application'). He also instructed L&C to purchase the TRG (Dunas Beach) investments in an 'Investment Form'. Both forms were signed and dated by Mr I on 14 July 2011.

In section two of the SIPP application, the section headed *"IFA Details"* named the same adviser who was named in the suitability letter. The IFA was stated to be from 'RealSIPP' with the name of CIB being put alongside the RealSIPP name but in brackets – the FSA authorisation numbers for both firms were quoted in this section of the application.

Unlike later 'Open Pension' SIPP applications that I've seen on some other cases, Mr I's application did not have questions following on from the IFA's details which confirmed whether advice had been given at the point of sale.

In section three of the SIPP application under the heading *"Remuneration Basis"*, the initial fee for the IFA was set at £2,550 with an annual fee of £300.

In section five of the SIPP application under the heading *"Investments"*, Mr I was asked if he wished to manage the fund himself to which the relevant box was marked 'Yes'. The investment was named directly under this box as **"Dunas Beach Property Investment – See Investment Instruction attached below"** (bold emphasis as set out in the form).

Following on from the SIPP application, there was an attached form which set out Mr I's investment instructions. Whilst the copy given to the Financial Ombudsman doesn't specifically call it the 'investment form', for ease of reference I will refer to it as that.

For each investment, Mr I completed a separate page of the investment form. However, each page contained the same information apart from using different reference numbers for the same investment chosen all of which were at the Dunas Beach Resort. The reference numbers and amounts to be invested were as follows:

- HS76 – 159,950 euros
- HS73 – 159,950 euros
- HS3 – 159,950 euros

Each page included that the Option Plan under which Mr I agreed to purchase each investment, was the *"Easy Ownership Option 3"*. No explanation of what Option 3 entailed was given. However, it was noted that under the three options (one, two or three): *"I wish you to meet the purchase price and all costs and expenses from the cash available in my Arrangement. I understand that if I have chosen Easy Ownership Option 1, 2 or Hotel Suite 50%, the initial deposit could be lost if for any reason there is not enough cash available in my Arrangement to pay the balance when due".*

Each page for the investment chosen by Mr I also contained the following statements:

(a) *that neither* the Trustee nor *its Administrator is authorised to give me financial or investment advice and that no information given to me is intended to be and will not be taken as advice to me of any kind nor as any kind of recommendation of an investment in this asset and*
(b) *that you obtained legal advice in your capacity as Trustee in order to assess the risks of ownership and to ensure the acquisition of appropriate title*
(c) that the advice you have obtained *does not cover the investment merits, marketability or value of the property but only the risks of ownership.*

Directly under these statements, it said that Mr I had: *"…reviewed the due diligence report obtained in January 2010 and the (since modified) current Promissory Contract of Purchase and Sale. I have obtained whatever information, reports, legal and other advice I require regarding the investment including the potential income and the associated costs and expenses which may fall to be paid out of my Arrangement."*

Under the next section of the investment form under the heading *"Sale",* L&C stated the investments could be sold either:

(a) upon the signed request of Mr I, or

(b) if a benefit became payable under his Arrangement and the sale was necessary to provide sufficient liquidity to pay that benefit, or
(c) if it became necessary to do so in order to comply with any law or regulatory requirement applying to the Open Pension account.

This section went on to say that Mr I understood: *"…in the circumstances described in (b) or (c) above, the asset must be sold within one year of the date on which the relevant event occurs and if a sale cannot be achieved by any other means then the asset may be sold at auction without reserve without further reference to me.*"

Under the next heading *"General"*, amongst other things, the investment form stated Mr I agreed that he would: *"…indemnify and keep* [L&C] *fully indemnified in respect of any loss claim action damage incurred or suffered by* [L&C] *in respect of the asset."*

Mr I signed the final page of the investment form which encompassed all three investments, and these were all dated 14 July 2011.

The transfer and purchase of the TRG (Dunas Beach) investments

Mr I's SIPP was established on 25 July 2011. And on 13 September 2011, £200,325.11 was transferred to his SIPP account from his DB pension scheme.

On 14 September 2011, as shown in his SIPP statements, Mr I invested a total of £184,557.69 in the TRG (Dunas Beach) investments. Each investment was for £61,519.23 and the statement had the same reference for each investment as *"Property Purchase Charge Re* [Mr I] *S03813"*.

Neither Mr I nor L&C have provided copies of the TRG/Dunas Beach property agreements/Promissory Contracts. I've seen other agreements on similar cases with the Financial Ombudsman. And these agreements (Promissory Contracts) were set up for the benefit of the SIPP account holder, who in this case, was Mr I.

In its submissions to the Financial Ombudsman, L&C's representatives has clarified what Mr I owned by the time of his complaint in 2017 as follows:

> *"On 14 July 2011* [Mr I] *completed three investment requests to purchase apartment 704b of DBR for 67,475 euros, apartment 736b of DBR for 139,950 euros and apartment 738b of DBR for 139,950 euros. We understand that upon completion of the properties the borrowing facility that had been planned to be made available to investors did not materialise, so by way of consolidation* [Mr I] *released his ownership of apartment 738b and in return gained full ownership of apartment 704b and apartment 736b as well as receiving the return of the surplus funds."*

Mr I's L&C SIPP Valuation Report dated 3 May 2018 showed his asset position as follows:

- Cash (SIPP Current Account) – £36,462.39
- Property – Room at Dunas Beach Resort (100% share) – valued at £161,154.12
- Property – Apartment at Dunas Beach Resort (100% share) – valued at £73,862.71

L&C's due diligence

In its submissions to the Financial Ombudsman, L&C said it did carry out due diligence on the underlying investments which included it (L&C) commissioning a due diligence report carried out by legal advisers. And it says it also reviewed legal opinion commissioned by TRG, which the latter report confirmed the investment was not an Unregulated Collective

Investment Scheme. L&C said that the latter report also confirmed that TRG units were reputable and capable of being held in a SIPP.

The due diligence report L&C refers to commissioning is from January 2011 (in the application form it says January 2010 but the report I've seen is from 2011. However, this report refers to 'Salinas Sea Project' – see published decision DRN-3336371). L&C says it also reviewed a TRG commissioned due diligence report relating to the TRG investments. This has not been provided to the Financial Ombudsman on this case, but again I have seen a copy of a TRG Due Diligence report on other cases. However, again, this report did not refer to the Dunas Beach Resort.

In terms of the introducer RealSIPP, L&C said it carried out due diligence on both RealSIPP and its principal CIB. L&C said RealSIPP and CIB completed an Intermediary Application form and there was an Intermediary Agreement following this. Whilst these documents have not been provided to us on this particular case, I've seen copies of them on other cases.

I've also seen documents from L&C on other cases where it has provided print outs of the FSA Register relating to both RealSIPP's and CIB's FSA authorisation details. These documents showed that CIB was authorised by the FSA from 1 December 2001. And RealSIPP was an Appointed Representative of CIB from April 2010 to June 2015.

Mr I's complaint

Mr I made a claim via the Financial Services Compensation Scheme ('FSCS') against the principal of RealSIPP, CIB. This claim was accepted by the FSCS on 27 March 2017. Mr I was paid £50,000 by the FSCS which was in line with its compensation limits. His total loss was calculated by the FSCS to be £237,373.28. Mr I received a Reassignment of Rights ('RoR') from the FSCS which allowed him to raise his complaint against L&C.

Mr I complained to the Financial Ombudsman about L&C on 26 October 2017. In summary, Mr I's CMC said that:

- L&C didn't carry out sufficient due diligence on the investments that Mr I purchased and put into his SIPP.
- L&C didn't carry out the necessary due diligence to ensure that TRG's investments were appropriate at the outset.
- L&C also failed to carry out satisfactory due diligence checks on its introducers and therefore, its guilty of failing to verify the integrity of the firms it was accepting business from.
- L&C failed to meet its obligations in that Mr I was a *"retail client"* and should not have been allowed to transfer into an unsuitable pension plan (SIPP), which then facilitated the purchase of an unsuitable, high-risk, illiquid investment.
- L&C accepted a SIPP application/investment form from Mr I who was not classified as a sophisticated investor.
- L&C have failed to meet its regulatory obligations as set out in the FCA's (formerly the FSA's) Handbook, specifically the Conduct of Business: Sourcebook ('COBS').
- L&C accepted investments in a country with no trust law and therefore no means for legally holding assets on behalf of pensions in accordance with UK pension laws.
- L&C has failed to have adequate controls in place to monitor business being introduced to it. And as a result, it has failed to investigate obvious risks in the business that it was accepting. Had L&C had proper controls in place it would have recorded the following:

- High volumes of business being introduced from the same firm.
- An advisory firm recommending the same product and similar investments repeatedly.
- Clients were in a very different location to the adviser, so how were interviews carried out; how did RealSIPP obtain these clients; and who completed the paperwork for the client.
- Clear trends appeared which should've triggered further investigation by L&C before accepting any further business from RealSIPP.

L&C rejected Mr I's complaint. In summary, it said:

- L&C doesn't provide investment advice and has referred to COBS sections 2.4.4. (Reliance on other investment firms) and 11.2.19 (Following specific instructions from a client) to support its case.
- Advice was provided to Mr I separately from L&C by RealSIPP an AR of CIB, who in turn was a FCA regulated firm. Mr I was introduced to L&C as a retail client.
- L&C's role was to obtain title to the proposed assets and assess whether they could be held within a SIPP in line with HMRC's requirements, which in this case it did.
- Mr I made various declarations saying he understood that L&C wasn't authorised to give advice; he had reviewed the investor pack and related documents; and he had obtained whatever: *"information, reports, legal and other advice* [Mr I] *require[d] regarding the investment including the potential income and the associated costs and expenses which may fall to be paid".* And that Mr I had acknowledged the legal advice the Trustees (L&C) used: *"does not cover the investment merits, marketability or value of the property but only the risks of ownership".*

Following L&C's rejection of his complaint, Mr I referred his complaint to the Financial Ombudsman. Our investigator recommended upholding the complaint and provided reasons for doing so. L&C disagreed with the investigator's view and responded as follows:

- The SIPP and the investments were set-up/made on an execution-only basis; L&C accepts no responsibility for checking the quality of the investment business.
- The Court held in Adams (full court references below) that, while the COBS rules contain express provisions dealing with the need to advise clients on both the *"suitability"* (COBS 9) and *"appropriateness"* (COBS 10) of their investment, those rules did not apply to execution only SIPP providers.
- Similarly, neither do the obligations under COBS 14.2.3R and COBS 14.3 to provide clients with product information, nor the obligation under COBS 19.1.2R to provide clients with pension product information, apply to execution only SIPP providers. Despite this, the investigator finds that L&C was under an obligation to protect against 'consumer detriment', to ensure that Mr I understood the level of risk involved and to have outlined the risk associated with a DB pension transfer.
- The investigator says the introductions involved a significant risk of consumer detriment, and it is accepted that Mr I invested in high risk investments. But as an execution only SIPP provider, L&C cannot reject such business without completing a full suitability assessment, which it does not have regulatory permissions to do.
- In compliance with its obligations pursuant to COBS 11.2.19R, L&C acted on Mr I's written instructions in the setting up of the SIPP and the investments. To decline this business would have required an assessment of suitability by L&C.
- The investigator largely ignores the disclaimers contained in the SIPP and investment application signed by Mr I.
- The investigator says L&C should have recognised that the investments were high risk, but this fact does not make it unsuitable to hold in a SIPP.

- The investigator says the regulator's publications and reports/reviews providing guidance, gave examples of good practice. This starts from the assumption that the examples of good practice would have been known to the wider SIPP industry at the time of the transaction. Further, the guidance issued by the regulator in the 2009 Thematic Review Report, did not constitute ‘formal guidance’. In any event, if it did provide statutory guidance, it would not give rise to a claim for damages under FSMA (Financial Services Markets Act 2000) section 138D - only a breach of rules can give rise to such a right.
- The other publications referred to by the investigator aren’t relevant as they were all published after Mr I’s transactions.
- The regulatory publications can’t alter the meaning of, or the scope of the obligations imposed by, the Principles for Businesses (the ‘Principles’).
- Whilst L&C accepts that taking the Principles into account is justified, these are overarching and no substitute for the COBS Rules. It remains the case that the investigator makes no attempt to explain why the Principles have been relied on rather than the High Court decision in Adams, despite this decision forming a much more solid foundation for any consideration of a complaint against a SIPP provider.
- The Principles themselves, without consideration of the relevant COBS rules or established case law, cannot result in a breach of the regulations or give rise to any cause of action at law.
- The investigator goes on to conclude there was an obligation on L&C to carry out appropriate checks to ensure the quality of the business that was being introduced. However, the investigator makes no comment on the 'quality' of the investments, presumably because it is beyond doubt that the investments were exactly as advertised.
- It’s clear that Mr I obtained good title to his investments and the TRG investment has produced a return. Notably, from this investment, Mr I has received regular rental income ranging from £300 to £1,000 into his SIPP bank account since its inception. Returns only ceased with the onset of the pandemic.
- L&C did carry out due diligence on the Dunas Beach investment including commissioning a due diligence report and reviewing legal opinion commissioned by TRG.
- There was no involvement of an ‘unregulated introducer’ in the sale of Mr I’s investment. In any event, there was no restriction on business being accepted from an unregulated introducer. Beyond this, the introduction to L&C came from a regulated entity.
- The investigator justifies upholding the complaint despite accepting the culpability of both RealSIPP and TRG. In effect, L&C is left to 'carry the can' as it is the last entity standing. This is not fair or reasonable.
- The view seems to have ignored, or to have placed insufficient weight on, the fundamental fact of the parties’ contractual arrangements, and on the clear demarcation of roles and responsibilities thereunder. And consequently to have constructed due diligence obligations for L&C to which it was not in fact subject.
- It is accepted that L&C had an obligation to conduct due diligence on RealSIPP and it complied with this obligation. As noted by the investigator L&C checked the FSA register and it showed RealSIPP were an appointed representative of CIB, who in turn, were regulated.
- L&C had an agency agreement in place with RealSIPP and its policy at the time was to only accept business from authorised firms. The investigator agreed this was good practice. But then questioned the scope of L&C’s due diligence practices.
- L&C submits that there was no requirement at the relevant time to understand the IFA’s business model and/or ask for suitability reports and/or other documents relating to the advice Mr I was given.

- There is no evidence that RealSIPP's clients' were investing in high risk investments at the time the due diligence was carried out by L&C.
- Beyond the due diligence checks it carried out, L&C could not reject business from a firm without making a value judgment on its suitability for each individual client, something which fell outside of its expertise and well outside of the terms of the contract L&C had with Mr I.
- The view states that no other SIPP provider should have accepted this business but it was common practice for SIPP providers to be accepting these types of investments in 2011.
- The investigator 'cherry picks' from the relevant case law. For example, Adams made it clear that reports, guidance and correspondence issued after the events at issue, could not be applied to the respondent's conduct at that time. Also the Adams case considered the SIPP providers duties at length, but the investigator relies more on the Berkeley Burke judicial review outcome (full reference below), in reaching their conclusions.
- Regard should be had to the statutory objective previously set out in FSMA section 5(2)(d), now section 1C, namely: *"the general principle that consumers should take responsibility for their decisions".* The investigator concludes that, despite the execution only nature of the transaction, Mr I is not responsible for any of his decisions.
- If the outcome recommended by the investigator is permitted to stand, the wider consequences will also be very serious, both for consumers and for execution only SIPP providers.
- The complaints should be dismissed by the Financial Ombudsman on the basis that The Pensions Ombudsman ('TPO'), or the Court, are more appropriate forums for this complaint. TPO has previously found that the Trustee of a SIPP has no due diligence duties towards the client but the Financial Ombudsman differs from this view. There should be a clear reason given for this.
- Mr I's complaint is out of time under the six year and three year time limits that apply.

As noted above, I issued a provisional decision. I said I reached the same outcome as the investigator but for different reasons. I also dealt with the issue of the jurisdiction and dismissal points made by L&C. In summary, I said:

- I was satisfied that L&C's policy from the relevant date, as confirmed by its directors, was to only accept applications from a firm authorised by the FSA.
- Nonetheless, L&C should have been conducting appropriate due diligence checks on introducers and investments to make informed decisions about accepting business from the relevant firm. This obligation was a continuing one.
- The evidence provided of the due diligence undertaken by L&C into RealSIPP/CIB wasn't sufficient in the circumstances to have met L&C's obligations.
- L&C didn't take appropriate steps or draw reasonable conclusions from the information that was available to it before accepting Mr I's application.
- L&C had some reasons to be concerned about the type of business RealSIPP was introducing. The introductions had anomalous features including high risk business for unregulated overseas property developments.
- Further, even though L&C believed that RealSIPP had the necessary permissions to give full regulated advice on the business it was introducing, a large proportion of the introduced business was execution only.
- L&C knew all of this, or else ought to have known it from the information available, but it didn't make further appropriate checks of RealSIPP's business model.
- Had L&C made reasonable checks prior to receiving Mr I's application, it would have realised that some introductions from RealSIPP involved a significant risk of consumer detriment.

- L&C should have ceased to accept introductions from RealSIPP before it accepted Mr I's application.
- In the circumstances, it was fair and reasonable for L&C to compensate Mr I to the full extent of the financial losses he had suffered due to L&C's failings.

I also considered what L&C's said about the matter being best placed for the TPO to decide. And I provided explanations as to why I thought the Financial Ombudsman was the appropriate body to consider the complaint in this instance. Further, I provided findings on the time limits that applied and I found that the complaint was something the Financial Ombudsman could consider.

L&C didn't accept my provisional findings. L&C's representative provided a detailed response. I've set out below a summary of what I consider to be the main points made in the response. However, the list isn't exhaustive and before making this decision I've carefully considered the response in full:

- L&C disagreed that the matter was within our jurisdiction under the three-year time limit rule. It maintained its previous argument that Mr I knew the investments were illiquid from the outset, and therefore, he should have complained sooner.
- The Ombudsman failed to take account of the law. And specifically the Ombudsman's departure from legal precedent setting out the importance of the contract between the SIPP provider and the customer, and the scope of an execution only SIPP provider's due diligence obligations wasn't properly explained.
- The Ombudsman 'cherry picks' from case law. For example, the findings from the decision in Adams v Options SIPP UK LLP (formerly Carey Pensions UK LLP) [2020] EWHC 1229 (Ch) is largely ignored.
- The decision quotes at length from the Berkeley Burke case whilst giving only a passing reference to the Adams cases. The Berkeley Burke judgment was a judicial review whereas the Adams cases examined, at length, the responsibility of a SIPP provider offering an execution only service both under COBS and contract.
- The Ombudsman does not properly address using the Principles as the basis for finding against L&C in preference to the COBS rules or established case law (see e.g. Kerrigan v Elevate Credit International Ltd [2020] C.T.L.C 161 at [30]).
- A breach of the Principles cannot, by itself, give rise to any cause of action at law.
- L&C accepts it should take into account the Principles but the Ombudsman makes no attempt to apply the Principles in light of the COBS as interpreted by the Adams cases.
- The Ombudsman applies the Principles wholly in contrast to the terms of the contract between the parties.
- The Ombudsman distinguishes this case from the Adams v SIPP case relating to a breach under COBS 2.1.1R. The Ombudsman's rationale is the Court was considering the contractual relationship between the parties *after* the contract was entered into. And the Judge wasn't asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP. L&C considers the Ombudsman's finding on these points inconsistent with the law.
- The regulatory permissions that L&C held at the time meant that it could not give advice but there is no attempt by the Ombudsman to explain how L&C could effectively have completed 'adviser level' due diligence without breaching its permissions.
- The Court in Adams held that, while the COBS rules contain express provisions dealing with the need to advise clients on both the *"suitability"* (COBS 9) and *"appropriateness"* (COBS 10) of their investment, those rules did not apply to execution only SIPP providers.
- The assessment of suitability of any pension product, transfer of pension rights or investments was wholly the responsibility of Mr I and/or his financial adviser.
- In compliance with its obligations pursuant to COBS 11.2.19R, L&C acted on Mr I's

written instructions in the setting up of the SIPP and the transfer of monies to TRG via instructions received from RealSIPP.

- The Ombudsman seeks to impose on L&C a duty of due diligence that goes far beyond the scope of any duty envisaged by the parties involved. The Ombudsman seeks to override COBS careful allocation of duties between different types of firms conducting different types of business.
- The Ombudsman placed insufficient weight on the parties' contractual arrangements, and on the clear demarcation of roles and responsibilities. The relevant documents setting out the contractual relationship between the parties made it clear that L&C was acting on an execution only basis.
- The Ombudsman's reasoning runs wholly contrary to that in Adams v SIPP in which it was held that a SIPP provider's duties under the regulatory regime fall to be construed in light of its contractual arrangements. The Ombudsman seeks to circumvent the Adams decision by ignoring this fact.
- Despite FSMA section 5(2)(d), now section 1C, the Ombudsman does not hold Mr I responsible for any of his own decisions.
- The Ombudsman's reliance on various FCA publications is misplaced and if anything, supports L&C's position.
- The publication of any reports, guidance and correspondence issued by the regulator has no bearing on the construction of the Principles as their contents cannot found a claim for compensation of itself.
- Regulatory publications cannot alter the meaning of, or the scope of the obligations imposed by, the Principles.
- It is not fair or reasonable to determine the complaint with reference to the FCA publications referred to, and to do so would only exacerbate the problem referred to by Jay J in R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service [2017] EWHC 352 (Admin).
- The 2009 and 2012 Thematic Review Reports do not provide *"guidance"* in any meaningful sense and are not statutory guidance – they do little more than highlight some *"examples of measures"* that *"SIPP operators could consider, taken from examples of good practice that* [the FSA] *observed"*.
- The Thematic Reviews are not statutory guidance under FSMA section 139A, there having been no consultation process under FSMA ss.138(5) and 139I.
- Even if the 2009 and 2012 Thematic Review Reports had been statutory guidance, the breach of such statutory guidance would not give rise to a claim for damages under FSMA section 138D (only the breach of rules can give rise to such a right).
- Many of the matters which the Thematic Review Reports are plainly directed at firms providing advisory services, not execution only SIPP providers.
- The FCA's Enforcement Guide in essence says that: *"Guidance is not binding on those to whom the FCA's rules apply."* And such material is intended to be illustrative only (and not the only way) in which a person can comply with the relevant rules.
- In accordance with good industry practice at the time, L&C ensured that RealSIPP (and by extension, CIB) were listed on the FSA Register and duly authorised to provide financial advice, including investment advice and also entered into intermediary agreements with RealSIPP/CIB.
- The outcome of L&C's due diligence on RealSIPP (and CIB) did not raise any cause for concern.
- L&C considers it carried out the appropriate level of due diligence in this case but the Ombudsman finds that L&C was under further obligations to protect against 'consumer detriment'. L&C didn't have the permissions to assess suitability. This was the reason that L&C entered into intermediary agreements with RealSIPP/CIB, so that financial advice could be provided to prospective clients.
- RealSIPP/CIB was required to operate under a set of regulatory obligations at all material times to ensure they have their client's best interests in mind when providing

their professional services. And under COBS 2.4.8 it is generally considered reasonable (in accordance with COBS 2.4.6R (2)) for a firm to rely on information from an authorised person/professional firm, unless that firm (L&C) was aware, or ought reasonably to be aware, of any fact that would've given it reasonable grounds to question the accuracy of that information.

- The Ombudsman does not provide a view on the appropriateness of the investment. L&C can only assume this is because it is accepted that the investment was exactly what it was advertised to be.
- Mr I received a total of £40,772.17 in rental income from the investment between 2011 and 2019. The rental income only ceased to be paid when the Global Pandemic effectively halted international travel, something that was clearly not foreseeable at the time the investment was made.
- The Ombudsman can find no fault with the investments and instead concludes that there was a responsibility on a SIPP provider to police the provision of pension transfer advice.
- The advice Mr I received from Mr F was outside the control of L&C.
- With regards to the DB transfer, the point of no return is when the complainant accepts the Cash Equivalent Transfer Value ('CETV') quote from the Trustees of the scheme – this took place before L&C had any basis to refuse any business.
- The complainant already received £50,000 from the FSCS in compensation. The Financial Ombudsman should reduce any losses from the date of receipt of the funds from FSCS on the basis that the complainant has had the benefit of those funds and so to ignore them gives the complainant a windfall.
- The complainant should be put to proof of the assumption that he will be a basic rate taxpayer at retirement.
- L&C disagrees with the £500 awarded for the distress and inconvenience caused to Mr I as it accepts no responsibility for the losses he's suffered.

Mr I accepted my provisional decision and had nothing further to add.

As no agreement could be reached, the matter has been passed back to me for a final decision.

What I've decided – and why

The TPO request

In response to my provisional decision, L&C didn't repeat its request for the matter to be considered by the TPO rather than the Financial Ombudsman. For completeness, I will reiterate what I said in my provisional decision which, in summary, was that I am of the view that this is a decision best suited for the Financial Ombudsman to consider in this particular case. And I remain of that view. I'll explain why.

We've a statutory duty to resolve complaints referred to us which are within our jurisdiction, subject to certain discretions, which are set out in our rules. Regarding L&C's submissions about TPO, the rules set out in DISP 3.4.1R state that: *"The Ombudsman may refer a complaint to another complaints scheme where: (1) he considers that it would be more suitable for the matter to be determined by that scheme; and (2) the complainant consents to the referral."* L&C says Mr I's complaint should be referred to TPO. And I could now refer the complaint to TPO on the basis of DISP 3.4.1R, if I take the view it's more suitable for TPO and if, in the light of that view, Mr I consents to a referral to TPO. But I don't consider this is a complaint that would be more suitable for determination by TPO. This complaint requires consideration to be given to the rules and principles set down by the regulator.

In my view, these are matters that the Financial Ombudsman is particularly well placed to deal with. I'm also remain satisfied we possess the necessary knowledge and expertise to fairly determine the complaint. Further, our investigation is also well advanced. So, I don't think it would be more suitable for the subject matter of this complaint to be considered by TPO.

I've also considered the Memorandum of Understanding ('MoU') between the Financial Ombudsman and TPO in reaching my conclusion. The MoU is a document about practical cooperation where there's remit overlap between the two organisations. However, the MoU doesn't determine the jurisdiction of either organisation. Ultimately, DISP 3.4.1R says that I may refer the complaint to another complaints scheme, not that I must. So, in other words, I've discretion to decide what I'll do in the circumstances. And, for the reasons I've given above, I've decided to exercise my discretion not to refer Mr I's complaint to TPO.

For similar reasons, I'm satisfied that I don't need to exercise my discretion to dismiss the complaint under DISP 3.3.4AR on the basis it would significantly impair our effective operation, as it is more suitable to be dealt with by a Court or a comparable ADR (alternative dispute resolution) entity. As I explained in my provisional decision, I'm satisfied this complaint is well suited to the work of the Financial Ombudsman. And I remain of that view. We have significant experience of dealing with complaints of this type and are well-placed to consider them. And I do not consider reviewing Mr I's complaint would seriously impair our effective operation.

My findings on jurisdiction – time limits

Whilst I've taken into account, L&C's further submissions about the time limits that apply, I remain of the view, for the same reasons set out in my provisional decision, that this complaint was referred to L&C within the relevant time limits.

The time limits to bring a complaint to the Financial Ombudsman or the respondent business, are set out in the DISP section of the FCA Handbook. At the time Mr I referred his complaint to us, DISP 2.8.2R said:

> The *Ombudsman* cannot consider a *complaint* if the complainant refers it to the *Financial Ombudsman Service*:
>
> (1) more than six *months* after the date on which the *respondent* sent the complainant its *final response*, … or
> (2) more than:
> (a) six years after the event complained of; or (if later)
> (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;
>
> unless the complainant referred the *complaint* to the *respondent* or to the *Ombudsman* within that period and has a written acknowledgement or some other record of the *complaint* having been received;

DISP also allows the Financial Ombudsman to look at a complaint where the respondent (L&C) consents to us doing so. L&C has not consented to the Financial Ombudsman looking at the complaint. DISP also allows the Financial Ombudsman to consider the complaint where exceptional circumstances explain the reasons for the delay. But I can't see that this applies in this case.

Before setting out my reasons why I think Mr I's complaint has been brought within the applicable time limits, by way of background, I consider it would be helpful to set out some caselaw and excerpts from the FCA Handbook which are relevant to this decision.

In *The Official Receiver v Shop Direct Finance Company Limited* [EWCA] Civ 367 Singh LJ said:

> *"44. The FCA Handbook is similar in its drafting style to the Financial Services Authority's Client Assets Sourcebook (CASS), which was considered by this Court in Re Lehman Brothers International (Europe) (No 2) [2010] EWCA Civ 917; [2011] 2 BCLC 184"*
>
> *"46. For present purposes I derive the following propositions from the judgments in Re Lehman Brothers:*
>
> *(1) Ultimately it is the actual wording of a provision that must govern any decision as to its effect.*
> *(2) The Handbook should be read as a whole, taking a holistic and iterative approach, so that a preliminary view on one provision can be tested by reference to the rest of the relevant provisions.*
> *(3) The provision should be construed in the light of its overall purpose.*
> *(4) It should be construed on the basis that it is intended to produce a practical and commercially sensible result. The rules should be taken to be grounded in reality. The court should keep in proportion any drafting infelicities."*

And Nugee LJ said the following in relation to DISP 2.8.2R

> *"155. The resemblance to the ordinary limitation periods for claims in negligence where there is also a primary period of 6 years (under s. 2 of the Limitation Act 1980 ("LA 1980")) and a secondary period of 3 years from the date of the claimant's actual or constructive knowledge (under s. 14A LA 1980) is striking. We have in fact been shown evidence that this is not a coincidence, but even without this material (which is of doubtful admissibility) it would have been a reasonable assumption that the general structure was modelled on the LA 1980 provisions and was designed to do the same thing in general terms.*
>
> *156. What then is the purpose of having these two time-limits? The purpose of an ordinary limitation period is to prevent stale claims from being litigated, the period of 6 years being fixed as a generally reasonable period to bring a claim. This explains the primary period. But as is well-known that could and did lead to some claimants who had suffered latent injury or damage finding that they had lost their rights to sue before they even knew, or could reasonably be expected to know, that they had been injured or suffered loss. Provision was therefore made, first in s. 11 and 14 LA 1980 (applicable to claims for personal injury) and subsequently in s. 14A LA 1980 (applicable to other claims in negligence), for the claimant to have 3 years from his date of knowledge to bring a claim. The purpose of this is obvious. It was to remedy the injustice of a claimant's claim being time-barred before they knew, or could reasonably be expected to know, that they had a claim. On the other hand the selection of a (relatively short) 3 year time period shows that another purpose was to provide that once they did, or should, have that knowledge they should get on with the claim and bring proceedings reasonably promptly. Precisely the same in my view applies to the secondary time-limit in DISP 2.8.2R(2)(b). The purpose of the rule is to prevent a complainant from losing the right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware."*

The FCA Handbook includes the following rule (GEN 2.2.1R): *"Every provision in the Handbook must be interpreted in the light of its purpose."* And there is guidance in the same

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

There is also a rule that says (GEN 2.2.7(R)):

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

The term 'cause for complaint' is not defined. However, the term is used in the context of a rule that begins: "The *Ombudsman* cannot consider a *complaint* [in italics so a defined term] if...". And that rule is in chapter 2 of a section of the Handbook that begins:

> *"This part of the FCA Handbook sets out how complaints* [in italics so a defined term] *are to be dealt with by respondents … and the Financial Ombudsman Service.*
> *…*
> *Chapters 2, 3 and 4 set out how the Financial Ombudsman Service … considers unresolved complaints* [in italics so a defined term]."

So, the term *'cause for complaint'*, though not in italics, appears in a rule that sets out what *complaints* (in italics) the '*Ombudsman'* cannot consider and it is reasonable to infer in light of all the above rules and guidance on interpreting the Handbook that the definition of the word *complaint,* (in italics) was intended to apply to that phrase.

The term '*complaint* 'is defined for the purposes of DISP in the FCA handbook as:

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

And *respondent* means a regulated firm covered by the jurisdiction of the Financial Ombudsman. So the Glossary definition of complaint requires that the act or omission complained of must relate to an activity of *"<u>that</u> respondent*" or firm (my emphasis).

Accordingly the material points required for Mr I to have awareness of a cause for complaint include:

- awareness of a problem
- awareness that the problem had or may have caused him material loss, and
- awareness that the problem was or may have been caused by an act or omission of L&C (the respondent in this complaint).

It is therefore my view that it is necessary for Mr I to have an awareness (within the meaning of the rule) that related to L&C not just awareness of a problem that had caused a loss. Knowledge of a loss alone is not enough. It cannot be assumed that upon obtaining knowledge of a loss and/or a problem that a consumer had knowledge of its cause. And I do

not accept the three year time limit necessarily means that knowledge of a loss/problem means the consumer has three years to make enquiries to discover all parties who might be responsible, failing which they run out of time to make a complaint. As Nugee LJ said in The Official Receiver case:

> "…*the purpose of the rule is to prevent a complainant from losing the right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware."*

That said, I don't think Mr I 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 I would've needed to have actual or constructive awareness that an act or omission of L&C had a causative role in the loss.

In this case, Mr I had investments in Dunas Beach investments which he purchased in September 2011. The SIPP had been established on 25 July 2011. Because Mr I is complaining that L&C didn't carry out sufficient due diligence on RealSIPP/CIB before accepting its business, I think the establishment of the SIPP is when the six-year time limit began. So, given Mr I did not bring his complaint to the Financial Ombudsman until 26 October 2017, I think the matter is out of time under the six-year time limit rule. I will now consider the three-year time limit rule.

Whilst CIB had gone into voluntary liquidation (the CMC referred to it as 'administration') in 2015, as far as Mr I could see from his statements, the assets hadn't lost any value. The valuation statements up until 2018 was showing the Dunas Beach investments as having a total value of £235,016.43. He purchased the Dunas Beach investments in 2011 for less than £200,000. Further, rental income was still being paid up until 7 March 2018.

So, even after CIB went into voluntary liquidation in May 2015, I don't think there was anything that would have given Mr I cause for concern or to make him think he had suffered any loss. It was only the intervention of the unregulated introducer, Mr F, that made Mr I aware that he may have a problem with his investments and that this may have caused him material loss. It's my understanding that Mr F told Mr I there may have been a problem with the advice he received from CIB. And that he (Mr I) should seek some advice from a CMC.

Mr I approached a CMC that had been recommended by Mr F for advice in January 2016. I think it was around this point that Mr I first knew or ought to have known there was a problem with the Dunas Beach investments. However, the CMC advised Mr I to seek further information before proceeding with any action as Mr I had no or very little paperwork relating to the investments. So, the CMC made a SAR on his behalf in 2016 to CIB and L&C. A claim was made to the FSCS after the information was received and this claim was accepted by the FSCS in March 2017. The FSCS calculated Mr I's total loss to be £237,737.28 and he was awarded £50,000 which was the FSCS' compensation limits at that time.

So, taking all these facts into account, I consider Mr I knew or ought to have known there was a problem with the Dunas Beach investments in or around 2016 when he sought advice from a CMC. Or even in 2015 when he spoke to Mr F which was sometime after the voluntary liquidation of CIB on 27 May 2015. Mr I was clearly given some awareness of a problem with CIB's advice because after his conversation with Mr F, he took steps to get advice from a CMC in or around January 2016.

It's unclear what he was told by the CMC at the initial meeting but clearly it had told him to obtain further information before making his claim. And that claim was initially made against CIB via the FSCS. So, I think it's more likely than not that Mr I was told that he had cause to

complain against CIB and that it was only after the FSCS claim was accepted that he was told by the CMC to pursue a complaint against L&C. Mr I's claim against CIB to the FSCS was accepted in March 2017, following which he received a RoR in July 2017. And then his CMC on his behalf made Mr I's complaint to L&C on 26 October 2017.

Given all of this, whilst Mr I may have had some awareness of a problem after speaking with Mr F in 2015, I don't think that he knew or ought reasonably to have known that he had cause to complain against L&C at the same time. Or that the cause for complaint was the result of L&C rather than the adviser (CIB) who had given him the advice about the investments. In my view, it would have been necessary for Mr I to have an awareness (within the meaning of the rules set out above) that showed he was aware of a problem which may have caused him material loss and this loss related to the actions/omissions of L&C.

That said, whilst Mr I brought his claim to the FSCS in late 2016/early 2017 about CIB, I don't think he would need to have understood at that point, all of the details of L&C's obligations to have been aware (or in a position whereby he ought reasonably to have been aware) of his cause for complaint about L&C. But I think Mr I would've needed to have actual or constructive awareness that an act or omission of L&C had a causative role in the loss. I can't see this formed the basis of his conversations with Mr F in 2015. And the main issue he brought to the CMC in 2016 was about CIB's advice. So, I don't think he knew or ought reasonably to have known at that time he had, or may have had, suffered a material loss and this loss could have been a result of the acts or omissions by L&C.

Mr I's CMC has confirmed that following his FSCS claim it advised Mr I that he should apply for a RoR and make a claim against L&C. The FSCS claim was accepted in March 2017 and the RoR was provided to him by FSCS in July of that year. Mr I complained to L&C in October 2017. So, I think it's more likely than not that he was told he could make a complaint against L&C by his CMC no later than March 2017. This is when he asked the FSCS for a RoR and I consider It's more likely than not the RoR was requested as a result of the CMC saying or indicating that he could have a complaint against L&C.

I note L&C's argument that Mr I knew his investments were illiquid from the outset. But if he had known or ought reasonably to have known that this may have been a problem and that this would have caused him material loss, I think it's unlikely he would have invested in the first place.

All in all, I don't think there was any information available to Mr I before 26 October 2014 (i.e. three years before he complained to L&C) that ought reasonably to have made him aware either that there was a problem or that this problem had, or may have, caused him material loss. I also don't think there was any information available to Mr I before 26 October 2014, that ought reasonably to have made him aware that he could attribute his problem to acts or omissions by L&C. Even if I were to accept that the CMC did say something to Mr I at his first meeting with it in January 2016 about L&C in that he could make a complaint about it (L&C) as well as CIB, this was still within the three year time limit.

For all these reasons, I remain of the view that Mr I's complaint was made within the relevant time limits that apply. And the Financial Ombudsman can consider the merits of Mr I's complaint as a result.

My findings - merits

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

Having carefully reconsidered all of the evidence and taking into account the further submissions by L&C in response to my provisional decision, I still consider this complaint should be upheld for largely the same reasons set out in my provisional decision. As such, I've largely repeated what I said in my provisional decision as to the reasons I am upholding this complaint.

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 so, I'm required to take into account relevant considerations which include the 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.

I should also say at this point that 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, whilst I've taken into account all the submissions made by both parties, I've focussed here on the points I consider to be key to my decision on what's fair and reasonable in all the circumstances.

Relevant considerations

I've carefully taken account of the relevant considerations to decide what's fair and reasonable in the circumstances of this complaint. In my view, the regulator's Principles (the Principles for Businesses) are of particular relevance to my decision.

The Principles, 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 regulator's 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 (Berkeley Burke) 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.

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 and the judgment in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 1188 when making this decision on Mr I's case.

I've considered whether Adams means the Principles should not be taken into account in deciding this case and I'm of the view that it doesn't. I note that the Principles didn't form part of Mr Adams' pleadings in his initial case against Options SIPP. And HHJ Dight didn't consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of the judgments say anything about how the Principles apply to an Ombudsman's consideration of a complaint. But to be clear, I don't say this means Adams isn't a relevant consideration at all. As noted above, I've taken account of the Adams judgments when making this decision on Mr I'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 further note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr I'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.

In Mr I's complaint, amongst other things, I'm considering whether L&C ought to have identified that the introductions from RealSIPP involved a significant risk of consumer detriment. And, if so, whether it ought to have ceased accepting introductions from RealSIPP before it received Mr I's application.

The facts of Mr Adams' and Mr I's cases are also different. I make that point to highlight there are factual differences between Adams v Options SIPP and Mr I's case. And I need to construe the duties L&C owed to Mr I under COBS 2.1.1R in light of the specific facts of his (Mr I's) case. So, I've considered COBS 2.1.1R, alongside the remainder of the relevant considerations, and within the factual context of Mr I's case, including L&C's role in the transaction.

However, as I've indicated above, I also 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 so, I'm required to take into account relevant considerations which include the 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.

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

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

The regulatory publications

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

- The 2009 and 2012 Thematic Review Reports (the 'review' or 'reviews')
- The October 2013 finalised SIPP operator guidance
- The July 2014 'Dear CEO' letter

I've considered the relevance of these publications. And I've set out material parts of the publications here, although I've considered them in their entirety.

<u>The 2009 review</u>

The 2009 review 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* [treating customers fairly] *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."*

<u>The later publications</u>

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

> *"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*
>
> *All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat 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 regulator's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles. And it 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've considered them in their entirety.

In its response to the provisional decision, L&C said the 2009 review isn't formal guidance. I acknowledge the 2009 and 2012 reviews and the 'Dear CEO' letter, aren't formal guidance (whereas the 2013 finalised guidance is). However, I'm of the view that the fact the reviews and the 'Dear CEO' letter didn't constitute formal guidance doesn't mean their importance should be underestimated. They provide a reminder that the Principles apply. And are an indication of the kinds of things a SIPP operator might do to

ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulator's expectations of what SIPP operators should be doing, also go some way to indicate what I consider amounts to good industry practice. I'm therefore satisfied it's appropriate to take them into account.

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

L&C has also indicated that the 2009 review didn't provide guidance in any meaningful sense. But as the review's introduction says: *"In this report, we describe the findings of this thematic review, and make clear what we expect of SIPP operator firms in the areas we reviewed. It also provides examples of good practices we found."* And as referenced above, the 2009 review goes on to provide: *"…examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms."*

So, I'm satisfied the 2009 review is a reminder that the Principles apply. And it gives an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. The 2009 review sets out the regulator's expectations of what SIPP operators should be doing and, therefore, indicates what I consider amounts to good industry practice at the relevant time. Given this, I'm satisfied it's relevant and appropriate to take it into account.

In its submissions, including when making its points about the regulatory publications, L&C has referenced the R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service [2017] EWHC 352 (Admin) case. While the judge in that case made some observations about the application of our statutory remit, that remit remains unchanged. And, as noted above, in considering what's fair and reasonable in all the circumstances of a case, I'm required to take into account (where appropriate) what I consider to have been good industry practice at the relevant time.

L&C has also said that many of the matters which the 2009 review invites firms to consider are directed at firms providing advisory services. It's not specified which parts of the review it thinks are directed at such firms but, to be clear, I consider the 2009 review was also directed at firms like L&C acting purely as SIPP operators. The review says: *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses…"* And it's noted prior to the good practice examples quoted above that:

> *"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."*

I'm also satisfied that L&C, at the time of the events under consideration here, thought the 2009 review was relevant. L&C acknowledged in its submissions that the review is relevant to how it conducts its business and highlights some areas of good practice. And L&C says it did carry out some due diligence checks on RealSIPP and the investments which it highlights as evidence of it carrying out sufficient due diligence.

L&C says that it took into account the due diligence reports on the investments. L&C has also said that it carried out due diligence on both RealSIPP and CIB. It says that in this respect, it had Intermediary (agency) Agreements with both RealSIPP and CIB. Both these businesses completed an Intermediary Application form. I've seen these documents as well as the application forms on other cases. L&C said it also checked RealSIPP's and CIB's authorisation details on the FSA register. I've seen copies of the print outs from the register that L&C has provided from the time of the search. So, clearly L&C thought it was good practice to carry out some checks before accepting business from RealSIPP/CIB.

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

I've carefully considered what L&C has said about the publications issued after Mr I's SIPP was set up. Like the Ombudsman in the BBSAL case, I don't think the fact the publications, (other than the 2009 review), post-date the events that took place in relation to Mr I's complaint, mean the examples of the good practice they provide weren't good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with them.

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

I note L&C's point that the judge in the Adams case didn't consider the 2012 review, 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 time of Mr I's complaint. 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 reviews, the '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.

The then regulator (FSA) also issued an 'alert' in 2013 about advisers giving advice to consumers on SIPPs without consideration of 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. Amongst other things, the alert stated:

> *"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 of 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 and/or the publications obliged L&C to ensure the transactions were suitable for Mr I. It's accepted L&C wasn't required to give advice to him and couldn't give advice under its permissions held at the time. 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, as I've said, would bring about the outcomes envisaged by the Principles.

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

It's important to keep in mind the judge in Adams v Options cases 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 I's SIPP application from RealSIPP, L&C complied with its regulatory obligations which were 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.

Submissions have been made by L&C about breaches of the Principles not giving rise to any cause of action at law, and breaches of guidance not giving rise to a claim for damages under FSMA. I've carefully considered these submissions but, to be clear, it's not my role to determine whether something that's taken place gives rise to a right to take legal action. 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/CIB and the business it (RealSIPP) was introducing, both initially and on an ongoing basis.

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

As noted above, L&C says it did carry out due diligence on RealSIPP before accepting business from it. And from what I've seen I accept that it undertook some checks. However, 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 were being put at significant risk of detriment. And, if so, whether L&C should therefore not have accepted Mr I's application from RealSIPP in the first place.

The contract between L&C and Mr I

In its response to my provisional decision, L&C's made a number of references to its contract with Mr M. I've carefully considered what L&C's said about this. This decision is made on the understanding that L&C acted purely as a SIPP operator. I don't say L&C should (or could) have given advice to Mr I or otherwise have ensured the suitability of the SIPP or TRG investments for him. I accept that L&C made it clear to Mr I in various documents, that it wasn't giving, nor was it able to, give advice. And that it played an execution only role in his SIPP investments.

The forms Mr I 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 I'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 I on the suitability of the SIPP or the TRG investments. But I'm 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 from a firm with the Principles in mind. And I don't agree it couldn't have rejected introductions and/or applications without contravening its regulatory permissions by giving investment advice.

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

In this case, the business L&C was conducting was its operation of SIPPs. And I'm satisfied that to meet its regulatory obligations when conducting its operation of SIPPs business, L&C had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind. The regulators' reviews and guidance provided some examples of good practice observed by the FSA and FCA during their work with SIPP operators. This included being satisfied that a particular introducer/investment is appropriate to deal with and/or accept. That involves conducting checks – due diligence – on introducers and

investments to make informed decisions about accepting business. This obligation was a continuing one.

As set out above, to comply with the Principles, L&C needed to conduct its business with due skill, care, and diligence; organise and control its affairs responsibly and effectively; and pay due regard to the interests of its clients (including Mr I) 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, as I've said, I think that L&C understood this at the time too, as 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, which I've seen in other cases.

It's also apparent that L&C had access to some information about the type and volume of introductions it was receiving from RealSIPP, as it's been able to provide us with information about this when requested on other cases. So, and well before the time of Mr I'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.

I consider L&C's submissions on the due diligence it undertook prior to allowing Dunas Beach holdings (the TRG investments) within its SIPPs reflect this. 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, with the Principles in mind.

L&C's due diligence on RealSIPP

L&C says it accepts that it had an obligation to conduct due diligence on RealSIPP and CIB and it says it complied with this obligation. As noted above, L&C said that:

- It checked the FSA register to ensure that RealSIPP was an Appointed Representative of CIB. And L&C checked the FSA register to ensure CIB were regulated and authorised to give financial advice.
- It entered into Intermediary Agreements with RealSIPP and its principal CIB.

L&C told us in its submissions that its policy at the time of Mr I's SIPP application was that it wouldn't have accepted applications from a firm that was not authorised by the FSA. These steps go some way towards meeting L&C's regulatory obligations and good industry practice. But I'm of the view L&C failed to conduct *sufficient* due diligence on RealSIPP before accepting business from it. Or to draw fair and reasonable conclusions from what it did know about RealSIPP.

I remain of the view that L&C ought reasonably to have concluded it should not have accepted business from RealSIPP and it should've ended its relationship with it before Mr I's application was made for the following key reasons:

- L&C was aware of, or should have, identified potential risks of consumer detriment associated with the business introduced by RealSIPP at the outset of its relationship with this business, and certainly by the time of Mr I's application.
- There was insufficient evidence to show RealSIPP (or any other regulated party including CIB) was offering or giving *full* regulated advice – that is

advice on the establishment of the SIPP, the transfer or switch to the SIPP and the intended investment(s).

- 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 and/or CIB had the necessary permissions to give full advice on the business RealSIPP was introducing, neither it nor CIB was giving advice on a large proportion of that business.

L&C should have 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. I consider such understanding would have 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 have concluded it shouldn't accept introductions from RealSIPP.

I've set out below, as I did in my provisional decision, some more detail on the potential risks of consumer detriment L&C either knew about or ought to have known about at the time of Mr I's application. These points overlap, to a degree, and should have been considered by L&C cumulatively.

Anomalous features

Volume of business

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. An example of good practice identified in the FSA's 2009 review 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."*

Given all that I've said above, I don't think simply keeping records without scrutinising the information would be consistent with good industry practice and L&C's regulatory obligations. As highlighted in the 2009 review, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

L&C said during the complaint that was the subject of a published decision DRN-3587366 that 153 of its members were introduced by RealSIPP, 44 of whom were introduced *before* the consumer in the published decision established their L&C SIPP in November 2011. In that case a total of 44 introductions involved members with an Occupational Pension Scheme.

On another case from January 2018, L&C said that RealSIPP's introductions were made between February 2011 and May 2013. Further, that RealSIPP was involved with a number of investments across members' SIPPs and that: *"all of these investments would be considered Non-standard by FCA definition."* L&C provided a list of the investments concerned and confirmed that in 77 cases RealSIPP received fees but indicated it didn't advise on the SIPP.

On more recent cases that I've seen, L&C has confirmed that the total of 160 clients were introduced by RealSIPP. And that following a sample of 20% of the total number of clients introduced by this introducer, 99.94% were from Occupational Pensions Schemes. L&C also said all investors invested in overseas commercial properties. And

during the course of the agreement with RealSIPP, 23% of L&C's total new business came from its (RealSIPP's) introductions.

L&C has not provided information about the number of cases that were introduced to it by RealSIPP by the time of Mr I's application (July 2011). But given the timing of his application compared to when it started accepting introductions (February 2011), I think it's more likely than not that by the time it received Mr I's application L&C would already have received a number of introductions from RealSIPP.

I think that L&C should have been concerned about the volume of introductions, relating exclusively to consumers investing in high risk esoteric investments was unusual – particularly from a small IFA business. And it should have considered how a small IFA business was able to introduce this volume of high risk business and still be able to meet its regulatory standards. And I think this concern ought to have been even greater in a case like Mr I's where a DB transfer 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 the COBS – even if it didn't apply directly to it. This was a further clear and obvious potential risk of consumer detriment.

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

The introductions L&C received from RealSIPP were for applicants looking to invest in high-risk non-standard esoteric holdings, such as the unregulated overseas property development at the Dunas Beach Resort Mr I was investing in. 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. The risks are multiplied where the property is *"off plan"* and further funding is necessary from investors to complete the purchases, as was the case with many of the deposit based TRG (Dunas Beach) investments, including those Mr I made.

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.

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

The application form L&C received from RealSIPP (which included the details of CIB as well) for Mr I made no record of whether he (Mr I) had received advice at the point of sale or not. But the available evidence shows that prior to receiving Mr I's SIPP application L&C was, or should have been, aware that not offering or giving advice was something RealSIPP was doing routinely.

As noted above, 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. And an example of good practice identified in the FSA's 2009 review 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 review, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

From the figures L&C's previously provided to us, 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 I'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 the business being introduced, wasn't a firm that was doing things in a conventional way. And I consider L&C ought to have recognised that there was a risk that RealSIPP might be choosing to introduce some consumers not only without them being given full regulated advice but also without having been offered full regulated advice.

I think these facts 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 or switches to invest in high risk esoteric investments, such as unregulated overseas property developments. 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 consider 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.

The availability of advice

L&C entered into Intermediary Agreements with RealSIPP and its principal, CIB. As part of this process, it was open to L&C to enquire whether full regulated advice would be made available to applicants introduced to L&C by RealSIPP/CIB. No correspondence I've seen between L&C and RealSIPP/CIB mentioned this.

Having carefully reconsidered all of the available evidence, I think it's more likely than not that RealSIPP/CIB introduced clients, like Mr I, investing in Dunas Beach (or some other TRG investments) weren't ever offered full regulated advice on the unregulated TRG investment that their pension monies were being transferred to. As its client agreement makes clear, CIB wasn't offering clients like Mr I the option of *full* regulated advice on the package it was offering.

And, based on the available evidence and what I think L&C should have known about RealSIPP/CIB, and the business being introduced by it, *before* it received Mr I's application, I don't think there would have been sufficient basis for L&C to reasonably assume at the point it received and reviewed Mr I's SIPP application (which referenced his intention to invest into the Dunas Beach investment) that *full* regulated advice had been given to RealSIPP/CIB introduced clients (like Mr I), or had been made available and declined.

The possibility full regulated advice hadn't been given, or made available, was a clear and obvious potential risk of consumer detriment here.

The involvement of an unregulated business

I remain of the view, that I think it's more likely than not from the available evidence that an unregulated party was involved with the promotion of the TRG investment to some consumers introduced to L&C (including Mr I). Mr I has been able to provide us with a copy of the TRG Reservation Form which was signed on 16 September 2010 – this was a year before the TRG Dunas Beach investments were made through Mr I's SIPP. He obtained this as part of his SAR from CIB.

Mr I said in his submissions that there were two unregulated introducers he dealt with in person. He said these two individuals gave him advice about the Dunas Beach investments and completed forms for him and gave him documents to review which he was able to read but not take away with him. Mr I has been able to recall the names of both of these parties. I have checked the names of these individuals against the regulator's register but I couldn't find that either of them had worked for RealSIPP or CIB.

I think it's unlikely that consumers like Mr I, were making the decision to establish a L&C SIPP, transfer their existing pension monies into a L&C SIPP and invest in a TRG investment of their own volition. And I consider L&C ought to have been alive to the risk that TRG and/or other unregulated introducers working with it, or for it, were involved in promoting the TRG investments such as Dunas Beach investment to be held in Mr I's SIPP.

The TRG Reservation Form dated in September 2010 noted that the Dunas Beach investment was to be paid for through a SIPP. And the L&C SIPP application signed by Mr I in July 2011 replicated the information that was set out in the Reservation Form in terms of the investments to be made. So, I think the establishment of a SIPP and the purposes for it, had already been discussed long before RealSIPP/CIB became involved in Mr I's case.

Although the promotion of the Dunas Beach investment might not have been a regulated activity, this was nonetheless another clear and obvious potential risk of consumer detriment – particularly where pension investors were being targeted. L&C should have been alive to the risks associated with an unregulated firm promoting an investment for SIPPs which was unlikely to be suitable for the vast majority of retail clients, particularly so where, on the face of it, full regulated advice wasn't being received by consumers such as Mr I.

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 should not continue accepting introductions from RealSIPP/CIB. 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.

<u>Requesting information directly from RealSIPP</u>

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 I's application. And mindful of the type of introductions it was receiving from RealSIPP from 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 FSA 2009 review explained 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, this then could have been 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 operator 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."*

I think that L&C, before accepting further applications from RealSIPP, should have checked with it (RealSIPP) about things like: 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 advice; what its arrangements with any unregulated businesses 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 remain of the view, that I think it's more likely than not that if L&C had asked RealSIPP for this *type of* information it (RealSIPP) would've provided a full response to the information sought. And that, amongst other things, L&C would have then been provided with copies of documents such as Client Agreements which was referred to in the Pensions Report prepared by CIB for Mr I. I consider this was a fair and reasonable step to take in all the circumstances to meet its regulatory obligations and good industry practice.

<u>Making independent checks</u>

I think, in light of what I've said above, it would also have been fair and reasonable for L&C, to 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 I. For example, it could have asked for copies of correspondence in which applicants were being offered advice.

The 2009 review 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 review 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 have been fair and reasonable for L&C to speak to some applicants, like Mr I, directly and to ask whether they'd been offered full regulated advice on their transactions and seek copies of the suitability reports. L&C say it couldn't comment on advice without potentially being in breach of its permissions. Again, I confirm I accept L&C

couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps included addressing a potential risk of consumer detriment by speaking to applicants and/or seeking copies of some suitability reports. This could have provided L&C with further insight into RealSIPP's business model and practices. These were fair and reasonable steps to take in reaction to the clear and obvious risks of consumer detriment I've mentioned.

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

As I said in my provisional decision, if L&C had undertaken these steps I think it ought to have identified, amongst others, the following risks before it received Mr I's application:

- Consumers were being introduced to L&C without having been given full regulated advice.
- Some consumers might have been 'sold' on the idea of transferring pension monies so as to invest in TRG investments before the involvement of any regulated parties.
- The other anomalous features I've mentioned did carry a significant risk of consumer detriment.

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

Had L&C carried out the due diligence I've mentioned above, I remain of the view that it should have identified that consumers introduced by RealSIPP hadn't received full regulated advice from RealSIPP and/or CIB on their transactions. So, I think it would have been fair and reasonable for L&C to speak to some applicants, like Mr I, directly and to ask whether they'd been offered and/or received full regulated advice on their transactions and seek copies of the suitability reports.

Had L&C carried out the due diligence I've mentioned above, I think it should have identified that consumers introduced by RealSIPP hadn't received full regulated advice from RealSIPP on their transactions. As was explained in the published decision DRN-3587366 there appear to have been *some* instances where RealSIPP wasn't offering consumers *any* regulated advice on the proposed transactions.

RealSIPP *did* refer some consumers to CIB for advice. But in those instances I'm aware of where CIB did give *some* advice, it restricted its advice to the transfer of existing pension scheme(s) to the SIPP, and without the specific TRG investment that transfers were being effected to make being named or discussed. As CIB explained in its Client Agreement that I've seen on another case: *"…we are restricting our services to the establishment and set-up of a specific SIPP to enable commercial property purchase. We will not be providing any advice on the suitability of this package to your own personal circumstances and you should seek professional advice where necessary."*

So, in these instances, CIB wasn't discussing the specific risks associated with the Dunas Beach investment or advising on the suitability of the overall proposition for the consumer (i.e. including the intended investment). This raises significant questions about the motivations and competency of CIB.

I think that if L&C had made enquiries with some applicants introduced by RealSIPP/CIB at the time, like Mr I, their responses would have been consistent with what was stated in the Client Agreement in relation to the extent of CIB's role.

Therefore, I consider L&C ought to have concluded Mr I – and applicants before him – didn't have full regulated advice made available to him by RealSIPP/CIB. And have viewed this as a significant point of concern. Retail consumers, like Mr I, were transferring their existing pension monies to L&C to invest entirely in unregulated overseas property developments such as Dunas Beach without the benefit of having been offered full regulated advice, by a business which appeared to be actively avoiding any responsibility to give advice on the investments that transfers were being effected to make.

So, I also think L&C should have concluded, had it spoke to some applicants and/or obtained copies of some suitability reports, that some consumers introduced by RealSIPP who were investing in TRG investments were likely being 'sold' on its investments by an unregulated business. And I think, if asked, Mr I would have explained how his application came about – which, as I mention elsewhere in this decision, was likely the result of the involvement of an unregulated business.

With the above in mind, I think L&C should also have concluded that with the overall volume of business and the proportion of consumers who weren't apparently receiving any advice, along with those that weren't receiving advice on the overall proposition, this raised serious questions about the motivation and competency of RealSIPP/CIB. And I think L&C should have concluded – certainly by the time of Mr I's application and long before it – that it wasn't in accordance with its obligations, to accept introductions from RealSIPP.

I, therefore, conclude it's fair and reasonable in the circumstances to say that L&C shouldn't have accepted Mr I's application from RealSIPP in the first place. In my view, L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr I fairly by accepting his application from RealSIPP. So, to my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant time and allowed Mr I to be put at significant risk of detriment as a result.

Due diligence on the underlying investments

L&C had a duty to conduct due diligence and give thought to whether an investment itself is acceptable for inclusion into 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.

As I acknowledged in my provisional decision, I accept the Dunas Beach investments didn't appear to be fraudulent or a scam. But this doesn't mean that L&C did all the checks it needed to do. However, given what I've said about L&C's due diligence on RealSIPP and my conclusion that it failed to comply with its regulatory obligations and good industry practice at the relevant time, I don't think it's necessary for me to also consider L&C's due diligence on the Dunas Beach investment.

I'm satisfied that L&C wasn't treating Mr I fairly or reasonably when it accepted his application from RealSIPP, so I've not gone on to consider the due diligence it may have carried out on the Dunas Beach investment and whether this was sufficient to meet its regulatory obligations. And I remain of the view that I don't need to make any findings about this issue.

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

For the reasons set out in my provisional decision and repeated again in this decision, I think L&C should have refused to accept Mr I's application from RealSIPP. So, things shouldn't have gone beyond that.

L&C's referred to the forms Mr I signed which included indemnity declarations. In my view, it's fair and reasonable to say that just having Mr I sign indemnity declarations, wasn't an effective way for L&C to meet its regulatory obligations to treat him fairly, given the concerns L&C ought to have had about his introduction.

L&C knew that Mr I had signed forms intended to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on such indemnities when L&C knew, or ought to have known, Mr I's dealings with RealSIPP were putting him at significant risk wasn't the fair and reasonable thing to do. Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse to accept Mr I's application. The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr I signed meant L&C could ignore its duty to treat him fairly.

To be clear, I'm satisfied that the indemnities contained within the contractual documents don't absolve, nor do they attempt to absolve, L&C of its regulatory obligations to treat customers fairly when deciding whether to accept or reject business. I remain satisfied that Mr I's SIPP shouldn't have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity, shouldn't have arisen at all. And I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for L&C to proceed with Mr I's application.

COBS 11.2.19R

In its response to Mr I's complaint L&C has referenced COBS 11.2.19R and said that it would have been in breach of COBS if it hadn't effected Mr I's investment instructions. However, in the circumstances it's my view that the crux of the issue in this complaint is whether L&C should have accepted Mr I's application from RealSIPP in the first place. An argument about having to execute the transaction as a result of COBS 11.2.19R was considered and rejected by the judge in *BBSAL.* In that case Jacobs J said:

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

So, with these comments in mind, 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 Mr I's business from RealSIPP.

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

L&C has contended it's RealSIPP and/or CIB that's really responsible for Mr I's losses. CIB would be the respondent for complaints about activities RealSIPP undertook as an

appointed representative of CIB. And the Financial Ombudsman won't look at complaints against CIB, as it's been dissolved and no longer exists as a regulated business. We also can't look at complaints about TRG.

The DISP rules set out when an Ombudsman's determination includes a money award, then that money award may be such amount as the Ombudsman considers to be fair compensation for financial loss, whether or not a Court would award compensation (DISP 3.7.2R). In my view, for the reasons set out above, 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 I fairly. Given this, the starting point is that it would be fair to require L&C to pay Mr I compensation for the loss he's suffered as a result of its failings.

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

I accept it may be the case that TRG and/or RealSIPP and/or CIB might have some responsibility for initiating the course of action which led to Mr I's loss. However, 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 I wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

I want to make clear that I've carefully taken everything L&C's said into consideration. But it remains my view it's appropriate and fair in the circumstances for L&C to compensate Mr I to the full extent of the financial losses he's suffered due to its failings. And, taking into account the combination of factors I've set out above, I'm not persuaded it would be appropriate or fair in the circumstances to reduce the compensation amount that L&C is liable to pay to Mr I. However, I have taken into account what L&C has said about the award of the FSCS payment made to Mr I. And I've reconsidered my redress on this point. I've set out what this means for the calculation of the award under 'Putting things right' below.

To be clear, I'm not making a finding that L&C should have assessed the suitability of the SIPP or the Dunas Beach investment for Mr I. I accept that L&C wasn't obligated to give advice to Mr I, or otherwise to ensure the suitability of the pension wrapper or investments for him. Rather, I'm looking at L&C's separate responsibilities. And for the reasons I've explained, I think it failed in meeting those responsibilities.

Mr I taking responsibility for his own investment decisions

L&C has reiterated its point that in construing L&C's obligations, regard should be had to section 5(2)(d) of the FSMA (now section 1C). This section requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions.

In its response to my provisional decision L&C cites Kerrigan v Elevate Credit International Ltd [2020] C.T.L.C 161 at [30]) which, amongst other things, considered the point of FSMA 1C. I've carefully considered all of this but I remain satisfied it wouldn't be fair or reasonable to say Mr I's actions mean he should bear the loss arising as a result of L&C's failings.

It remains my view, that if L&C had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr I's application from RealSIPP to open a SIPP at all. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr I 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 RealSIPP and reach the right conclusions. I think it failed to do this. And just having Mr I 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.

I've carefully considered what L&C has said about Mr I being aware of the risks. I wouldn't consider it fair or reasonable for L&C to have concluded that Mr I *had* received an explanation of the risks involved with the overall proposition from RealSIPP and/or CIB given what L&C knew, or ought to have known, about RealSIPP's business model by the time it received Mr I's application.

Turning to the suitability letter, I think it's important to note that:

- The suitability letter was not signed by the adviser.
- A copy of the suitability report was obtained by Mr I's CMC requesting a SAR before CIB was dissolved.
- There was no letter of acknowledgement of receipt that the suitability letter asked Mr I to provide.
- Mr I says he has no recollection of meeting or speaking with the CIB adviser. And that if he was advised not to transfer, he would not have done so. He says he can't recall receiving any recommendations from CIB only the unregulated introducers who gave him paperwork to sign but he says he was given nothing to take away with him.
- The suitability letter doesn't discuss ever meeting with Mr I.

It's difficult to know given the passage of time, whether Mr I did receive the CIB suitability letter. But I do think Mr I's testimony about advice being given to him by unregulated introducers is persuasive, particularly as he has been able to provide their names. Mr I has also been able to provide a document that TRG recorded in 2010 which his CMC was able to obtain under the SAR. This was well before his SIPP application was made to L&C in 2011.

On, balance, I think Mr I's testimony is credible and that it's more likely than not that it wasn't clear to him that transferring away from his DB Pension scheme so as to invest in Dunas Beach, was high risk and not appropriate for him. Mr I said all that he was told was that his DB pension wasn't earning very well and that he'd be better off investing as he did.

But, in any eventuality, this is a secondary point because, as mentioned above, if L&C had acted in accordance with its regulatory obligations and good industry practice I'm satisfied the arrangement for Mr I wouldn't have come about in the first place – that should have been the end of the matter.

CIB was a regulated firm with the necessary permissions to advise on the transactions this complaint concerns. And RealSIPP was an AR (Appointed Representative) of CIB. Mr I then used the services of a regulated personal pension provider, L&C. I'm satisfied that in his dealings with it, Mr I trusted these parties to act in his best interests.

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

Had L&C declined Mr I's business from RealSIPP, would the transactions complained about still have been effected elsewhere?

L&C has contended that Mr I would likely have proceeded with the transfer of his pension and purchase of the investments regardless of the actions it took. And in response to my provisional decision L&C says that it was too late for the DB pension to not go ahead by the time of its involvement due to Mr I's request for a CETV from his DB scheme provider.

Just in terms of the CETV that Mr I received, this was a quote from his DB pension provider and I don't think this was a point of 'no return' as L&C has suggested. In most cases, and I've seen no evidence in this case to say otherwise, requesting a CETV from your DB pension provider does not mean you have to accept this quote and transfer to a new provider. So, I think, on balance, even after requesting the CETV Mr I could have changed his mind and stayed where he was.

L&C also argues that another SIPP operator would have accepted Mr I's application had it (L&C) declined it. But I don't think it's fair and reasonable to say L&C shouldn't compensate Mr I for his losses on the basis of speculation that another SIPP operator would have made the same mistakes as I've found L&C did.

I accept the CIB suitability letter under 'Summary of Recommendation' said a SIPP did not match Mr I's attitude to investment risk and it also said nor did it meet with his agreed objectives. The suitability letter also gave reasons for this. But when he was asked by the Financial Ombudsman about why he went against what the adviser had said under this heading, Mr I said he can't recall receiving the suitability letter. And that he never met with the regulated adviser from CIB, so had no discussions with the adviser named on the suitability letter.

Looking at things in the round, I think it's far more likely than not that if Mr I had approached another regulated advisory firm he'd have been told in no uncertain terms he should leave his DB pension where it was. Mr I was told by the unregulated parties that he'd generate better returns by transferring his DB pension so as to invest in the Dunas Beach investment. And this seems to have been his main reason for transferring. Given this, I think it's more likely than not it wasn't clear to him from the overall advice he received from CIB, particularly with the involvement of the unregulated parties, that transferring away from his DB Pension scheme so as to invest in Dunas Beach, was high-risk and not appropriate for him. I also do not think there's anything to suggest that if L&C had not accepted Mr I's application, that he would have looked elsewhere to effect the transfer.

Further, in Adams v Options SIPP, the judge found that Mr Adams would have proceeded with the transaction regardless. HHJ Dight says (at paragraph 32): *"The Claimant knew that it was a high risk and speculative investment but nevertheless decided to proceed with it, because of the cash incentive."* But in the present case, I'm not satisfied that Mr I understood he was making a high risk investment. And I've also not seen any evidence to show Mr I was paid a cash incentive. It therefore cannot be said he was incentivised to enter into the transaction. On balance, I'm satisfied that Mr I, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams.

So, overall, I do think it's fair and reasonable to direct L&C to pay Mr I compensation in the circumstances. While I accept that TRG, RealSIPP and CIB might have some responsibility for initiating the course of action which led to Mr I's losses, I consider that L&C failed to comply with its own regulatory obligations and didn't put a stop to the transactions proceeding by declining Mr I's application when it had the opportunity to do so. 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 I for the full measure of his loss. RealSIPP was reliant on L&C to facilitate access to Mr I's pension. And but for L&C's failings, I'm satisfied Mr I's pension transfer wouldn't have occurred in the first place.

I'm not asking L&C to account for loss that goes beyond the consequences of its failings. I am 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 I's right to fair compensation from L&C for the full amount of his loss.

Putting things right

My aim is to return Mr I to the position he'd now be in but for what I consider to be L&C's failure to carry out adequate due diligence checks before accepting Mr I's SIPP application. As I've explained above, but for L&C's failings, I think it's fair and reasonable to conclude that Mr I's monies would have been retained in his existing Occupational Pension Scheme.

What should L&C do?

L&C must calculate fair compensation by comparing the current position to the position Mr I would be in if he'd not transferred from his former Occupational Pension Scheme where he held a defined benefit pension. In summary, L&C should:

1. Take ownership of the TRG Dunas Beach investments if possible (I'll refer to these investments as the TRG investments for the purposes of setting out the redress L&C should pay Mr I).
2. Calculate and pay compensation for the loss Mr I's pension provision has suffered as a result of L&C accepting his application from RealSIPP.
3. Pay Mr I £500 for the trouble and upset he's suffered.

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

1. Take ownership of the TRG investments if possible

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

If L&C is unwilling or unable to purchase the TRG investments, then the actual value of any TRG 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 I's SIPP.

If L&C doesn't purchase the investments, it may ask Mr I 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 I may receive from the TRG investments after the date of my final decision, 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 TRG investments, and they continue to be held in Mr I's SIPP, there will then be ongoing fees in relation to the administration of the SIPP. Mr I wouldn't be responsible for those fees if L&C hadn't accepted his application from RealSIPP. If the investments can't be removed from the SIPP, and because of this it can't be closed

after compensation has been paid, then it wouldn't be fair for Mr I to have to continue to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investment(s) and used only or substantially to hold that asset(s), then any future SIPP should be waived until the SIPP can be closed.

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

A fair and reasonable outcome would be for L&C to put Mr I, as far as possible, into the position he would now be in but for L&C's failings. I consider he would have likely remained in the Occupational Pension Scheme.

L&C should 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.

For clarity, Mr I plans to retire at age 67**.** So, compensation should be based on Mr I taking these benefits at this age.

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, the calculation should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr I's acceptance.

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

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

I acknowledge L&C's submissions in response to my provisional decision that Mr I has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr I's reassignment of rights require him to return 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 think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the compensation Mr I received from the FSCS. And it will be for Mr I to make the arrangements to make any repayments he needs to make to the FSCS. However, I do think it's fair and reasonable for some allowance to be made for the sum(s) Mr I actually received from the FSCS and has had the use of for a period of the time covered by the calculation.

As such, for the purposes of the calculation that's being carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4, if it wishes, L&C *may* notionally, for the period from the point of their payment through until the valuation date (as per the DISP App 4 definition of that term), allow for the payment(s) Mr I received from the FSCS following the claim about CIB, as an income withdrawal payment.

Where such an allowance is made then L&C must also, at the end of the calculation, allow for a notional addition to the overall calculated loss that's equivalent to the payment(s) Mr I received from the FSCS following the claim about CIB**.** The effect of this notional addition will be to increase the overall loss calculated using the most recent financial assumptions in line with PS22/13 and DISP App 4, by a sum that's equivalent to the payment(s) Mr I received from the FSCS.

Redress paid directly to Mr I as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, L&C may make a notional deduction to allow for income tax that would otherwise have been paid. Mr I's likely income tax rate in retirement is presumed to be 20%. However, if Mr I would have been able to take 25% tax-free cash from the benefits the cash payment represents, then this notional reduction may only be applied to 75% of the compensation, resulting in an overall notional deduction of 15%.

L&C has said that it can't be proven that Mr I is a basic rate taxpayer or that he will be in retirement. L&C has provided no evidence to suggest that my assumption that Mr I will be a basic rate taxpayer in retirement is incorrect. However, the DB pension that Mr I was entitled to was just over £180,000. Mr I has told us that he is currently working as a taxi driver and has said because of the shortfall he is likely to face in his pension provision he will need to carry on working until the state retirement age, which in his case is 67. So, from what I can see of his circumstances, I'm satisfied based on the facts that are available to me as at the date of this decision, that Mr I is likely to be a basic rate taxpayer in retirement. And I remain satisfied a notional deduction should be made based on his likely income tax rate in retirement being based on the basic taxpayer rate of 20%.

3. *Distress and Inconvenience Award*

In response to my provisional decision, L&C has disagreed with the payment of £500 for the distress and inconvenience caused to Mr I. But I remain of the view that it is a fair and reasonable amount to pay given the financial loss that Mr I has suffered as a result of the problems with his pension and the distress this would have caused him. And having to take steps to resolve this matter has caused him inconvenience that would not have been the case if it had not been for the acts or omissions of L&C. So, I remain of the view that £500 is a fair and reasonable amount of compensation for the distress and inconvenience suffered by Mr I in respect of this matter.

My final decision

For the reasons given, it's my final decision that I am upholding Mr I's complaint against London and Colonial Services Limited.

Where I uphold a complaint, I can award fair compensation of up to £150,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £150,000, I may recommend that the business pays the balance.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My final decision is that London & Colonial Services Limited

must pay Mr I the amount produced by that calculation up to the maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that London & Colonial Services Limited pay Mr I the balance plus any interest on the balance as set out above. The recommendation isn't part of my determination or award. London & Colonial Services Limited doesn't have to do what I recommend. As I said in my provisional decision, it's unlikely that Mr I could accept a decision and go to court to ask for the balance and Mr I may want to get independent legal advice before deciding whether to accept my final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr I to accept or reject my decision before 14 February 2024.

Yolande Mcleod
Ombudsman