

## **The complaint**

Mr L complains that London & Colonial Services Limited ('L&C') shouldn't have allowed him to invest in its Self-Invested Personal Pension ('SIPP') and that it failed to carry out sufficient due diligence on the investment made within it. He says L&C should compensate him for his loss.

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

For simplicity, I refer to Mr L throughout, even where the submissions I'm referring to were made by his representative.

## **What happened**

I've outlined the key parties involved in Mr L's complaint below.

### Involved parties

#### **L&C**

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

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

At the time of the events in this complaint, CIB was authorised by the then regulator, the Financial Services Authority ('FSA') – which later became the Financial Conduct Authority ('FCA') and which I'll refer to throughout for ease of reference – 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 liquidation, and has since been dissolved.

#### ***Real SIPP LLP ('RealSIPP')***

RealSIPP was an appointed representative of CIB from April 2010 to June 2015.

#### ***Sustainable Agroenergy plc ('SA')***

SA offered investments based on trees grown in Cambodia. The investments involved leasing plots of land from SA, along with the trees planted on them, and renting them out to a Cambodian company connected to SA and receiving a return either as annual income payments or additional land plots.

In November 2011, the Serious Fraud Office ('SFO') opened a criminal investigation into SA. In February 2012, it obtained company and freezing orders against SA. And, in March 2012, the company entered receivership.

The SFO investigation focused on the sale and promotion of SA's products, including the one Mr L invested in. The SFO found that investors had been deliberately misled about the nature of the investment and that a person responsible for sales had obtained commission rates of 65% of the amounts invested. It also noted that SA was effectively insolvent by mid-2011. The SFO later brought charges and three men were found guilty and given prison sentences in or around 2014.

### The transaction

On 29 September 2011, Mr L signed a SIPP application form to transfer his existing SIPP into one with L&C and to invest the funds in an '*Agroforestry Lease*' offered by SA. Mr L's application listed his financial advisers as RealSIPP and CIB. It provided FCA authorisation numbers for both and contact details for RealSIPP. And it said Mr L would manage the investment himself, as opposed to having a financial adviser manage it or appointing an investment manager. It also said fees of £1,000 upfront plus £200 per year would be paid to RealSIPP.

RealSIPP submitted Mr L's SIPP application form to L&C on 11 October 2011, which it received the next day. On 24 October 2011, just under £32,000 was transferred into Mr L's SIPP with L&C. And L&C said it formally opened this on 27 October 2011.

On 28 October 2011, L&C sent SA signed lease and rental agreements for the investment. These said that Mr L would purchase the lease of 4.4 plots for £26,400. That the plots were held in trust for SA. And after L&C had paid for the plots, the trustee would hold them in trust for the benefit of L&C. The trustee would issue a Certificate of Leasehold which would evidence L&C's beneficial ownership of the land. The terms said L&C could sell the plots back to SA for the original purchase price during years five to ten of the lease. And L&C could offer the lease for sale to a third party at any time. According to agreements, Mr L was to receive 50% of the gross value of the extracted reserves the Cambodian company would generate by harvesting seeds from the trees on his plots. And, on 16 November 2011, £26,400 of the value of Mr L's SIPP was invested into SA.

As mentioned above, in November 2011, the SFO opened a criminal investigation into SA. In February 2012 a court froze SA's assets and, in March 2012, SA entered receivership. I'm also aware that, in April 2012, the administrator for SA wrote to investors saying SA had no title to the land being invested in and no way its business model could work, and most of the land was unsuitable for jatropha trees. The administrator said investors had been promised returns of 5% in the first year, 12% in the second year, and 20% in the third and subsequent years.

### Additional background information

The evidence I've considered in reaching this decision also includes information provided to this Service by L&C as part of our investigation of another complaint (which was the subject of published decision reference DRN-3587366) in which RealSIPP introduced a consumer to L&C. I've summarised this evidence below.

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

I've also seen a copy of L&C's checklist for the '*Vetting of Intermediary Applications*' which confirmed it had, for example, checked the FCA register, along with a copy of the register dated 20 September 2010 which showed that CIB was authorised by the FCA.

L&C also gave us copies of print outs from the FCA register showing that, on 11 October 2011, RealSIPP was an appointed representative of CIB. And CIB's permissions included advising on pension transfers and pension opt outs.

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

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

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

#### Mr L's complaint

Mr L made a claim about CIB to the Financial Services Compensation Scheme ('FSCS'). Mr L said he made this claim in May 2019, after approaching his representative in September 2018 when he realised people were losing their money in the SA investment.

The FSCS wrote to Mr L on 10 January 2020 and said it agreed he had a valid claim against CIB. The FSCS provided a calculation in which it calculated Mr L's losses to be just over £58,000. And it paid Mr L £50,000 which, as I understand it, was its compensation limit at that time. On request, the FSCS later reassigned legal rights against L&C back to Mr L.

Mr L first complained, via his representatives, to L&C on 28 February 2020 that it shouldn't have allowed him to invest in his SIPP and that L&C didn't do enough due diligence on the SA investment which was unregulated, high-risk and didn't suit his risk profile.

L&C replied in June 2020. It said, in summary, that:

- It was an execution-only SIPP provider and this was clearly explained to Mr L in the documentation, including the application form, member declarations, terms and conditions and key features, which he signed confirming he'd understood this.
- It had to execute Mr L's execution only instruction to comply with the Conduct of Business (COBS) rules in the FCA's Handbook, including COBS 11.2.19, which said:

*'Whenever there is a specific instruction from the client, the firm must execute the order following the specific instruction.'*

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

- L&C didn't provide advice and wasn't permitted to do so. It didn't consider the appropriateness/suitability of the switch and underlying investment for Mr L.
- It provided numerous risk warnings about the SA investment being high risk and/or speculative, recommended he seek financial advice and took steps to ensure he understood his instructions were on an execution only basis.
- L&C's role was to satisfy itself that the investment was capable of being held in the SIPP in accordance with HMRC regulations, which was the full extent of its due diligence duty. And to do that it reviewed the legal paperwork, product information, company background checks and it obtained an independent report from an external compliance entity.

In June 2020, unhappy with this response, Mr L referred his complaint to our Service.

L&C said Mr L's complaint was out of time because it had opened his SIPP and made the investment more than six years before he complained. And that Mr L would've known more than three years before he complained that something had gone wrong, as statements and letters L&C sent Mr L between October 2012 and July 2016 said his investment had no value.

One of our Investigators reviewed Mr L's complaint and said it was made in time, as there was no reason to think Mr L became aware, or ought reasonably to have become aware, he had cause for complaint against L&C about the due diligence it had carried out until late 2018. And Mr L raised his complaint with L&C within three years of that.

Our Investigator also said Mr L's complaint should be upheld because, in summary, L&C shouldn't have accepted his application from RealSIPP in light of the volume of business and proportion of customers being introduced to it who weren't receiving advice on high-risk unregulated investments. She said that while L&C had told us that Mr L's application in October 2011 was the first introduction it received from RealSIPP, information provided on other cases showed that by the time of Mr L's referral to it L&C is likely to have already received around 43 introductions from RealSIPP.

In response, L&C disagreed that Mr L's complaint had been made in time. It said, in summary, that:

- Mr L's complaint is that SA investment shouldn't have been accepted into the SIPP. And there's no clearer indication of this than when the investment was valued at 'nil' in his annual statements from 2012.
- There's no requirement in the DISP rules for a complainant to be aware of the specifics of the complaint or exactly what this entails. The purpose of the 'three-year rule' is to allow time to investigate once concerned something had gone wrong.
- Mr L's awareness of issues with his investment from his statements ought to have led him to question the holding of this within his SIPP.
- In addition, it understands the receiver wrote to all investors on April 2012 and explained that neither the SA companies or its group had any title to the Cambodian land, yet it purported to effect the sale of leases to investors on the basis they did. And nor was there any way in which the business model on which the project was built could operate, as most of the site was unsuitable for products and very considerable work was needed, such that the guaranteed returns were illusory.
- A brief search of the SFO's website reveals that, by the end of 2014, SA's directors had been convicted. So Mr L ought to have been aware the investment was a sham.
- L&C wrote to Mr L in July 2016 and explained his SA investment had encountered serious trading difficulties, it was regarded as having no value with no realistic prospects for sale in the foreseeable future. So Mr L's SIPP can't be considered to

have any value.

- If it is correct that L&C shouldn't have accepted the SA investment – which it denies – then the correspondence Mr L received, including concerns about title and returns and the investment being valued at 'nil' and a sham, should have been sufficient to give him concern to investigate if this should have been accepted into his SIPP and to question the due diligence process.

While L&C didn't comment on the Investigator's view of the merits of Mr L's complaint, I'm aware that in submissions on other cases with our Service involving the same introducer it has said, amongst other things, that:

- Our Service is imposing a duty on L&C beyond that envisaged by the parties, which imposes additional duties on it to those provided for under the COBS.
- L&C didn't manage the SIPP or the assets in it. On the application form the customer confirmed they'd manage the investment themselves.
- L&C was aware of references to suitability reports in a 2009 review by the FSA, but SIPP operators weren't required to view suitability reports. Suitability, advice and recommendations were a matter between client and adviser.
- Clients were introduced by a reputable company and, where appropriate, were warned to take further investment advice before proceeding.
- FCA guidance in 2013 said SIPP operators weren't responsible for advice from third parties.
- L&C had controls in place to monitor business introduced, and the source and volume of business. And that was under constant review. L&C said that where it saw anomalies it took appropriate action, such as ceasing to accept business.
- L&C had limited powers to veto an investment and it didn't provide advice or comment on the merits of an investment. It added that:

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

- The customer had decided to switch before contacting L&C, and there's nothing to indicate they wouldn't have still gone ahead if L&C had refused the business.
- Other SIPP providers were accepting such investments at the time, and it's most likely the transactions would have been effected with another provider.
- L&C said that it ensured investment entities existed and where practical it obtained a legal opinion on an investment, and as far as possible it verified claims made about the investment and would not proceed if the adviser was not authorised.
- Appropriate and relevant due diligence was undertaken both to ensure that title to the asset would be obtained and that the SA investment proposition could be held in the SIPP.
- The investment was a legitimate business and not impaired.
- The investment could be valued and was capable of being purchased and sold.
- The introduction was from a FCA regulated entity and COBS 2.4.4 provides for division of responsibility in such circumstances. Insufficient weight has been given to contractual arrangements and the demarcation of roles and responsibilities.
- As RealSIPP/CIB are no longer extant, we've concluded that L&C is responsible.

- The Principles fall to be construed in light of the COBS rules applicable to L&C, its regulatory permissions, contractual arrangements and the statutory objective that consumers should take responsibility for their decisions.
- Publications issued after the transactions shouldn't have a bearing on this complaint. And these can't alter the meaning, or the scope, of the obligations imposed by the Principles.
- Many of the matters which The 2009 Thematic Review Report invites firms to consider are directed at firms providing advisory services.
- By linking findings to good practice instead of the interpretation of the COBS rules as set out in case law, L&C is held to an unreasonable standard. The standard it should be held to is that of a reasonably competent SIPP provider.
- L&C wasn't required to request information or copies of advice. It couldn't comment on advice without potentially being in breach of its permissions.
- Making a value judgment on advice wasn't within L&C's role. And L&C couldn't reject business without making a value judgment on suitability for each individual client, which fell outside of its expertise and the terms of the contract.
- L&C hasn't ever had permission to advise on investments.
- The relationships in this case are similar to those in *Adams*, the distinguishing factor is that RealSIPP wasn't an unauthorised introducer.
- In *Adams* the FCA agreed that the function of a firm, as determined by contract, would govern what it had to do to comply with its duties under the FCA Handbook.
- L&C acted in accordance with the contract and in full satisfaction of its duty.
- There was no restriction on L&C accepting business from RealSIPP without advice having been given.
- L&C wasn't in breach of any rule, guidance or law in accepting the investment.
- Insisting advice be offered would have made no practical difference, as the decision to transfer was made before the SIPP/investment applications were signed.
- A consumer who requested (and received) an execution-only service, after signing disclaimers should be responsible for the consequences of their actions.
- It was common practice for SIPP providers to accept such investments in 2011. If L&C had rejected the application, it would have proceeded with a different SIPP provider.
- Had L&C rejected the investment it wouldn't have been able to give reasons for this without breaching its permissions.

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

### **My provisional findings**

I issued a provisional decision upholding this complaint on 7 November 2023. Mr L responded confirming he had no further comments to make.

L&C didn't provide any further comments or information in respect of Mr L's complaint, despite being allowed further time to do so beyond the response deadline. And while L&C did go on to tell our Service it was considering making an offer to Mr L, I let it know that I intended to go ahead and give my decision in order to bring matters to a conclusion for Mr L given the length of time this has been ongoing for. And because I'd already set out that L&C should put things right for him and how it should do this in my provisional decision.

### **What I've decided – and why**

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

Having done so, I remain of the view that Mr L's complaint is one that our Service can consider and that it should be upheld for the reasons previously set out in my provisional decision, which I've largely repeated below.

## Jurisdiction

Before considering the merits of Mr L's complaint, I've considered whether he complained within the time limits allowed for making complaints. The rules our Service is bound by, known as the Dispute Resolution (DISP) Rules – found in the Financial Conduct Authority's (FCA) handbook – say in DISP 2.8.2R that, unless the business consents (L&C hasn't), we can't consider a complaint if it's referred to us:

- More than six years after the event complained of; or (if later)
- more than three years from the date on which the complainant became aware (or ought reasonably to have become aware) they had cause for complaint.

That is, 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.

The event complained of – that L&C shouldn't have accepted Mr L's SIPP and investment applications, causing him a loss – took place in 2011. And, as he didn't raise this with L&C and then our Service until 2020, it has been referred to us more than six years after the event occurred.

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

The time limits for bringing a complaint to the Financial Ombudsman Service are set out in the DISP section of the FCA Handbook. 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 an holistic and iterative approach, so that a preliminary view on one provision can be tested by reference to the rest of the relevant provisions.*

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

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

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

*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 ss.11 and 14 LA 1980 (applicable to claims for personal injury) and subsequently in s.14A LA 1980 (applicable to other claims in negligence), for the claimant to have 3 years from his date of knowledge to bring a claim. The purpose of this is obvious. It was to remedy the injustice of a claimant's claim being time-barred before they knew, or could reasonably be expected to know, that they had a claim. On the other hand the selection of a (relatively short) 3 year time period shows that another purpose was to provide that once they did, or should, have that knowledge they should get on with the claim and bring proceedings reasonably promptly. Precisely the same in my view applies to the secondary time-limit in DISP 2.8.2R(2)(b). The purpose of the rule is to prevent a complainant from losing the right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware.*

The term 'cause for complaint' is not defined in the Handbook. The term *complaint* (in italics) is defined, and it is reasonable to infer in light of the above guidance on interpreting the Handbook (and guidance in GEN 2.2.1R in the Handbook: *"Every provision in the Handbook must be interpreted in the light of its purpose."*) that the definition of the word *complaint*, was intended to apply to the phrase cause for complaint.

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."*

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

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

- awareness of a problem
- awareness that the problem had or may have caused her 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 L 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 that a consumer had knowledge of its cause. And I don't accept that the three-year time limit necessarily means that knowledge of a loss means that 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.*"

So, there are a number of points that I think are relevant here:

- In order to be aware of cause for complaint the complainant should reasonably know there is a problem, that they have or may suffer loss or damage, and that someone else is responsible for the problem – and who that someone is, as the respondent to the complaint. Knowledge of a loss or damage alone is not enough. It can't be assumed that upon obtaining knowledge of a loss a consumer had knowledge of its cause. So to have knowledge of his cause for complaint about L&C, Mr L had to be aware, or be in a position where he ought reasonably to have become aware, that there was a problem which had or may have caused him loss or damage **and** that L&C was or might be responsible for this.
- I've taken into account that Mr L was sent information about the problems with the SA investment – including those about the lack of title and returns being illusory, as well as statements and other correspondence which showed this had a 'nil' value from 2012. But, even if Mr L was aware, or ought reasonably to have become aware, there was a problem with his investment that had caused him some loss or damage, I've seen nothing to suggest Mr L was aware, or ought reasonably to have become aware, that L&C had responsibility for the position he was in more than three years before he complained to it in 2020.
- L&C has said, amongst other things, that the information Mr L was sent about the problems with the SA investment ought to have been sufficient to give him concern to investigate if this should have been accepted into his SIPP and to question its due diligence process. But I've seen no evidence that Mr L was sent or told anything more than three years before his complaint was referred to L&C in 2020, that made him aware or ought to have indicated to him, or a reasonable retail investor in his position, that L&C might have done something wrong and caused him to think it had responsibility either wholly or in part for the position he was in – the position of having a SIPP with investments in it that had suffered losses.
- I think it's worth highlighting that the relationship between L&C and Mr L is different to an adviser/client relationship. Mr L wasn't advised by L&C about setting up the SIPP or the suitability of the investments. So if the investment was disappointing the

obvious first thought when losses were suffered would have been that his financial adviser might have given poor advice and Mr L would reasonably have considered RealSIPP to have been responsible.

- Mr L has said that he approached his representative in September 2018, concerned about his investment and that people were losing money and this resulted in his complaint being made against CIB via the FSCS in May 2019. Mr L received the outcome for this in January 2020 and made his complaint to L&C the following month, seemingly as he had a balance of loss outstanding.
- As I've said, I've seen no evidence that Mr L was aware or had been told by any party, and more than three years prior to his representative raising a complaint with L&C in February 2020, that it may have done something wrong and might be wholly or partly responsible for the position he was in. It seems likely that Mr L was made aware of this at some point by representative, given he also later made his complaint to L&C via it. And Mr L made his complaint to L&C in 2020, which was within three years of when he's said he first approached his representative in September 2018.
- As set out below, the FCA published reports on the results of two thematic reviews on SIPP operators in 2009 and 2012, issued guidance for SIPP operators in 2013 and wrote to the CEOs of SIPP operators in 2014. A common theme of those communications is that the FCA considered that SIPP operators had obligations in relation to their customers even where they don't give advice, and that many SIPP operators had a poor understanding of those obligations.
- I don't think Mr L would need to have understood the details of a SIPP provider's obligations to have been aware (or in a position whereby she ought reasonably to have been aware) of her cause for complaint. But I think Mr L would have needed to have actual or constructive awareness that an act or omission of L&C had a causative role in the loss. And I don't think there was any information available to Mr L more than three years before his complaint was made to L&C that ought reasonably to have made him aware that he could attribute her problem to acts or omissions by L&C.

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

And, I don't think that Mr L was aware, or ought reasonably to have become aware, that he had cause for complaint against L&C more than three years before his complaint was referred to it. So I'm satisfied this complaint has been brought in time and that it's one we can consider.

### **The due diligence L&C carried out**

When deciding what's fair and reasonable in all the circumstances of this complaint, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I think was good industry practice at the relevant time.

While I've considered the entirety of the detailed submissions the parties have provided, my decision focuses on what I consider to be the central issues. The purpose of my decision

isn't to comment on every point or question made, rather it's to set out my decision and reasons for reaching it.

## Relevant considerations

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

*"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*

*Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.*

*Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."*

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

*"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirements 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 BBSAL, Berkeley Burke brought a judicial review claim challenging the decision of an Ombudsman who had upheld a consumer's complaint against it. The Ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The Ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and hadn't treated its client fairly.

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

*"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to*

*cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles-based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."*

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

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

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

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

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

The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim, on the basis he 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 think there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams (summarised in paragraph 120 of the Court of Appeal judgment) and the issues in Mr L’s complaint. 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 investment into its SIPP.

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

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

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

I also want to emphasise that I don’t say that L&C was under any obligation to advise Mr L on the SIPP and/or the underlying investments. Refusing to accept an application because it came about as a result of advice given by a firm which didn’t have the required permissions to be giving that advice, and had been introduced by that same firm, isn’t the same thing as advising Mr L on the merits of investing and/or transferring to the SIPP.

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

### **The regulatory publications**

The FCA issued a number of publications which reminded SIPP operators of their obligations and which set out how they might achieve the outcomes envisaged by the Principles, namely:

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

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.

### **The 2009 Thematic Review Report**

The 2009 report included the following statement:

*“We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses (‘a firm must pay due regard to the interests of its clients and treat them fairly’) insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a ‘client’ for COBS purposes, and ‘Customer’ in terms of Principle 6 includes clients.*

*It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.*

*...*

*We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate SIPPs that are unsuitable or detrimental to clients.*

*Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their customers’ interests in this respect, with reference to Principle 3 of the Principles for Businesses (‘a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems’).*

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

- Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm’s clients, and that they do not appear on the FSA website listing warning notices.*
- Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*
- Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*
- Being able to identify anomalous investments, e.g. unusually small or large transactions or more ‘esoteric’ investments such as unquoted shares,*

*together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*
- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*
- *Identifying instances of clients waiving their cancellation rights, and the reasons for this.*
- *Ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable).*
- *Ensuring that an investment can be independently valued, both at point of purchase and subsequently.*
- *Ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc)."*

## **The later publications**

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

*"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*

*All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a 'client' for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."*

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

*"Relationships between firms that advise and introduce prospective members and SIPP operators*

*Examples of good practice we observed during our work with SIPP operators include the following:*

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled*

*firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for unauthorised 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 nonregulated introducers*

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

### ***"Due diligence***

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

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

- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
- *having checks which may include, but are not limited to:*
  - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
  - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*
- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*
- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm”*

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

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

- *correctly establishing and understanding the nature of an investment*
- *ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*
- *ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*
- *ensuring that an investment can be independently valued, both at point of purchase and subsequently, and*
- *ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)*

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

These publications provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it treats its customers

fairly and produces the outcomes envisaged by the Principles.

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

I acknowledge that the 2009 and 2012 reports and the “*Dear CEO*” letter aren’t formal guidance (whereas the 2013 finalised guidance is). However, the fact that the reports and “*Dear CEO*” letter didn’t constitute formal guidance doesn’t mean the importance of these should be underestimated. These provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it’s treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators’ expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I’m therefore satisfied it’s appropriate to take these 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.

At its introduction the 2009 Thematic Review Report 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 report 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 that the 2009 Report 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 Report set 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. So I remain satisfied it’s relevant and therefore appropriate to take it into account.

To be clear, I think the Report is also directed at firms like L&C acting purely as SIPP operators. The Report says that “*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.*”

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

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

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

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

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

The regulator 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. It said:

*"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes).*

...

*Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.*

*The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes."*

The alert post-dates the events in this complaint – but, again, it didn't set new standards. It

highlighted that advisers using the restricted advice model discussed in the alert generally weren't meeting *existing* regulatory requirements and set out the regulator's concerns about industry practices at the time.

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

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

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

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

I'm deciding 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 this decision. So taking account of the factual context of this case, I think 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/the business RealSIPP was introducing and the SA investment *before* deciding to accept Mr L's applications.

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

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

## **The contract between L&C and Mr L**

My 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 L or otherwise have ensured the suitability of the SIPP or SA investment for him. I accept that L&C made it clear to Mr L that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investments. And that forms Mr L 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 L'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 L on the suitability of the SIPP or SA investment. But I remain satisfied that, to meet its regulatory obligations when conducting its operation of SIPP's business, L&C had to decide whether to accept introductions of business and/or investments with the Principles in mind. And I don't agree that it couldn't have rejected introductions or applications without contravening its regulatory permissions by giving investment advice.

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

The business L&C was conducting was its operation of SIPP's. The regulatory publications provided some examples of good industry practice observed by the FCA during its work with SIPP operators, including being satisfied that it should accept applications from a particular introducer, and being satisfied that a particular investment is an appropriate one to accept. So I'm satisfied that, to meet its regulatory obligations and good industry practice, when conducting its business, L&C was required to consider whether to accept or reject particular referrals of business and particular applications for investment in its SIPP's.

L&C was under a regulatory obligation to conduct its business with due skill, care and diligence, organise and control its affairs responsibly and effectively, and pay due regard to the interests of its customers (including Mr L) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

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

So, I think L&C ought to have understood before it received Mr L's application that its obligations meant that it had a responsibility to carry out appropriate checks on RealSIPP/CIB 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, like the SA investment, before accepting them into its SIPP's.

So I'm satisfied that, to meet its regulatory obligations when conducting its business, L&C was also required to consider whether to accept or reject a particular investment (here SA), with the Principles in mind.

### **L&C's due diligence on RealSIPP**

I've looked at evidence L&C has provided to show what due diligence checks it did on RealSIPP and what conclusions it drew from any checks it did. Including the evidence it gave us on the complaint that was the subject of published decision reference DRN3587366, which was about L&C accepting an introduction from RealSIPP in November 2011. The evidence L&C gave us shows that, by the time it accepted Mr L's application, L&C had:

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

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

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

- L&C was aware or should have been aware of potential risks of consumer detriment associated with business introduced by RealSIPP by the time of Mr L's application, as:
  - Consumers were being introduced to L&C by RealSIPP without having been given full regulated advice (that is advice on the transfer or switch to the SIPP and advice on the intended investment).
  - The introductions had anomalous features – high-risk business, in relatively high volumes, for unregulated overseas property developments and other esoteric investments. And, even though RealSIPP had the necessary permissions to give full advice on the business it was introducing, it wasn't giving any advice on a large proportion of that business.
- L&C should've taken steps to address these risks (or, given these risks, have simply declined to deal further with RealSIPP).
- Such steps should have involved getting a fuller understanding of RealSIPP's business model – through requesting information from RealSIPP and through independent checks.
- Such understanding would've revealed there was a significant risk of consumer detriment associated with introductions of business from RealSIPP.
- In the alternative RealSIPP would have been unwilling to answer or fully answer the questions about its business model.
- In either event L&C should've concluded it shouldn't accept introductions from RealSIPP.

I've set out below 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 L's application. These points overlap, to a degree, and should have been considered by L&C cumulatively.

## 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.

During our investigation of the complaint that was the subject of the published decision, L&C said 153 members were introduced by RealSIPP, 44 of whom were introduced in the nine months *before* the consumer in that decision established their L&C SIPP in November 2011, which I note was only weeks after Mr L's business was introduced to it in mid-October 2011. L&C also said that 44 of the total introductions involved members with an Occupational Pension Scheme.

And, on another previous complaint, back in 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 didn't advise on the SIPP.

L&C confirmed in information provided in respect of Mr L's complaint that a total of 160 clients were introduced by RealSIPP. And that following a sample of 20% of the total number of these, 99.94% were from occupational pension schemes. L&C also said all investors invested in overseas commercial properties. And that, 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 clarified that by the time of Mr L's application, RealSIPP had already introduced 32 applications to it. So I think it's clear that by that point L&C had received a number of introductions from RealSIPP over a period of around eight months.

I think L&C should've been concerned that such a volume of introductions, relating exclusively to consumers investing in higher-risk esoteric investments, was unusual – particularly from a small IFA business like RealSIPP. And it should have considered how a small IFA business introducing this volume of higher-risk business was able to meet regulatory standards. This was a clear and obvious potential risk of consumer detriment.

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

RealSIPP was introducing consumers who were all investing in high-risk non-standard esoteric holdings, such as the unregulated overseas property development and the unregulated overseas forestry scheme that Mr L invested in. As mentioned, I think it's fair to say that such investments are highly unlikely to be suitable for the vast majority of retail clients. They will generally only be suitable for a small proportion of the population – sophisticated and/or high net worth investors.

So, I think L&C either was aware, or ought reasonably to have been aware, that the type of business RealSIPP was introducing was high-risk and therefore carried a potential risk of

consumer detriment on this basis too.

#### High proportion of execution-only business

The available evidence shows that before L&C accepted Mr L's application it was, or should have been, aware that not offering or giving advice was something RealSIPP was doing routinely.

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

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

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

From the figures L&C provided, a little under half the introductions from RealSIPP were transacted as execution-only business (i.e. with no advice being given by RealSIPP). That's a large proportion of the total business RealSIPP introduced. And, bearing in mind what I've said about the timing of Mr L's introduction to L&C, I think it's likely that RealSIPP had introduced business to L&C without providing advice on a number of occasions before his application was received.

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

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

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

#### **The availability of advice to Mr L**

I've seen from evidence provided on the complaint that was the subject of the published decision that L&C entered into intermediary agreements with RealSIPP and its principal, CIB. As part of this process, it was open to L&C to 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 mentioned this.

Mr L's SIPP application didn't say whether or not he had been given advice at the point of sale. I've seen no evidence that Mr L was offered full regulated advice on his switch to and investment in the SIPP. And RealSIPP's website from around the time of Mr L's investment said it didn't *'provide individual financial advice on any of the developments in which clients may wish to invest.'*

Having carefully considered the available evidence I think it's most likely that Mr L wasn't offered full regulated advice by RealSIPP or its principal (or any other regulated advisory firm) on the transactions this complaint concerns.

So based on the available evidence I think there was insufficient basis for L&C to reasonably assume that advice had been given or offered to Mr L at the point it received and reviewed his application, or had been made available to Mr L and declined. The details L&C has provided to us about the *type* of introductions it received from RealSIPP demonstrates that L&C was, or should have been, aware that not offering or giving advice was something RealSIPP was doing routinely. And, based on the available evidence and on what L&C ought to have identified from the pattern of business introduced to it by RealSIPP from outset, I don't think there would have been sufficient basis for L&C to reasonably assume at the point it received and reviewed Mr L's application that full regulated advice had been given or offered to Mr L by RealSIPP.

The possibility no regulated advice had been given or made available was a clear and obvious potential risk of consumer detriment here. Mr L was switching his pension to invest entirely in an esoteric overseas unregulated forestry scheme – a move which was highly unlikely to be suitable for the vast majority of retail clients.

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

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

#### Requesting information directly from RealSIPP

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

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

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

*'Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of*

*business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.'*

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

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

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

#### Making independent checks

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

The 2009 Thematic Review Report said:

*'...we would expect [SIPP operators] to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, **for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification.**'* (bold my emphasis)

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

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

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

L&C might say it couldn't comment on advice without potentially being in breach of its permissions. Again, I confirm that I accept L&C couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps included addressing a potential risk of consumer detriment by speaking to applicants and/or having sight of advice letters, as this could have provided L&C with further insight into RealSIPP's

business model, and helped to clarify to L&C whether full regulated advice on the overall proposition was being offered/given. This was a fair and reasonable step 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?**

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

- RealSIPP was presenting itself publicly (on its website) as providing only '*generic information on the considerations and risks*' and not providing advice about '*any of the developments in which clients may wish to invest*'.
- Consumers were being introduced to L&C without having been offered full regulated advice.
- The other anomalous features I've mentioned did carry a significant risk of consumer detriment.

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

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

As previously stated, RealSIPP said it provided '*generic information*' about investments, rather than advice. And I've seen no evidence suggesting it ever offered full regulated advice to Mr L. This raises significant questions about the motivations and competency of RealSIPP.

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

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

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

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

L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly,

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

### **L&C's due diligence on the SA investment**

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

L&C had a duty to conduct due diligence and give thought to whether an investment itself is acceptable for inclusion in a SIPP. That's consistent with the Principles and the regulators' publications as set out earlier in this decision. It's also consistent with HMRC rules that govern what investments can be held in a SIPP.

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

- Identified SA as a high-risk, speculative and non-standard investment, so it should have carried out sufficient due diligence
- Considered whether SA was appropriate for a pension scheme
- Ensured the investment was genuine and not a scam, or linked to fraudulent activity
- Independently verified that SA's assets were real and secure, and the investment operated as claimed
- Ensured the investment could be independently valued, both at point of purchase and subsequently
- Ensured Mr L's SIPP wouldn't become a vehicle for a high-risk and speculative investment that wasn't a secure asset and could be a scam.

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

- SA purported to offer a very high return through oil produced by jatropha trees. There appears to have been no basis for the high projected return. I don't expect L&C to have been able to say the investment would be successful. But a high projected return without any apparent basis should have given L&C cause to question the investment's credibility.
- There was information available which called into question the viability of the proposed business model (particularly in light of the very high projected returns).
- There was negative commentary in the public domain about investments that purported to offer high returns through investment in jatropha plants. Some of these

articles warned investors against being seduced by high returns that might not be achievable, and questioned whether it was possible to make money from growing jatropa at all.

- SA had no track record.
- SA's first accounts which had been published on 6 October 2011 were subject to a qualified opinion from the auditors, which means there was some limitation or exception to accounting standards. The auditor said, '*...we have not obtained all the information and explanations that we consider necessary for the purpose of our audit and adequate accounting records have not been kept by [SA] as required by the Companies Act 2006*'.
- It's not clear how the lease of a parcel of land in Cambodia could be valued or realised.
- The investment was based overseas and would be subject to the domestic laws and regulations that apply to the ownership of land and matters governing investments. That created additional risk.
- The lease and rental agreements L&C signed for the investment didn't specify the location of the plots L&C would lease on behalf of Mr L. They said beneficial ownership of the plots would be evidenced by a Certificate of Leasehold and didn't offer any evidence of title held by the lessor.
- SA didn't have title to the land, so if L&C had done the check it said it did on title to the asset it ought to have concluded that title wouldn't be obtained.

The information that was available to L&C, and which would have come to light had it undertaken adequate checks, ought to have led L&C to the following conclusions:

- SA didn't have title to the land.
- There was a risk the investment might be fraudulent – it wasn't clear how such high returns could be offered.
- The land leases, if they existed, might have been difficult to independently value, both at point of purchase and subsequently. It was also possible that there might be no market for them. So an investor might not have been able to take benefits from their pension, or make changes to it, if they wanted to.
- The investment in SA would allow L&C's clients' SIPPs to become a vehicle for a high-risk and speculative investment that wasn't a secure asset and could have been a scam.

I'm satisfied L&C should've identified a number of the concerns I've mentioned, and ought to have drawn the conclusion I've set out, based on what was known at the time. L&C ought to have identified significant points of concern, which ought to have led it to conclude it should not accept the SA investment. It ought to have identified that there was a high risk of consumer detriment here. And it's the failure of L&C's due diligence that's resulted in Mr L being treated unfairly and unreasonably.

To my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant time. I think it's fair and reasonable to conclude that L&C didn't act with due skill,

care and diligence, and it didn't treat Mr L fairly, by accepting the SA investment in his SIPP.

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

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

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

### **Summary of what I've decided and why**

For the reasons given above, L&C shouldn't have accepted Mr L's application to invest in SA. And, to be clear, even if I thought L&C had undertaken adequate due diligence on RealSIPP and acted appropriately in accepting Mr L's business from RealSIPP (which, as I've explained earlier, I don't), I'd still consider it fair and reasonable to uphold Mr L's complaint on the basis that L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr L fairly, by accepting the SA investment into his SIPP.

I make this point here to emphasise that while I've concluded *both* that L&C shouldn't have accepted Mr L's business from RealSIPP and also that it shouldn't have accepted his application to invest in SA, had I only reached the conclusions I've set out above on one of those aspects and not also gone on to reach findings on the other aspect for completeness, I'd still consider it fair and reasonable in all the circumstances to uphold this complaint. That's because L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr L fairly by accepting his business from RealSIPP. And because, separately, L&C also didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr L fairly, by accepting the SA investment into his SIPP. And to my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant times, and allowed Mr L to be put at significant risk of detriment as a result.

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

For the reasons previously given above, I think L&C should have refused to accept Mr L's application from RealSIPP. So things shouldn't have got beyond that.

L&C has referred to forms Mr L signed. In my view it's fair and reasonable to say that just having Mr L 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 L 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 L'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 L's application.

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

I'm satisfied that Mr L'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 L's application

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

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

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

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

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

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

The involvement of other parties

I've considered the involvement of other parties in Mr L's loss. L&C might say that RealSIPP and its principal, CIB, were responsible for the loss. In this decision I'm considering Mr L's complaint about L&C. But I accept that RealSIPP and CIB were involved in the transaction complained about. CIB would be the respondent for complaints about activities RealSIPP undertook as an appointed representative of CIB. But CIB has been dissolved and no longer exists as a regulated business.

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

As I set out above, I think 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 L fairly. The starting point therefore, is that it would be fair to require L&C to pay Mr L 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 L for his loss, including whether it would be fair to hold another party liable in full or in part. And, in the circumstances, I consider it appropriate and fair in the circumstances for L&C to compensate Mr L to the full extent of the financial losses he's suffered due to L&C's failings.

I accept that it may be the case that SA, RealSIPP or CIB might have some responsibility for initiating the course of action that led to Mr L's loss. However, I'm satisfied that 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 L wouldn't have come about in the first place, and the loss he's suffered could have been avoided. And, taking into account the combination of factors I've set out, I'm not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that L&C's liable to pay to Mr L.

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

#### Mr L taking responsibility for his own investment decisions

Section 5(2)(d) of the FSMA (now section 1C) 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.

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

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

As I've made clear, L&C needed to carry out appropriate due diligence on the SA investment, and the business being referred to it from RealSIPP, and reach the right conclusions. I think it failed to do this. And merely having Mr L sign forms containing

declarations wasn't an effective way of L&C meeting its obligations, or of escaping liability where it failed to meet these.

CIB was a regulated firm with the necessary permissions to advise on the transactions this complaint concerns. And RealSIPP was an appointed representative of CIB. I'm satisfied that in his dealings with it, Mr L trusted RealSIPP to act in his best interests. Mr L also then used the services of a regulated personal pension provider in L&C. So, overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair to say L&C should compensate Mr L for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr L should suffer the loss because he ultimately instructed the transactions to be effected.

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

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

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

Mr L has said he recalls being told the investment would yield a 'decent return', but I've seen no evidence that he was warned it was high risk and speculative. And I'm not satisfied that he was determined to move forward with the transactions in order to take advantage of a cash incentive.

I've not seen any evidence to show Mr L was paid a cash incentive. It therefore cannot be said he was incentivised to enter into the transaction. And, on balance, I'm satisfied that Mr L, 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.

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

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

Having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mr L's application from RealSIPP, the transactions this complaint concerns wouldn't still have gone ahead. So, overall, I do think it's fair and reasonable to direct L&C to pay Mr L compensation in the circumstances.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr L. 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 L for the full measure of his loss. RealSIPP was reliant on L&C to facilitate access to Mr L's pension. L&C accepted Mr L's business from RealSIPP and it accepted the SA investment into Mr L's SIPP and, but for L&C's failings, I'm satisfied that Mr L's pension monies wouldn't have been transferred to L&C or invested in the SA investment.

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

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

### **In conclusion**

Taking everything into account, I think that in the circumstances of this case it's fair and reasonable for me to conclude that L&C should have decided not to accept business from RealSIPP and/or to accept the SA investment to be held in its SIPP before it had received Mr L's application from RealSIPP. I conclude that if L&C hadn't accepted Mr L's introduction from RealSIPP and/or the SA investment to be held in its SIPP, Mr L wouldn't have established a L&C SIPP, transferred his personal pension monies into it or invested in the SA investment.

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

### **Putting things right**

My aim is to return Mr L to the position he would now be in but for what I consider to be L&C's due diligence failings.

Mr L transferred from his existing SIPP to the L&C SIPP to make the SA investment. I've got no way of determining definitively in what funds, and in what proportions, Mr L's monies would have been invested to date though had they not been transferred away from the existing SIPP to the L&C SIPP and invested in SA. As such, having carefully considered this, for the purposes of quantifying redress in this case I think the fair and reasonable approach is to assume that the monies in question would have experienced a return from the date they were transferred into the L&C SIPP equivalent to the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index). I'm satisfied that's a reasonable proxy for the type of return that could have been achieved over the period in question.

In light of the above, I think that L&C should calculate fair compensation by comparing Mr L's current position to the position he would be in if he hasn't invested in SA.

In summary, L&C should:

1. Calculate a current notional value, as at the date of this decision, of the monies that were transferred into the L&C SIPP if they'd not been transferred into the L&C SIPP.
2. Obtain the actual current value of Mr L's L&C SIPP, as at the date of this decision, less any outstanding charges.
3. Deduct the sum arrived at in step 2) from the sum arrived at in step 1).
4. Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
5. Pay an amount into Mr L's L&C SIPP, so that the transfer value of this is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.
6. Pay Mr L £500 for the distress and inconvenience the problems with his pension have caused him.

I've explained how L&C should carry out the calculation, set out in steps 1 - 6 above, in further detail below:

1. Calculate a current notional value, as at the date of this decision, of the monies that were transferred into the L&C SIPP if they'd not been transferred into the L&C SIPP.

L&C should calculate what the monies transferred into the L&C SIPP would now be worth had they instead achieved a return equivalent to that of the FTSE UK Private Investors Income Total Return Index from the date they were first transferred into the L&C SIPP through until the date of my final decision.

I'm satisfied that's a reasonable proxy for the type of return that could have been achieved over the period in question.

L&C must also make a notional allowance in this calculation for any additional sums Mr L has contributed to, or withdrawn from, his L&C SIPP since outset. To be clear this doesn't include SIPP charges or fees paid to third parties like an adviser.

Any notional contributions or notional withdrawals to be allowed for in the calculation should be deemed to have occurred on the date on which monies were actually credited to, or withdrawn from, the L&C SIPP by Mr L.

2. Obtain the actual current value of Mr L's L&C SIPP, as at the date of this decision, less any outstanding charges.

This should be the current value as at the date of this decision.

3. Deduct the sum arrived at in step 2) from the sum arrived at in step 1).

The total sum calculated in step 1) minus the sum arrived at in step 2), is the loss to Mr L's pension provisions.

4. Pay a commercial value to buy Mr L's share in any investments that cannot currently be redeemed.

I'm satisfied that Mr L's L&C SIPP only still exists because of the illiquid investments that are held within it. And that but for these investments Mr L's monies could have been transferred away from L&C. In order for the SIPP to be closed and further SIPP fees to be prevented, any remaining investments need to be removed from the SIPP.

To do this L&C should reach an amount it's willing to accept as a commercial value for the investments, and pay this sum into the SIPP and take ownership of the relevant investments.

If L&C is unwilling or unable to purchase the investments, then the actual value of any 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 L's SIPP in step 2).

If L&C doesn't purchase the investments, it may ask Mr L 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 L may receive from the investments, and any eventual sums he would be able to access from the SIPP. L&C will need to meet any costs in drawing up the undertaking.

5. Pay an amount into Mr L's L&C SIPP, so that the transfer value of this is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

The amount paid should allow for the effect of charges and any available tax relief. Compensation shouldn't be paid into a pension plan if it would conflict with any existing protections or allowances.

If L&C is unable to pay the compensation into Mr L's SIPP, or if doing so would give rise to protection or allowance issues, it should instead pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid.

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

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

Neither Mr L nor L&C disputed that this is a reasonable assumption when they were given the opportunity to, despite being told that it won't be possible for us to amend this assumption once any final decision has been issued on the complaint.

6. Pay Mr L £500 for the distress and inconvenience the problems with his pension have caused him.

In addition to the financial loss that Mr L has suffered as a result of the problems with his pension, I think that the loss suffered to Mr L's pension provisions has caused Mr L distress. And I think that it's fair for L&C to compensate him for this as well.

### *SIPP fees*

If the investments can't be removed from the SIPP, and it hence cannot be closed after compensation has been paid, then it wouldn't be fair for Mr L to have to continue to pay annual SIPP fees to keep the SIPP open. As such, L&C should pay an amount into Mr L's SIPP equivalent to five years' worth of the fees that will be payable on the SIPP (based on the most recent year's fees). Five years should allow enough time for the issues with the investments to be dealt with, and for them to be removed from the SIPP. As an alternative to this, L&C can agree to waive any future fees which might be payable by Mr L's SIPP.

### *Interest*

The compensation resulting from this loss assessment must be paid to Mr L or into his SIPP within 28 days of the date L&C receives notification of Mr L's acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation isn't paid within 28 days.

### **My final decision**

For the reasons given. It's my final decision that this complaint is upheld and London & Colonial Services Limited must calculate and pay fair compensation to Mr L as set out above.

Where I uphold a complaint, I can make an award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend that London & Colonial Services Limited 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 the amount produced by that calculation up to the maximum of £160,000 (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 £160,000, I recommend that London & Colonial Services Limited pay Mr L 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. It's unlikely that Mr L could accept a decision and go to court to ask for the balance and Mr L may want to get independent legal advice before deciding whether to accept a decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 27 December 2023.

Holly Jackson  
**Ombudsman**