DRN-4621137

The complaint

Mr D has a self-invested personal pension ('SIPP') with London & Colonial Services Limited ('L&C'). Mr D opened the SIPP with L&C in 2011 and he complains that it (L&C) didn't carry out adequate due diligence checks on the introducer of the SIPP and the investments he subsequently made.

Mr D is being represented by a Claims Management Company ('CMC'). For ease of reference, in parts of this decision, I will refer to 'Mr D' when this includes submissions and evidence submitted by his CMC.

What happened

I issued a provisional decision which was sent to both parties on 31 January 2024. Both parties have responded so I am now issuing my final decision. Having reviewed the further information provided by both parties, my view remains that this complaint should be upheld for the same reasons outlined in my provisional decision. Before setting out my reasoning, I'll set out the background to this complaint as follows:

Main parties involved

L&C

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

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

CIB was authorised by the regulator who, at the time of the SIPP being established in 2011, was the Financial Services Authority ('FSA'), which later became the Financial Conduct Authority ('FCA' - I will refer to both bodies as the 'regulator').

CIB had permissions from the regulator to advise on regulated products and services including giving investment advice and arranging deals in investments such as pensions. In May 2015, CIB went into voluntary liquidation, and was later dissolved.

Real SIPP LLP ('RealSIPP')

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

The Resort Group ('TRG')

TRG was founded in 2007. It owned a series of resorts in Cape Verde including the Dunas Beach Resort. TRG sold luxury hotel rooms to UK consumers, either as whole entities, or as fractional share ownership in a company. Mr D's complaint relates to the purchase of TRG's investments via RealSIPP.

Mr D's introduction to the SIPP and the Dunas Beach investments

Mr D held an Aegon personal pension plan before he switched (transferred) to a L&C SIPP in 2011. A few months prior to this, he says he was introduced to the TRG Dunas Beach Resort investment ('TRG investment') by an 'unregulated introducer', who I will refer to as 'Mr M'. Mr D's CMC says it understands that Mr M worked for an 'unregulated business' that was working for TRG as a seller for properties on one or more of its resorts.

Mr M, the unregulated introducer, explained to Mr D that because he (Mr D) didn't have the capital to invest it was possible to use his (Mr D's) pension funds to finance the purchase of the TRG investment. Mr D was then advised by the unregulated introducer firm, for whom Mr M worked for, that it wasn't qualified to give pension advice. Mr D was referred to CIB by the unregulated introducer firm. But despite this, Mr D says he doesn't recall ever speaking or having any form of contact with an adviser from CIB and/or RealSIPP. He says all he can remember is being given paperwork to sign by the unregulated introducer.

In 2016 Mr D made a claim through the Financial Services Compensation Scheme ('FSCS') about CIB's advice. In his FSCS claim form Mr D provided a summary of his claim, which included some background details leading to his claim which are relevant for this complaint. Amongst other things, the background included the following details:

- Mr D named the CIB adviser whose name was in the suitability report (see further below).
- Mr D named the unregulated introducer firm that Mr M was purported to have worked for as another party involved in the transaction.
- Mr D reiterated he was referred to CIB by the unregulated introducer firm and that he never spoke to anyone at CIB during the advice process.
- Mr D said the risks of the TRG investment weren't explained to him. And the investment was sold to him on the basis that returns would be guaranteed and higher than what he could obtain under his current personal pension plan.
- Mr D said he was not warned about ongoing costs of the investments he made via his SIPP. And he wasn't given any warning about the possibility of issues with selling this type of investment.
- Mr D said that excluding his home and even allowing for £40,000 in savings, his personal pension plan at the time (2011) made up around 80% of his overall wealth.

CIB's/RealSIPP's advice to Mr D

Whilst Mr D doesn't remember speaking to a CIB adviser, his CMC was able to provide a copy of the CIB suitability report (the 'suitability report') and other relevant documents on Mr D's behalf. These documents were obtained after the CMC submitted a Subject Access Request ('SAR'), to L&C and CIB prior to the latter business being dissolved.

The suitability report is dated 4 July 2011 and is addressed to Mr D. It was prepared by a CIB financial adviser (the 'adviser'). And it was noted that he would be treated as a 'retail client' for the purposes of the advice. The suitability report referred to various documents that had been given to Mr D such as a Key Facts document and a Client Agreement.

In the suitability report, the adviser noted: *"Further to our recent correspondence, we have now received sufficient information from you and your pension providers to report our findings."* Amongst other things, and in summary, the suitability report included:

- Under the heading 'Type of Advice' it said: *"Whenever possible, we* [CIB] *would wish to carry out a complete financial review, but at your explicit request, our advice is restricted to the consideration of establishing a Self Invested Personal Pension to*

allow you to invest in the offshore development of your choice. Should you wish us to consider any other areas, we would be very happy to provide further advice, in accordance with the costs and charges laid out in our Client Agreement."

- Under 'Requirements and Needs' it noted that Mr D:
    - Wanted to purchase an offshore/offplan investment within a registered pension scheme.
    - Wanted to establish a pension plan which allowed him to invest in an extremely wide selection of investments.
    - Held monies in a Aegon personal pension plan, which the adviser said didn't allow him (Mr D) the flexibility to meet his needs.

- Under 'Summary of Recommendations', the adviser said:
    - CIB only recommended one pension provider (L&C) and this was because the provider had: *"…an existing relationship with your developer and are experienced in the investment process.*"
    - Other pension plans such as a Stakeholder/Personal pensions were considered but discounted as the adviser said these would not give Mr D the flexibility he needed to meet his objectives.
    - It was noted that Mr D had sufficient pension funds available to create a SIPP and to provide enough assets to meet the initial payments and charges associated with his chosen investments.
    - The adviser ended this section by saying: *"We are therefore pleased to recommend that you consider establishing a Self Invested Personal Pension."*

- Under the heading 'Existing Pension Arrangements' it named Mr D's personal pension plan which it said had an approximate transfer value of £187,485. And under 'New Pension Provider' it was recommended the personal pension plan be transferred to a L&C SIPP.

- Under 'Benefits of Normal Retirement', an illustration was provided to Mr D. This showed if the transferred pension fund performed at the 'low rate' it could accumulate a value of £378,000 by Mr D's chosen retirement age. And at a 'high rate' it could accumulate a value of £685,000 at his chosen age of retirement. It also provided possible income benefits that could be taken from these sums as well as a tax-free cash lump sum.

- The adviser added directly under the illustration table: *"The risk taken when investing your own funds will have a direct impact on the value of your eventual retirement benefits. As you are intending to invest directly into commercial property, we are not really able to apply the traditional growth rate assumptions to make a comparison against your outgoing scheme."*

- The adviser's name was printed at the end of the suitability report but his signature was not in this document. Directly under his name was the printed name of 'C.I.B (Life & Pension) Ltd'.

Following on from the suitability report was a 'Pensions Report'. In summary, this made the following key points:

- It had a brief explanation of what a SIPP was and, a subsequent separate document, gave more detailed information about the business of L&C and its services.
- Under the heading *"Your Attitude to Risk",* it noted that investing in an offshore/off-plan commercial property investment, would be deemed to be speculative and adventurous in itself.
- The adviser explained the assessment of Mr D's attitude to risk as follows: *"As indicated on your fact find, I understand that your views on investment risk for these monies to be balanced, rather than cautious or adventurous. On a scale of 1 to 10 you want this investment to be around [four to six] as defined in the attached risk-rating guide."*
- The 'risk-rating guide' that followed explained that 'a scale of 6': *"…includes UK growth and income and UK growth unit trusts, most UK investment trusts and diversified international unit trusts. Also, most equity linked offshore funds and bonds are included in this group".*
- In terms of Mr D's 'balanced' attitude to risk, the adviser said this would *not* normally preclude him (Mr D) from considering an offshore/off-plan commercial property investment unless such investment formed a considerable part of his overall wealth.
- In a fact find that followed (see further below), this investment was assessed to be '0% to 10%' of Mr D's overall wealth. The only asset listed in the fact find apart from Mr D's personal pension plan was his residential home and no value was attributed to this.

After the Pension Report there was a section entitled ***"SIPP (especially with Offshore Commercial Property) – Risk Warnings"*** (CIB's emphasis). This section did not specifically address the TRG investment but gave general risk warnings about owning property abroad including:

- The value of 'your' property investment and income can fall as well as rise and is not guaranteed. And past performance wasn't a guide to future performance.
- A potential problem with this type of investment problem concerns liquidity, and the fact that taking retirement benefits might have to be delayed during a period when the property is not readily saleable.
- There may be risks of currency fluctuations due to assets being located abroad.
- To obtain the full benefit of the plan, any regular premium payments should be maintained up to retirement.
- If the investment is discontinued early, especially in the first few years, the transfer value could be less than the amount you paid in.

The Client Financial Information Form (Off-Plan/Offshore SIPP Package)

This was a seven page document and included the fact find, a RealSIPP Key Facts document and a CIB Client Agreement.

The fact find section stated: *"This information will be used to report on your current pension arrangements and the costs and benefits of transferring to a Self Invested Personal Pension package, for the express purpose of purchasing an off-plan, offshore commercial property. We are not offering full advice and only providing a report to your pension requirements. We will not provide any further advice."*

There were several questions posed to Mr D in the fact find to establish his attitude to risk, which as noted above was assessed as 'balanced'.

In terms of Mr D's proposed investments the following was noted in the fact find:

- Developer: The Resort Group
- Resort: Dunas
- Type of Property: Mr D named the same Apartment numbers that were subsequently used in his SIPP application
- Purchase Price: 347,375 euros
- Deposit Required: £173,821.79

Mr D said in the fact find that his retirement objective was to maximise his pension for his retirement. And he confirmed he wasn't currently contributing to a pension and the fact find showed he had no other pension provision other than his personal pension plan. Mr D signed and dated the fact find section on 27 June 2011.

The 'RealSIPP Key Facts' document that followed, reiterated that CIB/RealSIPP only offered products from a single company. And in terms of the service it would provide, this would only be in relation to Mr D's pension arrangements only.

The Client Agreement that followed on from the RealSIPP Key Facts document was a 'CIB Client Agreement'. CIB stated in the client agreement that it acted usually as a firm of 'Independent Financial Advisers' ('IFA') but in this case, under the heading 'Services', CIB noted it was restricting its services to the establishment and set-up of a specific SIPP to enable a commercial property purchase. CIB went on to say that it would: *"…not be providing any advice on the suitability of this package to your own personal circumstances and you should seek professional advice where necessary."* And that: *"For the avoidance of doubt, please be aware that when you become a client of C.I.B (Life & Pensions) Ltd we do not accept any responsibility for advice previously given to you by other firms. Nor is it part of our brief to review the suitability of advice previously given to you, unless we have specifically agreed to do so."* Mr D signed and dated the Client Agreement section on 27 June 2011.

The L&C SIPP brochure, application and investment form

As noted above, CIB recommended Mr D transfer his personal pension plan to a L&C SIPP. Mr D's application was marketed under L&C's 'Open Pension' SIPP. The SIPP brochure said from the outset that: *"…the L&C Open Pension is not appropriate for everybody and it is essential that you obtain financial advice before entering into one. Your own adviser should always be your first point of call for advice about the Open Pension".* The brochure explained that L&C had no responsibility for investment decisions made by the SIPP holder. But that it would ensure assets were correctly registered and were compliant with HM Revenue & Customs ('HMRC') rules and regulations.

Mr D instructed Aegon to transfer his pension to the SIPP on 27 June 2011. And in July 2011, his SIPP application form (the 'application') was submitted to L&C. The application, under 'IFA Details', noted the name of the CIB agent, who was different from the CIB adviser named in the suitability report. The firm named as acting for Mr D as his IFA was 'RealSIPP LLP' - CIB's name was next to RealSIPP's name in brackets. The initial fee for the adviser was £2,550 and there was an annual fee of £300. The was no question asked as to whether Mr D had received any advice at the point of sale.

Under 'Investments' the application asked whether Mr D wanted to manage the fund himself to which he answered 'yes'. And he put the investment he wanted to manage as the Dunas Beach Property Investment (the TRG investment).

Under 'Declaration' the application had a statement which said: *"I* [Mr D] *hereby agree to be responsible for any, claims, losses, costs, charges or expenses which may be raised*

against London & Colonial or incurred by London and Colonial in consequent of London & Colonial acting on instructions received by facsimile or email from the address stated on this application form and/or provided by me."

Mr D also completed investment forms for his TRG investments. Each investment form was on a separate page but the printed content on each page were the same. On each of the three investment forms, he provided details of the Dunas Beach apartment he wanted to invest in. As noted above, the apartments he chose on each form, were the same as those set out in his RealSIPP fact find.

On the first investment form Mr D named the Dunas Beach apartment and block he wanted to purchase - the purchase price was 139,950 euros. The purchase price of the second investment was 67,475 euros. And the purchase price of the third investment was 139,950 euros.

The investment forms gave three 'Payment Plan Options'. Mr D elected to pay under 'Easy Ownership Option 2' for all three of his apartments. Under each payment option the printed text said: *"I wish you to meet the purchase price and all costs and expenses from the cash available in my Arrangement. I understand that if I have chosen Easy Ownership Options 1, 2 or Hotel Suite 50% the initial deposit could be lost if for any reason there is not enough cash available in my Arrangement to pay the balance when due."*

Directly under the investment instructions, there was a declaration which said:

> *"I understand –*
>
> *(a) that neither the Trustee nor its Administrator is authorised to give me financial or investment advice and that no information given to me by you is intended to be and will not be taken as advice to me of any kind nor as any kind of recommendation of an investment in this asset and*
> *(b) that you have obtained legal advice in your capacity as Trustee in order to assess the risk of ownership and to ensure the acquisition of the appropriate title and*
> *(c) that the advice you have obtained does not cover the Investment merits, marketability or value of the property but only the risks of ownership."*
>
> *I have reviewed the due diligence report obtained in January 2010 and the (since modified) current Promissory Contract of Purchase and Sale. I have obtained whatever information, reports, legal and other advice I require regarding the investments including the potential income and the associated costs and expenses which may fall to be paid out of my Arrangements."*

Under the heading 'Sale', which followed on from the investment forms, the conditions under which the investments could be sold were set out which included the following: on receipt of a request from Mr D; if a benefit became payable and the sale was necessary to provide sufficient liquidity to pay that benefit; and if it became necessary to do so in order to comply with any law or regulatory requirements. And under the heading 'General', amongst other things, it said: *"I* [Mr D] *will indemnify and keep you* [L&C] *fully indemnified in respect of any loss claim action damage incurred or suffered by you in respect of the asset."*

Mr D signed and dated the SIPP application and the investment forms on 21 July 2011.

Mr D's SIPP was established on 1 August 2011 and the transfer of his pension plan funds was made on 13 September 2011.

In its submissions to the Financial Ombudsman, L&C's representative has clarified that at some point, upon completion of the properties the borrowing facility that had been planned to

be made available to investors did not materialise. So, L&C confirmed that in Mr D's case, by way of consolidation, he released his ownership of one apartment, and in return he gained 100% ownership of two of the apartments as well as the return of the surplus funds. This is supported by a statement of Mr D's holdings printed on 2 May 2018 which said:

- 1 May 2018 – SIPP Bank Account (cash) - £14,971.24.
- 30 March 2017 – 100% holding in an apartment at the Dunas Beach Resort valued at £134,728.31.
- 30 March 2017 – 100% holding in a Room at the Dunas Beach Resort valued at £72,346.07.

SIPP transactions

Mr D's SIPP transaction statement dated 2 May 2018 showed the following key transactions (all dates 2011 unless otherwise stated):

- 1 August - SIPP established
- 13 September - Aegon pension plan 'transferred in' £172,701.05
- 15 September - Employee and third party contribution 'transferred in' £4,800
- 16 September - Funds paid to TRG £32,670.15
- 16 September - Funds paid to TRG £70,211.51
- 16 September - Funds paid to TRG £70,211.51
- 21 September - IFA Fee paid £2,550
- 21 February 2012 - Tax Reclaim £1,200
- Between 16 December and 15 September 2014 monthly payments from TRG of £112.46 was paid into Mr D's SIPP. After this point there were ad hoc payments from TRG including rental payments and 'consolidations' payments. Payments into Mr D's SIPP from TRG included the following:
    - £2,707.25 on 18 March 2015 (consolidation payment);
    - £1,865.04 on 8 May 2015 (consolidation payment);
    - £2,940.59 on 8 May 2015 (consolidation payment);
    - £478.33 and £889.19 on 2 June 2015 (rental payments);
    - Other rental payments continued to be paid after June 2015, up until March 2018, ranging from £256.26 to £1,002.59.

Due diligence of RealSIPP/CIB undertaken by L&C

In its submissions to the Financial Ombudsman, L&C said it carried out due diligence on both the underlying TRG investments and on the introducer/adviser firms RealSIPP and CIB.

In terms of the TRG investments L&C said it commissioned its own due diligence report carried out in January 2010 and it also reviewed legal opinion commissioned by TRG. However, from what I have seen on other cases, the due diligence report L&C refers to commissioning is from January 2011. But this report refers to 'Salinas Sea Project' – see published decision (DRN-3336371). As noted above, L&C says it also reviewed a TRG commissioned due diligence report relating to the TRG investments. I have seen a copy of a TRG Due Diligence document, but from what I can see, this report did not refer to the Dunas Beach Resort.

In terms of the due diligence carried out against RealSIPP and CIB, L&C said that by applying to be an Intermediary, RealSIPP and CIB agreed to be bound by the terms of 'The Intermediary Agreement for Non-Insured Contracts' (the 'Intermediary Agreement'). L&C has, in Mr D's case, provided a copy of the Intermediary Applications completed by CIB and RealSIPP. These were both signed and dated on 13 September 2010. A letter dated

27 September 2010 from L&C to CIB confirmed the applications had been accepted. I've not seen a copy of the Intermediary Agreement itself in this case but have seen a copy of a L&C Intermediary Agreement in other cases.

L&C also said that as part of its due diligence it checked the regulatory status of the relevant parties. L&C's provided us with copies of print outs from the FSA Register which it said it checked prior to accepting CIB/RealSIPP as Intermediaries. These record that, as of 6 April 2010, RealSIPP was an Appointed Representative of CIB. And CIB had been authorised by the FSA since 1 December 2001. I've set out CIB's main permissions above, so I won't repeat them again here.

Mr D's complaint

Mr D approached a CMC for advice in early February 2016. He said this came about following advice from his mortgage adviser who formerly worked for the unregulated introducer business that had introduced him to CIB and/or RealSIPP.

Initially the CMC advised Mr D to make a claim to the FSCS about the advice he'd received from CIB, which by this time was in liquidation. In a letter dated 2 December 2016, the FSCS confirmed to Mr D that it had accepted his claim made against CIB and had calculated his loss to be £97,759.15. It should be noted that this calculation took into account, and made a deduction, based on the value of the TRG investments as at that time. Mr D received the FSCS award limit of £50,000. The FSCS provided Mr D with a Reassignment of Rights ('RoR') on 7 August 2017. The RoR allowed him to bring his complaint about L&C.

Mr D complained to L&C on 29 October 2017. In summary, Mr D said:

- L&C had failed to carry out sufficient due diligence on the introducer and the subsequent investments. He said that L&C was required to check the suitability of the advisers introducing business to it.
- He was a retail investor, with a low risk profile – he didn't think that the investments were suitable for him.
- L&C should have had proper controls in place to monitor CIB's/RealSIPP's activities. And that if L&C had done so, it would've realised that CIB/RealSIPP weren't acting appropriately in several areas.
- Mr D noted that L&C hadn't carried out any face-to-face meetings or telephone appointments with him, in order to question his reasons for purchasing a SIPP so that he could invest in high risk investments that clearly did not meet his risk profile.
- Mr D didn't think L&C had fulfilled its obligations under 'The Financial Crime Obligations – it should have had a process in place known as *"Enhanced Customer Due Diligence"* for non face-to-face business.

L&C responded to Mr D in a letter dated 25 January 2017. It has since transpired that this letter was dated incorrectly (I will deal with this issue further below). Amongst other things, L&C responded to Mr D's complaint as follows:

- It's an execution only pension provider which precludes it from responsibilities for either the selection or the performance of the investments held within its SIPPs.
- It was the responsibility of the regulated adviser to advise Mr D on the suitability of both the SIPP and the proposed investments. And it was CIB who provided the regulated advice on the suitability of the SIPP itself and on the intended investments.
- L&C's checks on the FSA's Register showed both RealSIPP acting as an AR for CIB, and CIB were authorised and regulated for the provision of regulated financial advice. So, Mr D's complaint should be directed to CIB as the firm who were responsible for

the advice.

- L&C's responsibilities to establish that the TRG investments were acceptable from an HMRC point of view were undertaken correctly.
- L&C took reasonable skill and care to establish that the seller had good title and could therefore sell the TRG investments.
- A SIPP allows members to have control over their investments and to choose the level of risk that is appropriate to their financial circumstances.
- L&C as Trustee has limited powers to veto investments. The investment instructions form explained to Mr D the limitations of L&C's role. Mr D confirmed in the documents he signed that he understood L&C's responsibilities.
- The investment had been independently valued in September 2016 by a 'RICS' Valuer. The valuations showed the TRG investments had increased in value. Note: that the acronym 'RICS' is commonly used to refer to the Royal Institute of Chartered Surveyors.
- L&C also noted that rental income was still being received as of 2018.
- Given its role, L&C would never have had any face-to-face meetings or telephone appointments with Mr D to question his reasons for purchasing the SIPP.
- The *"Enhanced Customer Due Diligence"* for non face-to-face business, only applies to Politically Exposed Persons. L&C said it carried out appropriate anti-money laundering checks in relation to Mr D's SIPP, including receiving a certified copy of his passport.
- L&C considered it acted in Mr D's best interests. And it has acted well within the rules set out by the regulator.

On 29 March 2018, Mr D brought his complaint to the Financial Ombudsman. He reiterated the complaint points he made to L&C which I've summarised above.

In its initial submissions to the Financial Ombudsman, along with the points it made to Mr D, which I've summarised above, L&C made several additional points including

- The complaint has been made out of time - Mr D's investments were made in September 2011 and his complaint was made in October 2017, which was more than six years after the cause for complaint arose.
- L&C confirmed its final response letter should have been dated 25 January 2018.
- L&C wanted the complaint dismissed on the grounds that it would be more suitable to be dealt with by The Pensions Ombudsman ('TPO').
- The matter had been referred to the FSCS and it wanted to know how much Mr D received from this claim so as to avoid double recovery.
- L&C referred to appointing solicitors to carry out due diligence who were experienced to advise on the purchase of property based in Cape Verde. L&C rejected it had failed to carry out satisfactory due diligence on the investments. And it said it had also carried out sufficient due diligence on the introducers.
- L&C said it did not fail to meet its regulated obligations under the regulator's Conduct of Business Sourcebook ('COBS'). In fact, L&C would have failed to meet its COBS obligations by refusing to act on Mr D's instructions.
- L&C had adequate controls in place to monitor business being introduced to it.
- Mr D has not made a loss. He invested £173,093.17. A valuation carried out in September 2016, showed an increase in the value of his investments which were worth £207,074.38 at that time.

Our investigator recommended upholding the complaint. In brief, she didn't think L&C had carried out sufficient due diligence on RealSIPP or its principal, CIB. She said if L&C had done so, Mr D would not have set up the SIPP in the first place and no losses would have been made due to the investments he subsequently made.

L&C, through a representative, disagreed with the investigator's view. In summary L&C's representative said:

- The SIPP was set up on an execution only basis, so L&C accepted no responsibility for checking the quality of the investment business, much less the decision to transfer and invest.
- The investigator was imposing a duty that went far beyond what was agreed between the parties. And which is not provided for either at law and/or in any regulatory guidance/rules and/or case law.
- The investigator largely ignored the disclaimers contained in the SIPP and investment forms which were both signed by Mr D.
- The investigator's view makes no comment on the 'quality' of the investment itself, presumably because it is beyond doubt the investments were exactly as advertised.
- It's accepted by everyone that these were high-risk investments, but they were purchased by Mr D on an execution only basis. Because an investment is high risk, doesn't make it unsuitable for a SIPP.
- Further, a SIPP provider can't refuse to accept or reject an instruction simply based on an investment being high risk. And a SIPP provider cannot reject such business without completing a full suitability assessment which L&C did not, and does not, have the regulatory permissions to do.
- In compliance with its obligations pursuant to COBS 11.2.19R, L&C acted on Mr D's written instructions in the setting up of the SIPP and the investment. L&C could not refuse to accept Mr D's instructions based on this section of COBS.
- The view says the introduction involved a significant risk of consumer detriment because of the type of business being introduced and L&C should've been concerned about this. But Mr D knew about the risks involved in the type of investment he was purchasing and there was nothing preventing a SIPP provider from accepting such business.
- It's accepted that L&C did have an obligation to conduct due diligence on RealSIPP/CIB and it complied with this obligation. The Investigator accepts L&C carried out checks of the FSA Register and it showed RealSIPP was an AR of CIB, who, in turn, was a regulated entity. L&C had an Intermediary Agreement in place with RealSIPP/CIB and it has said its (L&C's) policy at the time was to only accept business from firms authorised by the regulator. The investigator accepted in the view that this was good practice.
- But the investigator still goes on to question the scope of the due diligence carried out in respect of RealSIPP and whether L&C was obliged to have done more. L&C submits that there was no requirement at the time to understand the adviser's business model as part of the due diligence and even if the Financial Ombudsman finds against L&C on this point, there is no evidence the information identifying RealSIPP's clients as investing in high-risk investments was available at the time the due diligence was conducted.
- L&C was in possession of all of the relevant information at the time of the due diligence and this information did not raise concerns.
- The investigator says that high risk holdings such as Dunas Beach are generally only suitable for a small proportion of the population. This ignores the fact that a SIPP provider offering an execution only service is wholly unable to assess the suitability of any particular investment for a customer. A SIPP provider's role in such a transaction is to obtain good title to the investment and hold it within a pension wrapper. L&C correctly fulfilled its role.
- The view states that no other SIPP provider should have accepted this business and if it wasn't for L&C, Mr D would not have suffered any losses as a result of his investments as he would not have opened a SIPP in the first place. But L&C disagrees with this as it was common practice for SIPP providers to accept

investments such as those purchased by Mr D in 2011. So, he would have likely found another provider to carry out the transaction if L&C didn't.

- The investigator notes the involvement of an unregulated introducer but, even if this were the case, there was no restriction on business being accepted from an unregulated introducer. Beyond this, the introduction to L&C came from a regulated entity.
- The investigator points to the FSA/FCA publications citing them showing areas of good practice. These publications do not constitute 'formal guidance'. And other than the regulator's 2009 Thematic Review Report these were not published before Mr D's investments and therefore, are not relevant to this complaint.
- The Adams decision (full court reference below) made clear that any reports, guidance and correspondence issued after the events at issue could not be applied to the Respondent's conduct at the time. So, based on the court findings in Adams, the only publication which could have any bearing in Mr D's case is the 2009 Thematic Review Report. Even this has no bearing on the construction of the regulator's Principles for Businesses (the 'Principles') as the contents of this document cannot found a claim for compensation of itself.
- The 2009 Thematic Review does not provide guidance in any meaningful sense – it merely highlights some 'examples of measures' that SIPP operators could consider.
- Even if the 2009 Thematic Review had been statutory guidance made under the Financial Services Markets Act ('FSMA') section 139A (which it did not), the breach of such statutory guidance would not give rise to a claim for damages under FSMA section 138D - only the breach of rules can give rise to such a right.
- Perhaps most importantly, the view largely ignores the findings of the High Court in Adams on the duties imposed by COBS. In particular, the Court held that, while the COBS rules contain express provisions dealing with the need to advise clients on both the *"suitability"* (COBS 9) and *"appropriateness"* (COBS 10) of their investment, those rules did not apply to execution-only SIPP providers.
- Despite this, the investigator seeks to impose on L&C a duty of due diligence that it does not in fact owe and which goes far beyond the scope of any duty envisaged by the parties. It seeks, in effect, to override COBS' careful allocation of duties between different types of firms conducting different types of business, and to impose duties on L&C in addition to those provided for under COBS by means of a generalised appeal to the Principles.
- The view doesn't properly explain its preference for using the Principles as opposed to the COBS rules and/or established case law.
- The investigator 'cherry picks' from the case law on which to base their view.
- It was the responsibility of RealSIPP as the financial adviser to advise Mr D on the suitability of both the product and the proposed investment. The investigator echoes this by stating that L&C couldn't and didn't give any advice to Mr D.
- The investigator justifies upholding the complaint despite accepting the culpability of both RealSIPP/CIB and (it seems) TRG. In effect, L&C is left to 'carry the can' as it is the last entity standing. At law, the only logical conclusion would be that L&C was not responsible for the decision to invest (this was the outcome in Adams) and, regardless of whether they are extant, the entities who brought about the transaction should be held responsible.
- Further, the criticisms about Dunas Beach made by Mr D are unfounded. Whilst it is illiquid, the investment has increased in value and has performed as advertised.
- The statutory objective previously set out in FSMA section 5(2)(d), now section 1C, namely *"the general principle that consumers should take responsibility for their decisions"* should be applied in this case.
- L&C said TPO and/or the Court was a more appropriate forum for this complaint to be decided.
- L&C said if the investigator's view is permitted to stand, the wider consequences will be very serious, both for consumers and for execution only SIPP providers

Submissions following the provisional decision

As noted above, both parties have now provided submissions in response to my provisional decision.

Mr D's CMC pointed out that I had not put in a recommendation in my redress in the event that the amount calculated goes over our award limits, which in Mr D's case is £150,000. I thought it fair and reasonable to do so. Therefore, I sent a letter to each party to say that if I uphold my decision following submissions to my provisional decision, I would also be making a recommendation that L&C pay the balance over the award limit.

Mr D's CMC also noted that: *"We also note your comments regarding the FSCS payment and we would confirm that FSCS will enforce the terms of the reassignment. Therefore the £50,000 previously awarded will have to be repaid to the FSCS. With that in mind we believe it is unfair if the £50,000 has to be deducted from the final redress figure after tax has been applied. From another case of a similar nature it was agreed that the financial loss would be calculated, the £50,000 that needs to be repaid to the FSCS would be deducted and then the firm would calculate the redress payable to the client from the remainder. Can we ask that the Ombudsman consider this point when making the final decision."* The CMC listed a number of scenarios of calculations that it felt would apply in Mr D's case if the redress it suggested applied in terms of the FSCS issue.

L&C in a letter dated 6 February 2024 from its representative reiterated many of the points it made prior to my provisional decision, which I had already taken into account when reaching my decision. So, many of the points had already been addressed. But for completeness, in summary L&C said in response to my provisional decision:

- The Ombudsman has upheld the complaint despite the execution-only nature of L&C's SIPP service and has said L&C should have carried out additional due diligence checks on the introducers/investments to make sure they were appropriate to deal with. L&C considered it had carried out sufficient due diligence on both the investments and the introducers.
- The Ombudsman has failed to take account of the law as she is specifically required to do under the Dispute Resolution: Complaints ('DISP') section of the FCA Handbook at section 3.6.4R. And in particular the Ombudsman has departed from legal precedent setting out (a) the importance of the contract between the SIPP provider and the customer; and (b) the scope of an execution-only SIPP provider's due diligence obligations. This is of particular importance in this instance, as the Ombudsman is creating new due diligence obligations in a way that is contrary to the FCA's own publications at the time.
- The Ombudsman's reliance on various FCA publications is misplaced and if anything, supports L&C's position.
- The Ombudsman 'cherry picks' from case law. The outcome in the Adams' cases is largely ignored and instead weight is placed on the Judicial Review decision of Berkeley Burke (court case references below). This is despite the fact that the relationships in the present case between L&C and Mr D are similar to those in Adams (if anything Mr D is in a safer position as he had the benefit of another FCA regulated entity – RealSIPP/CIB).
- The Ombudsman does not properly address using the Principles as the basis for finding against L&C in preference to the COBS rules or established case law, especially where a breach of these cannot, of itself, give rise to any cause of action at law.

- Whilst L&C accepts that the Ombudsman should take into account the Principles, these are overarching (as set out in Berkeley Burke) and are no substitute for the COBS rules (the application of which were considered in Adams). It remains the case that the Ombudsman makes no attempt to explain why the Principles have been relied on rather than the High Court decision in Adams, despite this decision forming a much more solid foundation for any consideration of a complaint against a SIPP provider.
- Whilst the Ombudsman accepts that L&C did not give advice and could not give advice to Mr D in accordance with its permissions at the time, no attempt is made to explain how L&C could effectively have completed adviser level due diligence and communicated this to Mr D without breaching its permissions. This contradicts the decision in Adams which held, that there was no duty on the SIPP provider in that case to consider the suitability or appropriateness of a SIPP or the underlying investment. The contract between the parties makes that clear.
- In respect of the statutory objective previously set out at FSMA section 5(2)(d), now s.1C, namely: *"the general principle that consumers should take responsibility for their decisions",* the Ombudsman concludes that, despite the execution-only nature of the transaction, Mr D is not responsible for any of his decisions.
- The publication of any reports, guidance and correspondence issued by the FCA had no bearing on the construction of the Principles as the contents of the documents (or the Principles) cannot found a claim for compensation of itself.
- Regulatory publications cannot alter the meaning of, or the scope of the obligations imposed by, the Principles.
- The 2009 and 2012 Thematic Review Reports did not, in fact, provide guidance in any meaningful sense and did not claim to do so. And they are not statutory guidance under FSMA.
- The 2009 and 2012 Thematic Reviews do little more than highlight some *"examples of measures" that "SIPP operators could consider, taken from examples of good practice that [the FSA] observed"*. Moreover, many of the matters which the Thematic Reviews invites firms to consider are plainly directed at firms providing advisory services, not firms, such as L&C, providing execution-only services.
- Even if the 2009 and 2012 Thematic Reviews had been statutory guidance made under FSMA section 139A (which they were not), the breach of such statutory guidance would not give rise to a claim for damages under FSMA s.138D (only the breach of rules can give rise to such a right).
- The FCA's Enforcement Guide deals with the status of statutory guidance as follows, guidance is not binding on those to whom the FCA's rules apply. Nor are the variety of materials such as case studies, FCA speeches and generic letters written by the FCA to Chief Executives in particular sectors published to support the rules and guidance in the FCA Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules.
- In light of the matters outlined above, it is not fair or reasonable to determine the complaint by reference to the FCA publications referred to, and to do so would only exacerbate the problem referred to by Jay J in R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service [2017] EWHC 352 (Admin).
- The provisional decision seeks to impose on L&C a duty of due diligence that it does not in fact owe and which goes far beyond the scope of any duty envisaged by the parties. It seeks, in effect, to override COBS' careful allocation of duties between different types of firm conducting different types of business, and to impose duties on L&C in addition to those provided for under COBS, by means of a generalised appeal to the Principles..
- The Ombudsman states in her provisional decision that the facts in the Adams case are different to those relating to this complaint, as are the breaches of breach under COBS 2.1.1R. L&C's submissions in response to this point are that the Ombudsman's findings

are clearly inconsistent with the law, in that it creates a relationship between L&C and Mr D before a contract is entered into and before any funds are received by L&C.

- L&C were entitled to rely on the fact that both CIB and its agent, RealSIPP were regulated entities and authorised to give advice to Mr D. L&C's due diligence did raise any concerns about either of these regulated entities. L&C also checked that both entities (RealSIPP/CIB) signed and agreed to a L&C Intermediary Agreement as part of its due diligence checks.
- Notwithstanding the appropriate level of due diligence carried out by L&C in respect of RealSIPP/CIB, the provisional decision finds that L&C was under further obligations to protect against 'consumer detriment' and ensure that Mr D understood the level of risk involved. This is wrong in L&C's view.
- COBS 2.4.8 states that it is reasonable for a firm to take comfort in the FCA status of another professional firm and in ignoring this provision, the Ombudsman is acting unfairly to L&C.
- The Ombudsman seeks to differentiate Adams by stating that HHJ Dight didn't consider the application of the Principles to SIPP operators in his judgment. L&C considers what the Ombudsman has done is an attempt to circumvent the Adams decision.
- L&C also notes that the provisional decision does not provide a view on the appropriateness of the investment. L&C can only assume that this is because it is accepted that the investment was exactly what it was advertised to be.
- The assessment of suitability of any pension product, transfer of pension rights or investments was wholly the responsibility of Mr D and/or his financial adviser. In compliance with its obligations pursuant to COBS 11.2.19R, L&C acted on Mr D's written instructions in the setting up of the SIPP and the transfer of monies to The Resort Group (via instructions from RealSIPP).
- The decision that Mr D undertook to transfer his pension was outside of L&C's control. With regards to Mr D's 'defined benefit transfer', the point of no return is when he accepted the cash equivalent transfer value ('CETV') quote from the trustees of the scheme – this took place before L&C's had any basis to refuse any business from him.
- The Ombudsman should justify applying the 20% basic taxpayer rate to Mr D's award. Mr D should be put to proof that he will be a basic rate taxpayer in retirement.
- L&C requests confirmation from the Ombudsman that the award of £500 takes account of the distress and inconvenience caused by Mr D's own actions resulting in the loss of monies from his SIPP.

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

What I've decided – and why

Before I reconsider the merits of Mr D's complaint, I will again state why I think this matter has been brought within the relevant time limits. I will also set out the reasons why I don't think this matter should be dismissed as L&C had requested in its first submissions to the Financial Ombudsman Service.

Jurisdiction – time limits

L&C said in its submissions to the Financial Ombudsman Service that the matter had been brought out of time.

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

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

(1) more than six months after the date on which the respondent sent the complainant its final response, … or

(2) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;"

Even where a complaint has been brought outside of the relevant time limits, DISP still allows the Financial Ombudsman to look at a complaint where the respondent consents to us doing so (DISP 2.82R (5)), or where exceptional circumstances apply (DISP 2.8.2R (3)). But L&C does not consent to the Financial Ombudsman looking at the complaint if it has been brought too late. And I can see no exceptional circumstances that would have prevented Mr D from bringing his complaint before the relevant time limits set out in the DISP rules expired.

In terms of the six-month time limit rule, it should be noted that L&C's final response letter was dated 25 January 2017, which pre-dated Mr D's complaint letter of 29 October 2017. In its submissions to the Financial Ombudsman dated 3 May 2018, L&C clarified that its final response letter should've been dated 25 January 2018. So, I'm satisfied Mr D referred his complaint, which was on 29 March 2018, to the Financial Ombudsman within six months of receiving its (L&C's) final response letter. I will now consider the six-year and three-year time limit rules.

Mr D referred his complaint to L&C on 29 October 2017. This was more than six years after the SIPP was established on 1 August 2011 and more than six years after he made his investments in mid-September 2011. As Mr D's complaint is about the setting up of the SIPP and the investments he made, I think by referring his complaint to L&C on 29 October 2017, his complaint has been brought outside of the six-year time limit rule.

Turning now to the three-year time limit rule, in thinking about when Mr D was aware, or ought reasonably to have been aware, that he had cause for complaint, I've considered how 'cause for complaint' should be interpreted in the context of the FCA Handbook.

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

"44. The FCA Handbook is similar in its drafting style to the Financial Services Authority's Client Assets Sourcebook (CASS), which was considered by this Court in Re Lehman Brothers International (Europe) (No 2) [2010] EWCA Civ 917; [2011] 2 BCLC 184

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

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

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

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

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

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

The FCA Handbook includes the following rule (GEN 2.2.1R): *"Every provision in the Handbook must be interpreted in the light of its purpose."* And guidance in the same section that says the purpose of any provision in the Handbook is to be gathered from the text of the provision in question and its context amongst other relevant provisions (GEN 2.2.2(G)).

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

"In the Handbook …

(1) an expression in italics which is defined in the Glossary has the meaning given there; and

(2) an expression in italics which relates to an expression defined in the Glossary must be interpreted accordingly.' (GEN2.2.7(R))"

The term 'cause for complaint' is not defined in the FCA's Glossary. But where DISP says the Ombudsman cannot consider a complaint if it is out of time, the word *"complaint"* is in italics. So it is a defined term in the FCA Glossary and must be treated accordingly. And where that section of the Handbook says it sets out how complaints are to be dealt with by respondents, *"complaint"* is again in italics. So again it is a defined term.

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

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

"Any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service…which:

(a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and

(b) relates to an activity of that respondent, or any other respondent with whom that respondent has some connection in marketing or providing financial services or products …which comes under the jurisdiction of the Financial Ombudsman Service."

And 'respondent' (which is italicised) means a regulated firm covered by the jurisdiction of the Financial Ombudsman Service. So, the Glossary definition of complaint requires that the act or omission complained of must relate to an activity of 'that respondent' or firm.

Given this, the material points required for Mr D to have awareness of a cause for complaint include:

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

It is therefore my view that it is necessary for Mr D 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 that there may be a loss alone is not enough. It cannot be assumed that upon obtaining knowledge of a loss and/or a problem that a consumer had knowledge of its cause. And I don't accept the three-year time limit limb of the rules necessarily means that knowledge of a potential loss means the consumer has three years to make enquiries to discover all parties who might be responsible, failing which they run out of time to make a complaint. As Nugee LJ said in *The Official Receiver* case: "*the purpose of the rule is to prevent a complainant from losing the right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware."*

To be clear, I don't think Mr D would need to have understood the details of the SIPP provider's obligations to have been aware (or in a position whereby he ought reasonably to

have been aware) of his cause for complaint. But I think Mr D would've needed to have actual or constructive awareness that an act or omission of L&C had a causative role in the loss.

The CMC has provided information about its initial dealings with Mr D and what advice it gave him and when. The CMC's records show that he contacted it for advice on 17 February 2016 which was shortly after he had a discussion with his mortgage adviser. It was the mortgage adviser who had informed Mr D that he (Mr D) may have a problem with the TRG investments held in his SIPP. So, at the point of speaking with his mortgage adviser, I think Mr D knew or ought reasonably to have known, that there was a problem with his TRG investments. And therefore, I consider the three-year time limit began at this point (early 2016). However, I don't think there is any evidence that at the point of contacting the CMC that Mr D would've likely have had actual or constructive awareness of a problem that may have caused him material loss which could be linked to an act or omission by L&C.

When asked how Mr D would have known about his cause to complain against L&C the CMC said it would have advised him about the possible complaint against the SIPP provider. It said the discussion could occur at various times during the complaints process. But is normally covered off once the files are received, in this case under the SAR, from the IFA (CIB in this case) and the SIPP Provider (L&C).

I note that once instructed by Mr D, the CMC sent for further information from both CIB and L&C. And it received information from L&C on 13 April 2016. It said it was at this point that it knew that there was a likelihood that all of Mr D's losses may not be met by the claim against CIB via the FSCS. Additional evidence was obtained by the CMC on 19 May 2016. And one of its agents conducted a telephone interview with Mr D on 14 June 2016. The CMC says the prospect of a complaint against the SIPP provider would have been discussed during this call.

So, from what the CMC says, it was in June 2016 that Mr D was told that he had cause to complain about L&C. This would mean that he had until June 2019 to make a complaint. And as he made his complaint to L&C in a letter dated 29 October 2017, this would mean his complaint was made within the three-year time limit rule.

However, I think it's more likely than not that the CMC did make Mr D aware of a potential cause for complaint about L&C earlier than its discussion in June 2016. I say this because it didn't just ask for the files of CIB but also requested the files from L&C so it seems to me it was actively seeking to establish a case against both CIB and L&C. So, I consider its more likely than not that the CMC did make Mr D aware of a potential claim against L&C at the outset i.e. when he contacted the CMC for advice in February 2016. But even if this were the case, the earliest Mr D would have known he had cause for complaint against L&C was in February 2016. And as he complained to L&C in October 2017, I consider the matter is still within the three-year time limit part of our rules.

I note L&C's argument that Mr D knew his investments were 'illiquid' from the outset so the three-year time limit period started at this point i.e. 2011. But I don't think the knowledge of the investment being 'illiquid' by itself, would have given rise to an awareness about a problem and that this problem was as a result of an act or omission by L&C. As his investment was in property it is usual to warn investors buying this type of asset, that it is likely to be 'illiquid'. When reference to the 'liquidity' of an asset is mentioned this simply refers to the ease with which the asset can be converted into cash. It is a measure of how quickly the asset can be sold. So, I don't think the risk warnings about his TRG investments being illiquid, which he received at the outset in 2011, would've given rise to a cause for concern about the assets he was about to purchase.

All in all, for all the reasons set out above, I consider the Financial Ombudsman does have the power to look at Mr D's complaint as he has referred it within the relevant time limits.

The TPO request

In response to the view, amongst other things, L&C said it believes the complaint is better suited to be considered by TPO or a Court. It doesn't dispute that the Financial Ombudsman has jurisdiction in respect of this case, which I'm satisfied we do. Having carefully considered L&C's submissions on this point, I'm satisfied that Mr D's complaint is one we can, and should, consider.

We've a statutory duty to resolve complaints referred to us which are within our jurisdiction, subject to certain discretions, which are set out in our rules. Regarding L&C's submissions about TPO, the rules set out in DISP 3.4.1R state that: *"The Ombudsman may refer a complaint to another complaints scheme where: (1) he considers that it would be more suitable for the matter to be determined by that scheme; and (2) the complainant consents to the referral."*

L&C says Mr D's complaint should be referred to TPO. And I could now refer the complaint to TPO on the basis of DISP 3.4.1R, if I take the view it's more suitable for TPO and if, in the light of that view, Mr D consents to a referral to TPO. But I don't consider this is a complaint that would be more suitable for determination by TPO. This complaint requires consideration to be given to the rules and principles set down by the regulator.

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

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

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

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

Having reconsidered all the evidence, I am upholding this complaint. I'll explain why. Before I set out my reasoning, I think it is important to note that when considering what's fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

As a preliminary point, I should also say the purpose of this decision is to set out my findings on what's fair and reasonable, and explain my reasons for reaching those findings, not to offer a point by point response to every submission made by the parties to the complaint including those that were sent in response to my provisional decision

which largely repeat what was said before my provisional findings were issued. And so, whilst I've taken into account all the submissions made by both parties, I've focussed here on the points I consider to be key to my decision on what's fair and reasonable in all the circumstances.

Relevant considerations

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

The Principles, which are set out in the FCA's Handbook: *"…are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G). I consider that the Principles relevant to this complaint include Principles 2, 3 and 6 which say:

> *"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence."*
>
> *"Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems."*
>
> *"Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."*

I've carefully considered the relevant law and what it says about the application of the Principles. In R (British Bankers Association) v Financial Services Authority [2011] EWHC 999 (Admin) ('BBA') Ouseley J said at paragraph 162: *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."*

And at paragraph 77 of BBA, Ouseley J said: *"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."*

In R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service [2018] EWHC 2878 ('BBSAL'), Berkeley Burke brought a judicial review claim challenging the decision of an Ombudsman who had upheld a consumer's complaint against it. The Ombudsman considered the regulator's Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper. And that if it (Berkeley Burke) had done so, it would have refused to accept the investment. The Ombudsman found Berkeley Burke had therefore, not complied with its regulatory obligations and had not treated its client fairly.

Jacobs J, having set out some paragraphs of BBA including paragraph 162 which I've set out above, said (at paragraph 104): *"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles-based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."*

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

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

On 18 May 2020, the High Court handed down its judgment in the case of Adams v Options SIPP [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474. I've taken account of both these judgments and the judgment in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 1188 when making this decision on Mr D's case.

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

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

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

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

paragraph 148: *"In my judgment in order to identify the extent of the duty imposed by Rule 2.1.1 one has to identify the relevant factual context, because it is apparent from the submissions of each of the parties that the context has an impact on the ascertainment of the extent of the duty. The key fact, perhaps composite fact, in the context is the agreement into which the parties entered, which defined their roles and functions in the transaction."*

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

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

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

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

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

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

The regulatory publications

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

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

I've reconsidered the relevance of these publications in light of L&C's further comments but my view on this matter has not changed. And, as I've said in my provisional decision, I've set out material parts of the publications here, although I've considered them in their entirety.

The 2009 review

The 2009 review included the following statement:

> *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its clients and treat them fairly') insofar as they are obliged to ensure the fair treatment of their clients. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients. It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF* [treating customers fairly] *consumer outcomes.*
>
> *We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.*
>
> *Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their clients' interests in this respect, with reference to Principle 3 of the Principles for Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').*
>
> *The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:*
>
> - *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*
>
> - *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*
>
> - *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by*

intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.

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

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

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

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

- *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)."*

<u>The later publications</u>

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

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

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

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

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

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un-authorised business warnings.*
- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers. Examples of good practice we have identified include:

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*
- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*
- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from non-regulated introducers"*

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

*"**Due diligence***

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

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

The July 2014 Dear CEO letter provides a further reminder that the Principles apply and an indication of the regulator's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles. And it also sets out how a SIPP operator might meet its obligations in relation to investment due diligence. The regulator said:

"Our review assessed due diligence processes in five key areas:

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

Please note that the due diligence necessary for individual investments may vary depending on the circumstances, and the five areas highlighted above are not exhaustive."

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

In its response to the investigator's view, L&C has said the 2009 review isn't formal guidance. I acknowledge the 2009 and 2012 reviews and the 'Dear CEO' letter, aren't formal

guidance (whereas the 2013 finalised guidance is). However, I remain of the view that the fact the reviews and the 'Dear CEO' letter didn't constitute formal guidance doesn't mean their importance should be underestimated. They provide a reminder that the Principles apply. And are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulator's expectations of what SIPP operators should be doing, also go some way to indicate what I consider amounts to good industry practice. I therefore remain satisfied it's appropriate to take them into account.

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

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

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

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

And it's noted prior to the good practice examples quoted above that: *"We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs."*

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

I'm also satisfied that L&C, at the time of the events under consideration here, thought the 2009 review was relevant. L&C acknowledged in its submissions that the review is relevant to how it conducts its business and highlights some areas of good practice. And

L&C says it did carry out some due diligence checks on RealSIPP/CIB and the investments which it highlights as evidence of it carrying out sufficient due diligence.

L&C says that it took into account the two due diligence reports on the investments. As I noted above, these reports do not appear to relate to the Dunas Beach investments, but it does show that L&C did see the importance of taking steps to check the investments before allowing them into its SIPP.

As noted above, L&C has also said that it carried out due diligence on both RealSIPP and CIB. It says that in this respect, it had Intermediary Agreements with both RealSIPP and CIB – whilst L&C hasn't provided a copy of this Agreement in Mr D's case, I've seen a copy of the Intermediary Agreement that it has used in relation to other introducers. Prior to becoming subject to the Intermediary Agreement, both RealSIPP and CIB completed an Intermediary Application form. I've seen these documents. I've also seen a copy of L&C's letter where it approved each business (RealSIPP and CIB) as introducers which is dated 27 September 2010.

L&C said it also checked RealSIPP's and CIB's authorisation details on the FSA register. I've seen the copies of the print outs from the register it sent to us showing that it did carry out these searches. So, clearly L&C thought it was good practice to carry out some checks before accepting business from RealSIPP/CIB.

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

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

I note L&C reiterated its point that the judge in the Adams case didn't consider the 2012 review, 2013 SIPP operator guidance and 2014 Dear CEO letter to be of relevance to his consideration of Mr Adams' claim. But it doesn't follow that those publications are irrelevant to my consideration of what's fair and reasonable in the circumstances of this complaint.

I'm required to take into account good industry practice at the time under consideration here. And in my view, the publications indicate what I consider amounts to good industry practice at the relevant time. That doesn't mean that in considering what's fair and reasonable, I'll only consider L&C's actions with these documents in mind. The reviews, the 'Dear CEO' letter and guidance, gave non-exhaustive examples of good practice. They didn't say the suggestions given were the limit of what a SIPP operator should do. As the annex to the 'Dear CEO' letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

The then regulator also issued an 'Alert' in 2013 about advisers giving advice to consumers on SIPPs without consideration of the underlying investment to be held in the SIPP. The Alert *("Advising on pension transfers with a view to investing pension monies*

into unregulated products through a SIPP"), set out that this type of restricted advice didn't meet regulatory requirements. Amongst other things, the Alert stated:

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

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

To be clear, I don't say the Principles and/or the publications obliged L&C to ensure the transactions were suitable for Mr D. It's accepted L&C wasn't required to give advice to him and couldn't give advice under its permissions held at the time. And I accept the publications don't alter the meaning of, or the scope of the Principles. But they're evidence of what I consider to have been good industry practice at the relevant time, which, as I've said, would bring about the outcomes envisaged by the Principles.

I'd also add that, even if I agreed with L&C that any publications or guidance that post-dated the events subject of this complaint don't help to clarify the type of good industry practice that existed at the relevant time (which I don't), that doesn't alter my view on what I consider to have been good industry practice at the time. That's because I find that the 2009 review together with the Principles provide a very clear indication of what L&C could, and should, have done to comply with its regulatory obligations that existed at the relevant time before accepting Mr D's introduction from RealSIPP. It's important to keep in mind the judge in Adams v Options cases didn't consider the regulatory publications in the context of considering what's fair and reasonable in all the circumstances, bearing in mind various matters including the Principles (as part of the regulator's rules) or good industry practice.

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

Submissions have been made by L&C about breaches of the Principles not giving rise to any cause of action at law, and breaches of guidance not giving rise to a claim for damages under the FSMA. I've carefully reconsidered these submissions but, to be clear, it's not my role to determine whether something that's taken place gives rise to a right to take legal action. I'm making a decision on what's fair and reasonable in the circumstances of this complaint – and for all the reasons I've set out above I'm satisfied that the Principles and the publications listed above are relevant considerations to that decision.

So, taking account of the factual context of this case, it's my view that in order for L&C to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things, it should have undertaken sufficient due diligence into RealSIPP/CIB and the business it (RealSIPP) was introducing, both initially and on an ongoing basis.

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

As noted above, L&C says it did carry out due diligence on RealSIPP and its principal, CIB, before accepting introduction business from it. And from what I've seen I accept that it undertook some checks. However, the questions I need to consider are whether L&C ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by RealSIPP were being put at significant risk of detriment. And, if so, whether L&C should therefore not have accepted Mr D's application from RealSIPP in the first place.

The contract between L&C and Mr D

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

The forms Mr D 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 D'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 D on the suitability of the SIPP or the TRG investments. But I'm satisfied that, to meet its regulatory obligations when conducting its operation of SIPPs business, L&C had to decide whether to accept introductions of business from a firm with the Principles in mind. And I don't agree it couldn't have rejected introductions and/or applications without contravening its regulatory permissions by giving investment advice.

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

In this case, the business L&C was conducting was its operation of SIPPs. And I remain satisfied that to meet its regulatory obligations when conducting its operation of SIPPs

business, L&C had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind. The regulators' reviews and guidance provided some examples of good practice observed by the FSA and FCA during its work with SIPP operators. This included being satisfied that a particular introducer/investment is appropriate to deal with and/or accept. That involves conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.

As set out above, to comply with the Principles, L&C needed to conduct its business with due skill, care, and diligence; organise and control its affairs responsibly and effectively; and pay due regard to the interests of its clients (including Mr D) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis. And, as I've said, I think that L&C understood this at the time too, as it did more than just check the FSA entries for RealSIPP and CIB to ensure they were regulated to give advice. It also entered into Intermediary Agreements with those firms.

It's also apparent that L&C had access to some information about the type and volume of introductions it was receiving from RealSIPP, as it's been able to provide us with information about this when requested on other cases. So, and well before the time of Mr D's application, I think that L&C ought to have understood that its obligations meant that it had a responsibility to carry out appropriate checks on RealSIPP to ensure the quality of the business it was introducing. And I remain of the view that L&C also ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments before accepting them into a SIPP.

I consider L&C's submissions on the due diligence it undertook prior to allowing the TRG investments within its SIPPs reflect this. So, I'm satisfied that to meet its regulatory obligations when conducting its business, L&C was also required to consider whether to accept or reject a particular investment, with the Principles in mind.

L&C's due diligence on RealSIPP/CIB

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

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

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

Despite L&C's further submissions on this point, which as I've said, largely repeat what it said prior to my provisional decision, it ought reasonably to have concluded it should not have accepted business from RealSIPP and it should've ended its relationship with it before Mr D's application was made for the following key reasons:

- L&C was aware of, or should have, identified potential risks of consumer detriment associated with the business introduced by RealSIPP at the outset

of its relationship with this business, and certainly by the time of Mr D's application.
- There was insufficient evidence to show RealSIPP (or any other regulated party including CIB) was offering or giving *full* regulated advice – that is advice on the transfer or switch to the SIPP *and* 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 and/or CIB had the necessary permissions to give full advice on the business RealSIPP was introducing, neither it nor CIB was giving advice on a large proportion of that business.
- TRG, an unregulated business, was promoting the Dunas Beach investment and was using unregulated introducers to promote this and other similar investments.

L&C should have taken steps to address these risks or, given these risks, have simply declined to deal further with RealSIPP. Such steps should have involved getting a full understanding of RealSIPP's business model – through requesting information from RealSIPP and through independent checks. Such understanding would have revealed there was a significant risk of consumer detriment associated with introductions of business from RealSIPP. In the alternative RealSIPP would have been unwilling to answer or fully answer the questions about its business model. In either event L&C should have concluded it shouldn't accept introductions from RealSIPP.

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

Anomalous features

Volume of business

It's clear that L&C had access to information about the number and nature of introductions that RealSIPP made, as it's been able to provide us with details about this when requested. An example of good practice identified in the FSA's 2009 review was: *"Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified."*

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

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

On another case from January 2018, L&C gave further information about RealSIPP's introductions 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.

On more recent cases that I've seen, L&C has confirmed that the total of 160 clients were introduced by RealSIPP. And that following a sample of 20% of the total number of clients introduced by this introducer, 99.94% were from Occupational Pensions Schemes. L&C also said all investors invested in overseas commercial properties. And during the course of the agreement with RealSIPP, 23% of L&C's total new business came from its (RealSIPP's) introductions.

L&C has not provided information about the number of cases that were introduced to it by RealSIPP by the time of Mr D's application (July 2011). But given the timing of his application compared to when it started accepting introductions (February 2011), I think it's more likely than not that by the time it received Mr D's application L&C would already have received a number of introductions from RealSIPP. And I think it's more likely than not that the trends in the pattern of business it had received from RealSIPP up to that point would have been not dissimilar to the trends in the *overall* pattern of business it received from RealSIPP.

I think that L&C should have been concerned that such a volume of introductions, relating exclusively to consumers investing in higher-risk esoteric investments was unusual – particularly from a small AR business. And it should have considered how a small AR business introducing this volume of higher-risk business was able to meet regulatory standards.

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

The introductions L&C received from RealSIPP were for applicants looking to invest in high-risk non-standard esoteric holdings, such as the unregulated overseas property development at the Dunas Beach Mr D was investing in. I think it's fair to say that such investments are highly unlikely to be suitable for the vast majority of retail clients. They will generally only be suitable for a small proportion of the population – sophisticated and/or high net worth investors. The risks are multiplied where the property is *"off plan"* and further funding is necessary from investors to complete the purchases, as was the case with many of the deposit based TRG investments, including those Mr D made.

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

High proportion of execution-only business

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

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

From the figures L&C's previously provided to us, a little under half the introductions from RealSIPP were transacted as execution-only business (i.e. with no advice being given by RealSIPP or CIB). That's a large proportion of the total business RealSIPP introduced. And I think it's likely that RealSIPP had introduced business to L&C without providing advice on a number of occasions before Mr D's introduction. So, I think that from very early on, L&C was on notice that RealSIPP, although the AR (Appointed Representative) of a regulated business that had permissions to advise on the business being introduced, wasn't a firm that was doing things in a conventional way. And I consider L&C ought to have recognised that there was a risk that RealSIPP might be choosing to introduce some consumers not only without them being given full regulated advice, but also without having any regulated advice at all.

I think these facts ought to have been a red flag for L&C in its dealings with RealSIPP. It's highly unusual for regulated advice firms to be involved in execution-only transactions involving pension transfers or switches to invest in high-risk esoteric investments, such as unregulated overseas property developments. That's because the risks involved in such transactions are unlikely to be fully understood by most people, without obtaining regulated advice. I consider it's fair to say that most advice firms decline to be involved in such transactions and certainly don't transact this kind of business in significant volumes. I consider L&C ought to have viewed this as a serious cause for concern – this was a further clear and obvious potential risk of consumer detriment.

The availability of advice

As noted above, the CIB suitability report said: *"Whenever possible, we would wish to carry out a complete financial review, but at your explicit request, our advice is restricted to the consideration of establishing a Self Invested Personal Pension to allow you to invest in the offshore development of your choice. Should you wish us to consider any other areas, we would be very happy to provide further advice, in accordance with the costs and charges laid out in our Client Agreement."*

A full financial review, in my understanding, is a holistic review of an individual's total financial circumstances, including incomings, outgoings, savings, investments, mortgages, pension products, protection products etc and it then analyses the individuals needs and objectives and the adviser then recommends how the consumer could best meet them. So, I don't read that Mr D, not wanting a complete financial review as equating to him not wanting full advice on the specific financial product that he (the consumer) believed he would be being advised on (i.e. their pension monies).

I think it's more likely than not that the 'complete financial review' wording was just wording RealSIPP and/or CIB was incorporating into its letters. I say this mindful of the fact that we've seen no cases that I'm aware of where it gave a full financial review (i.e. looking at all the consumers investments, savings, outgoings, protection in place etc and identifying needs and objectives etc.). In all of the cases the Financial Ombudsman has seen, RealSIPP and/or CIB was either giving no advice, or it was only giving advice on an appropriate SIPP to transfer the consumer's pension monies into (and without consideration of the suitability or otherwise of the underlying investments).

Mr D was advised to proceed with the transfer of his Aegon personal pension plan to the SIPP. And as I've said this was without the benefit of full regulated advice. He was only advised to transfer from his personal pension to a SIPP and L&C was chosen for this purpose. So, given the advice he received, I think it's understandable that he followed this advice. But as I've said, this advice consisted only of whether he should transfer from one pension provider to another.

I should say at this point that L&C in its submissions in response to my provisional decision, referred to Mr D having a defined benefit pension with CETV. But Mr D had a 'Flexible Pension Plan' with Aegon. And L&C records will show that it liaised with Aegon in arranging the transfer of his pensions funds. A letter dated 26 August 2011 to L&C from Aegon clearly says that L&C had made an enquiry about Mr D's pension plan. And L&C was asked to complete the form attached if the transfer was to go ahead. So, I think it's likely L&C did this and this is when the transfer was completed i.e. after it completed the necessary transfer forms.

Taking all of this in the round, whilst Mr D agreed with the recommendation he was given by the CIB adviser, I don't think he could have made an informed decision as to whether to transfer or not. This was a significant sum of money and Mr D's sole source of income for his retirement. As I've said the CIB Client Agreement shows that it (CIB) wasn't offering clients like Mr D the option of *full* regulated advice that also incorporated advice on the suitability, or otherwise, of the proposed investments that monies were being transferred to affect.

The possibility that there had been no regulated advice and/or no full regulated advice been given/offered particularly when concerning a pension, was a clear and obvious potential risk of consumer detriment here. It was clear from the SIPP application that Mr D was intending to transfer monies in from an existing personal pension plan to invest (almost entirely) in overseas property developments – a move which was highly unlikely to be suitable for the vast majority of retail clients.

The involvement of an unregulated business

I think it's more likely than not from the available evidence that an unregulated party was involved with the promotion of the TRG investment to some consumers introduced to L&C (including Mr D). Mr D has been able to name the unregulated introducer and says he was his (Mr D's) only point of contact during the advice process.

Mr D has said in his submissions that the unregulated introducer he dealt with was in person. And it was this introducer, not RealSIPP and/or CIB who gave him advice about the TRG investments. I think it's unlikely that consumers like Mr D were making the decision to establish a L&C SIPP, transfer their existing pension monies into a L&C SIPP and invest in the TRG investments of their own volition. And I consider L&C ought to have been alive to the risk that TRG and/or other unregulated introducers working with it or for it, were involved in promoting the TRG investments such as Dunas Beach investments to be held in Mr D's SIPP. It's noted that the CIB adviser said that he had chosen L&C as the SIPP provider as it had worked with TRG.

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

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 of Mr D's application – that it should not have continued accepting applications from RealSIPP. And that L&C should have come to this conclusion before it received Mr D'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 received Mr D's application. And mindful of the type of introductions it was receiving from RealSIPP from the outset, I think it's fair and reasonable to expect L&C, in-line with its regulatory obligations, to have made some specific enquiries and obtained information about RealSIPP's business model.

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

The October 2013 finalised SIPP operator guidance gave an example of good practice as: "*Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with."*

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

I think it's more likely than not that if L&C had asked RealSIPP for this *type of* information it (RealSIPP) would've provided a full response to the information sought. And that, amongst other things, L&C would have then been provided with copies of documents such as the Client Agreement. I consider this was a fair and reasonable step to take in all the circumstances to meet its regulatory obligations and good industry practice.

Making independent checks

I consider, 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 and/or received to applicants like Mr D. For example, it could have asked for copies of correspondence in which applicants were being offered advice.

The 2009 review said: *"…we would expect (SIPP operators) to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way,* ***for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification.****"* (bold my emphasis).

The 2009 review also said that an example of good practice was: *"Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely."*

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

L&C said it couldn't comment on advice without potentially being in breach of its permissions. Again, I confirm I accept L&C couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps included addressing a potential risk of consumer detriment by speaking to applicants and/or seeking copies of some suitability reports. This could have provided L&C with further insight into RealSIPP's business model and practices. These were fair and reasonable steps to take in reaction to the clear and obvious risks of consumer detriment I've mentioned.

As was explained in the published decision DRN-3587366 there appear to have been *some* instances where RealSIPP wasn't offering consumers *any* regulated advice on the proposed transactions. In Mr D's case, information from CIB does show he (Mr D) was provided with advice about the transferring to the L&C SIPP but, the suitability report says Mr D declined an opportunity to complete a full financial review. However, I've set out above why it was more likely than not that Mr D wasn't offered full regulated advice. As per my earlier comments on this point, I don't read a consumer not wanting a complete financial review (of their total financial circumstances) as equating to a consumer not wanting full advice on the specific financial product that they're meeting with/talking to advisers about (i.e. their pension monies).

I accept there's a possibility that Mr D might only have been interested in advice about his pension provisions rather than a complete financial review of his overall financial circumstances. But I don't think it's more likely than not that Mr D was offered full regulated advice on the transactions this complaint concerns by RealSIPP and/or its principal CIB (or any other regulated advisory firm). And that he then declined that offer. I think, as evidenced from the content of its Client Agreement he was given along with L&C's records of the pattern of business it was receiving from RealSIPP/CIB, these firms weren't offering full regulated advice on the overall proposition to those SIPP clients it was introducing to L&C.

In its response to my provisional decision L&C referred to COBS 2.4.8G which states: *"It will generally be reasonable…for a firm to rely on information provided to it in writing by an unconnected authorised person or a professional firm, unless it is aware or ought reasonably to be aware of any fact that would give reasonable grounds to question the accuracy of that information."* But as I've said, in all the circumstances I've described above, I think L&C should reasonably have taken steps to carry out independent checks on the information it was being provided with to avoid the risk of consumer detriment. I don't think COBS 2.4.8G changes my view on that.

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 D's application:

- Consumers were being introduced to L&C without having been given full regulated advice.
- RealSIPP was having business referred to it which involved the selling of investments to consumers by an unregulated business, TRG. It follows that some consumers might have been 'sold' on the idea of transferring pension monies so as to invest in TRG investments before the involvement of any regulated parties.

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

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

Had L&C carried out the due diligence I've mentioned above, I think it should have identified that consumers introduced by RealSIPP hadn't received full regulated advice from RealSIPP on their transactions. As was explained in the published decision DRN-3587366 there appear to have been *some* instances where RealSIPP wasn't offering consumers *any* regulated advice on the proposed transactions. In Mr D's case RealSIPP did give *some* advice. But I don't think it was likely that he was offered full regulated advice and the advice received from CIB was restricted to the transfer of Mr D's existing pension schemes to the L&C SIPP.

In cases like Mr D's, RealSIPP wasn't discussing the specific risks associated with the actual investment he was proposing to purchase which was the TRG investment and/or advising on the suitability of the overall proposition for the consumer (i.e. including the intended TRG investment). 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 have been consistent with what RealSIPP and, where relevant, CIB, had disclosed to them in the contemporaneous documentation in relation to the extent of their role.

Therefore, I consider L&C ought to have concluded Mr D didn't have full regulated advice made available to him by RealSIPP/CIB. And have viewed this as a significant point of concern. Retail consumers, like Mr D, were transferring their existing pension monies to L&C to invest entirely in higher-risk esoteric investments, including unregulated overseas property developments such as Dunas Beach, without the benefit of having been offered full regulated advice, by a business which appeared to be actively avoiding any responsibility to give advice. So, I consider L&C should have concluded, had it spoke to some applicants and/or obtained copies of some suitability reports, that some consumers introduced by RealSIPP who were investing in TRG investments were likely being 'sold' on its investments by an unregulated business.

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

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

Due diligence on the underlying investments

L&C had a duty to conduct due diligence and give thought to whether an investment itself is acceptable for inclusion into a SIPP. That's consistent with the Principles and the

regulators' publications as set out earlier in this decision. It's also consistent with HMRC rules that govern what investments can be held in a SIPP.

I accept the TRG investments didn't appear to be fraudulent or a scam. But this doesn't mean that L&C did all the checks it needed to do. In any event, given what I've said about L&C's due diligence on RealSIPP and CIB and my conclusion that it failed to comply with its regulatory obligations as well as good industry practice at the relevant time, I don't think it's necessary for me to also consider L&C's due diligence on the TRG investments at this stage.

I'm satisfied that L&C wasn't treating Mr D fairly or reasonably when it accepted his introduction from RealSIPP. So, I've not gone on to consider the due diligence it may have carried out on the TRG investment and whether this was sufficient to meet its regulatory obligations. This doesn't mean I accept L&C's argument that the investment performed as intended. It simply means, I am making no findings about this issue as I consider Mr D's application should not have been accepted in the first place for all the reasons I've set out above.

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

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

L&C's referred to forms Mr D signed. In my view it's fair and reasonable to say that just having Mr D sign indemnity declarations signed as part of the application process, 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 D had signed forms intended to indemnify it against losses that arose from acting on his instructions.

In my opinion, relying on such indemnities when L&C knew, or ought to have known, Mr D's dealings with RealSIPP/CIB 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 D's application. The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr D signed meant L&C could ignore its duty to treat him fairly.

To be clear, I'm satisfied that the indemnities contained within the contractual documents don't absolve, nor do they attempt to absolve, L&C of its regulatory obligations to treat customers fairly when deciding whether to accept or reject business. This is the same in terms of the contractual arrangements (the Intermediary Agreement) between RealSIPP/CIB and L&C. I don't consider the latter firm could absolve itself from liability simply by having an agreement about the firm with which it was accepting business. I'm satisfied that Mr D's SIPP shouldn't have been established and the opportunity to execute investment instructions and/or to 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 D's application.

COBS 11.2.19R

In its response to Mr D's complaint L&C has referenced COBS 11.2.19R and said that it would have been in breach of COBS if it hadn't affected his investment instructions. However, in the circumstances it's my view that the crux of the issue in this complaint is whether L&C should have accepted Mr D's application from RealSIPP in the first place.

An argument about having to execute the transaction as a result of COBS 11.2.19R (at the time COBS 11.2.1R) was considered and rejected by the judge in *BBSAL.* In that case Jacobs J said:

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

So, I don't think that L&C's argument on this point is relevant to its obligations under the Principles to decide whether to accept Mr D's business from RealSIPP.

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

L&C has contended it's RealSIPP and/or CIB that's really responsible for Mr D's losses. CIB would be the respondent for complaints about activities RealSIPP undertook as its AR. And the Financial Ombudsman won't look at complaints against CIB, as it's been dissolved and no longer exists as a regulated business. We also can't look at complaints about TRG.

The DISP rules set out when an Ombudsman's determination includes a money award, then that money award may be such amount as the Ombudsman considers to be fair compensation for financial loss, whether or not a Court would award compensation (DISP 3.7.2R). In my view, for the reasons set out above, it's fair and reasonable in the circumstances of this case to hold L&C accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mr D fairly. Given this, the starting point is that it would be fair to require L&C to pay Mr D 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 D for his loss, including whether it would be fair to hold another party liable in full or in part. And, for the following reasons, I consider it appropriate and fair in the circumstances for L&C to compensate Mr D to the full extent of the financial losses he's suffered due to L&C's failings.

I accept it may be the case that TRG and/or RealSIPP and/or CIB might have some responsibility for initiating the course of action which led to Mr D's loss. However, I'm satisfied it's also the case that if L&C had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr D wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

I want to make it clear that I've carefully taken everything L&C's said into consideration including its further submissions in response to my provisional decision. And it remains

my view it's appropriate and fair in the circumstances for L&C to compensate Mr D to the full extent of the financial losses he's suffered due to its failings.

To be clear, I'm not making a finding that L&C should have assessed the suitability of the SIPP or the TRG investments for Mr D. I accept that L&C wasn't obligated to give advice to Mr D, 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 D taking responsibility for his own investment decisions

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

I've considered this point carefully and I'm satisfied it wouldn't be fair or reasonable to say Mr D's actions mean he should bear the loss arising as a result of L&C's failings. In my view, if L&C had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr D's application from RealSIPP to open a SIPP at all. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr D wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

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

I've carefully considered what L&C's said about Mr D being aware of the risks. The suitability report and other documents provided by CIB/RealSIPP gave him no specific advice on the actual risks of investing in the TRG investments and/or using the full amount of his pension provisions in such investments. It simply gave him some general risk warnings about investing in property investments but it didn't advise him on the merits and/or risks of investing in the TRG investments and/or the risks he would be taking with his pension monies by investing in such an investment. I wouldn't consider it fair or reasonable for L&C to have concluded that Mr D *had* received an explanation of the risks involved with the overall proposition from RealSIPP and/or CIB given what L&C knew, or ought to have known, about RealSIPP's business model by the time it received Mr D's application.

Prior to this, Mr D had very little investment experience. And his only major asset apart from his 'house' was his personal pension plan with Aegon. CIB was a regulated firm who used an AR as part of its process, so both had the necessary permissions to advise on the transactions this complaint concerns. Mr D then used the services of a regulated personal pension provider, 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 D for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr D should suffer the loss because he ultimately instructed the transactions to be affected.

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

L&C has contended that Mr D would likely have proceeded with the transfer of his pension and purchase of the investments regardless of the actions it took. It argues that another SIPP operator would've accepted Mr D's application had L&C declined it. But I don't think

it's fair and reasonable to say L&C shouldn't compensate Mr D for his losses on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it has. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr D's application from RealSIPP in the first place.

Further, if Mr D had sought advice from a different adviser, who had given full regulated advice on the overall proposition, I think it's more likely than not that the advice would have been not to establish a SIPP and transfer pension monies so as to affect the Dunas Beach investments. And I think it's more likely than not that Mr D would have listened to that advice as he did so when he was advised to transfer to the L&C SIPP by the CIB adviser. Alternatively, if L&C hadn't accepted Mr D's application from RealSIPP, he might have simply decided not to seek pensions advice elsewhere from a different adviser and still then retained his existing pension plan.

Overall, I think it's far more likely than not that if Mr D had approached another regulated advisory firm he'd have been told in no uncertain terms he should leave his pension where it was. And I consider its most likely that Mr D would have listened to this advice.

I've also not seen any evidence to show Mr D 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 D, 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. And having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mr D's application from RealSIPP, the transactions that have led to this complaint, would not have gone ahead.

All in all, I do think it's fair and reasonable to direct L&C to pay Mr D compensation in the circumstances. 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 D for the full measure of his loss. RealSIPP was reliant on L&C to facilitate access to his pension. But for L&C's failings, I'm satisfied Mr D's pension transfer wouldn't have occurred in the first place.

I'm not asking L&C to account for loss that goes beyond the consequences of its failings. I am satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I'm not able to determine. However, that fact shouldn't impact on Mr D's right to fair compensation from L&C for the full amount of his loss.

L&C has highlighted that RealSIPP/CIB are no longer in existence. I accept this is true. However, the key point here is that but for L&C's failings, Mr D wouldn't have suffered the loss he's suffered. As a result, the trading/financial position of RealSIPP/CIB, doesn't lead me to change my overall view on this point. And, as such, I remain of the opinion that it's appropriate and fair in the circumstances for L&C to compensate Mr D to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by the other parties involved.

For all the reasons set out above, I'm upholding this complaint.

Putting things right

I remain of the view that L&C failed to comply with its own regulatory obligations and didn't put a stop to the transactions. My aim in awarding fair compensation is to put Mr D back into the position he would likely have been in had it not been for L&C's failings. Had L&C acted

appropriately, I think it's *most likely* that Mr D would've remained a member of the pension plan he transferred into the SIPP.

In light of the above, L&C should:

- Obtain the notional transfer value of Mr D's previous pension plan.
- Obtain the actual transfer value of Mr D's SIPP, including any outstanding charges.
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Pay an amount into Mr D's SIPP so as to increase the transfer value to equal the notional value established. This payment should take account of any available tax relief and the effect of charges.
- If the SIPP needs to be kept open only because of the illiquid investments and is used only or substantially to hold those assets, then any future SIPP fees should be waived until the SIPP can be closed.
- If Mr D has paid any fees or charges from funds outside of his pension arrangements, L&C should also refund these to Mr D. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Pay to Mr D an amount £500 to compensate him for the distress and inconvenience he's been caused.

I've set out how L&C should go about calculating compensation in more detail below.

Treatment of the illiquid assets held within the SIPP

I think it would be best if any illiquid assets held could be removed from the SIPP. Mr D would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investments may prove difficult, as there is no market for them. For calculating compensation, L&C should establish an amount it's willing to accept for the investments as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investments.

If L&C is able to purchase the illiquid investments then the price paid to purchase the holdings will be allowed for in the current transfer value (because it will have been paid into the SIPP to secure the holdings).

If L&C is unable, or if there are any difficulties in buying Mr D's illiquid investments, it should give the holdings a nil value for the purposes of calculating compensation. In this instance L&C may ask Mr D to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holdings. That undertaking should allow for the effect of any tax and charges on the amount Mr D may receive from the investments and any eventual sums he would be able to access from the SIPP. L&C will have to meet the cost of drawing up any such undertaking.

Calculate the loss Mr D has suffered as a result of making the transfer

L&C should first contact the provider of his previous pension plan which was transferred into the SIPP and ask it to provide a notional value for the policy as at the date of the final decision. For the purposes of the notional calculation the provider should be told to assume no monies would've been transferred away from the plan, and the monies in the policy would've remained invested in an identical manner to that which existed prior to the actual transfer.

Any contributions or withdrawals Mr D has made will need to be taken into account whether the notional value is established by the ceding provider or calculated as set out below.

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would've enjoyed is allowed for.

If there are any difficulties in obtaining the notional valuation from the previous provider, then L&C should instead arrive at a notional valuation by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return index). That is a reasonable proxy for the type of return that could have been achieved over the period in question. And, again, there should be a notional allowance in this calculation for any additional sums Mr D has contributed to, or withdrawn from, his SIPP since its inception.

I acknowledge that Mr D has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr D's Reassignment of Rights require him to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required.

So, I think it's fair and reasonable to make no p*ermanent* deduction in the redress calculation for the compensation Mr D received from the FSCS. And it will be for Mr D to make the arrangements to make any repayments he needs to make to the FSCS. However, I do think it's fair and reasonable to allow for a *temporary* notional deduction equivalent to the payment Mr D actually received from the FSCS for a period of the calculation, so that the payment ceases to accrue any return in the calculation during that period.

As such, if it wishes, L&C may make an allowance in the form of a notional withdrawal (deduction) equivalent to the payment Mr D received from the FSCS following the claim about CIB, and on the date the payment was actually paid to Mr D**.** Where such a deduction is made there must also be a corresponding notional contribution (addition), at the date of my final decision equivalent to all FSCS payment notionally deducted earlier in the calculation.

To do this, L&C should calculate the proportion of the total FSCS' payment that it's reasonable to apportion to each transfer into the SIPP, this should be proportionate to the actual sums transferred in. And L&C should then ask the operator of Mr D's previous pension plan to allow for the relevant notional withdrawal in the manner specified above. The total notional deductions allowed for shouldn't equate to any more than the actual payment from the FSCS that Mr D received. L&C must also then allow for a corresponding notional contribution (addition) as at the date of my final decision, equivalent to the accumulated FSCS payment notionally deducted by the operator of Mr D's previous pension plan.

Where there are any difficulties in obtaining notional valuations from the previous pension plan provider, L&C can instead allow for both the notional withdrawal and contribution in the notional calculation it performs, provided it does so in accordance with the approach set out above.

The notional value of Mr D's existing plan if monies hadn't been transferred (established in line with the above) less the current value of the SIPP (as at the date of my final decision) is Mr D's loss.

I've carefully considered what Mr D's CMC has said about the FSCS payment. But I remain satisfied that the fair and reasonable approach to redress is that set out above.

Pay an amount into Mr D's SIPP so that the transfer value is increased by the loss calculated above.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr D's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr D as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

I've carefully considered what L&C has said about Mr D's tax in retirement. But I've seen no evidence that he would be a higher rate taxpayer and I'm satisfied that it's more likely than not that he will be a basic rate taxpayer in retirement so my view on this issue remains the same.

SIPP fees

If the investments can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mr D to have to continue to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investments and is used only or substantially to hold these assets, then any future SIPP fees should be waived until the SIPP can be closed.

Interest

The compensation must be paid as set out above within 28 days of the date L&C receives notification of Mr D'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 is not paid within 28 days.

Income tax may be payable on any interest paid. If L&C deducts income tax from the interest, it should tell Mr D how much has been taken off. And L&C should also then give Mr D a tax deduction certificate in respect of interest if he asks for one. The same applies to any interest that is awarded to Mr D in terms of the redress paid to him as set out below under 'My final decision'.

Distress & inconvenience

I have carefully reconsidered my view on the distress and inconvenience payment I recommended in my provisional decision given L&C disagrees with this. But I think the loss of the pension provision that is the subject of this complaint would've caused Mr D significant distress and concern. He may not recover the full amount of the losses he has suffered. This will clearly have a significant impact on Mr D and his retirement planning. And I remain of the view that it's fair and reasonable for L&C to pay him £500 to compensate him for the distress and inconvenience this matter has caused him.

My final decision

My final decision is that I am upholding the complaint. London & Colonial Services Limited must pay Mr D the amount that should be calculated as set out above under 'Putting things right'.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £150,000, plus any interest and/or costs/ interest on costs that I think are

appropriate. If I think that fair compensation is more than £150,000, I may recommend that the business pays the balance.

Decision and award: I am upholding the complaint. I think that fair compensation should be calculated as set out above under 'Putting things right'. My final decision is that London & Colonial Services Limited must pay Mr D the amount produced by that calculation up to a maximum of £150,000 and any award of interest as set out above.

Recommendation: If the amount produced by the calculation as set out under 'Putting things right', is more than £150,000, I will be recommending that London & Colonial Services Limited pays Mr D the balance. This recommendation will not be part of my determination or award. London & Colonial Services Limited doesn't have to do what I recommend. It's unlikely that Mr D can accept my decision and go to court to ask for the balance. Mr D may want to get independent legal advice before deciding whether to accept my final decision.

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

Yolande Mcleod
Ombudsman