DRN-4676999

The complaint

Miss C has a self-invested personal pension ('SIPP') with London & Colonial Services Limited ('L&C'). Miss C complains that she transferred two deferred Occupational Pension Schemes ('OPS') Defined Benefit ('DB') pensions and a personal pension plan to the SIPP without L&C carrying out sufficient due diligence checks on the regulated introducer of the SIPP. Miss C says that as a result of opening the SIPP and investing in the way that she did, she has made significant losses to her pension savings and she considers L&C is responsible for this.

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

What happened

On 12 March 2024, I issued a provisional decision. In summary, I said that I was intending to uphold the complaint and gave reasons for doing so. Both parties have had an opportunity to respond to my provisional decision. Before I set out what they said, and my findings on this matter, I will repeat what I said in my provisional decision as to the background of this complaint.

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' or by their respective initials where relevant).

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 at the Llana Beach Resort. TRG sold luxury hotel rooms to UK consumers, either as whole entities, or as fractional share ownership in a company. It should be noted that TRG employed the services of a promoter 'First Resort Property Services Limited' ('First Resort') to sell its investments. L&C has provided us with an unsigned copy of the agreement between TRG and First Resort.

Miss C's testimony – events leading to her complaint

In response to our investigator's questions, Miss C explained the background to opening her SIPP and investing in the Llana Beach Resort ('TRG investment') as follows:

- Miss C said initially she had a meeting with a will and probate adviser who I will refer to as 'Mr R' about setting up a will. Miss C referred to Mr R as an 'IFA' (an Independent Financial Adviser), but his business card did not refer to any regulatory permissions and simply said he provided will and probate advice.
- Mr R's business card, which was provided to us by Miss C, stated that he was a 'Personal Will and Probate Advisor'. Mr R had no regulator details on his business card and I could not find a person with that name and/or company registered on the regulator's website. There was one person with the same first and last name but this does not appear to be the same person as the Mr R that Miss C dealt with.
- Miss C said she was only seeking advice regarding her will at that time but the issue of pensions came up during their (Mr R's and Miss C's) discussions.
- Miss C said after discussing various types of pensions, Mr R suggested amalgamating Miss C's three pension plans and investing the funds into a resort in Cape Verde. Miss C said she did not even realise this kind of thing existed. She said Mr R explained the investment would be held in a SIPP and explained to her what a SIPP was.
- Miss C said she was "bowled over with the "glamour" of all this" in that she thought she would be owning a part share in a 'luxury resort' and more importantly, she thought it would mean she could leave something to her daughter of substance in her (Miss C's) will.
- Miss C said Mr R told her that she would be receiving rental income from the properties she had invested in and that this would all go into her pension pot to drawdown on later. Miss C said that at no point was it explained to her about this being an *"illiquid"* investment.
- Miss C said her understanding was that around £55,000 of the initial investment (this was about the amount of pension funds Miss C had to invest), would be topped up with the rental income she would receive from the properties she would be invested in.
- In terms of promotional material, Miss C said she was shown a TRG 'booklet' which she said looked "amazing". When asked whether she was provided with a Client Agreement or a Key Facts document by RealSIPP and/or CIB, Miss C said she wasn't sure. However, she noted that she was given documents at the time of sale.
- Miss C said that she believed that the role of Mr R was to 'lure' her into moving her pension into a SIPP with L&C. Her understanding was that L&C would be the company who would look after her pensions and investments once she had amalgamated her previous pensions into the L&C SIPP.
- Miss C said that she was shown brochures and asked which room she wanted and that this resort was still being built and/or nearing completion stage. Miss C noted that she was told her investment was in a prime location and that Cape Verde was one of the "hot" places to go, as it was up and coming. Miss C went on to say that she was told that there would not be a problem with occupancy as the 'sister' resort was exceeding itself, hence the need to build another one.
- Miss C said that no risks were highlighted as such and it had been a very good sales pitch as it had been directed from an "emotive view" and she thought because she

had been *"bowled over by the "glamour of it all"*, she would have come across as *"naïve"* and *"green"*.

- Miss C said she was desperate to secure a financial future for her daughter, which Mr R was aware of and seemingly, he realised this was the best way to go about selling the property investment to her. And this was particularly the case given her financial situation at the time. Miss C said Mr R told her that she wouldn't have to do anything apart from make the initial investment and then "sit back and watch the rental come in…".
- Miss C said she was informed that her current pensions, would not give her as high of a return as the TRG investment would. And given that at the time she still had 20 plus years of saving into her pensions, she thought this would be a good way of ensuring she had a big lump sum/pension pot to look forward to in her retirement. Miss C said if she had known, or had it explained to her, that this was an illiquid asset and there was a risk she would receive less than 20% as rental income, she would never have entered into this transaction at all and just left her pensions where they were.
- Miss C said that she would not have thought that anything was wrong with the investment until she heard an advert on the radio about 'mis-sold pensions'. She said after hearing this advert her "gut instinct" told her to look further into this issue. Miss C realised there was a problem and she started to get worried about the amount of her pension pot thinking she had lost nearly ten years of investment growth.
- Miss C contacted a CMC about this issue and initially made a claim via the Financial Services Compensation Scheme ('FSCS') against CIB in or around June 2018. And she was notified of her claim being successful almost a year later.
- Miss C said she was trying not to feel upset about this matter and hoped that she could recover her losses. Miss C said it was only recently that she realised that if she tried to sell her shares in her investment, she may only receive a small payment back.
- Miss C was asked about what she understood about the risks of investing as she did. She said she was led to believe she'd be investing in a part share of a room in a holiday resort in Cape Verde and she would be receiving rental income from this, whether "my room" was occupied or not.
- Miss C was asked by our investigator what she would have done if L&C had declined her SIPP application. She said that she would not have proceeded but she was heavily guided by her financial adviser Mr R. She said she trusted him. But she says she would not have opened the SIPP if L&C had not accepted it.
- Miss C was asked by our investigator why she went ahead with the TRG investment when the CIB suitability report, which she was later issued with (see further below) said this was not in her best interest. In summary, Miss C made several statements about why she went ahead with the TRG investment:
    - Recently she found a handwritten note, which she believed to be in her handwriting, on the back of the suitability report she was given at the time of sale. And she suddenly remembered at the time of sale, she had "panicked" when this suitability report had come back saying she would not be suitable for this investment. But when she contacted Mr R for advice about this report, because she had decided she no longer wanted to go ahead with the investment, he (Mr R) "convinced" her to continue with the investment by reminding her of the "glamour" of the property/resort again. And emphasising that her daughter would benefit hugely from this.
    - However, Miss C said that whilst the handwritten note seemed to be in her handwriting, she realised that the actual wording of that letter wasn't in her own words – and what prompted her to know this was the part about her daughter as she wouldn't have termed it in such a way. Miss C said she remembered Mr R "convincing" her that this was the best decision for her (Miss C's) daughter as she (Miss C's daughter) would be able to benefit "100%" from her pension transferring if Miss C were to die.

- Miss C said given that she had no other means of financial support for her daughter as she (Miss C) was living in rented accommodation, with no savings and no property to pass on to her daughter she was *"swayed"* by what Mr R had said. So, she went ahead with the recommendations made in the suitability report and the purchase of the investments. Miss C added Mr R had said it would be "fine". And that she just needed to send a letter in to say she still wanted to go ahead.
- Miss C said she was dubious about what Mr R was saying but she felt he (Mr R) played on the fact that she (Miss C) was a single parent and had no savings to leave to her daughter if she (Miss C) were to die. So, the TRG investment opportunity in Cape Verde would be the ideal solution for her (Miss C). Miss C went on to say knowing that this was her main objective i.e. to at least be able to leave something for her daughter upon her (Miss C's) death, Mr R was able to convince her to go ahead with the transaction.
- Ultimately, Miss C said she trusteed Mr R who recommended to her that she carry on with the transaction despite what the suitability report said and he was extremely personable and convincing. Miss C said she did not have a reason to doubt his explanations, which she considers were *"emotionally"* based, rather than the hard facts of what has transpired since with regards to this being invested in an illiquid asset. Miss C said she had not heard of that term (illiquid asset) until she started the compensation claim with her CMC (in fact Miss C spelt illiquid as 'e-liquid' in her submissions to the Financial Ombudsman Service).

- Miss C said that she has not taken any benefits or made any contributions to the SIPP other than her initial transfers.
- When asked what made her raise a complaint about L&C when she did, Miss C said that once she received a successful claim from the FSCS, she discussed potential options with her CMC to make a claim against L&C. She said that she decided on the advice of her CMC to pursue a complaint once the FSCS claim was completed.

The purchase of Miss C's TRG investment and the establishment of her SIPP

Dealings with TRG

In a letter dated 29 February 2012, Miss C received a letter from TRG. This thanked Miss C for investing her pension funds in the forthcoming exclusive and 'beautiful' Llana Beach Hotel in Cape Verde. The letter acknowledged that Miss C had selected: ***"Payment Plan Option (65) @ 1.2 (for the first 45% of your 1st deposit only)"*** (bold TRG emphasis). The letter went on to provide a breakdown of how the purchase price of 92,475 euros would be paid which was stated to be 'on contract' 60,108.75 euros; on completion 27,742.50 euros; and 4,523.75 (5%) written off. The TRG letter stated that 'lawyers' would draft the contract which Miss C would receive in due course along with the location map and other information about the TRG investment.

Miss C's pensions prior to the transfer to the L&C SIPP

Prior to transferring to the L&C SIPP, Miss C had three pensions – two were OPS DB final salary pensions plans and one was a personal pension plan. I will refer to the first DB scheme as 'Provider B'; the second DB scheme as 'Provider U'; and the personal pension plan as 'Provider S'.

The CIB Pension Report (see further below), set out Miss C's former pension plans as follows:

- Provider B – OPS Final Salary Scheme – Projected Final Pension £1,810.63 per year at age 60. The Cash Equivalent Transfer Value ('CETV') was £10,165.86.
- Provider U – OPS Final Salary Scheme – Projected Final Pension £5,859.16 per year at age 65. The CETV was £44,077.

CIB/RealSIPP advice

In a letter dated 17 April 2012, RealSIPP wrote to Miss C (the 'RealSIPP letter'), RealSIPP stated that it understood she (Miss C) wanted to purchase an offshore/offplan property within a pension plan. The letter went on to set out the investment as being with the developer, TRG. The resort was stated to be at Llana Beach, and the plot number was 102. The purchase price was stated to be 92,475 euros. The RealSIPP letter noted that Miss C could purchase the investment under RealSIPP's exclusive pension arrangements which was either by contributing new funds to meet at least 65% of the purchase price, or by transferring existing (eligible) pension assets to meet the same.

The RealSIPP letter noted that if Miss C had already provided details of the pension plans she was considering transferring to her SIPP, RealSIPP would be contacting the providers on her behalf to obtain all the necessary forms. The RealSIPP letter also noted that as a SIPP was a complex product, it was imperative that Miss C received financial advice before she acted. And that without this advice RealSIPP would not be able to proceed. RealSIPP went on to recommend its IFA partner, CIB, as the provider of advice for Miss C in order to establish whether a SIPP was a suitable product to facilitate the purchase of her chosen offshore property investment.

In her submissions to the Financial Ombudsman, Miss C has provided various documents she received from CIB which included a suitability letter dated 27June 2012. Included in the suitability letter was the following:

- It started by stating that CIB had received sufficient information from Miss C and her pension schemes to report its (CIB's) findings. It went on to say it was now providing Miss C with a suitability letter, with an attached report (the 'Pensions Report') and appendices, which CIB stated were all intended to set out its (CIB's) recommendations to Miss C.
- The suitability letter noted that Provider U and Provider B were both 'Occupational Final Salary Schemes'.
- Under the heading 'Requirement and Needs', amongst other things, the suitability letter stated the following:

    - *"You wish to invest in an alternative investment within a registered pension scheme environment.*
    - *You wish to save for your retirement in a tax efficient manner. You wish to invest for the long term and do not require access to your funds until your proposed retirement age.*
    - *You wish to establish a plan that will allow you to invest either lump sums or a regular amount over the years.*
    - *You wish to establish a plan which allows an extremely wide selection of investment vehicles, rather than a limited number of traditional investment funds.*
    - *You have preserved benefits from previous employers' final salary schemes, the trustees of which will not allow you to make personal investment choices. You wish to consider transferring a cash benefit from these schemes in order to invest in the alternative investment from your chosen developer.*

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

- Under the heading 'Summary of Recommendation' it noted that:

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

  - *You do require the security of guaranteed benefits*
  - *The Critical Yields of both final salary schemes are higher than your attitude to risk would suggest as acceptable*
  - *The Critical Yields are far higher than the investment return that could reasonably be expected in the current market conditions and for the foreseeable future*
  - *Your* [Provider U] *final salary scheme currently offers a valuable pension benefit for your daughter of 30% of your own benefit in the event of your untimely death*
  - *You are able to take early retirement*
  - *the overall benefits from your occupational scheme form a significant part of your retirement wealth"*

- The CIB IFA went on to say: *"As a consequence of my recommendation I do not believe it is prudent to transfer your* [Provider S] *Personal Pension plan as there would be insufficient funds to make the investment that you intended to make."*
- The suitability letter noted that it was treating Miss C as a retail client. And under the heading 'Type Of Advice' it noted that: *"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 a transfer of an Occupational Pension scheme to a Self Invested Personal Pension to allow you to invest in the alternative investment of your choice".* And that: *"It is important that you note we are only providing limited advice on this matter to provide you with an overall comparison of risks and benefits based on your stated objectives. This report should not be considered as a full analysis of your circumstances or overall financial position. It is important to note that we are not advising on your particular chosen alternative investments."*
- The suitability letter was signed by the CIB IFA and under his signature/name was the full name of CIB.

As noted above, attached to the suitability letter was a 'Pensions Report'. The Pensions Report gave an explanation, in general terms, of what a final salary/defined benefit scheme was. For example, it said: "Being in the pension scheme meant you got the promise of a pension when you retired which was dependant on how many years you worked for your employer and what your final salary was". It concluded by saying that:

"If you do decide to transfer this type of pension into some kind of personal arrangement, you would then miss out on all the increases you might have otherwise received had you left this pension where it was and chances are you'll end up with significantly less than you'd have otherwise got at retirement. Also, if you were to move this pension you would be moving from a scheme where the amount of the pension is fixed by the employer to a place where the actual pension depends on investment performance and the rate at which your pension funds can be converted to provide a pension income, neither of which is guaranteed."

Under the heading ‘Considerations of Benefits from Existing Occupational Schemes’, this set out Miss C’s likely benefits from Provider B and Provider U which I’ve set out above.

The Pensions Report went on to set out more details about the pensions with Provider B and Provider U including the ‘Critical Yield’ for each pension. The Critical Yield for Provider B was stated to be 11.90% per year. And for Provider U it was stated to be 7.5% per year.

The Pensions Report went on to discuss Miss C’s objectives which included purchasing an alternative investment; saving for retirement at age 65; maximising the tax efficiency of the savings; and utilising wider investment powers. The IFA noted that Miss C: *“…confirmed that to achieve the above objectives you would be prepared to forego the possibility of encashing in the plan prematurely.”*

Under the heading ‘Investment Planning: Pension Contributions’, the IFA noted that investment risk was inseparable from risk. And that a balanced portfolio would therefore include investments from a range of risk profiles so that any unexpected event affecting one of them would not damage the whole portfolio. The IFA also noted that risk was closely linked to the potential reward. And that investors in shares can expect a better long term return on their money than they would get by simply depositing funds in a savings or cash based ISA account.

The IFA stated under the heading ‘Views and Implications of Your Attitude to Risk’, that Miss C had wanted her investment to be around ‘seven’ or ‘eight’ as defined in the attached risk-rating guide. This group was classified as being within the ‘Balanced Investors range’ and would invest in in items such as international investment trusts; stocks and shares in large companies; gold mining; and commodity unit trusts.

I can see that, as Miss C noted above, there were some handwritten notes on the following page to the Pension Report. This note appeared to be from Miss C and said, amongst other things*, “Having read your report, I would still like to go down the route of transferring my existing pensions, ie.* [Provider B], [Provider U] *&* [Provider S] *into a SIPP.”* The note went on to say: *“There are a couple of reasons for me doing this, the main one being that I want to take control of my future, financially, e.g. my pension. The S.I.P.P. (sic) allows me the flexibility of being able to retire early and more importantly, is fully transferable/payable to my daughter. My pensions currently do not carry the same benefits.”*

Following on from the Pensions Report was a CIB ‘Client Financial Information Form (Alternative Investment SIPP Package)’ (the ‘Client Form’). Amongst other things, this stated: *“We* [CIB] *are not offering full advice and only providing a report to your pension requirements. We will not provide any further advice.”* Miss C was asked to provide details to the questions. Some of this was in handwriting and some of it was typed. Miss C’s personal details were provided. Under ‘Are you intending to purchase an alternative investment? If so, please describe. The details of TRG were provided as well as the product ‘Llana Beach Hotel’ Plot 102. The purchase price was stated to be 92,475 euros. And the deposit required was stated to be £50,342.56.

The Client Form also noted that Miss C would be totally dependent on this pension for her retirement. And that the pension represented over 76% of Miss C’s total wealth. Miss C was classified in this form as being in the risk category of ‘Adventurous/Balanced (Medium to higher risk)’, which, amongst other things, meant she would be *“relatively comfortable with investment risk.”* It was noted that Mis C had practical working knowledge about how investments work, and that she had prior experience in this area. Miss C signed the Client Form on 16 May 2012.

A RealSIPP Key Facts document was also completed. This noted that RealSIPP only offered products from a single company. And that Miss C would not receive advice or a Recommendation from RealSIPP. It provided details of its fees which were the same as those outlined in the SIPP application form.

RealSIPP also provided a 'Client Agreement'. Amongst other things, this reported that *"…we will not provide financial advice as to whether the SIPP is the right product for you, nor will we recommend or advise upon any investment strategy you should follow."*

In a letter dated 25 July 2012, RealSIPP wrote to Miss C. It thanked Miss C for the letter of confirmation, advising that she had read and understood the recent report by CIB. The RealSIPP letter noted that Miss C had provided written instructions stating that she wished to go ahead against CIB's recommendation. And to proceed with transferring her existing pension benefits to a L&C SIPP in order to comply with her wishes to invest in her chosen alternative package. RealSIPP said it was forwarding her application to L&C for processing.

In a letter dated 14 August 2012, RealSIPP sent Miss C a L&C Investment Purchase Request Form; a L&C Offshore Property Development Investment Form; and a L&C Scheme Borrowing Form. RealSIPP stated that for L&C to proceed, Miss C needed to complete the documents where indicated.

Amongst other things, Miss C signed to say that she had not received any advice on the merits of the proposed investment and the investment decisions were solely her responsibility. She also confirmed that she had not received any advice from L&C. And that she had done her own due diligence on the investment and that she understood that it was high risk.

Miss C's SIPP application and transfer of her pensions

RealSIPP sent L&C Miss C's SIPP application for a SIPP marketed under the name 'Open Pension' on 25 July 2012. And on 26 July 2012, L&C wrote to Miss C to thank her for her application and set out her three pensions that she would be transferring to her SIPP. On the same day in a different letter, L&C told Miss C that her application was being processed and in the meantime, she could access her account online with the log in details provided to her. It also noted that she had 30 days to change her mind about the transfer.

Miss C's CIB IFA used a RealSIPP email address. In the 'firm' section it noted both the name of RealSIPP and CIB as the IFA firms. In this section of the SIPP application, there were two boxes – one asked if advice had been given at the point of sale and the other asked if advice had not been given at the point of sale. Neither of these boxes were ticked. Miss C's IFA signed this section (the IFA details section) of the SIPP application. Under the remuneration, the IFA was to receive an initial fee of £2,550 and an annual fee of £300.

Under the heading 'Investments' in the application, Miss C was asked whether she wanted to manage the fund herself. This box was ticked as 'Yes'. The application also asked if Miss C wanted L&C to act on the instructions of her IFA to which it was marked as 'Yes'.

Under the 'Declaration' section of the application, amongst other things, it said: *"I [Miss C] 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."*

Miss C signed the SIPP application on 16 May 2012.

The Initial investment instruction form noted that Miss C wanted to invest in the Llana Beach Hotel. The figure in the form was noted to be £92,475. But previous documents (see further above) showed that this figure was likely to be in euros rather than in sterling – so the cost was in fact 92,475 euros.

In a memo from RealSIPP to L&C dated 25 July 2012, RealSIPP provided various documents relating to Miss C's transfer from her current pension plans to the L&C SIPP. This included an application form, a borrowing form, discharge forms (it was noted that Provider U's form would follow), existing plans/ scheme details, off-plan property development form and investment form (the latter two documents were stated to follow).

On 15 August 2012, L&C wrote to Miss C to let her know that her SIPP marketed under the name 'Open Pension' had been established as of that date. On the same day, L&C wrote to Miss C to also let her know that the following funds had either been transferred or were due to be transferred into her SIPP from her previous pension providers:

- Provider S - £4,082.05 - funds had been received.
- Provider B - £10,465.86 - L&C was still awaiting funds to be paid into Miss C's SIPP.
- Provider U - £44,070 - L&C was still awaiting funds to be paid into Miss C's SIPP.

Key payments and events after Miss C's SIPP account had been set up

An Open Pension statement dated 28 June 2018 showing transactions since inception showed the following key payments/receipts (all 2012 unless otherwise stated):

- 15 August - Pension S transfer in £4,082.05.
- 21 August - payment to the IFA RealSIPP of £2,550.
- 9 October - Pension B transfer in £17,951.02.
- 3 December - Pension U transfer in £33,271.
- 3 December - Payment out to Resort Group Plot 115 for £50,159.
- Miss C's Holding List showed a bank balance of £3,223.83 as of 28 June 2018 and as of 30 March 2017, a 20% share in the Dunas Beach Resort 'Apt HS83'.

In a letter dated 8 June 2015, L&C wrote to Miss C to let her know that RealSIPP was no longer regulated, and it advised her to seek an alternative regulated adviser.

A day later (9 June 2015), L&C wrote to Miss C about her plot at the Llana Beach Resort (plot 115). The letter sent by L&C said that when Miss C asked it (L&C) to make the investment on her behalf to hold in her SIPP, it was on the understanding that scheme borrowing would be made available. However, L&C stated the developer (TRG) had not been able to find a lender who was willing to lend to investors in the resort. The letter went on to say that to remove the liability of Miss C's SIPP fund and to pay further funds to avoid the immediate risk of her SIPP defaulting on the promissory contract, the developer offered the opportunity for investors to 'consolidate' their holdings. L&C noted it understood TRG had been in contact with Miss C and that she had already agreed to the terms of this arrangement. in a letter dated 10 July 2015, Miss C confirmed that she had consolidated her original purchase to a unit in the Dunas Beach Resort – Hotel Suite 83.

Miss C's complaint

The FSCS wrote to L&C in a letter dated 19 July 2018, letting it know it was dealing with a claim from Miss C and requesting information about her policy. Within a year, Miss C was awarded compensation from the FSCS which was set out in a calculation letter dated 5 June 2019. The FSCS calculated Miss C's total loss as £129,313.75. However, this included

various deductions including an indicative value of £52,133.82 for the TRG investment which Miss C says has no value. Miss C was paid £50,000 which reflected the FSCS compensation limits. Miss C received a Reassignment of Rights from the FSCS allowing her to bring her complaint to us about L&C dated 17 December 2021.

Miss C sent a complaint to L&C in a letter via her CMC dated 18 December 2019. In brief, she, through her CMC made a number of complaint points to L&C. Her main complaint was that L&C had not carried out sufficient due diligence in line with its regulatory duties under the Financial Services Markets Act 2000 ('FSMA') and the various publications issued by the regulators issued between 2009 and 2014 in respect of regulated businesses due diligence and other duties. Miss C said that L&C was also responsible for her investing in a high-risk asset that was not suitable for her needs.

In a letter dated 25 February 2020, L&C rejected Miss C's complaint. In summary, it said that it was an execution-only provider and it had no involvement in Miss C's decision to transfer her pension to its SIPP and make the investments she made. So, L&C said it could not be held liable for any losses she made. It added that it was required to follow Miss C's instructions once received which it did. L&C added that as Miss C was advised by RealSIPP/CIB her complaint should be directed at these firms. L&C said that it undertook due diligence on both RealSIPP and CIB and it found that both were regulated by the FSA and their status only changed in June 2015 after Miss C's transaction was completed.

Unhappy with L&C's response Miss C referred her complaint to the Financial Ombudsman on 10 March 2020. One of our investigator's reviewed Miss C's complaint and he recommended it should be upheld. He didn't think L&C had carried out sufficient due diligence in relation to the introducers of Miss C's SIPP. He said that this put her at risk of consumer detriment and that if L&C had carried out sufficient due diligence in line with the regulatory duties including those set out under the Principles for Businesses (the 'Principles'), Miss C losses would have been avoided. Our investigator recommended how to put things right including paying Miss C £500 for the distress and inconvenience L&C had caused her.

Miss C agreed with the investigator's findings. She did, however, not want the redress paid into the SIPP but into another pension plan she had set up.

L&C disagreed with the investigator's findings. In summary, through its representative's, L&C made the following points:

- It carried out sufficient due diligence on both CIB and RealSIPP – L&C provided print outs of the FSA register dated 25 July 2012 in respect of both firms. These documents showed that RealSIPP was an Appointed Representative for CIB. And CIB had the permissions I've summarised above. Both CIB and RealSIPP also completed Intermediary Applications which were signed and dated on 13 September 2010. A letter to CIB was sent to confirm that the Intermediary Application had been approved by L&C. L&C has not provided an Intermediary Agreement in this case. But I have seen a copy of the Intermediary Agreement that applied to CIB and RealSIPP on other cases.
- Under Dispute Resolution: Complaints Sourcebook ('DISP') 3.3.4A, the Ombudsman may dismiss a complaint if dealing with it would impair the effective operation of the Financial Ombudsman Service, with examples of such cases including those which would be more suitable for the Court or another ADR entity. L&C argues that this case is more suitable for the Court or another ADR entity because of the legal issues that arise in this case.
- The investigator largely ignores the disclaimers contained in the SIPP application form and states that L&C should have recognised that the investment was high risk.

- The contract L&C had with Miss C was on an execution only basis. L&C accepted no responsibility for checking the quality of the investment business, much less the decision to transfer. In reaching the conclusion he did, the investigator imposes a duty on L&C that goes far beyond what was agreed by the parties and which is not provided for either at law or in the guidance/rules.
- The investigator states that the regulator's reports and guidance provide examples of good practice. This starts from the assumption that the examples of good practice would have been known to the wider SIPP industry at the time of the transaction. But most of the reports/ guidance documents referred to by the investigator weren't issued by the time of Miss C SIPP opening. So, no SIPP provider could have been aware of these examples as a consequence.
- The Adams decision made clear that any reports, guidance, and correspondence issued after the events at issue could not be applied to the SIPP operator's conduct at the time. Therefore, the 2012 Thematic Review, 2013 SIPP operator guidance and 2014 'Dear CEO' letter are of no relevance to this case.
- The only publication which could have any bearing is the 2009 Thematic Review Report. However, this has no bearing on the construction of the Principles as the contents of this document cannot found a claim for compensation of itself.
- The 2009 Thematic Review in fact does 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 Review invites firms to consider are plainly directed at firms providing advisory services, not firms such as L&C, providing execution-only services.
- The FCA's Enforcement Guide make it clear that guidance is not binding on those to whom the FCA's rules apply. Nor are the variety of materials for example, generic letters written by the FCA to Chief Executives, 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.
- Even if the 2009 Thematic Review had been statutory guidance made under FSMA section 139A (which it was 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).
- As stated in Adams, regulatory publications cannot alter the meaning of, or the scope of the obligations imposed by, the Principles
- The investigator concludes that there was an obligation on L&C to carry out appropriate checks to ensure the quality of the business it was introducing. However, he makes no comment on the 'quality' of the investment itself, presumably because it is beyond doubt that the investment itself was exactly as advertised.
- The investigator states that high risk holdings such as the TRG investment can generally only be 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.
- The investigator points to the involvement of an unregulated introducer. L&C was unaware of an unregulated introducer. As far L&C was aware the introduction came from a regulated entity, RealSIPP.
- The investigator states that the introductions involved a significant risk of consumer detriment. It's accepted by everyone that this was a high-risk investment but an execution only SIPP provider cannot reject such business without completing a full suitability assessment which it does and did not have the permissions to do. Further, there was a regulated IFA involved and the service being offered by L&C was on an execution only basis.
- L&C said that it discharged its obligations in respect of the due diligence that it was required to conduct on the Llana Beach Resort. And that it is L&C's view that the

investment made via a wrapper was classified by the FCA as a standard asset, provided arrangements were in place with the investment provider to ensure that it only comprised of standard assets. So, in this case Miss C only invested in standard assets and therefore, L&C discharged its duties in relation to the investment in the Llana Beach Resort.

- It remains the case that the investigator 'cherry picks' from relevant case law. It cites, for example, Berkeley Burke but largely ignores the decision in Adams. This is particularly apparent in the 'relevant considerations' section of the view, which quotes at length from the Berkeley Burke case which was a judicial review case. Adams on the other hand examined at length the responsibility of a SIPP provider offering an execution only service under the Conduct of Business: Sourcebook ('COBS') so is more relevant to this case.
- The investigator doesn't properly address using the Principles as the basis for finding against L&C in preference to the COBS rules or established case law. Again, a breach of these cannot, of itself, give rise to any cause of action at law (see, e.g., Kerrigan v Elevate Credit International Ltd [2020] C.T.L.C. 161 at [30]).
- The investigator ignores the statutory objective previously set out at FSMA section 5(2)(d), now section 1C, namely: *"the general principle that consumers should take responsibility for their decisions".*
- Perhaps most importantly, the view ignores the findings of the High Court in Adams on the duties imposed by COBS. Adams held that the duties cannot all apply to all firms in all circumstances. 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 such as L&C.
- Similarly, neither the obligations under COBS 14.2.3R and COBS 14.3 to provide clients with product information, nor the obligation under COBS 19.1.2R to provide clients with pension product information, apply to execution-only SIPP providers.
- The investigator's view 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.
- If under the Principles, L&C really had the obligations of due diligence that are set out in the view, and had acted in accordance with them, it would have been required to engage in the activity of advising on investments, which was in contravention of its regulatory permissions. Despite this, the view finds that L&C was under an obligation to protect against 'consumer detriment', to ensure that Miss C understood the level of risk involved and to have outlined the risk associated with a DB pension transfer.
- The investigator seeks to differentiate Adams by stating that: *"[HHJ DIGHT] wasn't asked to consider the question of due diligence before Options SIPP agreed to accept the store pod investments into its SIPP."* This can only be seen as an attempt to circumvent the Adams decision. The investigator's approach misapprehends the relationship between the Principles and L&C's contractual arrangements with Miss C.
- The view erroneously concludes that L&C was in breach in respect of the ongoing due diligence it completed on RealSIPP and should not have accepted the SIPP application or the consequential TRG investment. Again, the level of due diligence imposed by the view goes far beyond what was agreed between the parties, and certainly beyond any expectations Miss C had of L&C.
- There is no reason why L&C should have had any concerns about accepting business from RealSIPP. RealSIPP were an FCA regulated entity and L&C was able to take comfort from that. There was no restriction at the time on a customer transferring a pension without receiving advice and there was no obligation on L&C

to ensure that advice was taken. Furthermore, it is accepted that RealSIPP had permission to give investment advice.

- The view states that: *"…no other SIPP provider should have accepted the business for the same reasons I've set out above in my view".* L&C notes that the investigator's interpretation of the regulations and good industry practice runs contrary to that of the SIPP industry. Beyond this, the investigator should be aware, it was common practice for SIPP providers to be accepting investments such as this in 2012. The only logical conclusion, therefore, is that another provider would have accepted the application. So, L&C is not responsible for the loss suffered by Miss C.
- The investigator justifies upholding the complaint despite accepting the culpability of both RealSIPP and (it seems) TRG. In effect, L&C is left to 'carry the can' as it is the last entity standing and the investigator effectively confirms as much in the view.
- We note that the investigator has contacted Miss C to ask a series of questions. It is clearly procedurally irregular, and highly inappropriate, that a fact-sensitive matter such as this should be decided on the papers, especially when it is apparent from the view that specific and important questions have been put to, and answers received from, Miss C, without L&C having had the opportunity to hear directly the responses to those questions or L&C having been invited to be part of the process.
- If the view is permitted to stand, the wider consequences will also be very serious, both for consumers and for execution-only SIPP providers.

In response to the provisional decision, L&C repeated many of its points made in response to the investigator's view. For completeness, I'll summarise some of these and also add in the new points L&C made about Miss C.

- The Ombudsman 'cherry picks' from case law.
- 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.
- 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.
- The Ombudsman ignores the fact that the Principles, and such duties as may be imposed on L&C by these, fall to be construed in light of the COBS rules applicable to L&C and the regulatory permissions that L&C holds and held at the time.
- No attempt is made to explain how L&C could effectively have completed adviser level due diligence without breaching its permissions.
- The statutory objective previously set out at FSMA section 5(2)(d), now section 1C, namely *"the general principle that consumers should take responsibility for their decisions"* should apply.
- The publication of any reports, guidance and correspondence issued by the FCA/FSA has 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.
- The FCA's Enforcement Guide states that guidance is not binding on those to whom the FCA's rules apply.
- 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 Ombudsman draws a difference between Adams and the current case in that the Court in Adams were considering events after the contract whereas in Miss C's case, the issue is before the contract. This finding is clearly inconsistent with the law. L&C should not be held responsible for decisions made by Miss C prior to its involvement.
- Notwithstanding the appropriate level of due diligence carried out by L&C in respect of RealSIPP/CIB, the Ombudsman finds that L&C was under further obligations to

protect against ‘consumer detriment’ and ensure that Miss C understood the level of risk involved. This is wrong.

- The reason L&C entered into an Intermediary Agreement with RealSIPP/CIB, was so that financial advice could be provided to prospective clients through that means, if requested. And the outcome of L&C's due diligence on RealSIPP (and CIB) did not raise any cause for concern.
- The Ombudsman seeks to circumvent the Adams decision; regardless of when due diligence was completed in the respective cases, Adams considered the duties of a SIPP provider under COBS at length and the findings of that case should be applied.
- The assessment of suitability of any pension product, transfer of pension rights or investments was wholly the responsibility of Miss C and/or her financial adviser. In compliance with its obligations pursuant to COBS 11.2.19R, L&C acted on Miss C's written instructions in the setting up of the SIPP and the transfer of monies to TRG (via instructions from RealSIPP).
- As the Ombudsman will be aware, COBS 2.4.8 states that: *"It will generally be reasonable (in accordance with COBS 2.4.6R (2)) 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."* So, L&C could rely on the information provided to it by CIB/RealSIPP.
- Miss C relied on the advice of 'Mr R' and therefore should be directing this complaint towards Mr R and not towards L&C.
- Miss C in her RealSIPP application stated that the IFA was RealSIPP/CIB. L&C reiterates that it was unaware of the presence of an unregulated introducer.
- The conclusion arrived at by the Ombudsman is neither fair nor reasonable. Miss C states that she was reliant on Mr R, however, also states that she would not have made the investment if L&C had rejected this. Yet, when Miss C was presented with the suitability letter from CIB she 'panicked' and told Mr R that she did not want to go ahead with the investment. Nonetheless, Miss C goes on to say Mr R managed to convince her that she should proceed. The only logical conclusion is that he would have also convinced her to make the investment with a different SIPP provider had L&C refused her SIPP application.
- Miss C also confirmed that she understood the investment was high risk. So, with or without, the involvement of L&C, Miss C would have proceeded with this investment with another provider.
- The Ombudsman accepts that the TRG investment does not appear to be fraudulent or a scam – we need to stress that the investment is not fraudulent, it is exactly as advertised and continues to provide a return. On this basis, receiving a number of referrals to invest in TRG would not be a red flag. The Ombudsman has made no findings in respect of the due diligence conducted by L&C on the investment so L&C has no further comment to make in this regard.
- Miss C has also already received compensation from the FSCS which L&C submits (a) should be taken into account in its entirety as CIB's contribution to Miss C’s losses or (b) if the Financial Ombudsman refuses to take account of the redress from the FSCS in full, it should reduce any losses from the date of receipt of funds from the FSCS on the basis that Miss C has had the benefit of those funds.
- Notwithstanding L&C’s objections to the Ombudsman’s provisional decision, to the extent that any part of the complaint is upheld and that interest is said to be fairly payable, L&C disagree that interest at a rate of 8% is fair and reasonable. Accordingly the applicable interest rates should at most be 2.5% above base rate. Any greater rate contains a punitive element and as such is inappropriate.
- For completeness, Miss C should be put to proof of all of her available pension provisions and other income to consider her tax rate and it is neither fair nor reasonable to assume a rate of 20% when there is potential for this to be factually incorrect.

- L&C requests confirmation from the Ombudsman award of £500 takes no account of distress and inconvenience caused by Miss C own actions resulting in the loss of monies from her SIPP. As alluded to above, L&C cannot be held responsible for the decisions that Miss C took when investing her own personal monies or the consequential losses she incurred.

Finally, L&C requested some documents following its response to my provisional decision and it made a few more comments following receipt of these documents as follows:

- As previously set out L&C could not comment on the advice received by Miss C without potentially being in breach of its permissions.
- L&C is unclear from a causative perspective, what difference requesting the suitability letter would have made to the actions that Miss C chose to take. Miss C was provided with a copy of the suitability letter, which she then discussed with Mr R and proceeded with the investment anyway.
- L&C reiterates the points raised in its response to the provisional decision, the conclusion arrived at by the Ombudsman is neither fair nor reasonable. In particular:
    - Miss C states that she was reliant on Mr R, however, she also states that she would not have made the investment if L&C had rejected this.
    - Yet, when Miss C was presented with the suitability letter from CIB she 'panicked' and told Mr R that she did not want to go ahead with the investment. However, he (Mr R) managed to convince her that she should proceed. The only logical conclusion is that he would have also convinced her to make the investment with a different SIPP provider had L&C refused this.
    - When confirming that she wanted to proceed with the investment, Miss C noted the suitability report and said that she would still like to go down the route of transferring her existing pensions. Miss C went on to say: *"There are a couple of reasons for me doing this, the main one being that I want to take control of my future financially".* So, again, she would have found another provider if L&C had refused her application.

- L&C said Miss C also confirmed that she understood the investment was high risk (despite her subsequent recollection to the contrary).

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

What I've decided – and why

Whilst I've taken into account the submissions from both parties, my decision remains the same as that set out in my provisional decision. I'll explain why after I deal with the issue of jurisdiction and the dismissal point that L&C raised in its initial submissions.

Jurisdiction – time limits

L&C has not specifically mentioned the issue of jurisdiction in terms of time limits but as this matter has been brought more than six years after the event being complained of, I will need to assess whether this matter falls within the relevant time limits that apply.

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 Miss C referred her 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, redress determination or summary resolution communication; 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;

unless:

(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R or DISP 2.8.7 R was as a result of exceptional circumstances;
or
…
(5) the respondent has consented to the Ombudsman considering the complaint where the time limits in DISP 2.8.2 R or DISP 2.8.7 R have expired (but this does not apply to a "relevant complaint" within the meaning of section 404B(3) of the Act)."

L&C has not said it consents to the Financial Ombudsman looking at the complaint if it has been brought too late. And I can't see any exceptional circumstances that would have prevented Miss C from bringing her complaint before the relevant time limits set out in the DISP rules I've set out above.

In terms of the six-month time limit rule, it should be noted that L&C's final response letter was dated 25 February 2020 following Miss C's complaint made on 28 November 2019. Miss C referred her complaint to the Financial Ombudsman on 12 February 2020 prior to receiving the final response letter from L&C. Given this, I'm satisfied the matter has been brought within the six-month time limit rule. I will now consider the six-year and three-year time limit rules.

Miss C referred her complaint to L&C on 28 November 2019. And the SIPP being complained about was set up on 3 September 2011. So this means the matter was clearly referred to L&C outside of the six-year time limit rule.

But the matter can still be considered if it falls within the three-year time limit rule as set out above. In thinking about when Miss C was aware, or ought reasonably to have been aware, that she 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 FCA 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 it (the Handbook's) definition of the word 'complaint' was intended to apply to that phrase. For the purposes of DISP the FCA Handbook defines 'complaint' as follows:

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

(a) Alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and
(b) Relates to an activity of that respondent, or any other respondent with whom that respondent has some connection in marketing or providing financial services or products…which comes under the jurisdiction of the Financial Ombudsman Service."

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

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

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

It is therefore my view that it is necessary for Miss C 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.

Further, I don't accept the three-year time limit part 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."*

And I don't think Miss C would need to have understood the details of the SIPP provider's obligations to have been aware (or in a position whereby she ought reasonably to have been aware) of her cause for complaint. But I think Miss C would've needed to have actual or constructive awareness that an act or omission of L&C had a causative role in the loss.

Miss C has said that she had actual awareness of a problem to do with her pension when she heard an advert on the radio about the 'mis-selling of pensions'. She said this made her think there was something wrong with her investment within her pension albeit at that time it was still showing at more than its original cost in her Holding Statements. Nonetheless, this advert made Miss C look into matters further and she sought advice from a CMC. This led to her making a claim against CIB via the FSCS and once this was completed she made a complaint to L&C. So, it's clear that Miss C had actual knowledge of a cause for complaint in or around 2018 when she heard the radio advert drawing her attention to problematic investments within pension wrappers.

I can see that Miss C sought advice from a CMC in or around June 2018. So, as I've said, this is clearly when she realised she had a problem with her investment/SIPP. And it was at this point she began to make a claim against CIB via the FSCS. After receiving notice of a successful claim from the FSCS in July 2019, Miss C via her CMC made her complaint to L&C about its due diligence which was on the advice of her CMC.

Looking at Miss C's Holding Statements and Financial Statements from L&C prior to her claim to the FSCS in mid-2018, I can't see anything that would have caused her concern about her pension. For example, her Holding Statements up until 2022, shows that Miss C's investment in the TRG investment had fallen to 26,100 euros as of 22 February 2021. But before this time, all her Holding Statements including those after she made her claim via the FSCS showed her TRG investment valued at 60,000 euros. Further, she was still receiving rental payments into her SIPP account up until 11 March 2019.

As I noted above, Miss C said the point at which she realised she had a problem with her pension was following a radio advert about pension 'mis-selling'. And she said it was her *"gut instinct"* that led her to think that something was wrong rather than any other financial signs such as a fall in value (which had not happened at that point) of her TRG investment. I can't see that there was a problem that would likely have made Miss C aware of a problem with her pension until, at the earliest, when her TRG investment held in her SIPP more than halved in value which was only shown in the Holding Statement dated 22 February 2021.

Even at this point, I do not consider this meant Miss C would have known or reasonably have known that she had cause for concern against L&C. L&C was the SIPP provider and she would have had to have known, for example, something about its duties to link it to any problem with her pension. And from what I can see, once Miss C knew there was a problem with her pension, which was not until mid-2018, this would have been the earliest she would have been in a position to have carried out some research to see if L&C had anything to do with the issue with her SIPP. And since she complained to L&C in December 2019, I think she has brought her complaint on time against L&C.

Given all that I've said above, I consider Miss C made her complaint to L&C within three years of when she knew, or ought to have reasonably known, she had cause to complain about its acts or omissions as her SIPP provider. And as a result, the Financial Ombudsman does have the power to look at Miss C's complaint as it has been brought within the relevant time limits that apply.

Dismissal

In response to the investigator's view, amongst other things, L&C said that it believes the complaint is better suited to be considered by another ADR scheme (alternative dispute resolution scheme) or a Court. I will repeat what I said in my provisional decision as to why I think the matter is best placed with the Financial Ombudsman.

Having carefully considered L&C's submissions on this point, I remain satisfied that Miss C'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 submission about referring the matter to another ADR the rules set out in the FCA Handbook, at DISP 3.4.1R, say:

> *"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's argued that Miss C complaint should be referred to another ADR scheme or the Court. And I could now refer the complaint to another ADR scheme on the basis of DISP 3.4.1R if I take the view it's more suitable for another ADR scheme and if, in the light of that view, Miss C consents to the referral.

But I don't consider this is a complaint that would be more suitable for determination by another ADR scheme or the Court. This complaint requires consideration to be given to the rules and principles set down by the FCA. In my view, these are matters which 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. 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 another ADR scheme.

Ultimately, DISP 3.4.1R says that I may refer the complaint to another complaints scheme, not that I must. So 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 Miss C's complaint to another ADR scheme.

For similar reasons, I'm satisfied that I don't need to exercise my discretion to dismiss the complaint under DISP 3.3.4 AR 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 entity. As I've explained, I'm satisfied the complaints well suited to the work of the Financial Ombudsman Service. We have significant experience of dealing with complaints of this type and are well-placed to consider them.

Given my determination in respect of L&C's dismissal points, I'll now go on to consider the merits of this complaint below.

Merits

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

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. And so whilst I have considered all the submissions made by both parties and have reconsidered all the points covered in my provisional decision, I've focussed here on the points I believe to be key to my decision on what's fair and reasonable in the circumstances.

Relevant considerations

Having carefully reconsidered all of the evidence, including the submissions in response to my provisional decision, I'm still of the view that the relevant considerations in this case are those that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

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

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

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

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

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

In R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service [2018] EWHC 2878 ('BBSAL'), Berkeley Burke brought a judicial review claim challenging the decision of an Ombudsman who had upheld a consumer's complaint against it. The Ombudsman considered the regulator's Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper. And that if it (Berkeley Burke) had done so, it would have refused to accept the investment. The

Ombudsman found Berkeley Burke had therefore, not complied with its regulatory obligations and had not treated its client fairly.

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

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

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

On 18 May 2020, the High Court handed down its judgment in the case of Adams v Options SIPP [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474. I've taken account of both these judgments and the judgment in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 1188 when making this decision on Miss C'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. And I've noted L&C's comments on this in response to my provisional decision. But as I said in my provisional decision 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, as I've said previously, 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 Miss C'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 Miss C'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 Miss C'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 Miss C. I've taken into account L&C's submissions on this point. But I remain of the view that it is fair and reasonable to consider what due diligence was carried out before L&C accepted Miss C's application.

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

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

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

The regulatory publications

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

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

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

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. It says those obligations could be met by:

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

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

In its response to my provisional decision L&C said the 2009 review isn't statutory guidance. That's a point I acknowledged in my provisional decision. And I again acknowledge here that 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'm therefore satisfied it's appropriate to take them into account.

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

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

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

L&C says that many of the matters which the 2009 review invites firms to consider are directed at firms providing advisory services. It's not specified which parts of the review it thinks are directed at such firms but, to be clear, I consider the 2009 review was also directed at firms like L&C acting purely as SIPP operators. The review says: *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses…".* And it's noted prior to the good practice examples quoted above that: *"We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs."*

I'm also satisfied that L&C, at the time of the events under consideration here, thought the 2009 review was relevant. L&C acknowledged in its submissions that the review is/was relevant to how it conducts its business and highlights some areas of good practice. And L&C did carry out some due diligence on RealSIPP. So, it clearly thought it was good practice to do so, at the very least.

As well as ensuring that the TRG investments had good title, L&C has said that it carried out due diligence on both RealSIPP and CIB. L&C says that in this respect, it checked the FSA register for both firms. I've seen copies of the print outs from the register that L&C has provided from the time of the search. I also note that it had Intermediary Agreements with both RealSIPP and CIB. Both these businesses completed an Intermediary Application form. I've seen these documents as well as the Intermediary Application forms on other similar cases. 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. So, clearly L&C thought it was good practice to carry out some checks before accepting business from RealSIPP/CIB.

The remainder of the publications also provide a reminder that the Principles apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and to produce the outcomes envisaged by the Principles. In this respect, these publications also go some way to indicate what I consider amounts to good industry

practice at the relevant time. Therefore, I remain satisfied it's appropriate to take them into account.

I've carefully considered what L&C's said about publications issued after Miss C'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 Miss C's complaint, mean the examples of the good practice they provide weren't good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with them.

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

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

I'm required to take into account good industry practice at the relevant time. As mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time. That doesn't mean that in considering what's fair and reasonable, I'll only consider L&C's actions with these documents in mind. The 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, as I said in my provisional decision, I don't say the Principles and/or the publications obliged L&C to ensure the transactions were suitable for Miss C. It's accepted L&C wasn't required to give advice to her 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 Miss C'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 Miss C's SIPP application from RealSIPP, L&C complied with its regulatory obligations which were to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and treat them fairly; and to act honestly, fairly, and professionally. In doing that, I'm looking to the Principles and the publications listed above to provide an indication of what L&C should have done to comply with its regulatory obligations and duties.

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

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

In deciding what's fair and reasonable in the circumstances, it's appropriate to take an inquisitorial approach. And, ultimately, what I'll be looking at here is whether L&C took reasonable care, acted with due diligence, and treated Miss C fairly, in accordance with her best interests. And what I think's fair and reasonable in light of that. I consider the key issue in Miss C's complaint is whether it was fair and reasonable for L&C to have accepted her

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 Miss C's SIPP application.

As noted above, L&C says it did carry out due diligence on RealSIPP before accepting introduction business from it. And from what I've seen I accept that it undertook some checks. However, the question I need to consider is 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 Miss C's application from RealSIPP in the first place.

The contract between L&C and Miss C

In its response to my provisional decision, L&C's made a number of references to its duties as an execution only provider. 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 Miss C or otherwise have ensured the suitability of the SIPP or TRG investments for her. I accept that L&C made it clear to Miss C in various documents, that it wasn't giving, nor was it able to, give advice. And that it played an execution only role in her SIPP investments.

The forms Miss C signed confirmed, amongst other things, that losses arising as a result of L&C acting on her instructions were her 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 Miss C'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 Miss C on the suitability of the SIPP or the TRG investment. But I'm satisfied that, to meet its regulatory obligations when conducting its operation of SIPP business, L&C had to decide whether to accept introductions of business from a firm with the Principles in mind. And I don't agree it couldn't have rejected introductions and/or applications without contravening its regulatory permissions by giving investment advice.

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

In this case, the business L&C was conducting was its operation of SIPPs. And I'm satisfied that to meet its regulatory obligations when conducting its operation of SIPP 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 Miss C) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information, and events on an ongoing basis. And, as I've said, I think that L&C understood this at the time too, as it did more than just check the FSA entries for RealSIPP and CIB to ensure they were regulated to give advice. It also entered into Intermediary Agreements with those firms, which I've seen in other cases.

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

So, and well before the time of Miss C's application, I think that L&C ought to have understood that its obligations meant that it had a responsibility to carry out appropriate checks on RealSIPP to ensure the quality of the business it was introducing. And I think L&C also ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments before accepting them into a SIPP. I consider L&C's submissions on the due diligence it undertook prior to allowing the TRG investment 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 says it accepts that it had an obligation to conduct due diligence on RealSIPP and CIB and it says it complied with this obligation. As noted above, L&C said that it checked the FSA register to ensure that RealSIPP was an Appointed Representative of CIB. And L&C checked the FSA register to ensure CIB was regulated and authorised to give financial advice. L&C also told us that it entered into Intermediary Agreements with both RealSIPP and CIB.

L&C told us in its submissions that its policy at the time of Miss C'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 remain of the view L&C failed to conduct sufficient due diligence on RealSIPP before accepting business from it. Or to draw fair and reasonable conclusions from what it did know about RealSIPP.

I've reached the view that L&C ought reasonably to have concluded it should not have accepted business from RealSIPP and it should've ended its relationship with it before Miss C'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 Miss C'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 its investments such as the Dunas Beach Resort and/or the Llana Beach Resort by 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.

Whilst L&C said there was no obligation on it to understand the business model of firms it was choosing to do business with until the regulator issued guidance in October 2013 on this matter, I think having 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 Miss C'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. In this case, L&C said that the number was in fact 160. On another case from January 2018, L&C said that RealSIPP's introductions were made between February 2011 and May 2013. Further, that RealSIPP was involved with a number of investments across members' SIPPs and that: *"all of these investments would be considered Non-standard by FCA definition."* L&C provided a list of the investments concerned and confirmed that in 77 cases RealSIPP received fees but didn't advise on the SIPP.

As noted above, L&C has confirmed that the total of 160 clients were introduced by RealSIPP. And it has previously told us 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.

So, given it began accepting introductions from February 2011, it's clear that by the time it received Miss C's application in August 2012, L&C had already 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 this introducer. I consider by this point (August 2012) 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 IFA firm. And it should have considered how a small IFA firm such as RealSIPP, introducing this type of 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 Llana Beach Resort Miss C 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.

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 Miss C made no record of whether she (Miss C) had received advice at the point of sale or not. But the available evidence shows that prior to receiving Miss C'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 Miss C, 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, it's clear that L&C had access to information about the number and nature of introductions that RealSIPP made. And an example of good practice identified in the FSA's 2009 review was: *"Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified."* So, I don't think simply keeping records without scrutinising that information would be consistent with good industry practice and L&C's regulatory obligations. As highlighted in the 2009 review, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

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

I think these facts ought to have been a red flag for L&C in its dealings with RealSIPP. It's highly unusual for regulated advice firms to be involved in execution only transactions involving pension transfers or switches to invest in high risk esoteric investments, such as unregulated overseas property developments. That's because the risks involved in such transactions are unlikely to be fully understood by most people, without obtaining regulated advice. I 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 letter in Miss C's case 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 a transfer of an Occupational Pension scheme to a Self Invested Personal Pension to allow you to invest in the alternative investment of your choice."*

However, as noted in the statement by CIB in its suitability letter quoted above, it was still only offering clients restricted advice. 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 Miss C, not wanting a complete financial review as equating to her not wanting full advice on the specific financial product that she (the consumer) believed she would be being advised on (i.e. her 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 either CIB or RealSIPP 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). And I've seen similar wording used by CIB in its suitability reports and later CIB Client Agreements. 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).

Miss C was no exception to this. She was not given any advice about the underlying investment. The advice she received from CIB was simply whether to transfer her pensions to a SIPP. The IFA did give Miss C advice not to proceed with the transfer of her three pension plans to the SIPP. But she was not given the benefit of full regulated advice before reaching this decision. The only advise to transfer from her OPS DB pensions to a SIPP and the suitability report took no account of the underlying investments. So, given the advice she received, I think it's understandable that she didn't follow this advice. As I've said, the advice consisted only of whether she should transfer from one pension provider to another.

I'm also aware that Miss C was receiving information from an unregulated adviser (Mr R) who, I think more likely than not, introduced her to RealSIPP/CIB. And it was through this unregulated adviser that Miss C was communicating with. I think this presented a clear and obvious potential risk of consumer detriment. L&C was aware that unregulated advisers were being used as it had received an agreement from TRG which set out that it would be employing promoters to sell the TRG investments. So, whilst it referred to Mr R in response to my provisional decision, saying that it was unaware of his existence, it was aware of TRG's business model. So, there was a real risk that Miss C would come to the SIPP/TRG investment via an unregulated introducer.

Taking all of this in the round, whilst Miss C went against the recommendation that she was given by the CIB adviser, I don't think she could have made an informed decision as to whether to transfer or not. The OPS was a complicated product and from what I understand Miss C was being told that she would receive more money if she were to transfer. She was also being influenced by a third party – an unregulated party who introduced Miss C to

RealSIPP – this should have been a cause for concern to any regulated party but L&C didn't question this and didn't establish how RealSIPP were sourcing its clients.

Further, as I've said the CIB suitability letter shows that it wasn't offering clients like Miss C the option of full regulated advice that also incorporated advice on the suitability, or otherwise, of the proposed investments. So, as I said, I don't think she could have made a full informed decision without this full regulated advice. The possibility that there had been no regulated advice and/or no full regulated advice been given/offered particularly when concerning a DB pension, was a clear and obvious potential risk of consumer detriment here. It was clear from the SIPP application that Miss C was intending to transfer monies in from existing pension plans to invest (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

As noted above, I think it's more likely than not from the available evidence that an unregulated party was involved with the promotion of the TRG investments to some consumers introduced to L&C (including Miss C). Miss C said the unregulated introducer in her case was a 'Mr R' who was a will and probate adviser.

So, in my view, I think it's more likely than not that Mr R, acted as an unregulated introducer or promoter for the TRG investment. I think it's unlikely that consumers like Miss C 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 Llana Beach Resort investments to be held in Miss C's SIPP.

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 the circumstances points to the involvement of an unregulated introducer.

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

L&C could simply have concluded that, given the potential risks of consumer detriment – which I think were clear and obvious at the time – it should not have continued accepting applications from RealSIPP and before it received Miss C'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.

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

Given the significant potential risk of consumer detriment I think that as part of its due diligence on RealSIPP, L&C ought to have found out more about how RealSIPP was operating long before it received Miss C'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.

I know L&C has said that it didn't need to understand RealSIPP's business model until after the October 2013 finalised guidance and to say it should have done so is with the benefit of

hindsight. But I think the October 2013 guidance simply gave examples of what SIPP providers could do to meet the Principles. And that these requirements (i.e. meet with the regulatory duties under the Principles) had applied before the 2013 guidance was issued. The example questions I've set out above, would have given L&C a clearer understanding of how RealSIPP were operating.

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."*

So, 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 consider it's most likely if L&C had asked RealSIPP for this information that RealSIPP would have provided a full response to the information sought.

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 Miss C. 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."*

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 Miss C, 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 Miss C's case, information from CIB does show she (Miss C) was provided with advice about transferring to the L&C SIPP but that she refused an opportunity to complete a financial review. However, I've set out above why it was more likely than not that Miss C 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 Miss C might only have been interested in advice about her pension provisions rather than a complete financial review of her overall financial circumstances. But I don't think it's more likely than not that Miss C 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 she then declined that offer. I think, as evidenced from the content of its CIB suitability report 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.

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 Miss C'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. 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. 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 its role.

Therefore, I consider L&C ought to have concluded Miss C – and applicants before her – didn't have full regulated advice made available to her by RealSIPP/CIB. And have viewed this as a significant point of concern. Retail consumers, like Miss C, were transferring their

existing pension monies to L&C to invest entirely in higher risk esoteric investments, including unregulated overseas property developments, without the benefit of having been offered full regulated advice. And it seems that RealSIPP/CIB was actively avoiding any responsibility to give advice. I also think L&C should have concluded, had it spoke to some applicants and/or obtained copies of some suitability letters, 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, I think L&C should have concluded – certainly by the time of Miss C's application and sometime before it – that it wasn't in accordance with its obligations, or its own policy requirements, to accept introductions from RealSIPP. I, therefore, remain of the view that it's fair and reasonable in the circumstances to say that L&C shouldn't have accepted Miss C'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 Miss C fairly by accepting her 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 Miss C 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 remain of the view that I don't think it's necessary for me to also consider L&C's due diligence on the TRG investment.

I remain satisfied that L&C wasn't treating Miss C fairly or reasonably when it accepted her 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. And I make no findings about this issue. I should note that this doesn't mean, as L&C has said, that I accept the investment performed as 'advertised'. It simply means that I don't think it should have accepted the investment in the first place.

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

For the reasons previously given above, I think L&C should have refused to accept Miss C's application from RealSIPP. So, things shouldn't have gone beyond that. L&C's referred to forms Miss C signed. In my view it's fair and reasonable to say that just having Miss C 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 her fairly, given the concerns L&C ought to have had about her introduction. L&C knew that Miss C had signed forms intended to indemnify it against losses that arose from acting on her instructions.

In my opinion, relying on such indemnities when L&C knew, or ought to have known, Miss C's dealings with RealSIPP/CIB were putting her 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 Miss C's application.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Miss C signed meant L&C could ignore its duty to treat her 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 (Intermediary Agreements) 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 Miss C's SIPP shouldn't have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity, shouldn't have arisen at all. And I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for L&C to proceed with Miss C's application.

COBS 11.2.19R

In its response to Miss C'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 followed Miss C's investment instructions. However, in the circumstances it's my view that the crux of the issue in this complaint is whether L&C should have accepted Miss C's application from RealSIPP in the first place.

An argument about having to execute the transaction as a result of COBS 11.2.19R (then 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, given the explanation by Jacobs J in the BBSAL case, 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 Miss C's business from RealSIPP.

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

L&C has reiterated in its response to my provisional decision that it is not responsible for the losses Miss C has suffered. It says it's RealSIPP and/or CIB and/or Mr R that are really responsible for Miss C's losses. CIB would be the respondent for complaints about activities RealSIPP undertook as the atter firm was an Appointed Representative of CIB. And the Financial Ombudsman won't look at complaints against CIB, as it's been dissolved and no longer exists as a regulated business. We also can't look at complaints about TRG or any of its unregulated introducers.

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 Miss C fairly. Given this, the starting point is that it would be fair to require L&C to pay Miss C compensation for the loss she 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 Miss C for her 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 Miss C to the full extent of the financial losses she 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 Miss C'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 Miss C wouldn't have come about in the first place, and the loss she suffered could have been avoided.

I want to make clear that I've carefully taken everything L&C's said into consideration. But it remains my view it's appropriate and fair in the circumstances for L&C to compensate Miss C to the full extent of the financial losses she's suffered due to its failings. And, taking into account the combination of factors I've set out above, I'm not persuaded it would be appropriate or fair in the circumstances to reduce the compensation amount that L&C is liable to pay to Miss C.

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 Miss C. I accept that L&C wasn't obligated to give advice to Miss C, or otherwise to ensure the suitability of the pension wrapper or investments for her. 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.

Miss C taking responsibility for her 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 Miss C's actions mean she 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 Miss C'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 Miss C wouldn't have come about in the first place, and the loss she 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 Miss C 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 Miss C being aware of the risks - a point it reiterated after seeing the suitability letter and Miss C's handwritten notes following my

provisional decision. The suitability letter and other documents provided by CIB/RealSIPP gave her no specific advice on the actual risks of investing in the TRG investments and/or using the full amount of her pension provisions in such investments. It simply gave her some general information about risks of investing in property investments but it didn't advise her on the merits and/or risks of investing in the TRG investments and/or the risks she would be taking with her DB pensions monies by investing in such investments. I wouldn't consider it fair or reasonable for L&C to have concluded that Miss C 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 Miss C's application.

Prior to this, Miss C had very little investment experience. And it's clear she was an inexperienced investor. She was solely reliant on her pensions to provide an income for herself in her retirement. She had no other assets. Miss C was told that she would be better off if she moved her pensions by Mr R when she queried the advice she received. 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. But from all the evidence, it doesn't appear that Miss C had any direct dealings with either RealSIPP or CIB when she had questions.

Miss C 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 Miss C for the losses she's suffered. I don't think it would be fair to say in the circumstances that Miss C should suffer the loss because she ultimately instructed the transactions to be carried out.

Had L&C declined Miss C's business from RealSIPP, would the transactions complained about still have been carried out elsewhere?

Again, after seeing the suitability letter and Miss C's handwritten notes, L&C has contended that Miss C would likely have proceeded with the transfer of her pension and purchase of the investments regardless of the actions it took. This, it says, is particularly the case given the involvement of Mr R. It said in response to my provisional decision, that given Mr R's influence over Miss C and her willingness to go along with his 'advice', she would simply have found a new SIPP provider if L&C had refused her application. It therefore says it is not the cause of Miss C's loss.

But as I previously said, I don't think it's fair and reasonable to say L&C shouldn't compensate Miss C for her loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did. 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 Miss C's application from RealSIPP in the first place. I think it's more likely than not that Miss C would have listened to that advice. And if L&C hadn't accepted her business from RealSIPP, Miss C might have simply decided not to seek pensions advice elsewhere from a different adviser and still then retained her existing pension plans.

Further, Miss C was persuaded by Mr R based on the limited advice she received from CIB, the regulated adviser. Had she 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 to Miss C would have been not to establish a SIPP and not to transfer her pension monies to invest in the TRG investment. So, overall, I think it's far more likely than not that if Miss C had approached another regulated adviser and had been given full regulated advice, I consider she would have listened to this advice and left her pensions where they were.

I've also not seen any evidence to show Miss C was paid a cash incentive. It therefore cannot be said she was *"incentivised"* to enter into the transaction. And, on balance, I'm satisfied that Miss C, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for herself. 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 Miss C'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 Miss C compensation in the circumstances. While I accept that TRG, RealSIPP and CIB might have some responsibility for initiating the course of action which led to Miss C's loss, I consider that L&C failed to comply with its own regulatory obligations and didn't put a stop to the transactions proceeding by declining Miss C's application when it had the opportunity to do so.

In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against L&C that requires it to compensate Miss C for the full measure of her loss. RealSIPP was reliant on L&C to facilitate access to Miss C's pension. But for L&C's failings, I'm satisfied Miss C'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 Miss C's right to fair compensation from L&C for the full amount of her 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, Miss C wouldn't have suffered the loss she'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 Miss C to the full extent of the financial losses she'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 the complaint.

Putting things right

I consider that L&C failed to comply with its own regulatory obligations and didn't put a stop to the transactions that are the subject of this complaint. My aim in awarding fair compensation is to put Miss C back into the position she would likely have been in had it not been for L&C's failings. Had L&C acted appropriately, I think it's more likely than not that Miss C would have remained a member of the pension schemes she transferred into the SIPP.

Miss C transferred monies from a number of different pension schemes into the SIPP, including monies from both a defined contribution scheme and defined benefit schemes. To put things right L&C will need to undertake different types of loss calculations, one in relation to the monies that originated from the defined benefit schemes and another in relation to monies that originated from the defined contribution scheme. As part of doing this L&C will need to calculate the portion of Miss C's current SIPP value that's attributable to each of the respective transfers/switches and apply them to the relevant calculations.

In light of the above, L&C should:

- Obtain the actual transfer value of Miss C's SIPP, including any outstanding charges.
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Undertake loss calculations as set out below in respect of each of the schemes from which monies were transferred into the SIPP and pay any redress owing in line with the steps set out below.
- If the SIPP needs to be kept open only because of the illiquid investment and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- If Miss C has paid any fees or charges from funds outside of her pension arrangements, L&C should also refund these to Miss C. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Deal with the FSCS payment as set out below.
- Pay Miss C £500 to compensate her for the distress and inconvenience she's been caused.

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

FSCS payment

I acknowledge that Miss C has received a sum of compensation from the FSCS, and that she has had the use of the monies received from the FSCS. The terms of Miss C's Reassignment of Rights require her to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the Assignment if required. So, I think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the compensation Miss C received from the FSCS. And it will be for Miss C to make the arrangements to make any repayments she needs to make to the FSCS.

I did make this allowance in my provisional decision and I've taken account of L&C's comments on this issue. My view remains that I think it's fair and reasonable for some allowance to be made for the sum Miss C actually received from the FSCS and has had the use of for a period of the time covered by the calculation.

If L&C wishes to make such an allowance, it must first calculate the proportion of the total FSCS' payment Miss C received that it's fair and reasonable to apportion to each individual transfer into the SIPP – this *must* be proportionate to the value of the actual sums transferred in. The total FSCS payment allowed for *must* be no more than the total FSCS payment Miss C actually received. Having done this, L&C can then make the allowance by following the steps set out in the sections 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. Miss C would then be able to close the SIPP, if she wishes. That would then allow her to stop paying the fees for the SIPP. The valuation of the illiquid investment may prove difficult, as there is no market for it. For calculating compensation, L&C should establish an amount it's willing to accept for the investment as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment.

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

If L&C is unable, or if there are any difficulties in buying Miss C's illiquid investment, it should give the holding a nil value for the purposes of calculating compensation.

If L&C doesn't purchase the investments, and if the total calculated redress in this complaint is less than £160,000, L&C may ask Miss C to provide an undertaking to account to it for the net amount of any future payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Miss C may receive from the investments after the date of my final decision, and any eventual sums she would be able to access from the SIPP. L&C will need to meet any costs in drawing up the undertaking.

If L&C doesn't purchase the investments, and if the total calculated redress in this complaint is greater than £160,000 and L&C doesn't pay the recommended amount, Miss C should retain the rights to any future return from the investments until such time as any future benefit that she receives from the investments together with the compensation paid by L&C (excluding any interest) equates to the total calculated redress amount in this complaint. L&C may ask Miss C to provide an undertaking to account to it for the net amount of any further payment the SIPP may receive from these investments thereafter. That undertaking should allow for the effect of any tax and charges on the amount Miss C may receive from the investments from that point, and any eventual sums she would be able to access from the SIPP. L&C will need to meet any costs in drawing up the undertaking.

Calculate the loss Miss C has suffered as a result of making the transfer in relation to monies originating from the defined benefit schemes

L&C must undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4: https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

For clarity, Miss C has not yet retired, and she has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

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

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

- always calculate and offer Miss C redress as a cash lump sum payment,
- explain to Miss C before starting the redress calculation that:
  - their redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
  - a straightforward way to invest their redress prudently is to use it to augment their DC pension
- offer to calculate how much of any redress Miss C receives could be augmented rather than receiving it all as a cash lump sum,
- if Miss C accepts L&C's offer to calculate how much of their redress could be augmented, request the necessary information and not charge Miss C for the calculation, even if she ultimately decides not to have any of her redress augmented, and

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

For the purposes of the calculation that's being carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4, if it wishes, L&C *may* notionally, for the period from the point of their payment through until the valuation date (as per the DISP App 4 definition of that term), allow for that proportion of the payment Miss C received from the FSCS following the claim about CIB, that it's fair and reasonable to apportion to monies transferred in from the defined benefit schemes and in accordance with what's stated earlier in this decision as an income withdrawal payment.

Where such an allowance is made then L&C must also, at the end of the calculation, allow for a corresponding notional addition to the overall calculated loss that's equivalent to the relevant notional income withdrawal payments allowed for. The effect of this notional addition will be to increase the overall loss calculated using the most recent financial assumptions in line with PS22/13 and DISP App 4, by a sum that's equivalent to the proportion of the payment Miss C received from the FSCS accounted for in this part of the calculation.

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

L&C has said that Miss C should be put to proof about the level of tax she is likely to pay in retirement. Given what I have said about Miss C's finances above, I think it is more likely than not that she will be a basic rate taxpayer in retirement. And L&C has offered nothing by way of evidence to dispute this assumption.

Calculate the loss Miss C has suffered as a result of making the transfer in relation to monies originating from her defined contribution scheme

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

Any contributions or withdrawals Miss C has made from the SIPP 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 have enjoyed is allowed for.

If there are any difficulties in obtaining a 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.

If it wishes, L&C may make an allowance in the form of a notional withdrawal (deduction) equivalent to that proportion of the payment Miss C received from the FSCS following the claim

about CIB, that it's fair and reasonable to apportion to monies transferred in from the defined contribution scheme in accordance with what's stated earlier in this decision, and on the date the payment was actually paid to Miss C. Where such a deduction is made there must also be a corresponding notional contribution (addition), at the end date of the final decision equivalent to the total relevant notional withdrawals accounted for in this part of the calculation.

To do this, L&C should ask the operators of Miss C's previous defined contribution pension plan to allow for the relevant notional withdrawal in the manner specified above. L&C must also then allow for a corresponding notional contribution (addition) as at the date of calculation as at the date of my final decision once issued, equivalent to the accumulated FSCS payment notionally deducted by the operators of Miss C previous defined contribution pension plan.

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

The notional value of Miss C's existing plan if monies hadn't been transferred (established in line with the above) less the proportion of the current value of the SIPP that's attributable to monies transferred in from the same existing plan as at the date of the final decision is Miss C's loss.

Pay an amount into Miss C's SIPP so that the transfer value is increased by the loss calculated above in relation to monies originating from the defined contribution scheme

If the redress calculation demonstrates a loss, the compensation should, if possible, be paid into Miss C's SIPP. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the SIPP if it would conflict with any existing protection or allowance. I appreciate Miss C wants any redress paid into her new pension policy but this will be for her to arrange with L&C.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Miss C 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 (her) likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

SIPP fees

If the illiquid 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 Miss C to have to continue to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Distress & inconvenience

I remain of the view that £500 reasonably and fairly reflects the distress and inconvenience caused by L&C to Miss C. I think the loss of the pension provision that is the subject of this complaint caused Miss C significant distress. She was seeking to provide for her daughter in the event of her untimely (Miss C's) death. So, I think this must have been a very distressing matter once she found out the investment had failed.

My final decision

My final decision is that I uphold this complaint against London & Colonial Services Limited and I require it to pay Miss C the award as calculated above.

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

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out above under 'Putting things right'. My decision is that London & Colonial Services Limited should pay Miss C the amount produced by that calculation – up to a maximum of £160,000 and any interest that becomes payable as set out above.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that London & Colonial Services Limited pays Miss C the balance. This recommendation is not part of my determination or award. London & Colonial Services Limited doesn't have to do what I recommend. It's unlikely that Miss C can accept my decision and go to court to ask for the balance. Miss C may want to get independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss C to accept or reject my decision before 24 April 2024.

Yolande Mcleod
Ombudsman