DRN-4715265

## The complaint

Mrs H complains about the due diligence London & Colonial Services Limited ('L&C') undertook before accepting her application for a Self-Invested Personal Pension ('SIPP').

Mrs H complains that L&C failed to carry out sufficient due diligence when it accepted her SIPP application and investment application, in breach of the regulator's guidance and rules.

Mrs H is represented by a claims management company ('CMC'). L&C has also been represented, by a solicitor, for periods of our investigation of this complaint. But for ease, I've referred to Mrs H and L&C throughout, whether the submissions came directly from them or were made on their behalf.

## What happened

The following is a summary of the parties involved in this complaint:

L&C

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

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

At the time of the events in this complaint, CIB was authorised by the regulator – the Financial Services Authority ('FSA'), which later became the Financial Conduct Authority ('FCA') - to advise on regulated products and services including giving investment advice and arranging deals in investments such as pensions. In May 2015, CIB went into liquidation, and has since been dissolved.

Real SIPP LLP ('RealSIPP')

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

The Resort Group ('TRG')

TRG was founded in 2007. TRG owns a series of luxury resorts in Cape Verde. TRG sold luxury hotel rooms to UK consumers, either as whole entities or as fractional share ownership in a company. TRG wasn't regulated by the financial services regulator.

This case involves investments in TRG's Llana Beach Resort ('LBR') holdings. The LBR investment has no in-built exit route and exiting from the investment depends on being able to sell the investment to another buyer. And I understand there is no active secondary market in the investments.

## Background

Mrs H had a Defined Benefit ('DB') pension with her former employer.

Mrs H says she was approached by Mr C and Mr A of a firm that was a sales agent for TRG. Mrs H says Mr C was the uncle of a friend, and a person she and her husband knew as both a friend and as someone in financial services. She says she hadn't been interested in changing her pension at that time, but Mr C and Mr A promoted TRG to her as having great returns that would outperform anything she already had, plus the added bonus of capital growth on her investment. Mrs H says that, following this, she was referred to RealSIPP/CIB for the pension advice.

As a result of the contact between Mrs H and RealSIPP/CIB, on 8 January 2013 Mrs H signed an application for an L&C 'Open Pension' SIPP. The application form named her independent financial adviser ('IFA') as Mr M who was working for *"RealSIPP LLP/CIB (life & pensions) Ltd",* and a box reading *"Advice given at point of sale to client"* was ticked.

The form showed that the IFA would be paid an initial fee of £2,550 and a further £300 annually, and that Mrs H wished to manage the investments herself. The 'Initial investment instructions' section of the form said the assets to be purchased were *"Llana Beach Hotel… £107,475"* and *"Llana Beach Hotel… £99,000".*

I've not been provided with a copy of a 'scheme borrowing form' in relation to Mrs H. But I'm aware that clients in other similar complaints brought to our Service did sign such forms. And so I understand Mrs H would have signed such a form too. Neither Mrs H or L&C have disputed my understanding.

L&C accepted Mrs H's application and the SIPP was opened on 25 January 2013. Mrs H's DB pension scheme's transfer value of just over £151,000 was transferred into the newly opened SIPP on 25 January 2013. And on 19 February 2013, just over £112,000 was paid from Mrs H's SIPP to TRG in relation to LBR, with the remainder left to cash.

In 2014, Mrs H applied to transfer from her L&C SIPP to a Small Self Administered Scheme ('SSAS') pension with another provider. This transfer took place in August 2015 with almost £150,000 transferred, comprising just over £112,000 of LBR "assets" and just over £36,000 of cash.

Additional background information

There has been some further documentation provided to our Service in relation to this complaint alongside some other relevant material related to similar complaints against L&C.

The RealSIPP branded L&C 'Investment request' form specific to Mrs H is missing. But on other complaints considered by us relating to similar events at around the same time, copies have been retained. It is reasonable to assume that Mrs H's Investment request form indicated she wished to purchase an LBR investment and how much she was to pay for it. The Investment request forms on other complaints also explained that with staged payments the initial deposit and interim payments could be lost if the balance couldn't be paid when due. And that L&C wasn't authorised to give financial or investment advice, but that it had obtained legal advice in its capacity as trustee, in order to assess the risks of ownership and to ensure the appropriate title was attained.

In similar complaints there were also 'Scheme borrowing forms' signed by the investor. We have not been provided with such a form for Mrs H. But the scheme borrowing forms that I've seen in other similar complaints detailed that future funding would need to be obtained by the developer, but the sums to be borrowed, and the lender they'd be borrowed from, were left blank. But it was noted in the forms that:

- This was an unusual investment structure involving property in a foreign jurisdiction, with a long period between the contract being entered into and completion, when the balance (including any scheme borrowing) would be due.
- There were no standard or previously agreed terms with any potential lender.
- Where scheme borrowing was needed, it was for the investor to choose a lender and obtain an offer. And this would then be sent to L&C to review.

L&C's provided us with a third-party investment due diligence document it obtained. The document sets out some details about the LBR investment, including that:

- The investment appeared to be a genuine hotel operation and TRG had completed one previous development in Cape Verde.
- The investment involved acquiring hotel rooms off plan, with annual income being generated through room rental. Ownership and rental income weren't pooled.
- TRG said that the investment wasn't an Unregulated Collective Investment Scheme ('UCIS'). But as the investment was still unregulated there'd be no Financial Services Compensation Scheme ('FSCS') protection.
- Management of the hotel would be covered by an operator agreement; the hotel operator would be an established operator listed on the Spanish stock exchange.
- First Resort Property Services Limited was promoting the investments under licence from TRG.
- Web searches reveal no adverse history for those involved in the arrangement.
- Where used by administrators, a 'high risk/illiquid' disclaimer could be considered.

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

L&C has also provided us with copies of print outs from the FSA Register. These record that as of 16 January 2013, RealSIPP was an appointed representative of CIB. And CIB's permissions included advising on Pension Transfers, Pension Opt Outs and investments.

I've also seen L&C's SIPP 'Open Pension Brochure' document. Amongst other things, this says that, "*the L&C Open Pension is not appropriate for everybody and it is essential that you obtain financial advice before entering into one*". The brochure also explains that L&C has no responsibility for investment decisions, but that it will ensure assets are correctly registered and comply with HM Revenue & Customs (HMRC) rules and regulations.

Although it has not been provided in relation to this complaint, on another similar complaint that was the subject of published decision DRN-3587366, I have seen copies of RealSIPP's client agreement and Key facts document, titled "*about our services for our Resort Group SIPP package."* RealSIPP's client agreement describes itself as an 'administrator and packager' of pension solutions to clients of various alternative investment providers, and says that:

> "*We are not, however, financial advisers as defined by the Financial Services and Markets Act 2000 and 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. You should seek advice from a suitably qualified and regulated firm or individual."*

Further, that:

*"RealSIPP LLP does not make specific investment recommendations, nor will we confirm your objectives and any restrictions on the type of product that you wish to buy. We act upon your instructions."*

**Mrs H's complaint**

Mrs H engaged her first CMC ('Firm E') on 19 July 2017. Firm E assisted Mrs H to start a claim to the Financial Services Compensation Scheme ('FSCS') in July 2018 about CIB in relation to her SIPP and SSAS. This was successful and in April 2019 the FSCS calculated that Mrs H's financial loss was over £250,000 . The FSCS paid Mrs H £50,000 compensation, its limit at that time.

Mrs H says Firm E never told her she also had a possible complaint against L&C as the SIPP provider. Instead, Mrs H says she and her husband Mr H (who has a similar but separate complaint) were first told about this possibility in around May 2021, by Mr C. That they'd not seen Mr C for some time, but he called into their office on a social visit whilst travelling nearby. Mrs H says they thanked Mr C for previously putting them in touch with Firm E and helping them get some compensation. And Mr C told them they'd also have another claim against L&C as the SIPP provider, as they'd not recovered all their losses. Mrs H and Mr H say they'd not known about this as Firm E never mentioned it, so they asked Mr C how to go about it. And he suggested calling what became their current CMC - Mrs H says they called within a couple of days and has provided evidence to show she and Mr H engaged their current CMC in May 2021.

In July 2021 the FSCS provided Mrs H with a reassignment of rights to enable her to pursue a complaint against L&C.

On 2 December 2021 Mrs H complained to L&C, via her current CMC. In summary, her complaint was that L&C had shown a lack of due diligence on CIB and ought not to have accepted its business, and had also shown a lack of due diligence on the LBR investment and should not have accepted it into its SIPPs.

On 16 February 2022 L&C issued its final response to Mrs H's complaint, which it did not uphold. Amongst other things, it said:

- Mrs H was introduced to L&C by RealSIPP/CIB.

- L&C provided execution-only (i.e. non-advised) SIPP administration services and this had been made clear to Mrs H when she applied for the SIPP and submitted the investment instructions.

- COBS 11.2.19 meant L&C had to act on Mrs H's investment instructions.

- Mrs H was advised to transfer her pension into the SIPP and to invest in LBR by RealSIPP/CIB who was FCA regulated at the time and had the required permissions. It was RealSIPP/CIB's obligation to disclose the risks associated with Mrs H's chosen investment and provide her with all the information about the investment it was recommending, to enable Mrs H to make an informed decision about whether she wished to proceed with the investment.

- Mrs H's complaint is about the advice she was given by RealSIPP/CIB, and L&C accepted her instructions on an execution-only basis following the advice she had received from RealSIPP/CIB. So Mrs H's complaint should be properly directed towards RealSIPP/CIB, as they were the regulated advisers responsible.

- L&C undertook due diligence on RealSIPP and CIB, both of which were regulated by the FCA, and on the LBR investment RealSIPP recommended to Mrs H.

- RealSIPP/CIB's regulated status only changed in June 2015 which was after Mrs H's transactions had completed.

- RealSIPP/CIB was listed as Mrs H's chosen financial adviser on the application form, and had submitted both the application and investment instructions to L&C.

- Mrs H was paying RealSIPP/CIB an ongoing annual advice fee, indicating she was receiving ongoing advice.

- All the forms sent to Mrs H for completion contained clear information and risk warnings and guided her to seek financial advice. At no point did Mrs H contact L&C for clarification about the content of the documentation she was required to complete.

- L&C was not authorised to provide advice nor to assess the suitability of the investment instructions Mrs H had given L&C to carry out. All L&C could do as a SIPP provider was determine whether or not an investment was capable of being held within a SIPP - beyond this, responsibility lay with the client and/or their adviser.

- L&C's due diligence provided no cause for concern or reason to suspect FCA regulated firm RealSIPP/CIB or the advice it offered to Mrs H was in any way inappropriate.

- L&C was not an investment manager and has no involvement in the operation of the underlying investments chosen by its members. It was not its responsibility, nor was it permitted, to provide any form of advice, including the suitability of the SIPP, pension transfer, investment or Mrs H's chosen financial adviser.

- L&C is not responsible for the decisions and instructions Mrs H made, or that her chosen investment has not performed in line with her expectations.

- Whilst not a rule book, L&C had conducted itself in line with the behaviour and type of conduct that the FCA's 2009 report entitled "*Self-Invested Personal Pension (SIPP) operators. A report on the findings of a thematic review"* indicated it hoped to see from reasonable SIPP operators.

- Any suggestion that the investment was unsuitable for Mrs H was not something L&C was able to assess as it went beyond the scope of duty of a SIPP provider.

- The application documents show that Mrs H was aware of the high risk and speculative nature of the investment.

- L&C complied with all of the relevant and applicable COBS rules in its dealings with Mrs H.

- L&C did not act negligently or in breach of its statutory duty by accepting instructions from Mrs H. It had reminded Mrs H that she had the opportunity to seek regulated advice before proceeding (and it understood she had).

- L&C is acutely aware of the standards it must meet and has continually acted in accordance with its regulatory and statutory requirements and improved its processes over the years in line with guidance from the regulators.

- Mrs H had not provided or evidenced full details of the financial loss she thought L&C had caused her.

- L&C considers that as Mrs H's complaint is in relation to an execution-only SIPP, it should be heard by the Pensions Ombudsman ('TPO').

Unhappy with L&C's final response to her complaint, Mrs H referred her complaint to the Financial Ombudsman Service on 4 April 2022.

L&C told us it thought Mrs H's complaint had been brought too late under the relevant time limit rules for our Service to be able to consider it. As it was more than six years since the event Mrs H complained of. And more than three years since L&C thought Mrs H knew she had cause for complaint in 2017, when Firm E sent L&C a subject access request ('SAR') on Mrs H's behalf two years after her L&C SIPP had closed.

One of our Investigators ultimately thought Mrs H's complaint had been brought within the relevant time limit rules, as it was brought within three years of when Mrs H knew or ought reasonably to have known she had cause for complaint about L&C.

And having considered the merits of Mrs H's complaint, our Investigator thought L&C hadn't treated Mrs H fairly. In summary, amongst other things, he said the pattern of business being introduced by RealSIPP presented a high risk of consumer detriment. So L&C should have taken steps to understand RealSIPP's business model and to make sure clients were being offered advice. And L&C should have done this prior to receiving Mrs H's application. L&C should have concluded it was likely that the business introduced by RealSIPP might produce unsuitable SIPPs and that there was a high risk of consumer detriment. L&C should then have declined Mrs H's business from RealSIPP. And, had it done so, Mrs H wouldn't likely have opened a SIPP, transferred her DB pension benefits or invested in LBR.

Our Investigator said L&C should put things right by undertaking a redress calculation in line with the regulator's guidance for firms on how to calculate redress for unsuitable DB pension transfers, and by paying Mrs H a further £300 as compensation for the distress L&C's errors caused her.

But L&C maintained Mrs H had complained too late under the regulator's time limit rules. In summary, L&C said:

- The question was when Mrs H had cause for complaint, or ought reasonably to have had cause for complaint - with 'complaint' being the financial loss of her DB pension on the advice of her regulated financial adviser, RealSIPP/CIB.

- Mrs H had been authorised in the very early 2000's to provide investment advice and held CF21 (investment adviser function) permissions. So she'd have undergone significant investments training which would have included the SIPP process and risks, and the obligation of regulated parties to carry out due diligence on investments they were advising on and/or accepting into their portfolio. And given Mrs H undertook investment advisory in the early 2000's, it's reasonable to assume she had a working knowledge of investments since then.

- Further, her husband Mr H was and remains an IFA, with relevant permissions. And both Mrs H and Mr H transferred their pension, invested in LBR and encountered the same issues.

- So Mrs H and Mr H were sophisticated investors with the relevant knowledge and

expertise to know of any problems with their LBR investments, sufficient to put Mrs H on a train of enquiry much earlier than she alleged. This undermined Mrs H's credibility in saying she had no knowledge of a possible claim against L&C, and meant she ought reasonably to have been aware she had cause for complaint in 2015.

- L&C thought Mrs H should provide evidence about what prompted her to transfer from her L&C SIPP to a SSAS in 2015; when she was told about her new SSAS provider's financial difficulties; and what her current pension arrangements were.

- Firm E's 2017 SAR enclosed a letter of authority signed by Mrs H on 18 July 2017. At that time, a SIPP provider was judicially reviewing the Financial Ombudsman Service in relation to a SIPP complaint (*Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service* [2018] EWHC 2878) ('BBSAL'). And CMC's were targeting the SIPP industry and those claims were starting to financially impact SIPP providers. So Firm E must have discussed complaining to L&C with Mrs H.

- Firm E's 2017 SAR didn't have any connection to Mrs H's FSCS claim. The FSCS claim was started a year after the SAR, in July 2018. Firm E specialised in financial claims, so it's reasonable to assume its SAR was to elicit information from L&C in order to consider whether a claim could be brought against L&C.

- When complainants instruct a CMC, it's unlikely they are aware of the precise scope of their complaint, and the CMC will advise the best way forward. So it's reasonable for the three year time limit to start when the CMC was instructed, and our Investigators have specifically stated this to L&C in their views on other complaints.

- Given all this, either Firm E told Mrs H she had cause for complaint about L&C, and so Mrs H should provide copies of the documentation between her and Firm E. Or, Firm E didn't tell Mrs H she had cause for complaint about L&C, in which case Mrs H should take this up with Firm E or their insurers.

- Mrs H complained to L&C more than three years after the case of BBSAL was published on 30 October 2018, which demonstrated to consumers that a SIPP provider could be responsible for losses associated with investments. So this was the latest point at which Mrs H either was, or ought to have been, aware she had cause for complaint about L&C. And views from our Investigators in other complaints supported this.

- L&C questioned what prompted Mrs H to approach her current CMC, other than a pre-existing awareness of having grounds to bring a complaint which she'd not pursued previously.

- The approach taken by our Investigator to conclude that Mrs H's complaint had been made in time – that Mrs H was required to know there was a problem, to know she had or might have suffered a loss, to know someone else is responsible and who that someone is, and to know she was able to bring a complaint against that person - was not in line with DISP 2.8.2(2)(b) and went far beyond DISP's definition of a complaint.

Our Investigator asked Mrs H to comment on the further points raised by L&C. In summary, Mrs H said, amongst other things:

- Firm E helped her secure £50,000 from the FSCS so if Firm E had suggested a further claim against another party, Mrs H would have jumped at the chance to start another complaint and there was no reason for her not to. But Firm E never

mentioned a possible further claim. Firm E was dissolved in March 2020 and so couldn't provide any further information. And Mrs H couldn't find any of its paperwork.

- Mrs H transferred from a SIPP to a SSAS in 2015 as she wanted to invest further funds into investments that L&C didn't accept. So rather than have two pension products and sets of fees, she was advised to transfer everything to a SSAS with a new provider. Mrs H still held her SSAS with that provider. And her SSAS provider (as a specific legal entity) was not in financial difficulty, and this was irrelevant anyway.

- She's never been an IFA. She's never advised on pensions and instead worked in the area of mortgages. Only a minimal level of knowledge was needed to sell these products, and completing exams to enable her to recommend tied products didn't mean she had the necessary qualifications or knowledge regarding pensions and SIPPs – to suggest so is *"like suggesting that a GP is qualified to perform open heart surgery".* Further, SIPPs didn't become regulated by the FCA until April 2007, so even if pensions training had been given (which it wasn't), it was unlikely to have included any reference to SIPPs.

- She had set up a mortgage and protection advice business with her husband, but never advised within it.

- Firm E's 2017 SAR to L&C *was* connected to her FSCS claim. The information gained through the SAR confirmed what regulated party was involved in setting up the pension, where the pension funds came from and where they were invested. And key documents held by L&C would have been mandatory requirements for her FSCS claim. So the information held by L&C was key for establishing the facts, and once provided, could lead to further SARs to the advising firm, or other firms as necessary. Mrs H thought that the FSCS and the Financial Ombudsman Service wouldn't permit connected claims to run concurrently and a that CMC could be in breach of its own regulatory rules if it submitted claims in a scatter gun approach at every party involved in the transaction.

**Other submissions from L&C**

I'm aware that in other similar complaints brought to us, L&C has made further submissions to the Financial Ombudsman Service regarding the merits of the complaint. In summary, L&C has said, amongst other things:

- The wording in the investment request forms confirmed that the client had obtained any reports, legal or other advice that he required on the investments. It also confirmed the client was aware L&C was unable to, and did not give, advice.

- The SIPP application form also included a declaration which was signed by the client that said:

  *"I hereby agree to be responsible for any claims, losses, costs, charges or expenses which may be raised against London & Colonial or incurred by London & Colonial in consequence of London & Colonial acting on instructions received…by me".*

- The client signed to indemnify L&C from any loss claim arising from the investment.

- The disclaimers contained in the SIPP had been largely ignored by our Investigator, and he'd failed to take into account the ruling in *Adams*.

- Primacy should be given to the contract agreed between the parties, which was on an execution-only basis – L&C accepted no responsibility for checking the quality of the investment business, and less so the decision to transfer and invest.

- The examples of good practice provided within the regulator's reports and guidance were not known to the wider SIPP industry (other than the guidance contained within the 2009 and 2012 Thematic Review) due to having been published after the event. And these were *examples*, not guidance, and being held to these rather than the COBS rules was an unreasonable standard.

- Our Investigator made no comment on the 'quality' of the investment itself, which L&C presumed was because the investments were exactly as advertised.

- There was nothing to prevent a SIPP provider from accepting such business, and L&C could not have rejected such business without making a judgement on its suitability for each client, which was outside of its expertise, its regulatory permissions and terms of the contract.

- RealSIPP/CIB, as the financial adviser, was responsible for advising on the suitability of both the SIPP and proposed investment. L&C did not have the required permissions to do either.

- L&C accepted it did have an obligation to conduct due diligence on RealSIPP/CIB and it complied with this obligation.

- There was no requirement at the time for L&C to understand RealSIPP/CIB's business model as part of the due diligence. And that some RealSIPP/CIB clients were on occasion investing in high-risk investments was not a cause for concern. And for our Investigator to determine that L&C ought to have followed guidance that was published after the event was using hindsight.

- RealSIPP/CIB was a regulated entity and therefore ought to have been aware of its own obligations when it came to suitability.

- The level of due diligence required by our Investigator went far beyond what was agreed between all parties. There was no reason L&C should have been concerned about accepting business from RealSIPP/CIB, which was an FCA regulated entity, and L&C was able to take comfort from that.

- There was no obligation on L&C to ensure clients had received advice, and it acted in good faith when acting on the client's instructions.

- A SIPP provider cannot assess the suitability of any particular investment for a customer. Its role in such a transaction is not to make a value judgement on the investment, but to obtain good title and hold it within a pension wrapper.

- The investment was appropriate for a pension scheme: good title was obtained, and the asset was capable of being held in a SIPP.

- Our Investigator's conclusion that L&C ought to have refused the application as unsuitable is irrational. Furthermore, there was nothing which required it to request details of the advice that had been provided, and it wouldn't have been able to

comment on this advice without breaching its permissions.

- L&C conducted adequate due diligence on the investments.

- L&C should be held to the standard of a reasonably competent SIPP provider – not whether it followed best practice, which is the test for breach of duty at law. Using examples of best practice published in 2013, which was after the events concerned in the complaint ran contrary to logic, common sense, the position in *Adams* and led to an irrational conclusion.

- Our Investigator's view appears to have ignored established caselaw, in particular *Adams*.

- Our Investigator's view didn't properly explain why it used the Principles as a basis for the finding in preference to the COBS rules or established case law. A breach of the Principles cannot, of itself, give rise to any cause of action at law.

- The duties imposed on L&C within the Principles must be construed in light of the COBS rules, the regulatory permissions that it holds, its contractual arrangements, and the statutory objective in FSMA [The Financial Services & Markets Act 2000], namely "…*consumers should take responsibility for their decisions".*

- The decision in *Adams* made clear that publications after the event could not be applied to the SIPP operator's conduct at the time. This should be followed in this case.

- The only publications with any relevance are the 2009 and 2012 thematic reviews – however this has no bearing on the construction of the Principles as the contents of these documents cannot found a claim for compensation of themselves.

- The 2009 and 2012 thematic reviews do not provide statutory "guidance" and many of the matters they invite firms to consider are directed at businesses providing advisory services, so not L&C.

- The FCA's Enforcement Guide says that *"Guidance is not binding on those to whom the FCA's rules apply. Nor are the variety of materials (such as case studies showing good or bad practice, FCA speeches and generic letters written by the FCA to Chief Executives in particular sectors) published to support the rules and guidance in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules."*

- Our Investigator's view largely ignored the findings of the High Court in *Adams* on the duties imposed by COBS. And the need to advise clients on 'suitability' and 'appropriateness' of investments under COBS 9 and 10 did not apply to execution-only SIPP providers, nor did the requirement to provide the client with product information.

- The view sought to impose a greater emphasis on the Principles, overriding the allocation of duties to different types of businesses within COBS. COBS should take primacy with the Principles applied to it.

- L&C had no permission to carry on the regulated activity of advising on investments, and at no time did it provide advice as to whether a consumer should open or transfer monies into a SIPP or as to the underlying investments. However our Investigator

found that L&C was under an obligation to protect against 'consumer detriment' to ensure the client understood the level of risk involved and to have outlined the risk involved with an occupational pension transfer. This was in addition to the obligation to complete due diligence on LBR and ongoing due diligence on RealSIPP/CIB.

- The relationships in this case are similar to those in *Adams*.

- At all times, the client was aware that L&C would act on an execution-only basis and would accept no responsibility for the quality of the investment business.

- Amongst other things, the judge in *Adams* held that in order to identify the extent of the regulatory duties imposed on Carey, "*one has to identify the relevant factual context"* and that *"the key fact...in the context is the agreement into which the parties entered, which defined their roles in the transaction"* and that there was no duty on the SIPP provider to consider the appropriateness of the SIPP or underlying investment.

- The judge also said that *"a duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed...as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed."*

- In *Adams* the FCA agreed that the function of a firm, as determined by contract, would govern what it had to do to comply with its duties under the FCA Handbook.

- Insufficient weight has been given to contractual arrangements and the demarcation of roles and responsibilities.

- The contractual relationship between the parties was clear – L&C was acting on an execution-only basis.

- In suggesting that, notwithstanding the clear terms of the relevant contractual arrangements, L&C owed obligations of due diligence under the Principles, the reasoning of our Investigator's view runs wholly contrary to that in *Adams*, and the Investigator had made no attempt to consider this divergence.

- At the time of the transaction complained of there was no obligation on a customer to take advice on the transfer of a pension. And there was no obligation on L&C to ensure that advice was taken. It's not fair or reasonable to use the Principles to artificially impose a duty that goes beyond that accepted and agreed by the parties.

- *Adams* required that the parties' contractual arrangements should be taken into account. Had our Investigator paid proper regard to this the view would have found that L&C's duties to the client extended no further than those owed to the complainant in *Adams*, so it is neither reasonable nor fair for L&C to pay compensation in this case.

- L&C reiterated that in *Adams* the judge held that "*…the general principle that consumers should take responsibility for their decisions"* and the FCA did not disagree with this approach.

- Our Investigator's view fails to have regard to the general principle that consumers should take responsibility for their decisions, the fundamental principle of freedom of

contract and to the authority of *Adams* and *Kerrigan v Elevate Credit International Ltd* [2020] C.T.L.C. 161. In doing so it enabled the client to recover against L&C losses flowing from non-contractual obligations inconsistent with the parties' contractual arrangements.

- It was common practice for SIPP providers to accept investments such as those in this complaint, and another SIPP provider would have accepted the client's application.

- L&C being left to *"carry the can"* as it's the last entity standing isn't fair or reasonable. L&C was not responsible for the client's decision to invest, and regardless of whether or not they are still in existence, RealSIPP/CIB, the entity which brought about the transaction, should be held responsible.

As an agreement could not be reached in Mrs H's complaint, the matter was passed to me for a decision.

I made enquiries of a firm I thought Firm E's records might have been transferred to.

And at my request, Mrs H and L&C provided further information, including about the 2015 transfer to a SSAS. L&C added that this 2015 transfer, in order to make investments L&C didn't accept, was evidence of Mrs H's ongoing interest in making high-risk investments.

Amongst other things, Mrs H added that it was Mr A who suggested she might have cause for complaint regarding the suitability of RealSIPP/CIB's pension advice – she said Mr A told her some clients had been compensated for unsuitable advice and so Mrs H and Mr H should speak to Firm E about this. Mrs H said she'd not known whether she would receive any compensation but thought it was worth submitting a claim.

Mrs H also added that it was Mr C who told her and Mr H about new investments in 2015 – that Mr C said they could not hold these new investments in their SIPPs but could hold them in a SSAS. So rather than have two pension products and sets of fees, Mr C advised her and Mr H to transfer everything to a SSAS with a new provider. Mrs H said they trusted Mr C and didn't know enough about the differences between SIPPs and SSASs to question what he said – they just took his advice.

I issued a provisional decision in which I explained that I thought Mrs H's complaint had been brought within three years of when she ought reasonably to have been aware she had cause for complaint about L&C. And that having considered the complaint, I thought it should be upheld.

In summary, I said L&C should have decided not to accept business from RealSIPP/CIB and it should have made that decision some time before Mrs H's application was made to it. That if L&C hadn't accepted Mrs H's introduction from RealSIPP/CIB, Mrs H wouldn't have established an L&C SIPP, transferred her DB scheme monies into it or invested in LBR. And that by moving to a personal pension arrangement, L&C could reasonably have foreseen that Mrs H might change advisers and/or investments in future, so as a result of L&C's failure to comply with its regulatory obligations and good industry practice, Mrs H's pension fund was subject to the risk of unsuitable advice and investment risk and/or losses. I said it was fair and reasonable for L&C to compensate Mrs H for the full measure of the loss she's suffered as a result of L&C accepting her business from RealSIPP/CIB. So L&C should undertake a redress calculation for Mrs H, and also pay her £500 compensation for her distress.

Overall, Mrs H accepted the provisional decision but said:

- I should make an interest award, as she was concerned L&C wouldn't settle her complaint in a timely manner. She understood redress calculations involving DB pensions can take longer, but other such decisions from our Service directed the business to pay interest after 90 days.

- Her losses will exceed our maximum award limit of £170,000. She expects L&C won't pay anything beyond that limit or take ownership of her LBR investment. The provisional decision suggested she'd be accountable to L&C for any income received in relation to the LBR investment despite not being fully compensated. She didn't want to be overcompensated, but thought it was unfair that L&C could potentially benefit from the LBR investment if it's unwilling to compensate her for all her losses.

- The provisional decision held L&C *"fully responsible for all of the losses Mrs H might have incurred"*, but then said that if the LBR investments remain in the SSAS, Mrs H would be liable for all future costs associated with the LBR investment such as the related ongoing SSAS fees, and any other charges. She can't simply close the SSAS where it holds illiquid investments, and LBR and another of her investments are illiquid. So L&C should cover five years' worth of her continuing SSAS fees. The sums involved in her case mean this is unlikely to change what she receives. But her CMC wants to establish our Service's view on ongoing costs as this may affect its other clients.

L&C didn't agree with the provisional decision and thought there were points it hadn't addressed or given sufficient weight to. L&C provided further comments, including reiteration of some comments it had already made, summarised earlier in this decision. So here, I've summarised what I see to be the main new comments L&C has made. But I'd like to be clear that I've carefully considered L&C's response to the provisional decision in full:

- Mrs H's current role, her CF21 permissions being before the regulation of SIPPs, and whether she'd actually practiced as an IFA were irrelevant. The provisional decision overlooked that she'd completed the training and had the qualifications to understand and advise on investment products, whatever they were.

- Mrs H's suggestion that her apparent lack of understanding regarding SIPPs is like saying a GP is qualified to perform open heart surgery demonstrates her failure to account for her own investment decisions, and isn't the appropriate test under DISP 2.8.2(b) in any case. L&C isn't suggesting she was an expert in SIPP products. But rather that having worked as a financial services adviser for many years, she would have had a higher level of understanding and sophistication than the average retail customer. It's reasonable to think an individual with this background could identify a problem (which Mrs H did, in 2017, by instructing a CMC) and carry out research to find out who might be responsible for it. Despite this, the provisional decision wrongly treats Mrs H as an average retail customer.

- The provisional decision's argument that: *"L&C was not present for any of the discussions Mrs H had with Firm E and has not provided any evidence to support its argument. Whereas, Mrs H was present for those discussions. And her testimony is that Firm E never mentioned the possibility of complaining about L&C, and that she can't find any of the paperwork."* was flawed. The SAR sent to L&C was evidence that Firm E had identified L&C as a firm Mrs H might potentially have a claim against. Yet the Ombudsman gave disproportionate weight to Mrs H's testimony about her discussions with Firm E, which there was no evidence of and which only forms a very small part of her recollections. It's unlikely Mrs H could accurately recall her conversations with Firm E around seven years ago, and she has a vested interest in a specific version of events.

- Even if the relevance of the SAR wasn't explained to Mrs H, her background and experience meant she ought to have recognised that sending correspondence to the SIPP provider meant there was a potential claim against it. So either Firm E informed her she had a claim against L&C but chose to prioritise an FSCS claim in order to obtain redress more quickly, and Mrs H only pursued L&C when she realised the FSCS compensation didn't cover her losses. Or, Firm E didn't explicitly tell Mrs H she had a claim against L&C but she should have been aware of this anyway, given Firm E submitting a SAR to L&C coupled with her knowledge of financial services.

- The provisional decision didn't address L&C suggestion that if it were the former scenario, Mrs H should take up Firm E's failure with its insurer. Instead, the Ombudsman is using Firm E's failure as an excuse to pursue L&C in order to obtain redress for Mrs H. It may be more difficult for Mrs H to seek redress from Firm E's insurers, but that doesn't mean it's fair or reasonable to ask L&C to pay redress.

- L&C commented on Mrs H's speculations that the FSCS and our Service wouldn't permit connected claims to run concurrently, and that a CMC could be in breach of its own regulatory rules if it submitted claims in a 'scatter gun' approach at every party involved.

- Despite L&C's request, our Service hasn't explained its inconsistent application of time bar in relation to the Berkeley Burke judgment. And it's not fair or reasonable to afford any investor a 'grace period', given that DISP does not provide for such, especially sophisticated investors like Mrs H and Mr H.

- The provisional decision 'cherry picks' from case law whilst largely ignoring *Adams v Options SIPP UK LLP* which is more relevant.

- No attempt has been made to explain why the Principles have been relied on rather than the High Court decision in *Adams,* despite the decision forming a much more solid foundation for any consideration of a complaint against a SIPP provider.

- The provisional decision ignores the fact that the Principles, and the duties imposed on L&C by these, must be construed in light of the COBS rules applicable to L&C and the regulatory permissions L&C held at the time – it was unable to provide advice to Mrs H.

- The provisional decision finds that Mrs H was not responsible for any of her decisions despite the findings in *Adams.*

- The publication of the regulator's documents and their contents (or the Principles) cannot found a claim for compensation of itself.

- There was no obligation imposed on L&C by the Principles to consider and act on the suitability of the SIPP or underlying investment, and the regulator's publications referred to cannot impose such a duty.

- The 2009 and 2012 thematic reviews did not provide "guidance" and were not statutory guidance. They only highlighted some "examples of measures" that SIPP operators could consider. And many of these were aimed at advisory firms, not execution-only businesses like L&C.

- Despite many of the COBS rules not being applicable to execution-only SIPP providers (a position confirmed in *Adams)* the provisional decision seeks to impose on L&C a duty

of due diligence that it does not owe and which goes far beyond the scope of any duty envisaged by the parties, by a generalised appeal to the Principles.

- The Ombudsman was attempting to create a relationship between L&C and Mrs H before a contract was entered into and before any funds were received by L&C.

- The due diligence carried out by L&C on RealSIPP was sufficient and did not raise any cause for concern.

- It is wrong of the Ombudsman to conclude that L&C was under obligations to conduct further due diligence to protect against 'consumer detriment' and to ensure Mrs H understood the level of risk involved.

- L&C was unable to provide advice on either the suitability of the SIPP or the investment. That is why it entered into an intermediary agreement with RealSIPP/CIB. The provisional decision has largely ignored the parties contractual arrangements and demarcation of the roles and responsibilities.

- The provisional decision provided no rational reason for failing to consider the duties of a SIPP operator under COBS and for imposing obligations on L&C beyond its contractual relationship (contrary to *Adams).*

- The provisional decision hadn't provided a view on the appropriateness of the LBR investment, and L&C assumed this was because it was accepted that the investment was as advertised. Further, the rental income Mrs H received from the LBR investment between 2013 and 2015 suggests it was suitable to be held in a SIPP. The rental income only ceased because a global pandemic halted international travel, which wasn't something that could be foreseen.

- The provisional decision should have found that L&C's duties to Mrs H extended no further than those owed to the claimant in *Adams* and accordingly it is neither fair nor reasonable for L&C to pay redress in this case.

- L&C complied with COBS 11.2.19R when it acted on Mrs H's written instructions in the setting up of the SIPP and the transfer of monies.

- It was reasonable for L&C to be afforded a significant level of comfort from the fact that RealSIPP was an FCA authorised firm, and as such was required to operate under a set of regulatory obligations to keep its clients' best interests in mind. COBS stated it is reasonable for a firm to take comfort in the FCA status of another professional firm, and in ignoring this provision the Ombudsman is acting unfairly to L&C.

- Regarding Mrs H's DB pension transfer, the point of no return was when Mrs H accepted the cash equivalent transfer value ('CETV') quote from her DB scheme – this took place before L&C had any basis to refuse any business.

- There is a real unfairness if an execution-only SIPP provider is liable for the poor investment choices of consumers and the failures of other regulated entities over which it put in place contractual controls that the regulated entity breached. The SIPP providers business is structured on the basis that it is not advising clients as to whether a SIPP or the underlying investment is suitable or appropriate for the client - to do so puts it in breach of its own regulatory permissions, a criminal offence. Also the SIPP providers fees and charges are based on it providing execution-only services. And, where a consumer chooses an execution-only service, it would be unfair if the SIPP

provider wasn't able to rely on express representations made by the consumer when signing the contractual documentation. Further, it's unfair to hold L&C responsible in circumstances where the failure is RealSIPP/CIB's – a separate regulated FCA entity.

- L&C hasn't been given evidence that Mrs H will be a basic rate taxpayer in retirement. It's unfair to assume this will be 20% when this could potentially be factually incorrect.

- The £500 award for distress and inconvenience does not take into account that which was caused by Mrs H's own actions resulting in her financial loss.

I'm now in a position to make my decision.

**What I've decided – and why**

Firstly, I've thought about whether this is a complaint the Financial Ombudsman Service can consider.

L&C says we don't have jurisdiction over this complaint. It thinks Mrs H has complained too late under the regulator's rules as she complained more than six years after the event she is complaining about, and more than three years after she was, or ought to have been, aware she had cause for complaint.

L&C also thinks that this complaint should be heard by the TPO rather than the Financial Ombudsman Service.

Time limits

Our ability to consider complaints is set out in Chapter 2 (DISP 2) of the FCA's Handbook of Rules and Guidance. DISP 2.8.2R says:

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

*(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 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…was as a result of exceptional circumstances.*

Mrs H's complaint is that L&C failed to carry out sufficient due diligence when it accepted her SIPP application and her investment application. So the events Mrs H complains of happened before February 2013. This is clearly more than six years before Mrs H referred her complaint to L&C on 2 December 2021. So Mrs H's complaint is out of time under the six-year part of the rule. Therefore, I need to consider the three-year part of the rule.

For clarity, by cause for complaint I mean cause to make this complaint about this respondent firm, L&C. The term '*complaint'* is defined for the purposes of DISP in the FCA handbook as:

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

So the Glossary definition of complaint requires that the act or omission complained of must relate to an activity of "**that *respondent***" or firm (my emphasis) – in this case, L&C.

Accordingly the material points required for Mrs H to have awareness of a cause for complaint against L&C 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).

L&C makes several arguments for why it thinks Mrs H's complaint is out of time under the three-year part of the rule. But having considered all the evidence and arguments, I don't think Mrs H was aware, or ought reasonably to have been aware, she had cause for complaint against L&C until she was advised this may be the case in May 2021, by Mr C and by her current CMC, whom she engaged at that time. I'll explain why.

L&C says Mrs H's first CMC, Firm E, must have told her about the possibility of making a claim against L&C. L&C says this is supported by the 2017 SAR Firm E submitted to L&C, years after her SIPP had closed and at a time when a SIPP provider was judicially reviewing the Financial Ombudsman Service in relation to a SIPP complaint, and CMCs like Firm E (who specialised in financial claims) were targeting the SIPP industry. L&C says the SAR is evidence that Firm E had identified L&C as a firm Mrs H might potentially have a claim against, that there was no evidence of Mrs H's version of her discussions with Firm E and memory is fallible, and that Mrs H has a vested interest in her version of events.

I can see that Firm E's 2017 SAR letter asks L&C to supply information it held in relation to Mrs H, and went on to list particular information it wanted. This included copies of all documentation, details of the type of pension she held, and the name of the IFA that had advised her. The SAR letter also said *"Please note this letter does not represent a claim at this stage."*

Even if I were to accept L&C's argument that Firm E had identified L&C as a firm Mrs H might have a claim against, I still need to consider whether Firm E made Mrs H aware of this.

I'm mindful that L&C was not present for any of the discussions Mrs H had with Firm E, whereas Mrs H was present for those discussions. And her testimony is that Firm E never mentioned the possibility of complaining about L&C, and that she can't find any of the paperwork.

I see that Firm E dissolved several years ago, in March 2020. I've made enquiries of a firm I thought may have taken receipt of Firm E's records, but it has not responded to my enquiries about whether Firm E's records can be provided. So I'm satisfied that documentary evidence of what may have been discussed between Mrs H and Firm E is not available to me.

Where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

Mrs H has told us that she first became aware there might be a problem with her SIPP that had caused her a financial loss when Mr A suggested she might have cause for complaint regarding the suitability of RealSIPP/CIB's pension advice – she says Mr A told her that some clients had been compensated for unsuitable advice and so Mrs H and Mr H should speak to Firm E about this. Mrs H said she'd not known whether she would receive any compensation but thought it was worth submitting a claim. And Firm E represented her in making a claim to the FSCS.

After considering Mrs H's claim, in April 2019 the FSCS told Mrs H it had calculated her financial loss in relation to CIB's advice to be over £250,000, but it would only pay her it's maximum compensation award of £50,000 for that. So while Firm E had secured a significant sum of compensation for Mrs H, she was still left with a very significant loss of over £200,000. Therefore, it's reasonable to conclude that if Firm E had suggested to Mrs H that she could possibly claim further compensation from L&C, Mrs H would have made a claim against L&C at that time. Mrs H had nothing to lose by making such a claim against L&C, and potentially very much to gain. So on balance, I think it's more likely than not that Firm E didn't tell Mrs E that she could also make a claim against L&C.

L&C also says that Mrs H and her husband Mr H were sophisticated investors with relevant professional knowledge and expertise such that Mrs H ought to have been aware of a SIPP provider's obligations and of any problem with her LBR investment, sufficient to put Mrs H on a train of enquiry much earlier than she alleges - L&C suggests this means Mrs H should have been aware she had cause for complaint about L&C in 2015. And L&C says that even if Firm E didn't explain the SARs relevance to Mrs H, her background and experience meant she ought to have recognised that sending correspondence to the SIPP provider meant there was a potential claim against it.

I've carefully considered all the submissions L&C has made in relation to Mrs H and Mr H having a higher level of understanding and sophistication in relation to financial services. And I accept Mrs H and Mr H are not average retail consumers in some respects.

But while Mrs H's permissions to provide investment advice in the early 2000's may have involved investment and advisory training, I think it's unlikely to have provided her with sufficient knowledge to know that, very many years later, she may have cause for complaint against L&C regarding its obligations as a SIPP provider. Because her permissions started and ended some years before SIPPs became regulated in 2007. And I'm mindful that the FCA (and its predecessor, the FSA) thought SIPP operators themselves did not properly understand their own responsibilities and saw fit to issue a number of publications over the years which reminded SIPP operators of their obligations. Further, I can see Mrs H's employer didn't offer any pension products and that the business Mrs H started with Mr H relates to mortgages and does not relate to pensions. For these reasons, I'm not persuaded that Mrs H's professional knowledge and experience meant she herself ought to have been aware she had cause for complaint about L&C.

For similar reasons, I'm not persuaded that her husband Mr H's professional knowledge and experience meant this either. Like Mrs H's the only permissions Mr H had that predated the events of this complaint started and ended some years before SIPPs became regulated. And his other permissions started years after the periods of time relevant to this complaint. In addition, Mr H's own business relates to mortgages and does not relate to pensions.

So, I am not persuaded that Mrs H was aware or that she ought reasonably to have been aware that she had cause for complaint against L&C as early as 2015 as L&C suggests.

Further, Mrs H and Mr H paid adviser fees in relation to their SIPPs and SSAS, and they've paid for professional representation in bringing their complaints. I don't think Mrs H and Mr H would have paid such other parties if Mrs H or Mr H had the relevant professional knowledge and expertise L&C suggests they had.

L&C also says Mrs H ought to have seen from the case of BBSAL that she had cause for complaint against L&C. L&C says the findings in this case were published on 30 October 2018 and demonstrated to consumers that a SIPP provider could be responsible for losses associated with investments, so this was the latest point at which Mrs H either was, or ought to have been, aware she had cause for complaint about L&C.

But I think it's reasonable to think that Mrs H's first thought here was that RealSIPP/CIB was responsible for the problem with her pension, since it had advised her. And by the time BBSAL was published, Mrs H had already engaged Firm E regarding the problem with her pension and had submitted her FSCS claim in relation to RealSIPP/CIB's advice. So at that time, Mrs H was already taking action regarding the problem with her pension with the assistance of a professional representative, and I don't think a reasonable person would necessarily have continued to research their problem further by themselves at that point.

I note L&C's argument that in Mrs H's case, the three-year time limit should start running from the date BBSAL was published on 30 October 2018. L&C also says our Service hasn't explained its inconsistent application of time limits in relation to BBSAL, and that it's not fair or reasonable to allow a 'grace period', given that DISP doesn't provide for such.

I must be clear that my role here is to consider the particular circumstances of Mrs H's complaint, so I won't comment on other cases. And in the particular circumstances of Mrs H's complaint, I don't think it's reasonable to use 30 October 2018 as the start date for the three-year time limit.

I acknowledge that DISP makes no mention of a 'grace period'. But the issue is when Mrs H ought reasonably to have been aware she had cause for complaint against L&C.

Sometimes there will be one easily identifiable single event that ought to have given a consumer reasonable awareness of a relevant point, such as a document they received but didn't read or note in the way they reasonably should. In other cases, awareness cannot be reasonably be pinpointed to one single event. And in my view, the publication of the judgment in the BBSAL case was not such a single event in this case.

I don't consider that a reasonable consumer in Mrs H's position would have been constantly vigilant for such a development and so would have spotted it and understood its significance for their situation on the day it happened. But on the other hand I do consider that a reasonable consumer in Mrs H's position ought to have been reasonably mindful of the situation they were in - of having serious uncertainty, if not losses, with their pension (albeit some of which related to investments made after the pension was moved from L&C) which might mean that the losses in her pension might considerably exceed the maximum award the FSCS could pay out in respect of the claim made in relation to RealSIPP/CIB. It therefore

seems more likely than not that within a relatively short time after the Berkeley Burke judgment, a reasonable consumer in Mrs H's position would have noticed comment about that decision and realised that L&C, in addition to RealSIPP/CIB, might have some responsibility for the position she was in with her pension.

I cannot say exactly when that would have been, but I am satisfied that it was reasonable for a consumer in Mrs H's position not to have had awareness of cause for complaint against L&C by 2 December 2018. I say this at least in part because Mrs H's position was not straightforward in that, though she had transferred her pension to a SIPP with L&C and invested in LBR while with L&C, the pension and the investment was soon after transferred to a SASS and other additional investments made. And while those later investments may have suffered losses, the position with the LBR investment was not clear - for example, it was valued by the FSCS in its April 2019 loss calculation at over £145,000. So, put another way, in my view Mrs H did not have reasonable awareness of cause for complaint about L&C more than three years before she referred her complaint to L&C in December 2021.

I note L&C's submissions regarding Mrs H's speculations that the FSCS and our Service wouldn't permit connected claims to run concurrently, and that a CMC could be in breach of its own regulatory rules if it submitted claims in a 'scatter gun' approach at every party involved. But for clarity, these were comments Mrs H submitted to our Service as her thoughts on the matter. These are not reasons I've given or relied on, or findings I've made. So I see no need to address this point further.

Taking everything into account, I'm satisfied this complaint was made in time.

Should be heard by TPO

Having carefully considered L&C's submissions on this point, I'm satisfied that Mrs H's complaint is one we can and should consider. We have 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. 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 suggests Mrs H's complaint should be referred to TPO. And I could now refer the complaint to TPO on the basis of DISP 3.4.1R if I take the view it's more suitable for TPO and if, in the light of that view, Mrs H consents to a referral to TPO.

But I don't consider this is a complaint that would be more suitable for determination by TPO. This complaint requires consideration to be given to the rules and principles set down by the regulator. In my view, these are matters which the Financial Ombudsman Service 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 TPO.

In reaching this conclusion I've considered the Memorandum of Understanding ('MoU') between the Financial Ombudsman Service and TPO. The MoU is a document about practical cooperation where there's remit overlap between the two organisations – however the MoU doesn't determine the jurisdiction of either organisation. Ultimately, DISP 3.4.1R

says that I *may* refer the complaint to another complaints scheme, not that I *must*. So I have 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 Mrs H's complaint to TPO.

So, I'm satisfied that Mrs H's complaint was made within the time limits set out in DISP 2.8.2. And I don't consider that it would be more suitable for this complaint to be determined by TPO, and I've decided not to exercise my discretion to refer it.

Therefore, I've gone on to consider the merits of Mrs H's complaint.

The merits of Mrs H's complaint

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. This goes wider than the rules and guidance that come under the remit of the FCA. Ultimately, I'm required to make a decision that I consider to be fair and reasonable in all the circumstances of the case.

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 Mrs H fairly, in accordance with her best interests. And what I think's fair and reasonable in light of that. And I think the key issue in Mrs H's complaint is whether it was fair and reasonable for L&C to have accepted Mrs H's SIPP application in the first place. So, I need to consider whether L&C carried out appropriate due diligence checks on RealSIPP/CIB before deciding to accept Mrs H's SIPP application from it.

**Relevant considerations**

I have carefully taken account of the relevant considerations to decide what is fair and reasonable in the circumstances of this complaint.

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

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

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

> *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."*

And at paragraph 77 of BBA Ouseley J said:

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

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

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

> *"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles-based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."*

The BBSAL judgment also considers section 228 of 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 the BBA case 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 is 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 am 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 have taken account of both these judgments when making this decision on Mrs H's case.

I note that the Principles for Businesses did not form part of Mr Adams' pleadings in his initial case against Options SIPP. And HHJ Dight did not consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So neither of the judgments say anything about how the Principles apply to an Ombudsman's consideration of a complaint. But to be clear, I do not say this means *Adams* is not a relevant consideration *at all.* As noted above, I have taken account of both judgments when making this decision on Mrs H'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 did not 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 the High Court judgement 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."*

There are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mrs H's complaint. The breaches alleged by Mr Adams were summarised in paragraph 120 of the Court of Appeal judgment. In particular, as HHJ Dight noted, he was not asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP.

The facts of this case are also different, and I need to construe the duties L&C owed to Mrs H under COBS 2.1.1R in light of the specific facts of Mrs H's case.

To confirm, I have considered COBS 2.1.1R - alongside the remainder of the relevant considerations, and within the factual context of Mrs H's case, including L&C's role in the transaction.

However, I think it is important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I am required to take into account relevant considerations which include:

- law and regulations;
- regulators' rules, guidance and standards;

- codes of practice; and,
- where appropriate, what I consider to have been good industry practice at the relevant time.

This is a clear and relevant point of difference between this complaint and the judgments in *Adams* v Options SIPP. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

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

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

**The regulatory publications**

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

- The 2009 and 2012 thematic review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 "Dear CEO" letter.

**The 2009 Thematic Review Report**

The 2009 report included the following statement:

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

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

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

*Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we*

*may take enforcement action against SIPP operators who do not safeguard their customers' interests in this respect, with reference to Principle 3 of the Principles for 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."*

**The later publications**

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

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

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

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

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

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

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

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

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

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

***"Due diligence***

*Principle 2 of the FCA's Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers*

*as well as assessing that investments are appropriate for personal pension schemes) to help them justify their business decisions. In doing this SIPP operators should consider:*

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

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

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

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

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

I acknowledge that the 2009 and 2012 reports and the *"Dear CEO"* letter are not formal *"guidance"* (whereas the 2013 finalised guidance is). However, the fact that the reports and *"Dear CEO"* letter did not constitute formal guidance does not mean their importance should be underestimated. They provide a *reminder* that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect the publications, which set out the regulators' expectations of what SIPP operators should be doing, also goes some way to indicate what I consider amounts to good industry practice and I am, therefore, satisfied it is appropriate to take them into account.

It is relevant that when deciding what amounted to have been 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.

I'm also satisfied that L&C, at the time of the events under consideration here, thought the 2009 Thematic Review Report was relevant, and thought that it set out examples of good industry practice. L&C *did* carry out due diligence on RealSIPP/CIB. So, it clearly thought it was good practice to do so, at the very least.

Like the Ombudsman in the BBSAL case, I do not think the fact the publications, (other than the 2009 and 2012 reports), post-date the events that took place in relation to Mrs H's complaint, mean that the examples of good practice they provide were not 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 the Principles.

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

That doesn't mean that in considering what is fair and reasonable, I will only consider L&C's actions with these documents in mind. The reports, Dear CEO letter and guidance gave non-exhaustive examples of good practice. They did not 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.

Another relevant consideration is the regulator's alert about advisers giving advice to consumers on SIPPs without consideration of the underlying investment to be held in the SIPP. The regulator issued an alert in 2013 *("Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP*") setting out that this type of restricted advice didn't meet regulatory requirements. It said:

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

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

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

The alert post-dates the events in this complaint – but, again, it didn't set new standards. It set out the regulator's concerns about industry practices at the time.

It's important to keep in mind the judge in *Adams v Options* 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 Mrs H's SIPP application from RealSIPP/CIB, L&C complied with its regulatory obligations: to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and treat them fairly; and to act honestly, fairly and professionally. In doing that, I'm looking to the Principles and the publications listed above to provide an indication of what L&C should've done to comply with its regulatory obligations and duties.

Submissions have been made about breaches of the Principles not giving rise to any cause of action at law. 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 case. 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've undertaken sufficient due diligence into RealSIPP/CIB and the business RealSIPP/CIB was introducing, both initially and on an ongoing basis.

L&C says it carried out due diligence on RealSIPP/CIB before accepting business from it. And from what I've seen I accept that it undertook some checks. However, the questions I need to consider are whether L&C ought to have, in compliance with its regulatory obligations, identified that consumers introduced by RealSIPP/CIB were being put at significant risk of detriment. And, if so, whether L&C should therefore not have accepted Mrs H's application from RealSIPP/CIB.

**The contract between L&C and Mrs H**

L&C says it was unable to provide advice on either the suitability of the SIPP or the investment, which is why it had an intermediary agreement with RealSIPP/CIB. That the provisional decision ignored the parties contractual arrangements and demarcation of roles and responsibilities. And that the provisional decision attempted to create a relationship between L&C and Mrs H before a contract was entered into and L&C received any funds.

I accept that L&C made it clear to Mrs H that it wasn't giving, nor was it able to give, advice, and that it played an execution-only role in her SIPP investments. And that forms Mrs H signed confirmed, amongst other things, that losses arising as a result of L&C acting on her instructions were her responsibility.

So I've proceeded on the understanding that L&C wasn't obliged – and wasn't able – to give advice to Mrs H on the personal suitability of the SIPP or LBR investment. But I'm satisfied that, to meet its regulatory obligations when conducting its operation of SIPPs business, L&C had to decide whether to accept introductions of business with the Principles in mind. And I don't agree that it couldn't have rejected introductions or applications without contravening its regulatory permissions by giving investment advice. Or that having not yet entered into a contract with a new SIPP member or received funds meant it couldn't have rejected introductions or applications.

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

In this case, the business L&C was conducting was its operation of SIPPs. I'm satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business. The regulators' reports 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/accept. That involves conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.

L&C says that it checked the FSA's register to ensure that RealSIPP and CIB were regulated, and that it was reasonably afforded a significant level of comfort from the fact that they were FCA authorised, in line with COBS. L&C also entered into intermediary agreements with those firms.

I think this was evidence of good practice, but I don't think these steps were the only steps L&C should've taken.

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 Mrs H) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

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

So, and well before the time of Mrs H's application in January 2013, 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/CIB to ensure the quality of the business it was introducing.

And I think L&C also ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments before accepting them into a SIPP. I think L&C's submissions on the due diligence it undertook prior to allowing LBR holdings 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 (here LBR), with the Principles in mind.

However, given what I'll go on to say about the due diligence L&C carried out on RealSIPP/CIB, it is not necessary for me to consider and comment on the due diligence carried out by L&C on the LBR investment. It is enough to say that L&C was or should reasonably have been aware that the LBR investment would generally have been considered a non-mainstream higher risk investment for UK based pension investors, which had no in-built exit route and so was likely to be relatively illiquid and the sort of investment that was unlikely to be suitable for most retail investors.

**What due diligence did L&C carry out on RealSIPP/CIB?**

L&C appears to have carried out the following checks before it accepted business from RealSIPP:

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

And, prior to accepting Mrs H's application, it also had access to some information about the type and volume of introductions it was receiving from RealSIPP/CIB.

**Was this sufficient due diligence in the circumstances?**

Given the circumstances involved here, I don't think the above alone was reasonable or sufficient to meet L&C's regulatory obligations and good industry practice. Crucially, I don't think L&C took appropriate steps or drew reasonable conclusions from the information that was available to it before accepting Mrs H's application. In summary, my view is that:

- Based on the available evidence, it would've been unreasonable to assume that full advice, (i.e. advice on the establishment of the SIPP, the transfers of pensions to the SIPP, and the intended investment) was being offered by RealSIPP to applicants like Mrs H.
- L&C had some reasons to be concerned about the type of business RealSIPP/CIB was introducing. The introductions had anomalous features – high-risk business for unregulated overseas property developments and other esoteric investments.
- And, even though L&C believed that RealSIPP/CIB had the necessary permissions to give full advice on the business it was introducing, a large proportion of the introduced business was execution-only.

L&C knew all of this, or else ought to have known it from the information available, but it didn't then make further appropriate checks of RealSIPP/CIB's business model.

L&C should have taken steps to address these risks (or, given these risks, have simply declined to deal further with RealSIPP/CIB). Such steps should have involved getting a full understanding of RealSIPP/CIB's business model – through requesting information from RealSIPP/CIB and through independent checks. Such understanding would have revealed there *was* a significant risk of consumer detriment associated with introductions of business from RealSIPP/CIB. I know L&C argues it's wrong of me to conclude that L&C was under obligations to conduct further due diligence to protect against 'consumer detriment'. But I don't agree, because the regulator's 2009 Thematic Review Report said, with my emphasis, that it expected SIPP providers "…*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."*

In the alternative, RealSIPP/CIB may not have been willing to provide the required information, or fully answer the questions about its business model. In either event L&C should have concluded it shouldn't accept introductions from RealSIPP/CIB.

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

**The availability of advice**

L&C may suggest, as it has in other complaints brought to our Service, that advice might've been given to Mrs H. The application form for Mrs H's SIPP named her IFA as Mr M who was working for *"RealSIPP LLP/CIB (life & pensions) Ltd",* and a box reading *"Advice given at point of sale to client"* was ticked. But neither the SIPP application or the other documents I've seen in Mrs H's case make clear the extent of that advice. So, I'm not persuaded that Mrs H was ever offered full regulated advice by RealSIPP or its principal. And as its client agreement and 'Key facts' document make clear, RealSIPP wasn't offering clients like Mrs H full advice.

The possibility that full regulated advice had not been given or made available to Mrs H was a clear and obvious potential risk of consumer detriment. Mrs H was transferring just over £151,000 and investing the bulk of that into an overseas property development – a move which was highly unlikely to be suitable for the vast majority of retail clients.

So, based on the available evidence, I think there was insufficient basis for L&C to reasonably assume that full advice had either been given to Mrs H, or had been made available to Mrs H and she had declined it.

**RealSIPP was introducing applications for high-risk investments**

As part of our enquiries into this complaint we asked L&C how many of its members were introduced by RealSIPP/CIB, and how many of these were introduced before Mrs H. L&C informed us that a total of 160 of its members were introduced by RealSIPP/CIB since the introducer agreement commenced in September 2010, and there had been 156 introductions before Mrs H's. And L&C has previously told us back in 2018, that RealSIPP/CIB 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/CIB received fees but indicated they didn't advise on the SIPP.

The introductions L&C received from RealSIPP/CIB were for applicants looking to invest in high risk esoteric holdings, this included unregulated overseas property developments such as LBR. And I think it's fair to say that such investments can generally only be suitable for a small proportion of people investing for their pension – generally sophisticated and/or high net worth investors. The risks are multiplied where further funding is necessary from investors to complete the purchases, as was the case with many of the deposit based TRG investments, including that which Mrs H made.

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

**The business introduced by RealSIPP**

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

In addition to the possibility that full advice had not been given or made available to Mrs H, the available evidence also shows L&C was, or should have been, aware that not offering or giving advice was something that RealSIPP/CIB was doing routinely.

It's clear that L&C had access to information about the number and nature of introductions that RealSIPP/CIB made, as it has been able to provide us with details about this when requested.

An example of good practice identified in the FSA's 2009 Thematic Review Report was:

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

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

From the figures L&C has provided, a little under half the introductions from RealSIPP/CIB were transacted as execution-only business (i.e. with no advice being given by RealSIPP/CIB). That's a large proportion of the total business RealSIPP/CIB introduced, and I think it's likely that RealSIPP/CIB had introduced business to L&C without providing advice on a number of occasions before Mrs H's introduction.

And I think that, from very early on, L&C was on notice that RealSIPP, although the appointed representative of a regulated business that had permissions to advise on all the business being introduced, wasn't a firm that was doing things in a conventional way. The business RealSIPP was introducing, and in not insignificant volumes, involved consumers instructing their pension monies be invested in high-risk esoteric investments. And, mindful of the large proportion of execution-only business RealSIPP was introducing, I think L&C ought to have recognised that there was a risk here that RealSIPP might be choosing to introduce some consumers on an execution-only basis, and without those consumers having been offered full advice.

I think this ought to have been a red flag for L&C in its dealings with RealSIPP. It's highly unusual for regulated advice firms to be involved in execution-only transactions involving pension transfers and 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 investing for their pension, without obtaining regulated advice. I think it's fair to say that most advice firms decline to be involved in such transactions and certainly don't transact this kind of business in significant volumes.

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

<u>Volume of business</u>

L&C has said in response to this complaint, that 160 members were introduced by RealSIPP and the vast majority (over 99%) of these involved the transfer of an Occupational Pension Scheme. The figures provided by L&C to the complaints with the Financial Ombudsman Service have varied somewhat, but it is consistent that a large proportion of the introduced business from RealSIPP involved occupational pension transfers. I think that L&C should have been concerned, and before it received Mrs H's application, that the volume of

introductions it was receiving from RealSIPP, 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 introducing this volume of higher-risk business was able to meet regulatory standards.

And I think this concern ought to have been even greater given the amount of business introduced by RealSIPP which involved the transfer of occupational pensions with defined benefits, as was the case with Mrs H. At the relevant date COBS 19.1.6G stated:

*"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interest".*

While I acknowledge this aims to define the expectation of a regulated financial adviser when determining the suitability of a pension transfer, it emphasises the regulator's concern about the potential detriment such a transaction could expose a consumer to. Given the nature of its business and regulatory status, I'd expect L&C to have been familiar with the guidance contained in the COBS – even if it didn't apply directly to it. Mrs H's pension transfer involved defined benefits, and L&C has told us that the majority of the other applications introduced by RealSIPP did so too. This was a further clear and obvious potential risk of consumer detriment.

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

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

<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 Mrs H's application. And mindful of the type of introductions it was receiving from RealSIPP from the outset, I think it's fair and reasonable to expect L&C, in line with its regulatory obligations, to have made some specific enquiries and obtained information about RealSIPP's business model.

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

The October 2013 finalised SIPP 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."*

And I think that L&C, before accepting further applications from RealSIPP, should have checked with RealSIPP about things like:

- how it came into contact with potential clients,
- what agreements it had in place with its clients,
- whether all of the clients it was introducing were being offered advice,
- what its arrangements with any unregulated businesses were,
- how and why retail clients were interested in making these esoteric investments,
- whether it was aware of anyone else providing information to clients,
- how it was able to meet with or speak with all its clients, and
- what material was being provided to clients by it.

I think it's more likely than not that *if* L&C had asked RealSIPP for this type of information that RealSIPP would have provided a full response to the information sought. And that, amongst other things, L&C would have then been provided with copies of client agreements and Keyfacts documents that RealSIPP was providing to different consumers it was introducing to L&C. Including a copy of the *"about our services for our Resort Group SIPP package"* document.

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

Making independent checks

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

The 2009 Thematic Review Report said that:

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

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

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

Again, I confirm that I accept L&C couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps included addressing a potential risk of consumer detriment by speaking to applicants and/or having sight of advice letters, as this could have provided L&C with further insight into RealSIPP's business model, and

helped to clarify to L&C whether full regulated advice on the overall proposition was being offered/given. This was a fair and reasonable step to take in reaction to the clear and obvious risks of consumer detriment I've mentioned.

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

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

- RealSIPP was explaining to some consumers that its role was solely as "administrator and packager" of the SIPP.
- Consumers were being introduced to L&C without having been offered full regulated advice.

Each of these in isolation was 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 been offered, or received, full regulated advice from RealSIPP on their transactions.

As previously stated, RealSIPP wasn't offering clients like Mrs H the option of *full* advice. It was acting as *"administrator and packager"* of the SIPP – an unusual role for an advisory firm to take. This raises significant questions about the motivations and competency of RealSIPP.

I'm aware that in some cases RealSIPP *did* refer some consumers to CIB for advice. But in those instances I'm aware of where CIB did advise consumers to consider establishing a L&C SIPP, it didn't offer full regulated advice; it restricted its advice to the transfer of existing pension scheme(s) to the SIPP, referencing generic risks and without the specific TRG investment being named or discussed. As CIB explained in its client agreement:

> *"In this particular instance we are restricting our services to the establishment and set-up of a specific SIPP to enable commercial property purchase. We will not be providing any advice on the suitability of this package to your own personal circumstances and you should seek professional advice where necessary."*

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

I therefore think L&C ought to have concluded Mrs H, and applicants before her, didn't have full regulated advice made available to them by *any* route. And L&C ought to have viewed this as a significant point of concern, as retail consumers, like Mrs H, were transferring their existing pension monies to L&C to invest in higher-risk esoteric investments, including unregulated overseas property developments such as LBR. And this without the benefit of having been offered full regulated advice, by a business which appeared to be actively avoiding any responsibility to give advice.

With the above in mind, L&C should also have concluded that the overall volume of business and the proportion of consumers who weren't apparently receiving *any* advice asked further

serious questions about the motivation and competency of RealSIPP.

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

L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mrs H fairly by accepting her application from RealSIPP. To my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant time, and allowed Mrs H 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.

L&C has made submissions regarding Mrs H's LBR investment, and I've carefully considered these. I accept that the LBR investment doesn't appear to be fraudulent or a scam. But this doesn't mean that L&C did all the checks it needed to do.

However, given what I've said about L&C's due diligence on RealSIPP and my conclusion that it failed to comply with its regulatory obligations and good industry practice at the relevant time, I don't think it's necessary for me to also consider L&C's due diligence on the LBR investment at this stage. I'm satisfied that L&C wasn't treating Mrs H fairly or reasonably when it accepted her application from RealSIPP, so I've not gone on to consider the due diligence it may have carried out on the LBR investment and whether this was sufficient to meet its regulatory obligations. And I make no findings about this issue.

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

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

In other complaints brought to the Financial Ombudsman Service, L&C has referred to forms that clients like Mrs H signed. So it may argue that Mrs H signed indemnity forms. For completeness, in my view it's fair and reasonable to say that just having Mrs H sign indemnity declarations 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 Mrs H had signed forms intended to indemnify it against losses that arose from acting on her instructions. And, in my opinion, relying on such indemnities when L&C knew, or ought to have known, Mrs H's dealings with RealSIPP 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 Mrs H's application.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mrs H signed meant that L&C could ignore its duty to treat her fairly. To be clear, I'm satisfied that indemnities contained within the contractual documents don't absolve, nor

do they attempt to absolve, L&C of its regulatory obligations to treat customers fairly when deciding whether to accept or reject business.

***COBS 11.2.19R***

L&C has made the point that it complied with COBS 11.2.19R in executing Mrs H's written 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 the SIPP application from RealSIPP and established Mrs H's SIPP in the first place.

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

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

So 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 Mrs H's application to open a SIPP in the first place.

I'm satisfied that Mrs H'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 Mrs H's application.

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

<u>The involvement of other parties</u>

L&C suggests Mrs H should seek redress from Firm E's insurer, given Firm E's failure to inform her she had cause for complaint against L&C. And that I am using Firm E's failure as an excuse to pursue L&C in order to obtain redress for Mrs H. But to be clear, L&C had its own distinct regulatory obligations as a SIPP operator and Mrs H is entitled to make a complaint against L&C in relation to those. And that is the complaint I'm considering in this decision.

However, I accept that other regulated parties were involved in the transactions complained about – RealSIPP and CIB. L&C has contended that it's RealSIPP/CIB that is really responsible for Mrs H's losses. CIB, as the principal business, would be the respondent for complaints about the activities RealSIPP undertook as its appointed representative. But the Financial Ombudsman Service won't look at complaints against CIB as it's been dissolved

and no longer exists as a regulated business. And we can't look at complaints about TRG as it was not an authorised firm that is covered by our jurisdiction.

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

As I set out above, in my opinion it's fair and reasonable in the circumstances of this case to hold L&C accountable for its own failure to comply with the relevant regulatory obligations, good industry practice, and to treat Mrs H fairly.

The starting point therefore, is that it would be fair to require L&C to pay Mrs H compensation for the loss she's suffered as a result of its failings. I've carefully considered if there's any reason why it wouldn't be fair to ask L&C to compensate Mrs H 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 Mrs H to the full extent of the financial losses she's suffered due to L&C's failings.

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

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

To be clear, I'm not making a finding that L&C should've assessed the suitability of the SIPP or the LBR holdings for Mrs H. I accept that L&C wasn't obligated, and indeed was not authorised to give advice to Mrs H, 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.

Mrs H taking responsibility for her own investment decisions

I note the point is made by L&C that consumers should take responsibility for their own investment decisions in line with the findings in *Adams*. I've considered this point carefully and I'm satisfied that it wouldn't be fair or reasonable to say Mrs H'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 Mrs H'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 Mrs H wouldn't have come about in the first place, and the loss she's suffered could have been avoided.

As I've made clear, L&C needed to carry out appropriate due diligence on RealSIPP and reach the right conclusions. And I think it failed to do this. Just having Mrs H sign forms that

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

And I wouldn't consider it fair or reasonable for L&C to have concluded that Mrs H had received an explanation of the risks involved with the overall proposition from RealSIPP, given what L&C knew, or ought to have known, about RealSIPP's business model by the time it received Mrs H's application.

I don't think it would be fair to say in the circumstances that Mrs H should suffer the loss because she ultimately instructed the transactions be effected. I say this because CIB was a regulated firm with the necessary permissions to advise on the transactions this complaint concerns. And RealSIPP was an appointed representative of CIB. I'm satisfied that in her dealings with it, Mrs H trusted RealSIPP to act in her best interests. Mrs H also then used the services of L&C - a regulated personal pension provider.

So overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair to say L&C should compensate Mrs H for the loss she's suffered.

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

L&C says the point of no return was when Mrs H accepted the CETV quote from her DB scheme and requested a transfer, and this took place before L&C had any basis to refuse any business. But I don't agree. The completed SIPP application form RealSIPP sent to L&C on 11 January 2013 included a number of statements in the 'Declarations' section Mrs H signed, one of which said *"I request and consent to the payment of the transfer values(s) from my previous scheme(s)…"* And the letter L&C sent to RealSIPP on 14 January 2013 thanked RealSIPP for the application and said L&C had forwarded the transfer paperwork to Mrs H's ceding DB scheme. Further, the value of the DB scheme benefits were transferred in from the ceding DB scheme, on 25 January 2013. Given all this, I'm satisfied that when L&C received Mrs H's SIPP application form, Mrs H's pension benefits were still within her DB scheme and would only be transferred when L&C set up her new SIPP.

L&C might contend that Mrs H would likely have proceeded with the transfer and investments regardless of the actions it took. L&C has highlighted in other complaints brought to us that other SIPP providers were accepting such investments at the time, and it's most likely the transactions would've been effected through another provider.

L&C might argue that another SIPP operator would've accepted Mrs H's application had it declined it. But I don't think it's fair and reasonable to say that L&C shouldn't compensate Mrs H for her loss on the basis of speculation that another SIPP operator would've made the same mistakes that I've found L&C 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 Mrs H's application from RealSIPP.

Further, if Mrs H had sought advice from a different adviser, who had given full regulated advice on the overall proposition, I think it's more likely than not that the advice would have been not to establish a SIPP and transfer pension monies so as to effect the LBR investment. And I think it's more likely than not that Mrs H would have acted in accordance with that advice. Alternatively, if L&C hadn't accepted her business from RealSIPP, Mrs H might have simply decided not to seek pensions advice elsewhere from a different adviser and still then retained her existing DB pension.

In *Adams v Options SIPP*, the judge found that Mr Adams would have proceeded with the transaction regardless. HHJ Dight says (at paragraph 32):

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

But, in this case, I'm not satisfied that Mrs H proceeded knowing that the investment she was making was high risk and speculative, and that she was determined to move forward with the transactions in order to take advantage of a cash incentive.

I'm not satisfied that Mrs H understood she was making a high-risk investment. It appears Mrs H understood that her pension monies were being moved into a little to no risk pension arrangement with returns which would out-perform her existing arrangement. I've also not seen any evidence to show Mrs H 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 Mrs H, 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 Mrs H's application from RealSIPP, the transactions this complaint concerns would not have still gone ahead.

The 2015 transfer to a SSAS with another provider

I'm mindful that Mrs H transferred her pension in 2015 from an L&C SIPP to a SSAS with another provider. L&C may argue it shouldn't be held responsible for losses to Mrs H's pension which happened after this transfer. I've thought about this carefully and I think it's fair and reasonable in the circumstances of this complaint to hold L&C fully responsible for all of the losses Mrs H might have incurred.

DISP App 4.4.2 R (which I later refer to in more detail uses the current value of the defined contribution ('DC') pension arrangement as the comparator (adjusted only for benefits already paid to the consumer and SERPS adjustments where applicable).

So the rule does not limit the losses to the point where the pension is moved elsewhere. However, I've thought about whether it's fair to limit the loss up to the point Mrs H moved her pension to the new arrangement. But I don't think it is. In this decision, I've considered whether L&C complied with its regulatory obligations and good industry practice. And if it had, Mrs H would more likely than not have remained in her DB scheme and her benefits would not have been exposed to any investment risk at all.

By moving to a personal pension arrangement it was reasonably foreseeable that Mrs H might change advisers and/or investments in future – L&C couldn't reasonably expect that she would remain in the same SIPP and investments until retirement or that she would never change advisers. As a result of L&C's failure to comply with its regulatory obligations and good industry practice, Mrs H's pension fund is subject to the risk of unsuitable advice and investment risk and/or losses.

In any event, I'm deciding the complaint against L&C and I think without its failure of due diligence Mrs H wouldn't be in the position she is in now. So, in the circumstances of this complaint I consider it's fair and reasonable to hold L&C fully responsible for all of the losses Mrs H might have incurred.

**In conclusion**

So, overall, I do think it's fair and reasonable to direct L&C to pay Mrs H compensation in the circumstances. While I accept that RealSIPP and CIB might have some responsibility for initiating the course of action that's led to Mrs H's loss, I consider that L&C failed to comply with its own regulatory obligations and didn't, when it had the opportunity to do so, put a stop

to the transactions proceeding by declining Mrs H's application from RealSIPP. And I'm satisfied that Mrs H wouldn't have established the SIPP, transferred monies in from her existing DB scheme, or invested in LBR if it hadn't been for L&C's failings.

L&C didn't have to carry out an assessment of Mrs H's needs and circumstances in order to meet its regulatory requirements, but it did have to treat Mrs H fairly under the Principles. I'm satisfied that in the circumstances, and for all the reasons given, it's fair and reasonable to conclude that L&C should compensate Mrs H for the loss she's suffered.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mrs H – including RealSIPP and CIB. 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 Mrs H for the full measure of her loss. RealSIPP was reliant on L&C to facilitate access to Mrs H's pension. But for L&C's failings, Mrs H's pension transfer wouldn't have occurred in the first place.

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

Taking all of the above into consideration, I think that in the circumstances of this case it's fair and reasonable for me to conclude that L&C shouldn't have accepted Mrs H's application from RealSIPP. For the reasons I've set out, I also think it's fair to ask L&C to compensate Mrs H for the loss she's suffered.

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

**Putting things right**

My aim in awarding fair compensation is to put Mrs H 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 Mrs H would have remained a member of the DB pension scheme that she transferred into the SIPP.

In light of the above, L&C should calculate fair compensation by comparing the current position to the position Mrs H would be in if she'd not transferred from her DB scheme. In summary, L&C should:

1. Take ownership of the LBR investment if possible.
2. Calculate and pay compensation for the loss Mrs H's pension provisions have suffered as a result of L&C accepting her applications.
3. Pay Mrs H £500 for the distress and inconvenience she's suffered.

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

1. Take ownership of the LBR investments if possible.

   The valuation of the illiquid LBR investment may prove difficult, as there may be no market for it. L&C should take ownership of the LBR holdings by paying a commercial value acceptable to the SSAS provider. The amount L&C pays should

be included in the actual value of the SSAS before compensation is calculated. So that the sums paid into the SSAS to purchase the LBR holdings will then make up part of the current actual value of the SSAS.

If L&C is unable, or if there are any difficulties in buying Mrs H's illiquid investment, it should give the holding a nil value for the purposes of calculating compensation. To be clear, this would include the investment being given a nil value for the purposes of ascertaining the current value of Mrs H's SSAS.

In this instance, if the total calculated redress in this complaint is less than £170,000, L&C may ask Mrs H to provide an undertaking to account to it for the net amount of any payment the SSAS may receive from the relevant holding. That undertaking should allow for the effect of any tax and charges on the amount Mrs H may receive from the investment and any eventual sums she would be able to access from the SSAS. L&C will have to meet the cost of drawing up any such undertaking.

If the total calculated redress in this complaint is greater than £170,000 and L&C doesn't pay the recommended amount (set out below), Mrs H should retain the rights to any future return from the investment(s) until such time as any future benefit that she receives from the investment(s) 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 Mrs H to provide an undertaking to account to it for the net amount of any further payment the SSAS may receive from these investment(s) thereafter. That undertaking should allow for the effect of any tax and charges on the amount Mrs H may receive from the investment(s) from that point, and any eventual sums she would be able to access from the SSAS. As above, L&C will need to meet any costs in drawing up the undertaking.

Mrs H says she can't simply close the SSAS where it holds illiquid investments - and LBR and another of her investments are illiquid. So she thinks L&C should cover five years' worth of her continuing SSAS fees. She says the sums involved in her case mean this is unlikely to change what she receives, but her CMC wants to establish our Service's view on ongoing costs as this may affect its other clients.

My role here is to decide Mrs H's complaint in its own particular circumstances, so I'm not setting out a general view on ongoing costs. But I've reconsidered the particular circumstances of Mrs H's complaint. And on reflection, I think it's fair to say that if the illiquid investments can't be removed from the SSAS, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mrs H to have to continue to pay annual SSAS fees to keep the SSAS open.

As such, L&C should pay an amount into Mrs H's SSAS equivalent to five years' worth of the fees that will be payable on the SSAS (based on the most recent year's fees). Five years should allow enough time for the issues with the investments to be dealt with, and for them to be removed from the SSAS. I think it's fair and reasonable, though I note Mrs H's suggestion that the sums involved in her case mean this is unlikely to change the total redress L&C pays her.

2. Calculate and pay compensation for the loss Mrs H's pension provisions have suffered as a result of L&C accepting her applications.

A fair and reasonable outcome would be for L&C to put Mrs H, as far as possible, into the position she'd now be in if it hadn't accepted her application from

RealSIPP. As explained above, had this occurred I consider it's more likely than not Mrs H would have remained in her DB Scheme.

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

It's my understanding that Mrs H has not yet retired but plans to retire at age 60. So, compensation should be based on Mrs H taking benefits at age 60. Neither Mrs H or L&C have disputed my understanding.

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 Mrs H's acceptance of the decision.

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

- always calculate and offer Mrs H redress as a cash lump sum payment,
- explain to Mrs H before starting the redress calculation that:
    - her 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 her redress prudently is to use it to augment her defined contribution pension
- offer to calculate how much of any redress Mrs H receives could be augmented rather than receiving it all as a cash lump sum,
- if Mrs H accepts L&C's offer to calculate how much of her redress could be augmented, request the necessary information and not charge Mrs H 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 Mrs H's end of year tax position.

I acknowledge that Mrs H 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 Mrs H'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 Mrs H received from the FSCS. And it will be for Mrs H to make the arrangements to make any repayments she needs to make to the FSCS. However, I do think it's fair and reasonable for some allowance to be made for the sum(s) Mrs H actually received from the FSCS and has had the use of for a period of the time covered by the calculation.

As such, for the purposes of the calculation that's being carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4, if it wishes, L&C

*may* notionally, for the period from the point of their payment through until the valuation date (as per the DISP App 4 definition of that term), allow for the payment(s) Mrs H received from the FSCS following the claim about RealSIPP, as an income withdrawal payment. Where such an allowance is made then L&C must also, at the end of the calculation, allow for a notional addition to the overall calculated loss that's equivalent to the payment(s) Mrs H received from the FSCS following the claim about RealSIPP. The effect of this notional addition will be to increase the overall loss calculated using the most recent financial assumptions in line with PS22/13 and DISP App 4, by a sum that's equivalent to the payment(s) Mrs H received from the FSCS.

Redress paid to Mrs H 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 Mrs H would otherwise pay on income from her pension.

L&C disputes it's reasonable to assume Mrs H will be a basic rate tax payer in retirement. But I think that is a reasonable assumption based on the evidence provided to us. At the time of the transfer, Mrs H was in her mid-forties and her pension provision was worth around £151,000.

On balance, and having carefully considered all of the evidence we've received, I think it's fair and reasonable to conclude it is more likely than not that Mrs H will be a basic rate tax payer at her selected retirement age. So the reduction would equal 20%. However, if Mrs H would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

Mrs H thinks L&C should be directed to pay interest after 90 days, in case it doesn't settle her complaint in a timely manner. But in PS22/13 and DISP App 4, the regulator has set out what it deems to be appropriate redress to put right instances of unsuitable DB pension transfer, and this takes account of consumers being compensated for the delay between the valuation date and the date they receive their money. And I see no reason to depart from this in the circumstances of this complaint.

3. Pay Mrs H £500 for the distress she's suffered.

In addition to the financial loss that Mrs H has suffered as a result of the problems with her pension, I think Mrs H was caused distress by the loss of a significant portion of her pension provision as a result of L&C accepting her business from RealSIPP and permitting her to invest her L&C monies in LBR. So I think it's fair for L&C to compensate her for this as well.

**My final decision**

For the reasons given, my decision is that I uphold Mrs H's complaint and London & Colonial Services Limited must pay fair redress as set out above.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £170,000, plus any interest and/or costs/interest on costs that I think are appropriate. If I think that fair compensation is more than £170,000 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. My decision is that London & Colonial Services Limited should pay Mrs H the amount produced by that calculation – up to a maximum of £170,000 (including the award for distress and inconvenience but excluding costs) plus any interest set out above.

**Recommendation**: If the amount produced by the calculation of fair compensation exceeds £170,000, I recommend that London & Colonial Services Limited pay Mrs H the balance plus any interest on the balance as set out above.

The recommendation isn't part of my determination or award. London & Colonial Services Limited doesn't have to do what I recommend. It's unlikely that Mrs H could accept a decision and go to court to ask for the balance and Mrs H may want to get independent legal advice before deciding whether to accept my decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 25 April 2024.

Ailsa Wiltshire
**Ombudsman**