DRN-4783008

The complaint

Mr H complains that London & Colonial Services Limited ('L&C') failed to meet its obligations to deal with him fairly as a retail client, permitted a transfer to an unsuitable pension, which then facilitated the purchase of an unsuitable investment. He says this has resulted in him suffering a financial loss.

Both Mr H and L&C are being represented in the complaint but for ease I'll refer to all representations as being made by Mr H or L&C.

What happened

Involved parties

L&C

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

RealSIPP LLP ("Real SIPP")

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 (Llana Beach).

The transaction

Mr H says that he was approached through his church by a TRG salesperson. He then attended a conference before attending a presentation in Cape Verde. He was introduced to an adviser from RealSIPP by the TRG salesperson. Mr H says that other than some brochures, he was given very little paperwork around this transaction.

Despite several requests, L&C has provided no documentation for this complaint. It says that due to a system migration, it isn't able to provide a copy of the initial application but says this was submitted by RealSIPP on 6 January 2012. It's also said that this would have been a standard document which would have confirmed the following:

- Details of Mr H's financial adviser (this was Mr B of RealSIPP):
- That Mr H wished to manage the fund himself;
- That Mr H agreed to be responsible for any claims, losses, costs, charges or expenses which may be raised against L&C or incurred by it in consequence of L&C acting on his instructions. Section 4 of the application specifically confirmed that an investor would *"…indemnify and keep you fully indemnified in respect of any loss claim action damage incurred or suffered by you in respect of the asset*";
- That Mr H understood that L&C was not authorised to give financial advice or investments advice and that no information given was intended to be any kind of recommendation of an investment.

L&C has also said the application would have specifically confirmed that the complainant had obtained the necessary reports, legal and other advice required regarding the investment, including the potential costs and expenses of this.

After processing, the SIPP was opened on 18 January 2012 and several pensions Mr H held with previous providers were transferred to it. L&C has said that it was confirmed at that time that the nominated investments to be held in the SIPP consisted of two plots (apartments 1 & 2) at the Llana Beach Hotel, in Cape Verde, purchased for a total sum of €379,900.00. This figure was subject to a 5% incentive discount reducing the overall total to €360,905.00.

We've not been provided with a contract for Mr H's Llana Beach investment that has been signed by the vendor. However, we've previously been provided with a copy of a contract signed by the vendor (in that case Llana Beach Hotel, S.A.) in the complaint that was the subject of published decision DRN-3587366. In that complaint the signed contract explained that a total of 65% (consisting of a 45% 'down payment' and an additional 20%) was paid when the contract is signed. Another 30% was then payable on the conclusion of the construction, with the vendor writing off the final 5%. There'd also be a discount each year, equivalent to 3% of the cost of the 45% down payment, until the earlier of 3 years or the date of delivery of the keys.

Further, the contract explained that the established date for the conclusion of the construction was no later than 31 December 2014. And that if the purchaser didn't make any instalment payment that was due the vendor may (at their discretion and amongst other options), sixty days after the due date, terminate the contract and retain all amounts paid under its terms.

While we've not seen a copy of the contract in Mr H's case, I think it's more likely than not that a not dissimilar contract would have been completed in respect of his investment in the Llana Beach Resort.

In other correspondence we have only file, L&C has confirmed that the intention was for Mr H to own two properties outright with an initial deposit of 65% of cost price. And upon completion of the properties there was to be a borrowing facility available but this didn't materialise. As a result of the borrowing facility being withdrawn, TRG offered Mr H a consolidation exercise, which resulted in agreement to release Mr H's ownership of Apartment 1, in return for a 17% share in a different plot (Apartment 3) and Mr H retained 100% ownership of Apartment 2. L&C says TRG provided confirmation of Mr H's 17% member share in Apartment 3 (at a cost of €38,149.46), together with a consolidation refund of £3,754.94 paid back into the SIPP on 21 July 2016. L&C has also said that Mr H received the promised monthly returns on his investment during the first three years. And since construction was completed Mr H's SIPP account has been credited with rental income from both apartments every quarter since July 2017. However, I've not been

provided with copies of SIPP statements or a SIPP transaction history to support this.

Additional background information

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

L&C's provided us with a third-party investment due diligence document it obtained. The document sets out some details about the Llana Beach 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's 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's also provided us with copies of print outs from the FSA Register. These record that, as at November 2011, RealSIPP was an appointed representative of CIB. And CIB's permissions included advising on Pension Transfers and Pension Opt Outs.

I've also seen L&C's 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'll ensure assets are correctly registered and comply with HM Revenue & Customs ('HMRC') rules and regulations.

On the published decision complaint I've mentioned above, the complainant sent us a copy of RealSIPP's client agreement and Keyfacts document, titled "*about our services for our Resort Group SIPP package."* RealSIPP's client agreement describes it 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 types of product that you wish to buy. We act upon your instructions."

The Keyfacts document says that RealSIPP only offers products from a single company and that clients wouldn't receive advice or recommendations from RealSIPP. It's also explained that for clients establishing a SIPP (this included setting up the SIPP and arranging the transfers in) there'd be an initial £2,550 fee and an annual ongoing fee of £300 for administration and correspondence.

I've also seen a different client agreement on another complaint this service has been considering against L&C where RealSIPP/CIB was the introducer. This appears to be CIB's client agreement. It says:

"Our [CIB] firm is independent and we offer products from the whole market. 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*** *[text in bold is my emphasis].".*

And the keyfacts said: "*about our services for the SIPP package from RealSIPP*." And under: "*Whose products do we offer?",* it had the box marked which said: "*We only offer products from a single company*". The 'company' in this context was not named. The keyfacts document also said: "*You will receive advice and a recommendation from us in respect of your pension arrangements. We may ask some questions to narrow down the selection of products that we will provide details on. You will then need to make your own choices about how to proceed*."

The keyfacts document noted: *"RealSIPP LLP will pay CIB (Life & Pensions) Ltd for the Initial Advice & Review, of your pension arrangements*." But went on to say that for all other advice, CIB would agree the rate it would charge before beginning any work.
L&C hasn't provided any documentation on Mr H's complaint. But more recently Mr H has provided a copy of RealSIPP's keyfacts document and an unsigned RealSIPP client agreement. The keyfacts document has a cross in a box indicating that "*You will not receive advice or a recommendation from us. We may ask some questions to narrow down the selection of products that we will provide details on. You will then need to make your own choice about how to proceed".* And the RealSIPP client agreement is the same as the example wording I've set out above, indicating that RealSIPP would not be making a recommendation.

I note that during our investigation into the published decision complaint, L&C was asked whether it had clarified the service RealSIPP would provide to its clients and if it obtained a copy of RealSIPP's client agreement/Keyfacts document. L&C acknowledged receipt of our request but didn't provide a substantive response to it.

Mr H's complaint

In 2018, Mr H received £50,000 compensation from the FSCS following a successful claim

against CIB. This was the maximum award he could receive under the FSCS's award limits. This didn't cover the full extent of Mr H's loss so he submitted a complaint to L&C. The FSCS provided Mr H a reassignment of rights to enable him to pursue a complaint against L&C.

In his letter to L&C, dated 3 November 2018, Mr H complained, amongst other things, that:

- L&C failed to observe the Principles set out for a FCA regulated firm and to treat him fairly as a retail customer.
- He was encouraged to purchase investments which L&C knew to be unsuitable for his pension.
- L&C actively worked with unregulated third parties to facilitate the transfer of his existing pensions without any regard for his interests.
- There has been no effective or independent oversight of the transactions within his SIPP.
- L&C failed to exercise skill, care or diligence in the approach to the investments it permitted in his SIPP.

L&C didn't uphold the complaint. In summary it said that its role is as the sole trustee and administrator of Mr H's SIPP and it only accepts applications submitted by regulated financial advisers. RealSIPP provided Mr H with the initial product, transfer and investment advice. And L&C does not provide any form of recommendation or advice. In terms of the investment, L&C's role is to satisfy itself that the investment is acceptable from an HM Revenue & Customs ('HMRC') point of view and to take reasonable skill and care to establish that the seller has good title.

Mr H wasn't happy with L&C's response so he referred the matter to this service for consideration.

One of our investigators reviewed Mr H's complaint and thought that it should be upheld. The investigator said that L&C shouldn't have accepted Mr H's business from RealSIPP. Mr H accepted the investigator's findings.

L&C didn't accept the investigator's findings. It provided detailed submissions which I've summarised below.

- The Financial Ombudsman Service must take into account the relevant case law and, if this is deviated from, must set out why – R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service [2017] EWHC 352 (Admin) and Jay J's comments at paragraph 73 of that judgment were referenced.
- The investigator has considered the decision in Adams v Options SIPP UK LLP (formerly Carey Pensions UK LLP) [2020] EWHC 1229 (Ch), but they've departed from it, on the basis that Mr H has said he didn't know the investment wasn't high risk and he wouldn't have gone ahead with if he'd known. But this has been based on Mr H's hypothetical and reactionary responses.

- There's no justification for using the Principles as a basis for finding against L&C as a breach of these can't give rise to any cause of action at Law. The application of the Principles, and such duties as may be imposed on L&C by these, fall to be construed in light of the Conduct of Business Sourcebook ('COBS') rules, L&C's regulatory permissions, L&C's contractual arrangements and the statutory objective that consumers should take responsibility for their decisions.

- The publications the investigator referred to are of no bearing. It was said in Adams that reports, guidance and correspondence issued after the events at issue couldn't be applied to Options' conduct at the time. The only publication which could have any bearing is the 2009 Thematic review. However, the contents of this document can't found a claim for compensation of itself.

- Regulatory publications can't alter the meaning, or the scope, of the obligations imposed by the Principles. Thus, if there was no obligation imposed on L&C by the Principles to consider and act on the suitability of the SIPP or the underlying investment, the publications referred to in the investigator's opinion can't impose such a duty.

- The 2009 thematic review doesn't provide "guidance"; and is not statutory guidance under FSMA s.139A. Even if it was, the breach of such statutory guidance wouldn't give rise to a claim for damages under FSMA S.138D. Guidance is not binding on those to whom the FCA's rules apply.

- Adams held that duties imposed by COBS can't all apply to all firms in all circumstances. The obligations under COBS 14.2.3R and COBS 14.3 to provide clients with product information, and the obligation under COBS 19.1.2R to provide clients with pension product information, don't apply to execution-only SIPP providers. The investigator seeks to impose on L&C a duty of due diligence that it doesn't in fact owe and which goes far beyond the scope of any duty envisaged by the parties.

- L&C hasn't at any time had permission to advise on investments but the investigator finds that it was under an obligation to safeguard consumers against facilitating SIPPs that are unsuitable or detrimental to them.

- The investigator accepts L&C was not responsible for assessing suitability, which remained the responsibility of Mr H's financial adviser. Despite this, the investigator finds that there was an obligation on L&C to complete extensive due diligence on the investment.

- Insufficient weight has been given to contractual arrangements between the parties involved and the demarcation of roles and responsibilities. The documents setting out the contractual relationship between the parties make it clear that L&C was acting on an execution-only basis. And Mr H was aware of this at all times. The investigator's view runs contrary to Adams by suggesting that, notwithstanding the clear contractual terms, L&C owed due diligence obligations under the Principles. L&C has referenced several documents which it says set out the contractual relationship between the parties.

- The Financial Ombudsman Service is trying to circumvent the Adams decision, which is not fair or reasonable. Consideration of the Principles must be via the appropriate COBs rules.

- The investigator fails to have regard to FSMA s.5(2)(d), and to the authority of Adams and Kerrigan & Others v Elevate Credit International Limited (t/a Sunny) (in administration) [2020] EWHC 2169 (Comm) in this respect, and offers no justification for this failure. The position taken by the investigator would enable Mr H to recover against L&C for losses flowing from non-contractual obligations which were inconsistent and contrary to the express obligations in the parties' contractual arrangements.

- The investigator concludes that L&C breached its duty in respect of the due diligence it completed on the Llana Beach investment. L&C contests this. The suitability of a high-risk investment depends on the particular financial circumstances of the customer. Even if it was unsuitable for Mr H as an execution-only SIPP provider, L&C was under no regulatory obligation to ascertain these details.

- The level of due diligence expected by the investigator goes far beyond what would be expected of an execution only SIPP provider. It's not fair to hold that an execution only SIPP provider should have completed due diligence in respect of the commercial viability of the investment or how returns would be generated – that was a financial adviser's role.

- The Financial Ombudsman Service is suggesting L&C should have rejected whole categories of investment en masse because such categories of investment may not have been suitable for certain individuals.

- Mr H had already decided to switch his pension and invest in Llana Beach before he contacted L&C and there's nothing to suggest he wouldn't have gone ahead had L&C refused the business. A number of SIPP providers at the time were accepting such investments (and doing so on a wholly legitimate basis) and the most likely conclusion is that, had L&C rejected this, the transaction would have completed via another provider. Mr H didn't give a categorical answer when asked what he would have done if L&C had not permitted the investment.

- Mr H has been asked a series of questions, which is procedurally irregular and inappropriate. Matters such as this should be decided on the papers. Neither the Financial Ombudsman Service nor L&C were part of the questioning process. So L&C requests an oral hearing.

- Mr H must bear responsibility for his decisions, in particular in the light of the member declaration and indemnity which he signed. Any compensation awarded should therefore be reduced to nil reflect that responsibility.

- If the investigator's view is maintained, the wider consequences will be serious, both for consumers and for execution-only SIPP providers. From the perspective of the execution-only SIPP provider, there is also a real unfairness if it is liable for the poor investment choices of consumers, since its business is structured on the basis that it is not investigating the quality of the underlying investments (other than to ascertain that they are capable of being held within a UK registered pension scheme such as its SIPP). Its business is structured on the basis that it is not warning or advising clients as to whether a SIPP or the underlying investment is suitable or appropriate for the client.

As an agreement couldn't be reached, the complaint was passed to me to decide.

I issued a provisional decision in which I explained that I thought Mr H's complaint had been brought within three years of when he ought reasonably to have been aware he 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 Mr H's application was made to it. And if L&C hadn't accepted Mr H's introduction from RealSIPP/CIB, I was satisfied Mr H wouldn't have established an L&C SIPP, transferred his personal pension monies into it or invested in Llana Beach. So as a result of L&C's failure to meet its regulatory obligations and good industry practice at the relevant time, Mr H's pension had been put at significant risk of detriment.

I said it was fair and reasonable for L&C to compensate Mr H for the full measure of the loss he's suffered as a result of L&C accepting his business from RealSIPP/CIB. So L&C should undertake a redress calculation for Mr H, and also pay him £500 compensation for his distress.

Mr H responded to the provisional decision. He didn't provide any further comments but he did provide a copy of RealSIPP's keyfacts document and an unsigned copy of its client agreement.

L&C responded and confirmed that Mr H had transferred 5 personal pensions to the L&C SIPP with a combined transfer value of just over £221,600. It also provided a transaction statement for Mr H's SIPP. And it confirmed that it didn't agree with the provisional decision and thought there were points I 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:

- The Ombudsman has failed to take account of the law (as it is required to do under DISP 3.6.4) and specifically the Ombudsman's departure from legal precedent setting out (a) the importance of the contract between the SIPP provider and the customer; and (b) the scope of an execution-only SIPP provider's due diligence obligations. This is of particular importance in this instance, as the Ombudsman is creating new due diligence obligations in a way that is contrary to the FCA's own publications at the time. Further, the Ombudsman's reliance on various FCA publications is misplaced and if anything, supports L&C's position.

- L&C does not agree with the conclusion the ombudsman has reached regarding jurisdiction, and it maintains the complaint is time barred. The complaint is out of time on the six year part of the relevant rule. And in terms of the three year rule, L&C says that Mr H was aware from the outset that the investment was illiquid. And L&C wrote to him in around July 2015 to let him know that his holdings were being consolidated. This should have alerted Mr H to the fact that he had, or ought to have, cause for complaint.
- 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 Mr H.

- The provisional decision finds that Mr H was not responsible for any of his 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 advisery 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 Mr 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 Mr 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)*.

- L&C complied with COBS 11.2.19R when it acted on Mr 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.
- L&C should not be held responsible for decisions made by Mr H prior to its involvement. The decision that Mr H undertook to transfer his pension was outside of L&C's control.

- L&C says attempting to obtain notional values from ceding schemes can add months to the settlement process. This means L&C is accruing large sums of interest (payable 28 days after the final decision is accepted) where the delay in outside L&C's control. This is not a fair or reasonable outcome for L&C.
- Mr H has also already received compensation from the FSCS which L&C says should be taken into account in its entirety. If the ombudsman refuses to do this, the redress from the FSCS, should reduce any losses from the date of receipt of funds from the FSCS on the basis that the Mr H has had the benefit of those funds and so to ignore them gives Mr H a windfall as he will have received (i) the compensation, (ii) a return on the compensation and (iii) compensation from L&C ignoring the compensation and any return in their entirety.
- If the complaint is upheld. L&C disagrees that interest at a rate of 8% is fair and reasonable. Accordingly the applicable interest rates should at most be 2.5% above base rate. Any greater rate contains a punitive element and as such is inappropriate.
- L&C hasn't been given evidence that Mr 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 Mr H's own actions resulting in his financial loss.

- here 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.

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

What I've decided – and why

Jurisdiction

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

The rules I must follow in determining whether we can consider this complaint are set out in the Dispute Resolution (DISP) rules, published as part of the FCA's Handbook.

The section of the rules that applies to this complaint means that, unless L&C consents (it does not), we can't look into this complaint if it's been brought:

- more than six years after the event complained of;
- or, if later, more than three years after Mr H was aware – or ought reasonably to have become aware – he had cause for complaint;
    - unless the complaint was brought within the time limits, and there's a written acknowledgement or some other record of it having been received; or
    - unless, in the view of the Ombudsman, the failure to comply with the time limits was as a result of exceptional circumstances.

Before setting out my reasons why I think Mr H's complaint has been brought within the applicable time limits, by way of background, I consider it would be helpful to set out some caselaw and excerpts from the FCA Handbook which are relevant to this decision.
In The Official Receiver v Shop Direct Finance Company Limited [EWCA] Civ 367 Singh LJ said:

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

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

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

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

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

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

So the Glossary definition of complaint requires that the act or omission complained of must relate to an activity of “*that respondent*” or firm.

It follows that the material points required for Mr H to have awareness of a cause for complaint include:

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

It is therefore my view that it is necessary for Mr H to have an awareness (within the meaning of the rule) that related to L&C not just awareness of a problem that had caused a loss.

Knowledge of a loss alone is not enough. It cannot be assumed that upon obtaining knowledge of a loss and/or a problem that a consumer had knowledge of its cause. And I do not accept the three year time limit necessarily means that knowledge of a loss/problem means the consumer has three years to make enquiries to discover all parties who might be responsible, failing which they run out of time to make a complaint. As Nugee LJ said in The Official Receiver case:

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

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

In this case, L&C received Mr H's complaint on 5 November 2018. The crux of the complaint was that L&C didn't undertake sufficient due diligence on RealSIPP, nor the investments themselves, and that, as a result of this, he's suffered losses that L&C should compensate him for.

The application for the L&C SIPP was submitted on 6 January 2012. The SIPP was opened on 18 January 2012 and Mr H's pension funds were transferred into it shortly afterwards.

There's no paperwork on file for the investment into TRG. But I can see from the SIPP transaction statement that L&C provided in response to my provisional decision, that monies were sent from Mr H's SIPP to TRG in February 2012. So I've taken this as the date the investment started. All of this occurred more than six years before Mr H had referred his complaint to L&C.

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

Having considered the available information, I remain of the opinion, as set out in my provisional decision, that Mr H didn't have, nor ought he reasonably to have had, cause for complaint *against L&C* more than three years before he made his complaint.

L&C has provided limited information on this complaint so I've not seen copies of the correspondence it issued to Mr H after the SIPP was established and before he complained. I've therefore considered what L&C said in its final response letter to Mr H.

It appears that until February 2015 Mr H received the expected rental returns from his Llana Beach investment. And it doesn't appear from L&C's comments in the final response that Mr H's statements would have shown any significant falls in the overall value of his investment, certainly not more than three years before he made his complaint to L&C.

I note the Llana Beach developer was unable to secure lending so investors were offered the opportunity to consolidate their holdings. L&C has said it wrote to Mr H about this several times from around July 2015.

L&C hasn't provided copies of these letters. So I've assumed that these would have been the same, if not very similar, letters to those issued on the published decision complaint about this issue. On the published decision complaint there are two virtually identical letters dated 20 July 2015 and 14 August 2015.

These letters explained that the intention of the consolidation exercise was to remove the liability on the SIPP to pay further funds and to avoid the immediate risk of the SIPP defaulting on the promissory contract. The letters also set out the fees for doing this.

Mr H had initially agreed to purchase two plots but he consolidated his holdings, resulting in one plot being retained and the other being released in return for a 17% share of another plot. All fees payable for the consolidation exercise were paid from Mr H's SIPP.

Having reviewed these letters carefully, they indicated an issue had arisen with anticipated lending for the hotel development which a consolidation exercise could address. There would be some costs associated with the consolidation exercise, but I don't think this is unusual with property developments of this kind where additional costs can sometimes arise.

I certainly don't agree with L&C that these letters caused, or ought to reasonably to have caused, Mr H (or a reasonable investor in his position) to have concerns that there was a problem with his investment that had caused, or may cause, him material loss.

L&C said in its final response that since construction of the development completed, Mr H had been receiving rental income. And, as I've said above, there doesn't appear to have been any significant reduction in the overall value of Mr H's investment more than three years before he complained to L&C. So I've not seen anything that would lead me to conclude Mr H was aware, or ought reasonably to have become aware, that there was a problem with his investment that had caused, or may cause, him material loss before November 2015, more than three years before he complained to L&C in November 2018.

I think it's worth highlighting that Mr H wasn't advised by L&C about setting up the SIPP or the suitability of investments. And I think the obvious first thought when any losses or problems with the investment occurred, would have been that RealSIPP or TRG might have given him poor advice.

Mr H has told us that he sought advice about his pension from an independent financial adviser (IFA) in October 2017 after he spoke to a neighbour who had made the same investment and he became concerned. The IFA told Mr H that he may have been misadvised by CIB so he submitted a claim to the FSCS against CIB. Mr H has said that it was after the FSCS claim was successful in 2018 and there was an abatement on his compensation, that he contacted his current representative, who assisted him in complaining to L&C in November 2018.

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

Overall, I don't think there was any information available to Mr H before November 2015 (i.e. three years before he complained to L&C) that ought reasonably to have made him aware he had cause for complaint and lead him to attribute any problem to acts or omissions by L&C.

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

The DISP rules on hearings

In its response to the investigator's view on the complaint, L&C requested an opportunity to question Mr H in a hearing. However, I'm satisfied I'm able to fairly determine Mr H's complaint without convening a hearing.

As a preliminary point, the Financial Ombudsman Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (see section 225 of the Financial Services and Markets Act 2000 ('FSMA')). And, the Dispute Resolution rules found in the FCA Handbook under which we operate ('the DISP rules') provide the following in relation to the resolution of complaints by the ombudsman and hearings:

DISP 3.5.5R

> *"If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by any means which the Ombudsman considers appropriate in the circumstances, including by telephone. No hearing will be held after the Ombudsman has determined the complaint."*

DISP 3.5.6R

> *"A party who wishes to request a hearing must do so in writing, setting out:*
>
> > *(1) the issues he wishes to raise; and*
> >
> > *(2)(if appropriate) any reasons why he considers the hearing should be in private;*
>
> *so that the Ombudsman may consider whether:*
>
> > *(3) the issues are material;*
> >
> > *(4) a hearing should take place; and*
> >
> > *(5) any hearing should be held in public or private."*

DISP 3.5.7G

> *"In deciding whether there should be a hearing and, if so, whether it should be in public or private, the Ombudsman will have regard to the provisions of the European Convention on Human Rights."*

Given my statutory duty under FSMA to resolve complaints quickly and with minimum formality, I'm satisfied that it would normally not be necessary for me to hold a hearing in most cases (see the Court of Appeal's decision in R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service [2008] EWCA Civ 642).

The key question for me to consider in making my decision on a hearing request is whether or not "*the complaint can be fairly determined without convening a hearing*".

My consideration of the hearing request

In accordance with my duties under FSMA and the relevant DISP provisions as set out above, I've carefully considered the request for a hearing on this complaint. And, I'm satisfied that a hearing would only be required in this case if I thought the complaint couldn't be fairly determined without convening one.

As L&C will be aware, we don't operate in the same way as the Courts. Unlike a Court, we have the power to carry out our own investigation. And, if particular information is required to decide a complaint fairly, in most circumstances we're able to request this information from either party to the complaint, or even from a third party.

DISP 3.5.8R provides:

> *"The Ombudsman may give directions as to:*
>
> *(1) the issues on which evidence is required;*
>
> *(2) the extent to which evidence should be oral or written; and*
>
> *(3) the way in which evidence should be presented."*

This means I, as the ombudsman determining this complaint, am able to decide the issues on which evidence is required and how that evidence should be presented. And I'm not restricted to oral cross-examination to further explore points or to test the veracity of information that's been provided to me.

There are a number of issues that are in dispute in this complaint, but it is not uncommon for us to deal with complaints where the parties involved disagree as to what has happened and/or with the findings we've reached. But this doesn't necessarily mean that a hearing is required to fairly determine the complaint.

We generally decide complaints on the basis of the paperwork and submissions made either in writing or over the phone. We've received submissions from both parties during our investigation of this complaint, and I'm able to consider that evidence fully. I don't consider a hearing will necessarily make a difference or cause Mr H's recollections of events that occurred many years ago to change.

I also want to emphasise that a hearing is only an opportunity for me to ask the parties to provide oral evidence. A hearing wouldn't normally provide L&C with the opportunity to cross-examine evidence/testimony provided. Our hearings don't follow the same format as a Court. We're inquisitorial in nature and not adversarial. The purpose of any hearing would be for me to obtain any further information from the parties that I require in order to fairly determine the complaint.

DISP 3.5.4R provides:

> *"If the Ombudsman decides that an investigation is necessary, he will then:*
>
> > *(1) ensure both parties have been given an opportunity of making representations;*
> >
> > *(2) send both parties a provisional assessment, setting out his reasons and a time limit within which either party must respond; and*
> >
> > *(3) if either party indicates disagreement with the provisional assessment within that time limit, proceed to determination"*

I'm satisfied this procedure has been followed in this case.

Having taken all of the evidence and arguments into account, I'm satisfied that I'm able to fairly determine Mr H's complaint without convening a hearing. In deciding this, I have had regard to the parties' rights under the European Convention on Human Rights.

The merits of Mr 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.

As a preliminary point, I should also say the purpose of this decision is to set out my findings on what's fair and reasonable, and explain my reasons for reaching those findings, not to offer a point by point response to every submission made by the parties to the complaint. And so whilst I have considered all the submissions made by both parties, I've focussed here on the points I believe to be key to my decision on what's fair and reasonable in the circumstances.

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

Relevant considerations

I've carefully taken account of the relevant considerations to decide what's fair and reasonable in the circumstances of this complaint.

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

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

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

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

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

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

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

I've considered whether *Adams* means that the Principles should not be taken into account in deciding this case. I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Options SIPP. And, HHJ Dight didn't consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of the judgments say anything about how the Principles apply to an ombudsman's consideration of a complaint. But, to be clear, I don't say this means *Adams* isn't a relevant consideration *at all*. As noted above, I've taken account of both judgments when making this decision on Mr 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 the FSMA ('the COBS claim'). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

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

I note that in Adams v Options SIPP, HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at paragraph 148:

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

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

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

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

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

- law and regulations;
- regulators' rules, guidance and standards;
- codes of practice;
- where appropriate, what I consider to have been good industry practice at the relevant time.

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

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

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

The regulatory publications

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

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

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

The 2009 Thematic Review Report

The 2009 Report included the following statement:

"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its clients and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.
It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.
…
We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate SIPPs that are unsuitable or detrimental to clients.

Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their customers' interests in this respect, with reference to Principle 3 of the Principles for 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 stated:

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

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

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

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

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for 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, and*
- *ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)*

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

I acknowledge the 2009 and 2012 Thematic Review Reports and the "Dear CEO" letter aren't formal guidance (whereas the 2013 finalised guidance is). However, I'm of the view that the fact that the reports and "Dear CEO" letter didn't constitute formal guidance doesn't 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's treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take them into account.

It's 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. L&C's also said that the 2009 Thematic Review Report didn't provide 'guidance' in any meaningful sense. At its introduction the Report says:

> *"In this report, we describe the findings of this thematic review, and make clear what we expect of SIPP operator firms in the areas we reviewed. It also provides examples of good practices we found."*

And, as referenced above, the report goes on to provide *"…examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms."*

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

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

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

I'm also satisfied that L&C, at the time of the events under consideration here, thought the 2009 Thematic Review Report was relevant. L&C's acknowledged in its submissions that the report highlights some areas of good practice for SIPP operators. And L&C did carry out some due diligence on Real/SIPP. So, it clearly thought it was good practice to do so, at the very least.

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

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

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

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

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

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

"*It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes).*
…
Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.

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

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

To be clear, I don't say the Principles or the publications obliged L&C to ensure the transactions were suitable for Mr H. It's accepted L&C wasn't required to give advice to Mr H, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But they're evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles. As L&C notes from the FCA's Enforcement Guide, publications of this type "*illustrate ways (but not the only ways) in which a person can comply with the relevant rules*". And so it's fair and reasonable for me to take them into account when deciding this complaint.

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

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

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

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

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

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

The contract between L&C and Mr 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 Mr H before a contract was entered into and L&C received any funds.

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

So I've proceeded on the understanding that L&C wasn't obliged – and wasn't able – to give advice to Mr H on the personal suitability of the SIPP or the 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. And I'm satisfied that, to meet its regulatory obligations, when conducting its operation of SIPPs business, L&C had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind.

The regulators' 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 Mr 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 Mr H's application in 2012, 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 Llana Beach 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 Llana Beach), with the Principles in mind.

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 Mr 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 Mr 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 Mr 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.
- TRG or an unregulated business associated with it (First Resort Property Services Limited) was promoting the Llana Beach 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 Mr H's application. These points overlap, to a degree, and should have been considered by L&C cumulatively.

The availability of advice

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

Unfortunately, I've not been provided with a copy of a SIPP application for Mr H so I don't know if a box was ticked to indicate whether or not advice had been provided by RealSIPP. But the Terms of Business document Mr H has provided has a box ticked to indicate that RealSIPP was not providing advice to Mr H. So on balance, I think it's more likely than not that Mr H wasn't ever offered full regulated advice on the overall proposition (by which I mean the combination of the establishment of the SIPP, the transfers into the SIPP and the investment in TRG) by RealSIPP or its principal (or any other regulated advisery firm).

Further, based on the available evidence, and what I think L&C ought to have identified about the business introduced by RealSIPP before it accepted Mr H's application, I don't think there would have been sufficient basis for L&C to have reasonably assumed at the point it received Mr H's application that full regulated advice had been given to Mr H, or had been made available to Mr H and declined.

The possibility no regulated advice had been given or made available was a clear and obvious potential risk of consumer detriment here. Mr H was transferring significant sums from his existing pension arrangements to invest (Over £379,000) in an overseas property development – a move which was highly unlikely to be suitable for the vast majority of retail clients.

Anomalous features

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

We asked L&C how many of its members were introduced by RealSIPP/CIB. L&C informed us that a total of 153 of its members were introduced by RealSIPP/CIB since the introducer agreement commenced in September 2010. And L&C 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 were for applicants looking to invest in high-risk non-standard esoteric holdings, such as the unregulated overseas property development Mr H was investing in. As mentioned, I think it's fair to say that such investments are highly unlikely to be suitable for the vast majority of retail clients. They will generally only be suitable for a small proportion of the population – sophisticated and/or high net worth investors. The risks are multiplied where the property is "off plan" and further funding is necessary from investors to complete the purchases, as was the case with many of the deposit based TRG investments, including those Mr H made.

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

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

In addition to the possibility no advice had been given or made available to Mr H, the available evidence also shows L&C was, or should have been, aware that not offering or giving advice was something RealSIPP was doing routinely.

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

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

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

I think 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 to invest in high-risk esoteric investments, such as unregulated overseas property developments. That's because the risks involved in such transactions are unlikely to be fully understood by most people, without obtaining regulated advice. I think it's fair to say that most advice firms decline to be involved in such transactions and certainly don't transact this kind of business in significant volumes.

I 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.

Volume of business

L&C's said 153 members were introduced by RealSIPP and over a quarter of these had an Occupational Pension Scheme. But I am aware of another complaint where L&C has said that 160 members were introduced by RealSIPP and the vast majority (over 99%) of these involved the transfer of an Occupational Pension Scheme. So it's clear the figures provided by L&C to 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.

Prior to the application submitted in the published decision complaint, RealSIPP had introduced 44 applications in about 9 months. That was almost two months before Mr H's application was submitted. And before it had received Mr H's application I think that L&C should have been concerned that such a volume of introductions, relating exclusively to consumers investing in higher-risk esoteric investments was unusual – particularly from a small IFA business. And it should have considered how a small IFA business introducing this volume of higher-risk business was able to meet regulatory standards.

This was a further clear and obvious potential risk of consumer detriment.

The involvement of an unregulated business

I think it's more likely than not from the available evidence that an unregulated party was involved with the promotion of the TRG investment to some consumers introduced to L&C (including Mr H).

The third-party due diligence report L&C obtained on Llana Beach explained that TRG was promoting its products in the UK through First Resort Property Services Limited. Neither TRG nor First Resort Property Services Limited were regulated by the FSA.

I think it's unlikely Mr H decided to transfer his pension to a SIPP in order to invest in TRG of his own volition. And I think that's consistent with the testimony Mr H has provided on this issue.

L&C's inference is that it was RealSIPP who gave advice, although it hasn't confirmed if it was on this basis that it processed Mr H's application. But, L&C ought to have been alive to the risk TRG or an unregulated business working with it was involved in promoting the TRG investment as an investment for Mr H's pension, and that Mr H might have been 'sold' on the idea of transferring his pension so as to invest in Llana Beach before the involvement of any regulated parties. In fact, L&C seems to accept this was the case. In its submissions, it's highlighted that Mr H told L&C that "*The introducer seemed confident and to know what he was talking about. He explained to me how the property would be a real asset that my children could inherit out of the pension scheme if anything happened to me and they would continue to get the rental income. I was told that this type of arrangement was much superior to what I had in terms of my existing pensions in terms of flexibility, drawdown and inheritability*."

Although the promotion of TRG wasn't in itself a regulated activity, this was nonetheless another clear and obvious potential risk of consumer detriment – particularly where pension investors were being targeted, as appears to be the case here. L&C should have been alive to the risks associated with an unregulated firm promoting an investment for SIPPs which was unlikely to be suitable for the vast majority of retail clients, particularly so where full regulated advice wasn't being received by consumers, and TRG may have effectively been promoting its own investment, without being subject to regulatory controls.

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 Mr 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 thinks 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,
- 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.

I know in the published decision complaint, L&C said 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 Mr 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 Mr H, directly and/or to ask whether they'd been offered full regulated advice on their transactions and seek copies of the suitability reports.

L&C's said it couldn't comment on advice without potentially being in breach of its permissions. Again, I confirm that I accept L&C couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps included addressing a potential risk of consumer detriment by speaking to applicants and/or having sight of advice letters, as this could have provided L&C with further insight into RealSIPP's business model, and helped to clarify to L&C whether full regulated advice on the overall proposition was being offered/given. This was a fair and reasonable step to take in reaction to the clear and obvious risks of consumer detriment I've mentioned.

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

If L&C had undertaken these steps I think it ought to have identified, amongst others, the following risks before it received Mr 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.
- RealSIPP was having business referred to it by TRG, and it was then introducing business to L&C.
- Some consumers might have been 'sold' on the idea of transferring pension monies so as to invest in Llana Beach before the involvement of any regulated parties.
- The other anomalous features I've mentioned did carry a significant risk of consumer detriment.

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

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

In many cases, RealSIPP wasn't offering clients any regulated advice on the proposed transactions, let alone full advice. It was acting as "*administrator and packager*" of the SIPP – an unusual role for an advisery firm to take. This raises significant questions about the motivations and competency of RealSIPP – particularly where consumers were being introduced to it by unregulated businesses.

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 raises significant questions about the motivations and competency of CIB.

I think that if L&C had made enquiries with some applicants introduced by RealSIPP at the time their responses would have been consistent with what RealSIPP (and, where relevant, CIB) had disclosed to them in relation to the extent of its role.

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

I also think L&C should have concluded that consumers introduced by RealSIPP who were investing in TRG were likely being 'sold' on the TRG investments by an unregulated business. As mentioned, the third-party due diligence report L&C obtained on Llana Beach discloses the involvement of an unregulated business. And I think, if asked, Mr H would have explained how his application came about – which, as I mention, was likely the result of the involvement of an unregulated business or businesses.

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 Mr H's application and long before it – that it wasn't in accordance with its obligations, or good industry practice to continue accepting introductions from RealSIPP. I therefore conclude that it's fair and reasonable in the circumstances to say that L&C shouldn't have accepted Mr H's application from RealSIPP.

L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr H fairly by accepting his application from RealSIPP. To my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant time, and allowed Mr 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 Mr H's Llana Beach investment, and I've carefully considered these and I accept that the Llana Beach 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 Llana Beach investment at this stage. I'm satisfied that L&C wasn't treating Mr H fairly or reasonably when it accepted his introduction from RealSIPP, so I've not gone on to consider the due diligence it may have carried out on the Llana Beach 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 Mr H's application?

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

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

L&C knew that Mr H had signed forms intended to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on such indemnities when L&C knew, or ought to have known, Mr H's dealings with RealSIPP were putting him at significant risk wasn't the fair and reasonable thing to do.

Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse to accept Mr H's application.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr H signed meant that L&C could ignore its duty to treat him 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.

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

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

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

The involvement of other parties

In this decision I'm considering Mr H's complaint about L&C. However, I accept that other regulated parties were involved in the transactions complained about – RealSIPP and CIB. L&C's contended that it's RealSIPP/CIB that's really responsible for Mr H's losses. CIB would be the respondent for complaints about activities RealSIPP undertook as an appointed representative of CIB. And the Financial Ombudsman Service won't look at complaints against CIB, as it's been dissolved and no longer exists as a regulated business. We also can't look at complaints about TRG.

The DISP rules set out 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 its regulatory obligations, good industry practice and to treat Mr H fairly.

The starting point therefore, is that it would be fair to require L&C to pay Mr H compensation for the loss he's suffered as a result of its failings. I've carefully considered if there's any reason why it wouldn't be fair to ask L&C to compensate Mr H for his loss, including whether it would be fair to hold another party liable in full or in part.

And, for the following reasons, I consider it appropriate and fair in the circumstances for L&C to compensate Mr H to the full extent of the financial losses he's suffered due to L&C's failings.

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

I want to make clear that I've carefully taken everything L&C's said into consideration. And it's my view that it's appropriate and fair in the circumstances for L&C to compensate Mr H to the full extent of the financial losses he's suffered due to L&C's failings. 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's liable to pay to Mr H.

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

Mr H taking responsibility for his own investment decisions

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

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

In my view, if L&C had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr 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 Mr H wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

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

Mr H told our service that he "*did not think there were any real risks with this investment in the sense that I could lose money. I was told I was buying in advance off plan at a discount and the property would immediately be worth more than I paid. I was told I could even sell it on at a profit when it was finished or keep it as an investment. It seemed to make sense as I was paying for the property several years before it was built*".

I'm satisfied that Mr H's testimony is credible when he says he was led to believe there'd be little or no risk. And I wouldn't consider it fair or reasonable for L&C to have concluded that Mr H had received an explanation of the risks involved with the overall proposition from RealSIPP and/or CIB given what L&C knew, or ought to have known, about RealSIPP's business model by the time it received Mr H's application.

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

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

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

L&C's contended that Mr H would likely have proceeded with the transfer and investments regardless of the actions it took. L&C's highlighted that other SIPP providers were accepting such investments at the time, and it's most likely the transactions would have been effected with another provider.

L&C's argued that another SIPP operator would have accepted Mr 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 Mr H for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr H's application from RealSIPP.

And I'm not satisfied that Mr H was so keen on the Llana Beach investments, that he'd have sought to submit his application to L&C, or any other provider, through a different regulated firm. Mr H has been clear that he'd had no intention of transferring his pensions before TRG's, RealSIPP's and CIB's involvement.

I note L&C says that Mr H hasn't given a categorical answer when asked what he would have done if L&C had not permitted the investment. It's referenced Mr H's statement where he told L&C that "*if London & Colonial had not permitted the investment, I would have been a bit surprised. I would have definitely have sought a second opinion on what I was doing. The fact that I had been told they were doing the checks and balances, and then if they'd said "no" would have made me a bit wary… if the pension company had refused to allow the investment in the hotel room, I probably would have taken whatever action the "second opinion" person gave me.*"

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

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 Mr H proceeded knowing that the investments he was making were high-risk and speculative, and that he was determined to move forward with the transactions in order to take advantage of a cash incentive.

I'm not satisfied that Mr H understood he was making a high-risk investment. It appears he understood that his pension monies were being moved into a little to no risk pension arrangement. And he says he was told that transferring and investing in Llana Beach would generate better returns than his existing pension arrangements, and his children could inherit the pension and continue to get rental income after he died.

I've also not seen any evidence to show Mr H was paid a cash incentive. It therefore cannot be said he was incentivised to enter into the transaction. And, on balance, I'm satisfied that Mr H, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams. And having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mr H's application from RealSIPP, the transactions this complaint concerns wouldn't still have gone ahead.

So, overall, I do think it's fair and reasonable to direct L&C to pay Mr H compensation in the circumstances. While I accept that TRG, RealSIPP and CIB might have some responsibility for initiating the course of action that's led to Mr H's loss, I consider that L&C failed to comply with its own regulatory obligations and didn't put a stop to the transactions proceeding by declining Mr H's application from RealSIPP when it had the opportunity to do so. And I'm satisfied that Mr H wouldn't have established the SIPP, transferred monies in from his existing arrangements or invested in Llana Beach if it hadn't been for L&C's failings.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr 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 Mr H for the full measure of his loss.

RealSIPP was reliant on L&C to facilitate access to Mr H's pension. And but for L&C's failings, I'm satisfied that Mr H's pension transfers 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 Mr H's right to fair compensation from L&C for the full amount of his loss.

I'm of the opinion that it's appropriate and fair in the circumstances for L&C to compensate Mr H to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by RealSIPP/CIB.

In conclusion

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 Mr H's application from RealSIPP. For the reasons I've set out, I also think it's fair to ask L&C to compensate Mr H for the loss he's suffered.

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

Putting things right

As I've already mentioned above – if Mr H had sought advice from a different adviser, who was qualified to give pension switching and investment advice, I think it's more likely than not that the advice would have been to retain his existing pension plans. I think it's unlikely that another adviser, acting properly, would have advised Mr H to transfer away from his existing pension plans and make the investments in Llana Beach. Alternatively, Mr H might have simply decided not to seek pensions advice elsewhere from a different adviser and still then retained his existing pension plans.

So, L&C should calculate fair compensation by comparing the current position Mr H's in, to the position he would be in if he hadn't transferred from his existing pension plans.

Mr H has told us his existing pension plans were personal pensions, without any guarantees. And, recent information provided by L&C supports this.

In light of the above, I direct L&C to:

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

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

Treatment of the illiquid assets held within the SIPP

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

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

If L&C is unable, or if there are any difficulties in buying Mr H's illiquid investments, it should give the holdings a nil value for the purposes of calculating compensation. If L&C doesn't purchase the investments, and if the total calculated redress in this complaint is less than £160,000, L&C may ask Mr H to provide an undertaking to account to it for the net amount of any future payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Mr H may receive from the investments after the date of my decision, and any eventual sums he would be able to access from the SIPP in respect of the investments. L&C will need to meet any costs in drawing up the undertaking.

If L&C doesn't purchase the investments, and if the total calculated redress in this complaint is greater than £160,000 and L&C doesn't pay the *recommended* amount, Mr H should retain the rights to any future return from the investments until such time as any future benefit that he receives from the investments together with the compensation paid by L&C (excluding any interest) equates to the total calculated redress amount in this complaint.

L&C may ask Mr H to provide an undertaking to account to it for the net amount of any further payment the SIPP may receive from these investments thereafter. That undertaking should allow for the effect of any tax and charges on the amount Mr H may receive from the investments from that point, and any eventual sums he would be able to access from the SIPP in respect of the investments. L&C will need to meet any costs in drawing up the undertaking.

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

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

Any contributions or withdrawals Mr H has made will need to be taken into account whether the notional value is established by the ceding provider or calculated as set out below. Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would've enjoyed is allowed for. To be clear withdrawals here doesn't include SIPP charges or fees paid to third parties like an adviser.

But it would include any pension commencement lump sums or pension income Mr H actually took after his pension monies were transferred to L&C.

If there are any difficulties in obtaining the notional valuations from the previous providers, then L&C should instead arrive at a notional valuation by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return index). That is a reasonable proxy for the type of return that could have been achieved over the period in question.

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

However, I do think it's fair and reasonable to allow for a *temporary* notional deduction equivalent to the payment(s) Mr H actually received from the FSCS for a period of the calculation, so that the payment(s) ceases to accrue any return in the calculation during that period.

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

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

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

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

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

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

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

Mr H hasn't disagreed with what was said in my provisional decision about it being reasonable to assume he is likely to be a basic rate taxpayer in retirement. L&C does dispute this, but I haven't seen any evidence that makes me think it's more likely than not Mr H will be anything other than a basic rate taxpayer in retirement. I still think that is a reasonable assumption based on the evidence provided to us. At the time of the transfer, Mr H was in his late-forties and his pension provision was worth around £221,000. 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 Mr H will be a basic rate tax payer at his selected retirement age. So the reduction would equal 20%. However, if Mr 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%.

SIPP fees

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

Interest

The compensation resulting from this loss assessment must be paid to Mr H or into his SIPP within 28 days of the date L&C receives notification of his acceptance of my final decision. The calculation should be carried out as at the date of final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days.

I've carefully considered what L&C has said about the 28 day period. I acknowledge that the 28 day period means L&C has to act promptly to avoid paying additional interest, but I'm satisfied that there are steps available to it so as to reasonably undertake the calculation in the period provided. If there are any difficulties in obtaining the notional valuations from the previous providers, I have also provided for an alternative means for arriving at notional valuations elsewhere in this decision.

I've also noted what L&C has said about the rate of interest to be added after 28 days. It considers 2.5% simple, rather than 8% simple, to be more appropriate. However, I remain satisfied that interest at 8% simple per year is fair and reasonable to ensure that Mr H doesn't lose out if L&C doesn't quantify and pay any redress owing promptly. I'm satisfied that if L&C acts promptly it can avoid paying this additional interest in any event.

Distress & inconvenience

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

My final decision

For the reasons given, my final decision is that I uphold Mr H's complaint against London & Colonial Services Limited.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. London & Colonial Services Limited should pay Mr H the compensation amount as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I additionally require London & Colonial Services Limited to pay Mr H any interest on that amount in full, as set out above. Where the compensation amount already exceeds £160,000, I only require London & Colonial Services Limited to pay Mr H any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that London & Colonial Services Limited pays Mr H the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mr H.

My recommendation is not part of my determination or award. London & Colonial Services Limited doesn't have to do what I recommend. Further, it's unlikely that Mr H can accept my final decision and go to Court to ask for the balance. Mr H may want to consider getting independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 4 June 2024.
Lorna Goulding
Ombudsman