DRN-4842872

The complaint

Ms H complains that London & Colonial Services Limited ('L&C') failed to carry out sufficient due diligence before accepting her Self-Invested Personal Pension ('SIPP') and investment applications, causing her a loss.

For simplicity, I refer to Ms H throughout, even where the submissions I'm referring to were made by her representative.

What happened

I've outlined the key parties involved in Ms H's complaint below.

Involved parties

L&C

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

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

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

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

The Resort Group ('TRG')

TRG was founded in 2007. It owned a series of resorts in Cape Verde including at the Llana Beach Resort. TRG sold luxury hotel rooms to UK consumers, either as whole entities, or as fractional share ownership in a company.

The transaction

On 10 November 2011, Ms H signed a SIPP application form to transfer her existing defined benefit occupational pension scheme ('OPS') into an L&C SIPP and to make two investments into Llana Beach. Ms H's application listed her financial advisers as RealSIPP and CIB. It provided FCA authorisation numbers for both and contact details for RealSIPP. Underneath this, there was a tick next to the option '*Advice not given at point of sale to client*' and it went on to say that Ms H would manage the investment herself, as opposed to having a financial adviser manage it or appointing an investment manager. It also said fees

of £2,550 upfront, plus £300 per year, would be paid to RealSIPP.

It's unclear when L&C received Ms H's SIPP application form, but it appears to have formally opened her SIPP in early January 2012. On or around 2 July 2012, just over £170,000 was transferred into Ms H's SIPP with L&C.

L&C has said that Ms H's SIPP application was accompanied by initial instructions to invest a total of €244,925 into Llana Beach, structured by way of a 65% deposit with an additional 30% payable on completion and 5% written off by TRG. And that there was a promissory contract of sale and purchase. L&C doesn't appear to have provided us with a copy of the instruction forms and contracts, despite me asking it to do so by the deadline to respond to my provisional decision.

In similar complaints where customers were paying a deposit with the balance payable on completion and where borrowing was involved, it seems it was set out that future funding would need to be obtained by the developer, but the sums to be borrowed, and the lender they'd be borrowed from, weren't detailed. And I'm aware L&C wrote to some customers in 2015 and said that when the customer asked it (L&C) to make the investment on their behalf to hold in their SIPP, it was on the understanding that scheme borrowing would be made available. However, the developer had not been able to find a lender who was willing to lend to investors in the resort. And L&C said that to remove the liability of the SIPP and to pay further funds to avoid the immediate risk of the SIPP defaulting on the promissory contract, the developer offered the opportunity for investors to 'consolidate' their holdings.

It seems Ms H went on to do that around March 2016, given her SIPP transaction statement shows a property consolidation fee. And because L&C said itself that Ms H later consolidated her original fractional purchase from plots 45 and 121 into plot 45 in full, along with taking a fractional share in plot 447 instead and that she paid no additional sums when doing so. In my provisional decision I said that if either Ms H or L&C dispute my understanding, they should explain why and provide any supporting evidence by the response deadline. Given neither party has done so, I've proceeded on the above understanding.

In 2017, Ms H first asked L&C to sell her interest in the properties, seemingly without success. And it appears Ms H received a rental income into her SIPP from her TRG investments until August 2018.

Ms H's complaint

Ms H made a claim about CIB to the Financial Services Compensation Scheme ('FSCS'). And, in December 2017, it said that Ms H had made a gain based on valuations and that it was unable to compensate her.

Ms H then complained, via her representative, to L&C in March 2018 that it shouldn't have permitted the SIPP transfer and that L&C didn't do enough due diligence on the TRG investment which was high-risk, unregulated and didn't suit her risk profile.

L&C replied in May 2018. It said, in summary, that:

- Ms H acted without advice. L&C didn't provide advice and wasn't permitted to do so. It didn't consider the appropriateness/suitability of the transfer and underlying investment for Ms H and it didn't have a duty to do so. And it set this out in documentation, as well as letting Ms H know she should obtain financial advice.
- It followed its procedures, carried out appropriate due diligence and acted in line with FCA guidance.

- There's no evidence that Ms H's investment decisions were unsuitable. While her investments are illiquid, the value has increased and she's receiving rental income. And the legal advice it obtained didn't cover the marketability of the investment.
- In Ms H's investment instructions she declared she understood that L&C had obtained legal advice which covered assessing the risks of ownership and to ensure the acquisition of appropriate title. And that it didn't cover investment merits, marketability or value of the property. She also declared that she'd understood the due diligence report, report on title, promissory contract of purchase and sale, management/rental agreement and investor pack. And that she'd obtained whatever advice she required regarding the investment.
- L&C's duties were to consider whether the investment fell within the list of those permitted by HMRC and to ensure good title was obtained to the asset. And in respect of this it obtained a due diligence report from Cape Verde solicitors in January 2011 and a third-party report from September 2011 showing that Llana Beach investments were capable of being held in a SIPP.
- The Pensions Ombudsman dealt with a similar complaint and didn't uphold it.

In July 2018, unhappy with this response, Ms H referred her complaint to our Service.

In October 2022, the FSCS said that having valued the investments at their most recent value it had calculated Ms H's losses to be just over £80,000. However, this included various deductions, including an indicative value for plot 45 of around £72,000 (of which Ms H says has no value). And it paid Ms H a total of £50,000, which it said was its compensation limit at the time. On request, the FSCS reassigned legal rights against L&C back to Ms H.

Throughout the course of her complaint Ms H told us, amongst other things, that:

- She was worried about her pension, as she was going through a difficult time at work and wanted to ensure she wouldn't lose her pension as a result. So she got in touch with her mortgage adviser (who I'll refer to as 'Mr A'), who introduced her to the TRG investment and said this would be ideal for her – Mr A was an agent for TRG and she trusted him. He also put her in touch with CIB.
- Ms H was told the investment would grow in value and that she'd get a regular rental income into her pension. She thought she was buying a share in an investment and hadn't understood that it had been set up in a way that meant she'd need to borrow funds to allow this to complete. She wouldn't have agreed to the investment if she'd known she might have to do this, given that at the time she had no savings and was in negative equity with her property, also having to go bankrupt a few years later.
- She was led to believe there was no risk involved in the transfer and investment and she wouldn't have moved her pension if she'd known otherwise. She was suffering with her mental health and experiencing difficult personal circumstances at the time and wasn't in the right frame of mind to properly understand matters.
- Ms H was a retail customer with a low risk profile, with little to no investment experience. She continues to experience poor physical and mental health, not having worked for years as a result. And she has been consumed with worry about her pension.

One of our Investigators reviewed Ms H's complaint and said it should be upheld because, in summary, L&C shouldn't have accepted her application from RealSIPP.

In L&C's responses to our Service about Ms H's complaint it said, in summary, that:

- It carried out sufficient due diligence on both CIB and RealSIPP, including checking the FCA register.

- Under Dispute Resolution: Complaints Sourcebook ('DISP') 3.3.4A, the Ombudsman may dismiss a complaint if dealing with it would impair the effective operation of our Service, with examples of such cases including those which would be more suitable for the Court or another ADR entity. L&C argues that this case is more suitable for the Court or another ADR entity because of the legal issues that arise in this case.
- It had to execute Ms H's execution only instruction to comply with the Conduct of Business (COBS) rules in the FCA's Handbook, including COBS 11.2.19, which said:

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

- Our Service has largely ignored the disclaimers contained in the SIPP application form and states that L&C should have recognised that the investment was high risk.
- The contract L&C had with Ms H was on an execution only basis. L&C accepted no responsibility for checking the quality of the investment business, much less the decision to transfer. In reaching the conclusion we have, our Service imposes a duty on L&C that goes far beyond what was agreed by the parties and which is not provided for either at law or in the guidance/rules.
- We've said that the regulator's reports and guidance provide examples of good practice. This starts from the assumption that the examples of good practice would have been known to the wider SIPP industry at the time of the transaction. But, other than those published in 2009, these were published after the events. So, no SIPP provider could have been aware of these examples as a consequence.
- The Adams decision made clear that any reports, guidance and correspondence issued after the events at issue could not be applied to the SIPP operator's conduct at the time. Therefore, the 2012 Thematic Review, 2013 SIPP operator guidance and 2014 "Dear CEO' letter are of no relevance to this case.
- The only publication which could have any bearing is the 2009 Thematic Review Report. However, this has no bearing on the construction of the Principles as the contents of this document cannot found a claim for compensation of itself.
- The 2009 Thematic Review in fact does little more than highlight some "*examples of measures*" that "*SIPP operators could consider, taken from examples of good practice that* [the FCA] *observed*".
- Moreover, many of the matters which the Thematic Review invites firms to consider are plainly directed at firms providing advisory services, not firms, such as L&C, providing execution-only services.
- The FCA's Enforcement Guide make it clear that guidance is not binding on those to whom the FCA's rules apply. Nor are the variety of materials for example, generic letters written by the FCA to Chief Executives, published to support the rules and guidance in the FCA Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules.
- Even if the 2009 Thematic Review had been statutory guidance made under FSMA section 139A (which it was not), the breach of such statutory guidance would not give rise to a claim for damages under FSMA s.138D (only the breach of rules can give rise to such a right).
- As stated in Adams, regulatory publications cannot alter the meaning of, or the scope of the obligations imposed by, the Principles.
- Stating that high risk holdings such as TRG can generally only be suitable for a small proportion of the population ignores the fact that a SIPP provider offering an

execution only service is wholly unable to assess the suitability of any particular investment for a customer.

- As far as L&C was aware the introduction came from a regulated entity, RealSIPP.
- It's accepted by everyone that this was a high-risk investment but an execution only SIPP provider cannot reject such business without completing a full suitability assessment which it does and did not have the permissions to do. Further, there was a regulated IFA involved and the service being offered by L&C was on an execution only basis.
- L&C said that it discharged its obligations in respect of the due diligence that it was required to conduct on Llana Beach Resort. And that it is L&C's view that the investment made via a wrapper was classified by the FCA as a standard asset, provided arrangements were in place with the investment provider to ensure that it only comprised of standard assets. So, in this case Ms H only invested in standard assets and therefore, L&C discharged its duties in relation to the investment in the Llana Beach Resort.
- Our Service 'cherry picks' from relevant case law. It largely ignores the decision in Adams, which examined at length the responsibility of a SIPP provider offering an execution only services under the Conduct of Business: Sourcebook ('COBS') so is more relevant to this case.
- Our Service hasn't properly addressed using the Principles as the basis for finding against L&C in preference to the COBS rules or established case law. Again, a breach of these cannot, of itself, give rise to any cause of action at law (see, e.g., Kerrigan v Elevate Credit International Ltd [2020] C.T.L.C. 161 at [30]).
- We've ignored the statutory objective previously set out at FSMA section 5(2)(d), now s.1C, namely: "the general principle that consumers should take responsibility for their decisions".
- We've ignored the findings of the High Court in Adams about the duties imposed by COBS. Adams held that the duties cannot all apply to all firms in all circumstances. In particular, the Court held that, while the COBS rules contain express provisions dealing with the need to advise clients on both the "suitability" (COBS 9) and "appropriateness" (COBS 10) of their investment, those rules did not apply to execution-only SIPP providers such as L&C.
- We're seeking to impose on L&C a duty of due diligence that goes far beyond the scope of any duty envisaged by the parties. It seeks in effect, to override COBS' careful allocation of duties between different types of firms conducting different types of business, and to impose duties on L&C in addition to those provided for under COBS by means of a generalised appeal to the Principles.
- We have ignored, or placed insufficient weight on, the fundamental fact of the parties' contractual arrangements, and on the clear demarcation of roles and responsibilities thereunder, and consequently have constructed due diligence obligations for L&C to which it was not in fact subject.
- We've sought to differentiate Adams by stating that: "[HHJ Dight] *wasn't asked to consider the question of due diligence before Options SIPP agreed to accept the store pod investments into its SIPP*." This can only be seen as an attempt to circumvent the Adams decision and misapprehends the relationship between the Principles and L&C's contractual arrangements with Ms H.
- There is no reason why L&C should have had any concerns about accepting business from RealSIPP. RealSIPP was an FCA regulated entity and L&C was able to take comfort from that. There was no restriction at the time on a customer transferring a pension without receiving advice and there was no obligation on L&C to ensure that advice was taken. Furthermore, it is accepted that RealSIPP had permission to give investment advice.
- It was common practice for SIPP providers to be accepting investments such as this in 2012. The only logical conclusion, therefore, is that another provider would have

accepted the application. So, L&C is not responsible for the loss suffered by Ms H.
- As the last entity standing L&C is being held responsible.
- If the view is permitted to stand, the wider consequences will also be very serious, both for consumers and for execution-only SIPP providers.

And I'm aware that in submissions on other cases with our Service involving the same introducer, L&C has said, amongst other things, that:

- L&C was aware of references to suitability reports in a 2009 review by the FCA, but SIPP operators weren't required to view suitability reports. Suitability, advice and recommendations were a matter between client and adviser.
- Clients were introduced by a reputable company and, where appropriate, were warned to take further investment advice before proceeding.
- FCA guidance in 2013 said SIPP operators weren't responsible for advice from third parties.
- L&C had controls in place to monitor business introduced, and the source and volume of business. And that was under constant review. L&C said that where it saw anomalies it took appropriate action, such as ceasing to accept business.
- L&C had limited powers to veto an investment and it didn't provide advice or comment on the merits of an investment. It added that:

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

- The customer had decided to switch before contacting L&C, and there's nothing to indicate they wouldn't have still gone ahead if L&C had refused the business.
- The introduction was from a FCA regulated entity and COBS 2.4.4 provides for division of responsibility in such circumstances. Insufficient weight has been given to contractual arrangements and the demarcation of roles and responsibilities.
- The Principles fall to be construed in light of the COBS rules applicable to L&C, its regulatory permissions, contractual arrangements and the statutory objective that consumers should take responsibility for their decisions.
- Many of the matters which The 2009 Thematic Review Report invites firms to consider are directed at firms providing advisory services.
- By linking findings to good practice instead of the interpretation of the COBS rules as set out in case law, L&C is held to an unreasonable standard. The standard it should be held to is that of a reasonably competent SIPP provider.
- Making a value judgment on advice wasn't within L&C's role. And L&C couldn't reject business without making a value judgment on suitability for each individual client, which fell outside of its expertise and the terms of the contract.
- The relationships in this case are similar to those in Adams, the distinguishing factor is that RealSIPP wasn't an unauthorised introducer.
- In Adams the FCA agreed that the function of a firm, as determined by contract, would govern what it had to do to comply with its duties under the FCA Handbook.
- L&C acted in accordance with the contract and in full satisfaction of its duty.
- There was no restriction on L&C accepting business from RealSIPP without advice having been given.

- L&C wasn't in breach of any rule, guidance or law in accepting the investment
- Insisting advice be offered would have made no practical difference, as the decision to transfer was made before the SIPP/investment applications were signed.
- A consumer who requested (and received) an execution-only service, after signing disclaimers should be responsible for the consequences of their actions.
- Had L&C rejected the investment it wouldn't have been able to give reasons for this without breaching its permissions.

My provisional findings

Because no agreement could be reached the case was passed to me for a decision. I issued a provisional decision on Ms H's complaint and concluded that it should be upheld.

Ms H accepted my provisional findings, adding that she doesn't dispute that a retirement age of 55 is appropriate in view of her health issues – she hasn't worked since and will never do due to her health. Although she hasn't been able to make proper use of her pension when she should have been able to at 55, she hasn't been able to benefit from the regular income that would have been expected.

L&C didn't accept my provisional findings and said, amongst other things, that:

- The provisional findings are entirely inconsistent with the terms of the contract between the parties, the relevant COBS rules and restriction of L&C's permissions. No fair and reasonable reading of the Principles could require it to conduct due diligence of the nature suggested.
- A number of points haven't been addressed or given sufficient weight. In particular our Service's failure to take account of the law as required under DISP 3.6.4 and our departure from legal precedent setting out the importance of the contract between SIPP provider and customer and the scope of an execution only provider's due diligence obligations. We're creating new obligations in a way that's contrary to the FCA's publications at the time. Our reliance on the various FCA publications is misplaced and supports L&C's position.
- There's real unfairness if an execution only SIPP provider is liable for poor investments choices and the failures of other regulated entities, over which it put in place contractual controls which that entity breached. Particularly given it isn't investigating the suitability of the underlying investments (other than ascertaining if these are capable of being held in a UK registered pension scheme), it isn't warning customers as to the suitability of the SIPP or investments (as that would put it in breach of its permissions) and its fees and charges are based on the provision of execution only services.
- Where a customer chooses such a service it would be unfair if it couldn't rely on express representations made by them when signing the documentation and to hold it responsible where the failure is that of RealSIPP, which is a separate regulated entity.

What I've decided – and why

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

Having done so, I remain of the view that Ms H's complaint should be upheld for largely the same reasons as those set out in my provisional decision, which I've largely repeated below.

When deciding what's fair and reasonable in all the circumstances of this complaint, I need

to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I think was good industry practice at the relevant time.

While I've considered the entirety of the detailed submissions the parties have provided, my decision focuses on what I consider to be the central issues. The purpose of my decision isn't to comment on every point or question made, rather it's to set out my decision and reasons for reaching it.

Preliminary point – time limits

For the avoidance of doubt, I've considered this preliminary point on the basis of the applicable rules and law and not on the basis of what is fair and reasonable in all the circumstances.

I can't see that L&C has consented to us considering the complaint if it was made outside our time limits. I can see that the SIPP was taken out more than six years before the complaint and therefore it's possible the complaint was made outside of these. But because I haven't seen anything that makes me think Ms H knew, or ought to have known, of cause for complaint and that L&C was or might be responsible for this more than three years before she complained to it, I'm satisfied this complaint was referred within the time limits and I've gone on to consider the merits of the complaint. In my provisional decision I explained that this could change if we're provided with new evidence showing otherwise, but I haven't been provided with any to date. So I remain satisfied that Ms H's complaint has been made in time for us to consider it.

Preliminary point – dismissal

In response to the Investigator's view, amongst other things, L&C said that it believes the complaint is better suited to be considered by another ADR scheme (alternative dispute resolution 'ADR' scheme) or a Court. It's appropriate to consider this issue before I consider the merits of this complaint.

Having carefully considered L&C's submissions on this point, I am satisfied Ms H's complaint is one we can and should consider. We've a statutory duty to resolve complaints referred to us which are within our jurisdiction, subject to certain discretions which are set out in our rules. Regarding L&C's submission about referring the matter to another ADR the rules set out in the FCA Handbook, at DISP 3.4.1R, say:

> *"The Ombudsman may refer a complaint to another complaints scheme where:*
>
> *(1) he considers that it would be more suitable for the matter to be determined by that scheme; and*
> *(2) the complainant consents to the referral."*

L&C has said that Ms H's complaint should be referred to another ADR scheme or the Court. And I could now refer the complaint to another ADR scheme on the basis of DISP 3.4.1R if I take the view it's more suitable for another ADR scheme and if, in the light of that view, Ms H consents to the referral.

But I don't consider this is a complaint that would be more suitable for determination by another ADR scheme. This complaint requires consideration to be given to the rules and principles set down by the FCA. In my view, these are matters which the Financial Ombudsman is particularly well placed to deal with. I'm also satisfied we possess the necessary knowledge and expertise to fairly determine the complaint. Our investigation is

also well advanced. So, I don't think it would be more suitable for the subject matter of this complaint to be considered by another ADR scheme.

Ultimately, DISP 3.4.1R says that I may refer the complaint to another complaints scheme, not that I must. So I've discretion to decide what I'll do in the circumstances. And, for the reasons I've given above, I've decided to exercise my discretion not to refer Ms H's complaint to another ADR scheme.

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

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

Relevant considerations

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

> *the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules*."

In *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) ('BBSAL'), Berkeley Burke brought a judicial review claim challenging the decision of an Ombudsman who had upheld a consumer's complaint against it. The Ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The Ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and 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 s.228 of the FSMA and the approach an Ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the Ombudsman in that complaint, which I've described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

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

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

I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against L&C SIPP. And, HHJ Dight didn't consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither judgment said 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 Ms 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 owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was

actionable pursuant to section 138(D) of FSMA ('the COBS claim'). HHJ Dight rejected this claim and found that Options had complied with the best interests rule on the facts of Mr Adams' case.

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

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

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

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

In Ms 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 Ms H.

The facts of Mr Adams' and Ms H's cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Ms H's case. And I need to construe the duties L&C owed to Ms H under COBS 2.1.1R in light of the specific facts of her case.

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

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

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

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 Businesses ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

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

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

- *Having Terms of Business agreements governing relationships, and clarifying*

respective responsibilities, with intermediaries introducing SIPP business.

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

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

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

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

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

The later publications

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

> *"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*
>
> *All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a 'client' for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."*

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

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

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for unauthorised business warnings.*

- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*

- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*

- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*

- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

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

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*

- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*

- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from nonregulated introducers*

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

*"**Due diligence***

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

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

- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*

- *having checks which may include, but are not limited to:*

    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*

- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*

- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm"*

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

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

- correctly establishing and understanding the nature of an investment

- ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation

- ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)

- ensuring that an investment can be independently valued, both at point of purchase and subsequently, and

- ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)

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

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

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

At its introduction the 2009 Thematic Review Report says:

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

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

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

I think the Report is also directed at firms like L&C acting purely as SIPP operators, rather than just those providing advisory services. 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 review was relevant. L&C acknowledged in its submissions that the review is relevant to how it conducts its business and highlights some areas of good practice. And L&C *did* carry out some due diligence on RealSIPP. 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 apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and to produce the outcomes envisaged by the Principles. In that respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I therefore am satisfied it's appropriate to take them into account too.

I've carefully considered what L&C has said about publications published after Ms H's SIPP was set up. But, like the Ombudsman in the *BBSAL* case, I don't think the fact that some of the publications post-date the events that took place in relation to Ms 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 these existed throughout, as did the obligation to act in accordance with the Principles.

It's also clear from the text of the 2009 and 2012 Thematic Review Reports (and the "*Dear*

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

I note 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 their consideration of Mr Adams' claim. But it doesn't follow that those publications are irrelevant to my consideration of what's fair and reasonable in the circumstances of this complaint. I'm required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider to amount to good industry practice at the relevant time.

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

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

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

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

To be clear, I don't say the Principles or the publications obliged L&C to ensure the transactions were suitable for Ms H. It's accepted L&C wasn't required to give advice to Ms H, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But as I've said above these are evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes

envisaged by the Principles. And, as per 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*". 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 Ms H's applications.

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 Ms H's application to establish a SIPP and invest in TRG, 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 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 deciding what's fair and reasonable in the circumstances of this complaint – and for all the reasons I've set out above I'm satisfied that the Principles and the publications listed above are relevant considerations to that decision.

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

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

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

The contract between L&C and Ms H

My decision is made on the understanding that L&C acted purely as a SIPP operator. I don't say L&C should (or could) have given advice to Ms H or otherwise have ensured the suitability of the SIPP or TRG investment for her. I accept that L&C made it clear to Ms H that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in her SIPP investments. And that forms Ms H signed confirmed, amongst other things, that losses arising as a result of L&C acting on her instructions were her responsibility.

I've not overlooked or discounted the basis on which L&C was appointed. And my decision on what's fair and reasonable in the circumstances of Ms H's case is made with all of this in mind. So, I've proceeded on the understanding that L&C wasn't obliged – and wasn't able – to give advice to Ms H on the suitability of the SIPP or TRG investment. But I remain 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 and/or investments with the Principles in mind. And I don't agree that it couldn't have rejected introductions or applications without contravening its regulatory permissions by giving investment advice.

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

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

L&C was under a regulatory obligation to conduct its business with due skill, care and diligence, organise and control its affairs responsibly and effectively, and pay due regard to the interests of its customers (including Ms 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 L&C understood this at the time too, as I've seen on the complaint which was the subject of published decision reference DRN-3587366 ('the published decision') that it did more than just check the FCA entries for RealSIPP and CIB to ensure they were regulated to give advice. It also entered into intermediary agreements with those firms, as set out further below. And it's apparent that L&C had access to some information about the type and volume of introductions it was receiving from RealSIPP, as it has previously been able to provide us with information about this when requested.

So, I think L&C ought to have understood before it received Ms H's application that its obligations meant that it had a responsibility to carry out appropriate checks on RealSIPP/CIB to ensure the quality of the business it was introducing. And I think L&C also ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments, like the TRG investment, before accepting these into its SIPPs.

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 TRG), with the Principles in mind.

L&C's due diligence on RealSIPP/CIB

The evidence I've considered in reaching this decision also includes information provided by L&C as part of our investigation of another complaint (which was the subject of the published decision) in which RealSIPP introduced a consumer to L&C in November 2011. I've summarised this evidence below.

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

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

L&C also gave us copies of print outs from the FCA register showing that, in January 2012, RealSIPP was an appointed representative of CIB. And CIB's permissions included advising on pension transfers and pension opt outs.

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

So, having looked at the evidence L&C has provided to show what due diligence checks it did on RealSIPP and what conclusions it drew from these, this shows that, by the time it accepted Ms H's application, L&C had:

- checked the FCA register to ensure RealSIPP and its principal were regulated and authorised to give financial advice.

- entered into intermediary agreements with RealSIPP and its principal.

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

In the published decision L&C previously explained to us that it wouldn't have accepted applications from a firm that wasn't authorised by the FSA. And L&C also said that its directors from the relevant period had confirmed its policy was that applicants effecting a pension transfer had to have had advice made available to them which would, as L&C put it, *"in* (that) *case* (have been) *through RealSIPP."* And that it was then for the applicant to choose whether to take up the intermediary's offer of advice. As Ms H was introduced to L&C by RealSIPP at a similar period of time to the consumer in the published decision then my understanding is that L&C's policy in respect of the above would also have been in effect when it accepted Ms H's applications. But if I'm wrong about this, or if I've misunderstood this, L&C should explain as such and clarify the position regarding its policy on these points at the date it accepted Ms H's applications and by the deadline to respond to this provisional decision.

These steps go some way towards meeting L&C's regulatory obligations and good industry practice. But I think L&C failed to conduct sufficient due diligence on RealSIPP before accepting business from it, or L&C failed to draw fair and reasonable conclusions from what it did know about RealSIPP. I think L&C ought reasonably to have concluded it shouldn't

accept business from RealSIPP, and it should have ended its relationship with RealSIPP before Ms H made her application. I say this because:

- L&C was aware or should have been aware of potential risks of consumer detriment associated with business introduced by RealSIPP before the time of Ms H's application, as:
    - There was insufficient evidence to show RealSIPP (or any other regulated party) was offering or giving full regulated advice (that is advice on the establishment of the SIPP, the transfer or switch to the SIPP *and* the intended investment).
    - The introductions had anomalous features – high-risk business, in relatively high volumes, for unregulated overseas property developments and other esoteric investments. And, even though RealSIPP had the necessary permissions to give full advice on the business it was introducing, it wasn't giving any advice on a large proportion of that business.

- L&C should've taken steps to address these risks (or, given these risks, have simply declined to deal further with RealSIPP).

- Such steps should have involved getting a fuller understanding of RealSIPP's business model – through requesting information from RealSIPP and through independent checks.

- Such understanding would've revealed there was a significant risk of consumer detriment associated with introductions of business from RealSIPP.

- In the alternative RealSIPP would have been unwilling to answer or fully answer the questions about its business model.

- In either event L&C should've concluded it shouldn't accept introductions from RealSIPP.

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

Volume of business

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

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

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

L&C has previously told us that 153 members were introduced by RealSIPP, 44 of whom were introduced in the nine months *before* the consumer in the published decision

established their L&C SIPP in November 2011, which I note was around the same time Ms H's business was introduced to it in mid-November 2011. L&C also said that 44 of the total introductions involved members with an Occupational Pension Scheme.

On another previous complaint, back in January 2018, L&C said that RealSIPP's introductions were made between February 2011 and May 2013. So I think it's clear that by the time of Ms H's application L&C had already received a number of introductions from RealSIPP over a period of around eight months. Further, that RealSIPP was involved with a number of investments across members SIPPs and that *"all of these investments would be considered Non- standard by FCA definition.".* L&C provided a list of the investments concerned and also confirmed that in 77 cases RealSIPP received fees but didn't advise on the SIPP. And L&C said that, during the course of the agreement with RealSIPP, 23% of L&C's total new business came from its (RealSIPP's) introductions.

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

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

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

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

High proportion of execution-only business

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

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

We don't appear to have been provided with a copy of RealSIPP's client agreement and key facts document by Ms H, but I am aware we were provided with a copy of these in the published decision. And amongst other things it was noted in these documents that 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.

All of which, again, supports the contention in cases like this that RealSIPP wasn't undertaking to proffer advice on the overall propostion.

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

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

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

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

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

The availability of advice to Ms H

As I've said, I've seen from evidence provided on the complaint that was the subject of the published decision that L&C entered into intermediary agreements with RealSIPP and its principal, CIB. As part of this process, it was open to L&C to mention to RealSIPP any policy requirements it had for full regulated advice to be made available to applicants where introduced business involved pension transfers. And to enquire whether full regulated advice would be made available to applicants introduced by RealSIPP/CIB. But no correspondence I've seen between L&C and RealSIPP mentioned this.

Ms H's SIPP application said she hadn't been given advice at the point of sale. I've seen no evidence that Ms H was offered full regulated advice on transferring to the SIPP or investing in TRG by RealSIPP. And RealSIPP's website from around the time of Ms H's investment said it didn't '*provide individual financial advice on any of the developments in which clients may wish to invest.*'

It seems Ms H was introduced to TRG and CIB/RealSIPP by Mr A, her mortgage adviser, who was seemingly an AR of another firm at the time and was only authorised to provide mortgage advice.

And, in any event, I've seen no evidence that Ms H was offered or provided with full regulated advice on the suitability of the overall proposition by RealSIPP or its principal (or any other regulated advisory firm).

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

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

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

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

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

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

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

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

> *'Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.'*

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

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

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

Making independent checks

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

The 2009 Thematic Review Report said:

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

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

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

So I think it would've been fair and reasonable for L&C to speak to some applicants, like

Ms H, directly and to ask whether they'd been offered full regulated advice on their transactions and/or seek copies of the suitability reports.

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

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

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

- RealSIPP was presenting itself publicly (on its website) as providing only '*generic information on the considerations and risks*' and not providing advice about '*any of the developments in which clients may wish to invest*'.

- 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 by RealSIPP.

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

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

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

As previously stated, RealSIPP said it provided '*generic information*' about investments, rather than advice. And I've seen no evidence suggesting it ever offered full regulated advice to Ms H. RealSIPP stated in its paperwork that it was acting as *"administrator and packager"* of the SIPP – an unusual role for an advisory firm to take. All of this raises significant questions about the motivations and competency of RealSIPP.

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

I therefore think L&C ought to have concluded that RealSIPP clients like Ms H – and applicants before her – didn't have full regulated advice made available to them by RealSIPP. And have viewed this as a significant point of concern. As retail consumers were transferring their existing pension monies to L&C to invest entirely in higher-risk esoteric investments, including unregulated overseas property developments, without the benefit of

having been offered full regulated advice, by a business which appeared to be actively avoiding any responsibility to give advice.

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

As such, I think L&C should have concluded – certainly before it received Ms H's application – that it wasn't in accordance with its obligations, or its own policy requirements, to accept introductions from RealSIPP. I therefore conclude that it's fair and reasonable in the circumstances to say that L&C shouldn't have accepted Ms H's application from RealSIPP.

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

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

I'm satisfied that L&C wasn't treating Ms H fairly or reasonably when it accepted her introduction from RealSIPP. So, I've not gone on to consider the due diligence it may have carried out on the TRG investment and whether this was sufficient to meet its regulatory obligations. And I make no findings about this issue.

Did L&C act fairly and reasonably in proceeding with Ms H's instructions?

L&C has said that it was reasonable to proceed in the light of the indemnity, and that it was obliged to proceed in accordance with COBS 11.2.19R.

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

The indemnity

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

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

above, it's my view that the fair and reasonable thing to do would have been to refuse to accept Ms H's application.

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

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

COBS 11.2.19R

I note that L&C has made the point that COBS 11.2.19R obliged it to execute investment instructions. It effectively says that once the SIPP has been established, it is required to execute the specific instructions of its client.

However, in the circumstances it's my view that the crux of the issue in this complaint is whether L&C should have accepted the SIPP application from RealSIPP and established Ms H's SIPP in the first place.

In any event, 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 Ms H's application to open a SIPP in the first place.

I remain satisfied that Ms 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 Ms H's application.

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

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

In this decision I'm considering Ms H's complaint about L&C. However, I accept that other regulated parties were involved in the transactions complained about – RealSIPP/CIB. L&C's contended that it's RealSIPP/CIB that's really responsible for Ms 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, I think it's fair and reasonable in the circumstances of this case to hold L&C accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Ms H fairly. The starting point therefore, is that it would be fair to require L&C to pay Ms H compensation for the loss she's suffered as a result of its failings. I've carefully considered if there's any reason why it wouldn't be fair to ask L&C to compensate Ms H for her loss, including whether it would be fair to hold another party liable in full or in part. And, in the circumstances, I consider it appropriate and fair in the circumstances for L&C to compensate Ms H to the full extent of the financial losses she's suffered due to L&C's failings.

I accept that TRG, RealSIPP, CIB and Firm A might have some responsibility for initiating the course of action that led to Ms 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 Ms H wouldn't have come about in the first place, and the loss she's suffered could have been avoided. I want to make clear that I've carefully taken everything L&C has said into consideration. And it's my view that it's appropriate and fair in the circumstances for L&C to compensate Ms H to the full extent of the financial losses she's suffered due to L&C's failings. And, taking into account the combination of factors I've set out, I'm not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that L&C's liable to pay to Ms H.

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

Ms H taking responsibility for her own investment decisions

Section 5(2)(d) of the FSMA (now section 1C) requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions.

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

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

As I've made clear, L&C needed to carry out appropriate due diligence on RealSIPP and reach the right conclusions. I think it failed to do this. And merely having Ms 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 these.

CIB was a regulated firm with the necessary permissions to advise on the transactions this complaint concerns. And RealSIPP was an appointed representative of CIB. I'm satisfied that in her dealings with it, Ms H trusted RealSIPP to act in her best interests. Ms 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 Ms H for the loss she's suffered. I don't think it would be fair to say in the circumstances that Ms H should suffer the loss because she ultimately instructed the transactions to be effected.

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

I've considered whether, in the circumstances, Ms H would have gone ahead with the transfer and the investment if L&C had refused her application from RealSIPP. In *Adams v Options SIPP*, the judge found that Mr Adams would've proceeded with the transaction regardless. HHJ Dight says (at paragraph 32):

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

Ms H has said she recalls being told the investment would grow in value and that she'd receive a regular rental income into her pension, but I've seen no evidence that she was warned it was high risk and speculative. And I'm not satisfied that Ms H was determined to move forward with the transactions in order to take advantage of a cash incentive.

I've not seen any evidence to show Ms H was paid a cash incentive. It therefore cannot be said she was incentivised to enter into the transaction. And, on balance, I'm satisfied that Ms H, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for herself. So, in my opinion, this case is very different from that of Mr Adams.

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

On balance, I think it's fair and reasonable to direct L&C to pay Ms H compensation in the circumstances. While I accept that other parties might have some responsibility for initiating the course of action that's led to Ms 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 when it had the opportunity to do so by declining to accept Ms H's business from RealSIPP.

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 Ms 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 Ms H compensation in the circumstances.

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

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

In conclusion

Taking everything into account, I think that in the circumstances of this case it's fair and reasonable for me to conclude that L&C should have decided not to accept business from RealSIPP before it had received Ms H's application from it. I conclude that if L&C hadn't accepted Ms H's introduction from RealSIPP, she wouldn't have established an L&C SIPP, transferred her OPS monies into it or invested in the TRG investment.

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

My aim in awarding fair compensation is to put Ms H back into the position she would likely have been in had it not been for L&C's failings. Had L&C acted appropriately, I think it's more likely than not that Ms H would have remained a member of her defined benefit OPS.

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

1. Take ownership of the Llana Beach investment if possible.
2. Calculate and pay compensation for the loss Ms H's pension provisions have suffered as a result of L&C accepting her applications.
3. Pay Ms H £750 for the distress and inconvenience she's suffered.

I've set out how L&C should carry out these steps in more detail below.

1. Take ownership of the Llana Beach investment if possible.

In order for the SIPP to be closed and further SIPP fees to be prevented, the TRG investments need to be removed from Ms H's SIPP. For calculating compensation, L&C should establish an amount it's willing to accept for the investment as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment. The sums paid into the SIPP to purchase the TRG investments will then make up part of the current actual transfer value of the SIPP (because it will have been paid into the SIPP to secure the holding).

If L&C is unable or unwilling to purchase the TRG investments, or if there are any difficulties in doing so, then the actual value of any TRG investments it doesn't purchase should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include their being given a nil value for the purposes of ascertaining the current value of Ms H's SIPP.

Provided Ms H is compensated in full then, if L&C doesn't purchase the TRG investments, it may ask Ms H to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Ms H may receive from the investments, and any eventual sums she would be able to access from the SIPP. L&C will need to meet any costs in drawing up the undertaking.

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

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

I understand Ms H planned to retire at age 55. And she has said that she's not worked for a number of years due to ill-health, for which she's said she is in receipt of benefits. And I can see that Ms H queried taking an income and tax-free cash with L&C not long after she'd turned 55. So, I think that compensation should be based on Ms H taking benefits at age 55. In my provisional decision I said that if either Ms H or L&C dispute my understanding, they should explain why and provide any supporting evidence they have alongside their response to it, as it won't be possible for us to amend this understanding once any final decision has been issued on the complaint. Neither party has disputed my understanding, so I've proceeded as set out above.

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

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

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

I acknowledge that Ms H has received a sum of compensation from the FSCS, and that she has had the use of the monies received from the FSCS. The terms of Ms H's reassignment of rights require her to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required. So, I think it's fair and reasonable to make no permanent deduction in the redress calculation for the compensation Ms H received from the FSCS. And it will be for Ms H to make the arrangements to make any repayments she needs to make to the FSCS. However, I do think it's fair and reasonable for some allowance to be made for the sum(s) Ms H actually received from the FSCS and has had the use of for a period of the time covered by the calculation.

For the purposes of the calculation that's being carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4, if it wishes, L&C may notionally, for the period from the point of their payment through until the valuation date (as per the DISP App 4 definition of that term), allow for that proportion of the payment(s) Ms H received from the FSCS following the claim about CIB as an income withdrawal payment.

Where such an allowance is made then L&C must also, at the end of the calculation, allow for a notional addition to the overall calculated loss that's equivalent to the payment(s) Ms H received from the FSCS following the claim about RealSIPP/CIB. The effect of this notional addition will be to increase the overall loss calculated using the most recent financial assumptions in line with PS22/13 and DISP App 4, by a sum that's equivalent to the payment(s) Ms H received from the FSCS.

Redress paid to Ms H as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, L&C may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension.

Ms H's likely income tax rate in retirement is presumed to be 20%. However, if Ms H would have been able to take 25% tax-free cash from the benefits the cash payment represents, then this notional reduction may only be applied to 75% of the compensation, resulting in an overall notional deduction of 15%. In my provisional decision I said that if either party dispute that this is a reasonable assumption, they must let me know as soon as possible so that the assumption can be clarified and Ms H receives appropriate compensation. And that it won't be possible for us to amend this assumption once any final decision has been issued on the complaint. And neither party disputed that this is a reasonable assumption in response.

SIPP fees

If the illiquid investments can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Ms 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 investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

3. *Pay Ms H £750 for the distress and inconvenience she's suffered.*

Ms H has explained that she's unwell and that she's been consumed with worry about her pension. And I recognise she's also said that she hasn't been able to benefit from the regular income she otherwise would have expected upon retirement. The redress as set out above is intended to put Ms H as closely as possible back into the position she would likely have been in had it not been for L&C's failings. And I consider that £750 in compensation fairly compensates Ms H for what I think is the significant distress and inconvenience she's been caused due to the loss of her pension provision – including not having access to her pension

benefits in the way she otherwise would have – as a result of L&C accepting her business from RealSIPP.

My final decision

it's my final decision that Ms H's complaint should be upheld and that London & Colonial Services Limited must pay fair redress as set out above.

Where I uphold a complaint, I can award fair compensation of up to £150,000, 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 £150,000, I may recommend that the business pays the balance.

Determination and award: I require London & Colonial Services Limited to pay Ms H the compensation amount as set out in the steps above, up to a maximum of £150,000.

Recommendation: If the compensation amount exceeds £150,000, I also recommend that London & Colonial Services Limited pays Ms H the balance.

My recommendation would not be binding. Further, it's unlikely that Ms H can accept my final decision when issued and go to court to ask for the balance. Ms H may want to consider getting independent legal advice before deciding whether to accept the final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms H to accept or reject my decision before 8 July 2024.

Holly Jackson
Ombudsman