DRN-5092962

The complaint

Mr C transferred three personal pensions to a Self-Invested Personal Pension ('SIPP') provided by London & Colonial Services Limited ('L&C'), and his SIPP monies were invested in The Resort Group's ('TRG's) Dunas Beach Hotel Resort ('Dunas Beach'). Mr C complains L&C didn't carry out sufficient due diligence on either the Dunas Beach investment or its suitability for him, and says it should compensate him for his financial loss.

What happened

I've outlined the key parties involved in Mr C's complaint below.

Involved parties

L&C

L&C's 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.

(Life & Pensions) Limited ('CIB')

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

Real SIPP LLP ('RealSIPP')

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

The Resort Group ('TRG')

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

The transactions

Mr C had three personal pensions. He says that at the time of the events, he was 'cold called' by an agent of TRG about Dunas Beach and how it could be part of his pension. That he was initially passed to a regulated firm ('Firm I'), and it appears Firm I contacted Mr C's existing pension providers for details of his pension benefits before Mr C was ultimately passed to RealSIPP/CIB.

Based on a November 2010 'plan details' letter from one of Mr C's existing pension providers, I can see that one of Mr C's pensions had a Guaranteed Annuity Rate ('GAR') which I'll call the 'GAR pension'. But it appears his two other pensions were defined contribution pensions with no guaranteed or safeguarded benefits, so I'll call these his 'non-GAR pensions'. So this is the understanding I've proceeded on and neither Mr C or L&C have disputed my understanding.

On 17 January 2011, Mr C signed a RealSIPP branded application form to open a SIPP with L&C. The 'Independent Financial Adviser ('IFA') Details' section records details for both RealSIPP and CIB, including their FSA authorisation numbers. 'Mr M' is the named contact and a RealSIPP email address is given. And it's recorded that initial remuneration of £650, and ongoing annual remuneration of £350, would be paid to the IFA.

Elsewhere in the form a ticked box confirms that Mr C wanted to manage the fund himself. And the initial investment instruction page records that a Dunas Beach investment was to be made, with a purchase price of 139,950 euros.

L&C has said in other similar complaints brought to our Service about L&C that clients also signed scheme borrowing forms. From the copies of these I've seen in other similar complaints, it was noted in the forms that:

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

L&C hasn't provided us with a copy of any further instruction forms, contracts or scheme borrowing forms in relation to Mr C's complaint.

On 21 January 2011, CIB provided Mr C with a suitability report. Amongst other things, the report said:

- *"You wish to purchase an offshore/offplan investment property within a registered pension scheme environment."*
- *"Wherever possible, we would wish to carry out a complete financial review, but at your explicit request, our advice is restricted to the consideration of establishing a Self Invested Personal Pension to allow you to invest in the offshore development of your choice."*
- Mr C's view on investment risk was "*cautiously balanced"* and on a scale of one to ten, he wanted his investment to be around three to four. And, *"You want the prospect of growth offered by a pooled equity investments but wish to err on the side of caution."*
- It recommended Mr C establish an L&C SIPP in order to allow the offshore investment and to give him flexibility.
- It recommended Mr C retain his GAR pension because of its benefits, but recorded that Mr C wanted to proceed against this recommendation.

L&C accepted Mr C's SIPP application and established his SIPP on 11 February 2011. In February and March 2011, a total of approximately £70,286 was transferred from his three existing personal pensions into his L&C SIPP. And on 18 March 2011, Mr C invested approximately £48,444 into Dunas Beach with the remainder left as cash in his SIPP account.

Over the years, L&C sent Mr C SIPP statements and I've been provided with copies of these. The statements between 2012 and 2019 set out the following approximate values for his SIPP:

- February 2012
  Cash balance £22,476, Dunas Beach investment £48,444, total SIPP value £70,920

- February 2013
  Cash balance £24,226, Dunas Beach investment £48,444, total SIPP value £72,671

- February 2014
  Cash balance £14,123, Dunas Beach investment £58,312, total SIPP value £72,435

- January 2015
  Cash balance £11,341, Dunas Beach investment £54,536, total SIPP value £65,878

- February 2016
  Cash balance £13,458, Dunas Beach investment £54,536, total SIPP value £67,995

- January 2017
  Cash balance £15,139, Dunas Beach investment £54,536, total SIPP value £69,676

- January 2018
  Cash balance £17,227, Dunas Beach investment £66,281, total SIPP value £83,508

- January 2019
  Fund value £85,631

- December 2019
  Cash balance £20,210, Dunas Beach investment £70,088, total SIPP value £90,298

In similar complaints where customers were paying a deposit with the balance payable on completion and where borrowing was involved, L&C has said that scheme borrowing which was indicated would be available to assist members with the completion of their balance did not materialise. So, TRG introduced the idea of 'consolidation' to ensure members did not lose their investments.

It seems Mr C went on to do that around November 2014. Because the transactions on his SIPP statements show a property consolidation fee at that time and, some months later, refunds described as *"refund following Dunas Beach consolidation"* and *"funds from refund of stamp duty".* And because his 2015 SIPP statement shows his Dunas Beach investment had changed to a different room in a different block. And neither Mr C or L&C have disputed my understanding.

Mr C's complaint

It seems that in around November 2019 Mr C began asking L&C to transfer £14,000 from his L&C SIPP to another pension he held. In February 2020 it still hadn't been transferred, so Mr C emailed L&C to complain about this delay.

Mr C says that around this time, in January 2020, he submitted a claim to the Financial Services Compensation Scheme ('FSCS'), via a professional representative, about the 2011 advice he'd received from CIB. In March 2020, the FSCS told Mr C that his claim was valid, it had calculated his interim financial loss as £21,262.62 and it would make an interim payment of compensation to him in this amount, but it wasn't yet clear what his final loss would be.

In June 2020, the FSCS told Mr C it had now received further information and looked again at his claim, it had calculated his financial loss as over £100,000, and it would now pay him additional compensation of £28,737.38, as its compensation limit of £50,000 didn't allow it to pay more than this. The FSCS later provided Mr C with a reassignment of rights to enable him to pursue a complaint against L&C.

On 8 June 2020, Mr C complained to L&C about its acceptance of TRG's Dunas Beach valuations over the years. He said,

"I spoke with [a property expert L&C had put Mr C in contact with] *and I have also taken other legal advice regarding the issue of getting a true valuation for my 50% share in Dunas 1050.*

*I would like to make a formal complaint with regards to your acceptance of the valuations given by The Resort Group as I believe that you are aware that these fractional properties are practically worthless as [*the property expert*] confirmed. The Resort Group are not going to give an independent value for their own properties as they will always inflate the true value.*

*I have received an email from [*The Resort Group*] who admits this. An extract of the email is below. The full email is available should you require it.*

> *'At the moment there is almost no interest from our sales distribution channels for fractional properties and the few sales that are being achieved are and* [sic] *very substantially lower prices than asking prices.'*

As you must also be aware there is absolutely no second hand market for fractional properties, it only took a couple of hours on the internet for me to find this out. As London and Colonial are responsible for looking after my "asset" I believe that you have a responsibility to carry out an investigation into finding out the real values of all these so called "assets" and to uphold your due diligence responsibilities towards your clients. This should not be left up to the individual person to do.

I look forward to your prompt rely [sic] *and your plan of action as to how you intend to achieve a true independent value."*

On 23 June 2020, Mr C chased L&C as it hadn't yet addressed his complaints. He added that the FSCS had calculated his Dunas Beach investment as having no value, he wanted to transfer his L&C SIPP's remaining cash value to another pension he held, and he wanted a refund of most of the fees he'd paid L&C since it hadn't acted in his best interest.

On 3 August 2020, L&C issued its final response to Mr C's complaints. Regarding the delay in transferring £14,000, L&C said the transfer took place in April 2020 but agreed it could have processed this sooner. Regarding its acceptance of TRG's Dunas Beach valuations over the years, L&C confirmed it had put Mr C in touch with a property expert through which he could obtain an independent valuation. L&C said it used the most recent valuation available for its annual valuations, which was December 2017 for Mr C's Dunas Beach holding. And that as an execution-only provider acting solely on its members instructions,

L&C isn't permitted to instruct a valuation and would need Mr C's permission to do so due to the costs involved, which Mr C would be liable for. L&C added that it was processing Mr C's recent request to transfer a further £5,000 from his L&C SIPP to his other pension.

Based on the SIPP transaction statements, the transfer of £5,000 took place on 10 August 2020.

On 15 December 2020, Mr C's professional representative complained to L&C on his behalf that L&C hadn't completed sufficient due diligence on the Dunas Beach investment or confirmed whether this type of high risk investment was suitable for Mr C. So, L&C should pay the uncompensated losses Mr C incurred by transferring his pensions to L&C and investing in Dunas Beach.

Some months later, Mr C's professional representative chased L&C for a response. L&C firstly said it had thought Mr C had withdrawn this complaint, and later said it was having system issues. But on 5 November 2021, L&C issued its final response to Mr C's complaint about the due diligence it had carried out before allowing him to invest in Dunas Beach. Amongst other things, L&C's response said:

- It provides execution-only (i.e. non-advised) SIPP administration services, as explained in the documents provided to Mr C at the start of his SIPP. And Mr C didn't question this.

- It is not permitted to provide any advice or comment in relation to the suitability of a SIPP, the underlying investment(s), performance or transfers of any previously held arrangements into the SIPP. It's not permitted to assess suitability for a client's individual circumstances, or to advise or comment on the suitability of the introducer a client has chosen to use.

- Mr C appointed CIB to advise him on the transactions he went on to make. So it was CIB's responsibility to assess the suitability of the transactions it recommended to Mr C and to provide him with all the information about the transactions and products it was recommending, including relevant risk warnings.

- Mr C's SIPP application form recorded RealSIPP/CIB as his financial adviser and confirmed *"Advice given at point of sale".* Before he contacted L&C, Mr C was advised by CIB on the establishment of his SIPP, the transfers he instructed and the underlying investment he chose. Mr C chose to make those transactions and L&C didn't influence those decisions. Mr C's SIPP application form was L&C's first contact with Mr C's SIPP business.

- L&C informed Mr C that he had thirty days in which he could cancel his instruction to transfer his pensions into the L&C SIPP.

- Fundamentally, as an execution-only (i.e. non-advised) provider, L&C would have been in breach of COBS 11.2.19 had it not followed Mr C's instruction to invest.

- Mr C's complaint is primarily about the advice he received so it should be directed to CIB. Because CIB had advised Mr C, and at that time it was regulated by the FCA and held the appropriate permissions to advise Mr C on the transactions he went on to make. And it was CIB's responsibility to ensure the investment was suitable for Mr C in his particular circumstances.

- L&C had carried out appropriate due diligence on RealSIPP/CIB.

- L&C also carried out appropriate due diligence on the Dunas Beach investment, to ensure it was suitable to be held in a UK pension scheme and was within HM Revenue & Customs ('HMRC') pension scheme rules. This included reviewing investment information, company background checks and an independent report from a third-party compliance entity. L&C concluded the investment would not cause any unauthorised payments within the scheme and was suitable to be held within a SIPP. L&C isn't responsible for the management, performance, level of income or liquidity of the investment, or for the investment not meeting Mr C's expectations.

- Mr C's complaint was in relation to an execution-only SIPP, so it should be heard by The Pensions Ombudsman ('TPO').

Mr C remained unhappy, so on 11 November 2021 he came to our Service saying L&C hadn't carried out sufficient due diligence on either the Dunas Beach investment or its suitability for him. Mr C's submissions to us included that:

- His CMC had started this complaint in December 2020 but L&C took ten months to issue its response, delaying the process.

- At the start of the events complained of, he'd been 'cold called' by an agent of TRG about Dunas Beach and how it could be part of his pension. This person then put him in touch with Firm I. Firm I seemed sincere and truthful.

- Firm I told him his new pension would be government-backed and recommended, that he could cash the whole amount in once he decided to retire, that it was safe and more guaranteed than his existing pensions, and would provide him with a good pension.

- He'd never really spoken to anyone at CIB – he thought Firm I and RealSIPP/CIB were all part of the same firm.

- He didn't receive any payment for making the transactions.

- Had he not been cold called, he wouldn't have known about the option to transfer his pensions or even considered doing so.

- He'd not understood how the Dunas Beach investment worked. He'd only understood that he would own an apartment which would provide rental income and which he could stay in while on holiday, that it was a safe investment and that it would be sold for far more when he retired.

- His professional representative had recommended he complain to L&C when the FSCS calculated his financial loss as over £100,000 and more than its compensation limit – he'd not complained until he realised what his total loss was.

- L&C should put him back into the position he would have been in had he not transferred his pensions and invested in Dunas Beach.

Additional background information

Having explained what's happened above, I've mentioned some of the additional documentation we've been provided by the parties below, before then going on to

summarise what's happened in Mr C's complaint to date.

L&C has provided us with a third-party investment due diligence document that it obtained. It is dated 16 April 2012 (which is after Mr C's purchase was completed) and sets out some details about the Dunas Beach investment, including that:

- It provided the ability to invest in hotel room ownership, and returns were achieved through a 50% share of room rental and possible capital growth. Rooms could be owned 100% or in a fractional ownership agreement.

- There was no fixed term to the investment although the rental agreement the investors enter into is fixed for 15 years and renewable thereafter for five-year terms.

- Funds would only be realised through sale of the room – subject to the acceptance by the buyer of abiding by the agreements already in force.

- The resort manager and developer had been identified.

- There was some uncertainty as to who owned and was responsible for the furniture, fixtures and fittings, so there was a potential for taxable property to arise.

- SIPP operators should seek their own independent tax advice.

- The investment was unregulated so no protections would be offered via the FSCS.

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

L&C has also provided us with copies of print outs from the FSA Register. These record that, as at November 2011, RealSIPP was an appointed representative of CIB. And CIB's permissions included advising on Pension Transfers and Pension Opt Outs.

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

Although it has not been provided in relation to this complaint, on another similar complaint that was the subject of published decision DRN3587366, I have seen copies of RealSIPP's client agreement and Key facts document, titled *"about our services for our Resort Group SIPP package".* RealSIPP's client agreement describes 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."*

I'm aware that L&C has made submissions in other similar complaints brough to our Service against L&C which feature RealSIPP/CIB as the regulated introducer and TRG investments. The points L&C has made within these submissions include that:

- Our Service imposes a duty on L&C beyond that envisaged by the parties. And imposes additional duties on L&C to those provided for under the COBS.

- L&C accepts business submitted by regulated financial advisers who've an intermediary agreement with it. Its controls included ensuring that business was submitted by a regulated financial adviser, whose responsibilities included advising on the suitability of the transfer, the SIPP and the underlying investments.

- L&C's due diligence on RealSIPP/CIB gave no cause for concern or reason to suspect there was anything wrong with RealSIPP/CIB or the advice it provided to the client.

- 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.

- No regard's been paid to the respective duties of the parties under the contract. The entities who brought about the transaction should be held responsible.

- As RealSIPP/CIB are no longer extant, we've concluded that L&C's responsible.

- Our Service quotes at length from *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) but gives only a passing reference to *Adams.*

- Our Service doesn't properly address using the Principles as the basis for finding against L&C in preference to the COBS rules or established case law.

- Our Service is attempting to use the Principles to circumvent the *Adams* decision.

- A breach of the Principles cannot, of itself, give rise to any cause of action at law.

- The Principles fall to be construed in light of the COBS rules applicable to L&C, L&C's regulatory permissions, L&C's contractual arrangements and the statutory objective that consumers should take responsibility for their decisions.

- Regulatory publications can't alter the meaning, or the scope, of the obligations imposed by the Principles.

- Publications issued after the transactions shouldn't have a bearing on this complaint.

- Many of the matters which the 2009 Thematic Review Report invites firms to consider are directed at firms providing advisory services.

- L&C conducted itself in line with the 2009 Report. But in any case, the 2009 Report is not a rulebook and doesn't have the force of statutory guidance. Further, it's not an exhaustive and prescriptive list of criteria SIPP operators must comply with. So it's not appropriate to refer to the 2009 Report as the test for reasonable skill and care.

- Our Service assumes examples of good practice observed by the regulators would have been known to the wider SIPP industry at the time.

- By linking findings to good practice instead of the interpretation of the COBS rules as set out in case law, L&C's held to an unreasonable standard. The standard that L&C should be held to is that of a reasonably competent SIPP provider.

- L&C wasn't required to request information or copies of advice. And L&C couldn't comment on advice without potentially being in breach of its permissions.

- Duties imposed by the COBS rules can't all apply to all firms in all circumstances.

- The COBS rules contain some provisions and obligations that don't apply to execution-only SIPP providers.

- The relationships in this case are similar to those in *Adams*, the distinguishing factor is that RealSIPP/CIB wasn't an unauthorised introducer.

- Amongst other things, the judge in *Adams* held that in order to identify the extent of the regulatory duties imposed on Carey, "*one has to identify the relevant factual context"* and that *"the key fact ... in the context is the agreement into which the parties entered, which defined their roles in the transaction"*.

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

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

- L&C acted in accordance with the contract and in full satisfaction of its duty.

- Our Service should find that L&C's duties extended no further than those owed in *Adams*. But the conclusion reached is effectively that the scope of L&C's duties is the same as the position advanced by the claimant in *Adams*.

- Our Service's conclusions run contrary to *Adams* by suggesting that, notwithstanding the clear contractual terms, L&C owed due diligence obligations under the Principles.

- Our Service fails to have regard to the general principle that consumers should take responsibility for their decisions, the fundamental principle of freedom of contract and to the authority of *Adams* and *Kerrigan v Elevate Credit International Ltd* [2020]

C.T.L.C. 161.

- We're enabling recovery of losses flowing from non-contractual obligations, which were inconsistent with express obligations in the parties' contractual arrangements.

- There was no restriction on L&C accepting business from RealSIPP/CIB without advice having been given.

- L&C wasn't in breach of any rule, guidance or law in accepting the investment.

- Making a value judgment on advice wasn't within L&C's role.

- The client knew that the TRG investments were illiquid holdings in property and that this was high-risk business. Further due diligence wouldn't have unearthed information that the client wasn't already aware of when he invested.

- L&C had strict procedures in place and satisfied itself that the client understood every aspect of his instructions, and the information L&C provided to him. And that he'd had the opportunity to seek regulated advice (which he obtained) before proceeding.

- All forms provided to the client not only guided him to seek financial advice but also required his signed confirmation that he agreed with their contents, and the forms contained clear information and risk warnings. In signing these, the client confirmed he was aware he was instructing L&C to establish a SIPP, transfer his pension and make the TRG investment, that he understood the risks associated with his choices and that L&C wasn't responsible for any of those decisions because it acted on an instruction/execution-only basis. The client didn't ask L&C to clarify or explain any of these forms. And these documents represented the full extent of information and warnings L&C was permitted to provide.

- It's not for L&C to look beyond the client's signature or decline his instruction on the assumption he didn't understand and agree to what he was signing, when there was no indication of this.

- Good title was obtained and the investments produced a return before the pandemic.

- In *Adams* the Store First investment being high-risk didn't make it manifestly unsuitable and the same's true of the TRG investment.

- The client's submission that he was told there was little or no risk as the investment had guarantees runs contrary to the literature.

- The case of *Gestmin SGPS v. Credit Suisse* [2013] EWHC 3560 emphasises the importance of contemporaneous documents when making factual findings.

- The starting point should be the documents and any recollection that runs contrary to the contents of these should be discarded.

- A SIPP provider can't reject business without completing a full suitability assessment.

- L&C couldn't reject business without making a value judgment on suitability for each individual client, this fell outside of its expertise and the terms of the contract.

- A consumer who requested (and received) an execution-only service, after signing numerous disclaimers should be responsible for the consequences of their actions.

- The information it's seen indicates that investment material was provided by RealSIPP/CIB. While it's not seen any evidence of direct promotion by TRG, there was no restriction on an unregulated entity promoting an unregulated investment.

- It was common practice for SIPP providers to accept such investments in 2011. If L&C had rejected the application, it would have proceeded with a different SIPP provider.

- Had L&C rejected the investment it wouldn't have been able to give reasons for this without breaching its permissions.

- L&C is acutely aware of the standards It must meet as part of the provision of its services as an execution-only SIPP provider. It has continually acted in accordance with its regulatory and statutory requirements, and improved its processes over the years in line with guidance from the regulators.

One of our Investigator's considered the due diligence L&C had carried out before accepting Mr C's SIPP business and Dunas Beach investment instruction, and concluded this complaint shouldn't be upheld. She said Mr C was only the eighth referral L&C had received from RealSIPP/CIB, so at that time it was reasonable for L&C to rely on its introducer agreement with RealSIPP/CIB, and it wasn't reasonable to expect L&C to have identified any pattern of business from such a low number of referrals. And she said L&C had carried out sufficient due diligence on the Dunas Beach investment.

Mr C's professional representative asked for this complaint to be referred for an Ombudsman's decision, as they disagreed with the conclusions our Investigator had reached. They said, in summary, that:

- L&C's due diligence obligations meant it should have confirmed whether such an offshore, offplan and unregulated property investment was suitable for Mr C, who had no savings except for his pensions, most of which were invested in Dunas Beach. An investment of this type would only be suitable for high net worth and sophisticated investors, and Mr C was not such an investor.

- L&C had continued to collect SIPP fees from Mr C, and as late as December 2019 L&C was valuing Dunas Beach at about £83,000. But claims and complaints about Dunas Beach had started several years earlier. And there was no evidence that L&C had obtained an independent valuation of the assets since they were purchased.

- Our Service had upheld two separate complaints against L&C, which featured RealSIPP/CIB and in which the events also took place in 2011. In each one, the deciding Ombudsman made reference to SIPP providers' obligations to ensure than an asset can be independently valued at purchase and thereafter.

But our Investigator didn't change her view. As agreement couldn't be reached, this complaint was passed to me for a decision.

I issued a provisional decision in which I said that, as preliminary matters, I had decided not to exercise my discretion to refer this complaint to TPO, and that I thought this complaint had been brought within the relevant time limits. I then concluded this complaint should be

upheld. In summary, I said L&C ought to have had significant concerns about the introductions it was receiving from RealSIPP/CIB and should have decided not to accept business from it before it had received Mr C's application from it. And if it had rejected Mr C's business, he wouldn't have established an L&C SIPP, transferred his pension scheme monies into it or invested in Dunas Beach. I said it was fair and reasonable for L&C to compensate Mr C for the full measure of the loss he's suffered as a result of L&C accepting his business from RealSIPP/CIB. So L&C should undertake redress calculations for Mr C, and also pay him £500 compensation for his distress.

Mr C accepted the provisional decision and said he had nothing further to add.

Despite being provided with the opportunity to do so, L&C didn't provide our Service with any further comments or evidence to consider in response to the provisional decision.

As both parties have had the opportunity to respond to my provisional decision, I'm now in a position to make my decision.

What I've decided – and why

I've reconsidered all the available arguments and evidence. Having done so, I remain of the view that Mr C's complaint is one that can be considered by our Service and that should be upheld, for the same reasons as those set out in my provisional decision, which I've largely repeated below.

Preliminary point - should the complaint be referred to TPO?

Firstly, I'll address L&C's argument that this complaint should be heard by TPO rather than the Financial Ombudsman Service. For the avoidance of doubt, I've considered this 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've carefully considered L&C's submissions on this point, and I'm satisfied that Mr C's complaint is one we can and should consider. We have a statutory duty to resolve complaints referred to us which are within our jurisdiction, subject to certain discretions which are set out in our rules. The rules set out in the FCA Handbook, at DISP 3.4.1R, say:

"The Ombudsman may refer a complaint to another complaints scheme where:

(1) he considers that it would be more suitable for the matter to be determined by that scheme; and

(2) the complainant consents to the referral."

I could now refer the complaint to TPO on the basis of DISP 3.4.1R if I take the view it's more suitable for TPO and if, in the light of that view, Mr C consents to a referral to TPO.

But I don't consider this is a complaint that would be more suitable for determination by TPO. This complaint requires consideration to be given to the rules and principles set down by the regulator. In my view, these are matters which the Financial Ombudsman Service is particularly well placed to deal with. I'm also satisfied we possess the necessary knowledge and expertise to fairly determine the complaint. Our investigation is also well advanced. So I don't think it would be more suitable for the subject matter of this complaint to be considered by TPO.

In reaching this conclusion I've considered the Memorandum of Understanding ('MoU') between the Financial Ombudsman Service and TPO. The MoU is a document about

practical cooperation where there's remit overlap between the two organisations – however the MoU doesn't determine the jurisdiction of either organisation. Ultimately, DISP 3.4.1R says that I *may* refer the complaint to another complaints scheme, not that I *must*. So I have discretion to decide what I'll do in the circumstances. And, for the reasons I've given above, I've decided to exercise my discretion not to refer Mr C's complaint to TPO.

So, I still don't consider that it would be more suitable for this complaint to be determined by TPO, and I've decided not to exercise my discretion to refer it.

Preliminary point - time limits

I've also thought about whether this is a complaint our Service can consider. For the avoidance of doubt, I've considered this 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.

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

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

> *(2) more than:*
>
> > *(a) six years after the event complained of; or (if later)*
> >
> > *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*
> >
> > *unless the complainant referred the complaint to the respondent or the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;*
> >
> > *unless:*
>
> *(3) in the view of the Ombudsman, the failure to comply with the time limits…was as a result of exceptional circumstances.*

The complaint Mr C has brought to our Service is that L&C didn't carry out sufficient due diligence on either the Dunas Beach investment or its suitability for him, before accepting his SIPP and investment applications. L&C accepted Mr C's SIPP application in February 2011, his existing pensions were transferred into it in February and March 2011, and his Dunas Beach investment was made in March 2011. Mr C complained to L&C about its initial due diligence on the Dunas Beach investment and its suitability for him in December 2020. As this is more than six years later than all of these events, Mr C's complaint has been brought outside the six-year part of the rule.

Therefore, I must consider whether Mr C's complaint has been brought within the three-year part of the rule. Under the three-year part of the rule, I need to consider not only when Mr C did become aware he had cause for complaint, but also when he ought reasonably to have become aware he had cause for complaint.

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

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

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

And *respondent* means a regulated firm covered by the jurisdiction of the Financial Ombudsman Service.

So, the material points required for Mr C to have awareness of a cause for complaint include:

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

I can see that by the time Mr C began asking in November 2019 to transfer £14,000 out of his L&C SIPP, his SIPP statements show that the total value of his SIPP was increasing steadily overall. The exception is the 2015 SIPP annual statement, which showed the total value of Mr C's SIPP had fallen somewhat so that it was about £4,400 less than the total amount he'd originally transferred into his L&C SIPP from his previous pensions. However, it's reasonable to think Mr C would have thought this fall was related to the consolidation that took place around November 2014, and I've not seen anything that ought to have made Mr C think that any act or omission by L&C was responsible for this fall. I note the SIPP statements thereafter until December 2019 showed the total value of Mr C's SIPP as steadily increasing again.

That said, I'm mindful Mr C says he engaged a professional representative in January 2020, and I've seen they were involved in the FSCS claim he submitted then. It's not clear to me what prompted Mr C to engage a professional representative at that time, but I note he did so around the time he was experiencing delays in L&C transferring £14,000 out of his L&C SIPP. And it's clear from Mr C's following correspondence with L&C that he was increasingly unhappy about what he termed the 'true' value of his Dunas Beach holding and L&C's acceptance of TRG's valuations of it over the years - I also note Mr C's June 2020 email to L&C said he'd taken legal advice on this matter and that L&C should uphold its 'due diligence' responsibilities towards its clients by finding out the real value of Dunas Beach.

So I think it's more likely than not that Mr C's professional representative discussed with him the possibility that L&C had due diligence responsibilities and could also bear a responsibility for the financial loss he'd suffered in relation to his SIPP investment, as well as RealSIPP/CIB. I've not been provided with any evidence to suggest that Mr C had any information prior to his discussions with his professional representative that ought reasonably to have made him aware he had cause for complaint about the due diligence L&C carried out when it accepted his SIPP and investment applications in 2011.

So in the circumstances of this particular complaint, even if the earliest point at which Mr C became aware he had cause for complaint against L&C was when he experienced delays in L&C transferring £14,000 out of his L&C SIPP and engaged his professional representative in January 2020, I don't consider that he ought reasonably to have been aware any earlier that there was a problem with his SIPP that had caused him a loss for which L&C might also bear a responsibility.

Mr C complained to L&C about the due diligence it had carried out when it accepted his investment application within three years of this, in December 2020. Therefore, I'm still of the view that Mr C's complaint about L&C has been brought in time under the three-year part of the rules and so is a complaint our Service can consider.

Given this, I've gone on to consider the merits of Mr C's complaint.

The merits of Mr C's complaint

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

When considering what's fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

Relevant considerations

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

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

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

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

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

I acknowledge that COBS 2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client)* overlaps with certain of the Principles, and

that this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of the FSMA ('the COBS claim'). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

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

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

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

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

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

The facts of Mr Adams' and Mr C's cases are also different. And I need to construe the duties L&C owed to Mr C under COBS 2.1.1R in light of the specific facts of Mr C's case.

So I've considered COBS 2.1.1R - alongside the remainder of the relevant considerations, and within the factual context of Mr C's case, including L&C's role in the transaction.

However, I think it's important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I'm required to take into account relevant considerations which include: law and regulations; regulators' rules, guidance and standards; codes of practice; 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 Mr C on the SIPP and/or the underlying investments. Refusing to accept an application isn't the

same thing as advising Mr C on the merits of the SIPP and/or the underlying investments.

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

The regulatory publications

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

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

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

The 2009 Thematic Review Report

The 2009 Report included the following statement:

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

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

…

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

Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their customers' interests in this respect, with reference to Principle 3 of the Principles for Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

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

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

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

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

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

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

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

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

The later publications

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

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

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

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

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

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise*

clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un- authorised business warnings.

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

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

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

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

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

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*

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

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

"**Due diligence**

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

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

- *periodically reviewing the due diligence the firm undertakes in respect of the*

introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme

- *having checks which may include, but are not limited to:*
    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

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

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

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

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

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

- *correctly establishing and understanding the nature of an investment*

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

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

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

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

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

L&C says the 2009 Thematic Review Report isn't statutory guidance. I acknowledge that the 2009 and 2012 Thematic Review 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 their importance should

be underestimated. They provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it's treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take them into account.

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

L&C also says the 2009 Thematic Review Report is not an exhaustive and prescriptive list of criteria SIPP operators must comply with, so it's not appropriate to refer to it as the test for reasonable skill and care. But at its introduction the Report says:

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

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

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

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

I'm also satisfied that L&C, at the time of the events under consideration here, thought the 2009 Thematic Review Report was relevant. L&C's acknowledged in its submissions that the Report's 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 for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and to produce the outcomes envisaged by the Principles. In that respect, these publications also go some way to indicate what I consider

amounts to good industry practice at the relevant time. I'm therefore satisfied it's appropriate to take them into account too.

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

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

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

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

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

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

given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes."

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

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

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

It's important to keep in mind the judge in *Adams v Options* didn't consider the regulatory publications in the context of considering what's fair and reasonable in all the circumstances bearing in mind various matters including the Principles (as part of the regulator's rules) or good industry practice.

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

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

So taking account of the factual context of this case, it's my view that in order for L&C to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into RealSIPP/CIB and the business it 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've looked at here is whether L&C took reasonable care, acted with due diligence and treated Mr C fairly, in accordance with his best interests. And what I think's fair and reasonable in light of that. And I think the key issue in Mr C's complaint is whether it was fair and reasonable for L&C to have accepted Mr C's SIPP application in the first place. So, I need to consider whether L&C carried out appropriate due diligence checks on RealSIPP/CIB before deciding to accept Mr C's SIPP application.

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

The contract between L&C and Mr C

L&C's made a number of references to its contract with Mr C, and I've carefully considered what it's said about this.

But 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 Mr C or otherwise have ensured the suitability of the SIPP or the Dunas Beach investment for him. I accept that L&C made it clear to Mr C that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investments. And that forms Mr C signed confirmed, amongst other things, that losses arising as a result of L&C acting on his instructions were his responsibility.

I've not overlooked or discounted the basis on which L&C was appointed. And my decision on what's fair and reasonable in the circumstances of Mr C's case is made with all of this in mind. So, I've proceeded on the understanding that L&C wasn't obliged – and wasn't able – to give advice to Mr C on the suitability of the SIPP or Dunas Beach investment. But I'm satisfied that, to meet its regulatory obligations when conducting its operation of SIPPs business, L&C had to decide whether to accept introductions of business with the Principles in mind. And I don't agree that it couldn't have rejected introductions or applications without contravening its regulatory permissions by giving investment advice.

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

In this case, the business L&C was conducting was its operation of SIPPs. And I'm satisfied that, to meet its regulatory obligations, when conducting its operation of SIPPs business, L&C had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind.

The regulators' reports and guidance provided some examples of good practice observed by the FSA and FCA during its work with SIPP operators. This included being satisfied that a particular introducer/investment is appropriate to deal with/accept. That involves conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.

As set out above, to comply with the Principles, L&C needed to conduct its business with due skill, care and diligence; organise and control its affairs responsibly and effectively; and pay due regard to the interests of its clients (including Mr C) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

And I think that L&C understood this at the time too, as it did more than just check the FSA entries for RealSIPP and CIB to ensure they were regulated to give advice. It also entered into intermediary agreements with those firms. And it's apparent that L&C had access to some information about the type and volume of introductions it was receiving from RealSIPP/CIB, as it's been able to provide us with information about this when requested.

So, and well before the time of Mr C's application, I think that L&C ought to have understood that its obligations meant that it had a responsibility to carry out appropriate checks on RealSIPP/CIB to ensure the quality of the business it was introducing.

And I think L&C also ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments before accepting them into a SIPP. I think L&C's submissions on the due diligence it undertook prior to allowing Dunas Beach holdings within its SIPPs reflect this. So, I'm satisfied that, to meet its regulatory obligations when conducting its business, L&C was also required to consider whether to accept or reject a particular investment (here Dunas Beach), 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/CIB 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 copies of the register dated 20 September 2010 and 3 February 2011 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 February 2011, RealSIPP was an appointed representative of CIB. And CIB's permissions included advising on pension transfers and pension opt outs.

I've also seen L&C's 'Open Pension Brochure' which relates to the SIPP Mr C 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/CIB and what conclusions it drew from these, this shows that, by the time it accepted Mr C'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 Mr C'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, since it has told us that Mr C was the eight introduction it received from RealSIPP/CIB.

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 Mr C was introduced to L&C by RealSIPP/CIB in the same year as 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 Mr C's applications, and L&C hasn't disputed my understanding.

These steps go some way towards meeting L&C's regulatory obligations and good industry practice. But I'm of the view L&C failed to conduct sufficient due diligence on RealSIPP/CIB before accepting business from it or draw fair and reasonable conclusions from what it did know about RealSIPP/CIB. I think L&C ought reasonably to have concluded it shouldn't accept business from RealSIPP/CIB, and it should have ended its relationship with it before Mr C made his application. I say this because:

- L&C was aware of, or should have been aware of, potential risks of consumer detriment associated with business introduced by RealSIPP/CIB at the outset of its relationship with RealSIPP, and certainly by the time of Mr C's application:
    - There was insufficient evidence to show RealSIPP/CIB (or any other regulated party) was offering or giving full regulated advice (that is advice on the transfer 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/CIB had the necessary permissions to give full advice on the business it was introducing, it wasn't giving advice on a large proportion of that business.
    - TRG or an unregulated business associated with it was promoting the Dunas Beach investments.

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

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

- Such understanding would have revealed there *was* a significant risk of consumer detriment associated with introductions of business from RealSIPP/CIB.

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

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

I've set out below some more detail on the potential risks of consumer detriment L&C

either knew about or ought to have known about at the time of Mr C'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/CIB 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/CIB, 44 of whom
were introduced in the nine months before the consumer in the published decision established their L&C SIPP in 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/CIB's introductions were made between February 2011 and May 2013. And I note that L&C has told us that Mr C's introduction, in February 2011, was the eight introduction. So by the time of Mr C's application L&C had already received seven introductions from RealSIPP/CIB in less than a month. I think that L&C should have been concerned that such a volume of introductions, relating exclusively to consumers investing in higher-risk esoteric investments was unusual. L&C provided a list of the investments concerned and also confirmed that in 77 cases RealSIPP/CIB 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/CIB'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/CIB. 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 all investing in high risk non-standard assets

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

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

The availability of advice

L&C entered into intermediary agreements with RealSIPP and its principal, CIB. As part of this process, it was open to L&C to mention to RealSIPP any policy requirements it had for full regulated advice to be made available to applicants where introduced business involved pension transfers. L&C could have highlighted this in the intermediary application form, The Intermediary Agreement for Non-Insured Contracts, or in supplementary correspondence with RealSIPP/CIB.

However, no correspondence I've seen between L&C and RealSIPP mentioned this. And while I note L&C says that Mr C's SIPP application form confirmed *"Advice given at point of sale"*, the copy of Mr C's SIPP application that has been provided to our Service doesn't include this – it doesn't include ask any questions or record any information in relation to what advice Mr D was or was not provided with.

Further, Mr C has provided our Service with a copy of the suitability report CIB prepared for him, albeit this is dated some days after Mr C signed his L&C SIPP application form. This report makes clear that CIB had restricted its advice to whether Mr C should open a SIPP.

So, based on the available evidence, I think there was insufficient basis for L&C to reasonably assume that advice on the overall proposition had been given to Mr C at the point it received and reviewed his application. The details L&C has provided to us about the type of introductions it received from RealSIPP/CIB demonstrates that L&C was, or should have been, aware that not offering or giving advice was something RealSIPP/CIB 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/CIB 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 Mr C's application that full regulated advice had been given to him by RealSIPP/CIB.

The possibility that full regulated advice on the overall proposition had not been given was a clear and obvious potential risk of consumer detriment here. Mr C was transferring his 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

High proportion of execution-only business

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

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

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

> *"Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give*

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

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

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

Although it has not been provided in relation to this complaint, on another similar complaint that was the subject of published decision DRN3587366, I have seen copies of RealSIPP's client agreement and Key facts document, titled *"about our services for our Resort Group SIPP package".* RealSIPP's client agreement describes 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."

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

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

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

The involvement of an unregulated business

I think it's *most likely* from the available evidence that an unregulated party was involved with the promotion of the TRG investment to some consumers introduced to L&C (including

Mr C) and that this ought to have been known by L&C.

I say this because Mr C's testimony is that TRG was involved in promoting the TRG investment as an investment for his pension. And because I've seen a copy of the 2010 Promoter Agreement setting out that TRG was promoting its products, including Dunas Beach, in the UK through First Resort Property Services Limited. Neither TRG nor First Resort Property Services Limited were regulated by the FSA.

So in my view, it's unlikely Mr C made the decision to transfer to the SIPP and invest in TRG on his own initiative. Therefore, L&C ought to have been alive to the risk TRG was involved in promoting the TRG investment as an investment for Mr C's pension, and that Mr C might have been 'sold' on the idea of transferring his pension(s) so as to invest in Dunas Beach before the involvement of any regulated parties.

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

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

L&C could simply have concluded that, given the potential risks of consumer detriment – which I think were clear and obvious at the time – it should not accept applications from RealSIPP/CIB. 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/CIB</u>

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

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

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

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

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

I think it's *most likely* if L&C had asked RealSIPP/CIB for this information that RealSIPP/CIB 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/CIB was providing to different consumers it was introducing to L&C. Including a copy of the *"about our services for our Resort Group SIPP package"* document.

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

Making independent checks

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

The 2009 Thematic Review Report said that:

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

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

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

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

L&C's said it couldn't comment on advice without potentially being in breach of its permissions. Again, 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 having sight of advice letters, as this could have provided L&C with further insight into RealSIPP/CIB's business model, and helped to clarify to L&C whether full regulated advice on the overall proposition was being given. This was a fair and reasonable step to take in reaction to the clear and obvious risks of consumer detriment I've mentioned.

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

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

- RealSIPP/CIB was explaining to consumers like Mr C 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 on the overall proposition.

- RealSIPP/CIB was having business referred to it by TRG, and it was then introducing business to L&C.

- Some consumers might have been 'sold' on the idea of transferring pension monies so as to invest in Dunas Beach before the involvement of any regulated parties.

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

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

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

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

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

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

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

I therefore think L&C ought to have concluded Mr C – and applicants before him – didn't

have full regulated advice on the overall proposition made available to them by *any* route. And have viewed this as a significant point of concern. As retail consumers, like Mr C, were transferring their existing pension monies to L&C to invest entirely in higher-risk esoteric investments, including unregulated overseas property developments such as Dunas Beach without the benefit of having been offered full regulated advice, by a business which appeared to be actively avoiding any responsibility to give advice.

I also think L&C should have concluded that consumers introduced by RealSIPP/CIB who were investing in TRG were likely being 'sold' on the TRG investments by an unregulated business. As mentioned, a Promoter Agreement set out that TRG was promoting its products, including Dunas Beach, in the UK through First Resort Property Services Limited And I think, if asked, Mr C would have explained how his application came about – which, as I mention, was likely the result of the involvement of an unregulated business.

Therefore, I think L&C should have concluded – and before it received Mr C's application – that it wasn't in accordance with its obligations, or its own policy requirements, to accept introductions from RealSIPP/CIB. So, I conclude that it's fair and reasonable in the circumstances to say L&C shouldn't have accepted Mr C's application from RealSIPP/CIB.

L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr C fairly by accepting her application from RealSIPP/CIB. To my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant time, and allowed Mr C to be put at significant risk of detriment as a result.

Due diligence on the underlying investments

L&C had a duty to conduct due diligence and give thought to whether an investment itself is acceptable for inclusion into a SIPP. That's consistent with the Principles and the regulators' publications as set out earlier in this decision. It's also consistent with HMRC rules that govern what investments can be held in a SIPP.

I accept that the Dunas Beach investment doesn't appear to be fraudulent or a scam. But this doesn't mean that L&C did all the checks it needed to do. However, given what I've said about L&C's due diligence on RealSIPP/CIB and my conclusion that it failed to comply with its regulatory obligations and good industry practice at the relevant time, I don't think it's necessary for me to also consider L&C's due diligence on the Dunas Beach investment at this stage. I'm satisfied that L&C wasn't treating Mr C fairly or reasonably when it accepted his introduction from RealSIPP/CIB, so I've not gone on to consider the due diligence it may have carried out on the Dunas Beach investment and whether this was sufficient to meet its regulatory obligations. And I make no findings about this issue.

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

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

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

L&C knew that Mr C had signed forms intended to indemnify it against losses that arose

from acting on his instructions. And, in my opinion, relying on such indemnities when L&C knew, or ought to have known, Mr C's dealings with RealSIPP/CIB were putting him at significant risk wasn't the fair and reasonable thing to do. Nor was placing any reliance on the waiver form when, as I've set out, it didn't clearly show full regulated advice had been offered.
Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse to accept Mr C's application.

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

I'm satisfied that Mr C's SIPP shouldn't have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity shouldn't have arisen at all. And I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for L&C to proceed with Mr C'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/CIB and established Mr C'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 Mr C's application to open a SIPP in the first place. I'm satisfied that Mr C's SIPP shouldn't have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity shouldn't have arisen at all. And I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for L&C to proceed with Mr C's application.

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

The involvement of other parties

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

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

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

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

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

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

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

Mr C taking responsibility for his 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 Mr C's actions mean he 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 Mr C's introduction from RealSIPP/CIB. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr C wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

As I've made clear, L&C needed to carry out appropriate due diligence on RealSIPP/CIB and reach the right conclusions. I think it failed to do this. And merely having Mr C sign forms containing declarations wasn't an effective way of L&C meeting its obligations, or of escaping liability where it failed to meet 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 his dealings with it, Mr C trusted RealSIPP/CIB to act in his best interests. Mr C also then used the services of a regulated personal pension provider in L&C. So, overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair to say L&C should compensate Mr C for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr C should suffer the loss because he ultimately instructed the transactions to be effected.

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

I've considered whether, in the circumstances, Mr C would have gone ahead with the transfer and the investment if L&C had refused his 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.'*

Mr C says he was told his new pension would be government-backed and recommended, that he could cash the whole amount in once he decided to retire, that it was safe and more guaranteed than his existing pensions, that it would provide him with a good pension, and that Dunas Beach was a safe investment which would sell for far more when he retired.

I've seen no evidence that Mr C was warned it was high risk and speculative. And I'm not satisfied that Mr C 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 Mr C was paid a cash incentive. It therefore cannot be said he was incentivised to enter into the transaction. And, on balance, I'm satisfied that Mr C, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams.

L&C's contended that Mr C would likely have proceeded with the transfer and investments regardless of the actions it took. L&C's highlighted that other SIPP providers were accepting such investments at the time, and it's *most likely* the transactions would have been effected with another provider - that another SIPP operator would have accepted Mr C's application, had L&C declined it. But I don't think it's fair and reasonable to say that L&C shouldn't compensate Mr C for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr C's application from

RealSIPP/CIB.

On balance, I think it's fair and reasonable to direct L&C to pay Mr C compensation in the circumstances. While I accept that other parties might have some responsibility for initiating the course of action that's led to Mr C's loss, I consider that L&C failed to comply with its own regulatory obligations and didn't put a stop to the transactions proceeding when it had the opportunity to do so by declining to accept Mr C's business from RealSIPP/CIB.

Having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mr C's application from RealSIPP/CIB, the transactions this complaint concerns wouldn't still have gone ahead. So, overall, I do think it's fair and reasonable to direct L&C to pay Mr C 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 Mr C. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against L&C that requires it to compensate Mr C for the full measure of his loss. RealSIPP/CIB was reliant on L&C to facilitate access to Mr C's pension. L&C accepted Mr C's business from RealSIPP/CIB and, but for L&C's failings, I'm satisfied that Mr C'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 Mr C's right to fair compensation from L&C for the full amount of his loss. The key point here is that but for L&C's failings, Mr C wouldn't have suffered the loss he's suffered. As such, I'm of the opinion that it's appropriate and fair in the circumstances for L&C to compensate Mr C to the full extent of the financial losses he'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/CIB before it had received Mr C's application from it. I conclude that if L&C hadn't accepted Mr C's introduction from RealSIPP/CIB, he wouldn't have established an L&C SIPP, transferred three existing pensions 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

Mr C transferred monies from different pension schemes into the SIPP, including a GAR pension and two non-GAR defined contribution pensions.

To put things right L&C will need to undertake different types of loss calculations, one in relation to the monies that originated from Mr C's GAR pension and another in relation to monies that originated from his other non-GAR defined contribution pension schemes.

As part of doing this L&C will need to calculate the portion of Mr C's current SIPP value that's attributable to each of the respective transfers/switches and apply these to the relevant calculations.

In summary, L&C should:

- Obtain the actual transfer value of Mr C's SIPP, including any outstanding charges.
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Undertake loss calculations as set out below in respect of each of the pension schemes from which monies were transferred into the SIPP and pay any redress owing in line with the steps set out below.
- Make an allowance in the form of a notional withdrawal (deduction) equivalent to the payments Mr C received from the FSCS following the claim about CIB.
- If the SIPP needs to be kept open only because of the illiquid investment and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- If Mr C has paid any fees or charges from funds outside of his pension arrangements, L&C should also refund these to Mr C. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this to reflect Mr C having been deprived of the use of these monies. Income tax may be payable on any interest paid. If L&C deducts income tax from the interest, it should tell Mr C how much has been taken off. And L&C should also then give Mr C a tax deduction certificate in respect of interest if he asks for one.
- Pay to Mr C £500 to compensate him for the distress and inconvenience he's been caused by this matter.

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

Treatment of the illiquid assets held within the SIPP

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

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

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

current value of Mr C's SIPP. In this instance L&C may ask Mr C to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding. That undertaking should allow for the effect of any tax and charges on the amount Mr C may receive from the investment and any eventual sums he would be able to access from the SIPP. L&C will have to meet the cost of drawing up any such undertaking.

Calculate the loss Mr C has suffered as a result of making the transfer in relation to monies originating from his GAR pension

L&C should calculate the loss Mr C has suffered as a result of making the transfer in relation to monies originating from the GAR policy. L&C must undertake a redress calculation based on the normal retirement age (NRA) for the GAR pension. If Mr C is now over this age, then L&C must calculate past loss as well as future loss as follows:

For Mr C's past loss (GAR)

1. L&C should contact the provider of the GAR pension and ask it to provide a notional value for the pension as at the NRA. For the purposes of the notional calculation the provider should be told to assume no monies would have been transferred away from the pension, and the monies in the pension would have remained invested in an identical manner to that which existed prior to the actual transfer.

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

   This sum (notional valuation from either the provider or the benchmark above) should then be used, for the purposes of the steps below, as the overall GAR pension fund value when calculating the tax-free cash and income that would have been available to Mr C had he taken benefits and exercised the GAR at the NRA.

2. Establish the annuity Mr C could have secured from his GAR pension had he exercised the GAR and purchased an annuity upon reaching the schemes NRA, having first taken the maximum available tax-free cash sum. In terms of the annuity, I think it's fair and reasonable to conclude that Mr C would have opted to take the highest available monthly in arrears with no guaranteed term and on a single life basis. Calculate the total accumulated net annuity and tax-free cash payments Mr C would have received from this pension from his reaching the NRA to the date of my final decision.

3. Work out how much of the total tax-free cash and net income (if any) that Mr C has received from the L&C SIPP which relates to monies transferred in from the GAR pension. For example, if the GAR pension transfer value represented 20% of the SIPP value, L&C should assume that 20% of the tax-free cash and any income Mr C had received from the SIPP to the date of my final decision related to the GAR pension transfer value.

4. If the accumulated notional net annuity and tax-free cash payments provided for in step 2 are greater than the total accumulated actual net income and tax-free cash payments provided for in step 3 then L&C must pay the difference directly to Mr C plus interest as a lump sum.

5. To calculate the interest, L&C must calculate the earliest point in time when the accumulated payments provided for in step 2 would have become greater than the total accumulated payments provided for in step 3. L&C must then add interest at 8% simple to any further payments in step 2 that Mr C would have received from that point in time through until the date of the final decision. Interest should be added from the date each of the further payments would have been paid to Mr C through until the date of the final decision.

   Income tax may be payable on any interest paid. If L&C deducts income tax from the interest, it should tell Mr C how much has been taken off. And L&C should also then give Mr C a tax deduction certificate in respect of interest if Mr C asks for one.

For Mr C's future loss (GAR)

1. L&C must ascertain if there is a future loss by way of ascertaining the capital cost of purchasing an annuity equivalent to the one that Mr C would have secured from the GAR pension. And this then needs to be compared to the actual value of that portion of Mr C's actual current L&C SIPP transfer value that's attributable to monies transferred in from the GAR pension. If the former is greater than the latter, there is a future loss.

2. If there's a future loss L&C should pay this future loss sum into Mr C's SIPP. The payment should allow for the effect of charges and any available tax relief.

   Compensation shouldn't be paid into the SIPP if it would conflict with any existing protection or allowance.

   If a payment into the pension plan isn't possible or has protection or allowance implications, it should be paid directly to Mr C as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. It's reasonable to assume that Mr C is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%.

3. For the purpose of ascertaining the capital cost of purchasing an annuity equivalent to the one Mr C would have secured from the GAR pension, L&C may ask Mr C to participate in obtaining an enhanced annuity quotation. But mindful of the disruption to Mr C, L&C shouldn't ask him to assist with more than one enhanced annuity quotation.

Calculate the loss Mr C has suffered as a result of making the transfer in relation to monies originating from Mr C's other non-GAR pension plans that were transferred into the SIPP

To do this L&C must:

1. Calculate the current notional values, as at the date of my final decision, of the non-GAR monies that were transferred into the L&C SIPP if they hadn't been transferred into this.

2. Calculate the portion of Mr C's actual current SIPP value as at the date of my final decision, less any outstanding charges, that's attributable to monies transferred in from Mr C's previous non-GAR pensions.

3. Deduct the sum arrived at in step 2 from the total accumulated sum arrived at in step 1.

4. Pay an amount into a pension arrangement for Mr C, so that the transfer value of that pension arrangement is increased by an amount equal to the loss calculated in step 3. This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

I've set out more detail for parts of this calculation below.

1. *Calculate the current notional values, as at the date of my final decision, of the non-GAR monies that were transferred into the L&C SIPP if they hadn't been transferred into this.*

   L&C should calculate what the monies transferred into the L&C SIPP would now be worth had they instead achieved a return equivalent to the FTSE UK Private Investors Income Total Return Index from the date they were first transferred into the L&C SIPP through until the date of my final decision.

   I'm satisfied that's a reasonable proxy for the type of return that could have been achieved over the period in question.

   L&C must also make a notional allowance in this calculation for any additional sums Mr C has contributed to, or withdrawn from, his L&C SIPP since outset. To be clear this doesn't include SIPP charges or fees paid to third parties like an adviser. But it does include any pension commencement lump sums or pension income Mr C actually took after his pension monies were transferred to L&C.

   Any notional contributions or notional withdrawals to be allowed for in the calculation should be deemed to have occurred on the date on which monies were actually credited to, or withdrawn from, the L&C SIPP by Mr C.

2. *Calculate the portion of Mr C's actual current SIPP value as at the date of my final decision, less any outstanding charges, that's attributable to monies transferred in from Mr C's previous non-GAR pensions.*

   This should be the current value of these monies as at the date of this decision.

3. *Deduct the sum arrived at in step 2) from the total accumulated sum arrived at in step 1).*

   The total sum calculated in step 1) minus the sum arrived at in step 2), is the loss to Mr C's pension.

4. *Pay an amount into a pension arrangement for Mr C, so that the transfer value of that pension arrangement is increased by an amount equal to the loss calculated in step 3. This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.*

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

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr C as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. And neither party has disputed this assumption. So, making a notional deduction of 15% overall from the loss adequately reflects this.

Make an allowance in the form of a notional withdrawal (deduction) equivalent to the payments Mr C received from the FSCS following the claim about CIB

I acknowledge that Mr C has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr C's reassignment of rights require him to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required. So, I think it's fair and reasonable to make no permanent deduction in the redress calculation for the compensation Mr C received from the FSCS. And it will be for Mr C to make the arrangements to make any repayments he needs to make to the FSCS. However, I do think it's fair and reasonable to allow for a temporary notional deduction equivalent to the payment(s) Mr C actually received from the FSCS for a period of the calculation, so that the payment(s) ceases to accrue any return in the calculation during that period.

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

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

SIPP fees

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

Distress & inconvenience

I think the impact of L&C's failings and the loss of a significant portion of his pension provision caused Mr C distress. I think it is fair and reasonable that L&C should pay Mr C £500 to compensate him for this.

My final decision

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

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

Determination and Award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that London & Colonial Services Limited should pay the amount produced by that calculation up to the maximum of £160,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that London & Colonial Services Limited pays Mr C the balance plus any interest on the balance as set out above.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 15 November 2024.

Ailsa Wiltshire
Ombudsman