DRN-5179205

The complaint

Mr G complains that London & Colonial Services Limited ('L&C') didn't undertake sufficient due diligence on the Carbon Credits investment he made through his L&C Self-Invested Personal Pension ('SIPP') and should not have permitted the investment to be held. Mr G says he's suffered a loss to his pension provision as a result.

L&C recently changed its name to Pathlines Pensions UK Limited but for ease of reference I'll simply be referring to L&C throughout.

In bringing this complaint, Mr G is represented by a professional third party, but also for ease I shall refer to Mr G throughout.

What happened

The entities involved

Given the various parties involved in Mr G's pension transfer and planned investment, I've set out a summary of each below.

L&C

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

Sorensen Financial Services ('Sorensen')

Sorensen was an advisory firm regulated by the FSA and later FCA, and was authorised to give investment advice and pension transfer advice. In September 2017, Sorensen went into liquidation.

Henderson Carter Associates Limited ('Henderson')

At the time of the events in this complaint, Henderson was an advisory firm authorised and regulated by the then regulator, the FSA, later the FCA. In February 2017, Henderson went into liquidation. In December 2018, the FCA started disciplinary action against the firm and its director which resulted in the prohibition of their carrying out any further regulated activities and fines for both the company and its director.

Viceroy Jones Ltd ("Viceroy Jones")

Viceroy Jones wasn't authorised by the financial services regulator. Viceroy Jones promoted the sale of Carbon Credits. It's my understanding Mr T's SIPP purchased Carbon Credits units in a hydro power project based in India that had been marketed by Viceroy Jones.

As I understand it, Viceroy Jones received a winding up order from the High Court in

January 2017 following a petition that had been lodged by the Insolvency Service on the grounds of public interest arising from its role in selling Carbon Credits.

A Carbon Credit is a generic term for any tradable certificate or permit representing the right to emit one tonne of carbon dioxide or the mass of another greenhouse gas equivalent to one tonne of carbon dioxide.

Buyers and sellers can use an exchange platform to trade, like a stock exchange for carbon credits. The quality of the credits is based in part on the validation process and sophistication of the fund or development company that acted as the sponsor to the carbon project.

What happened here

Mr G has said that in early 2012, he was cold called by a representative of Henderson offering him the opportunity to withdraw a tax-free lump sum from his pension. The representative recommended that Mr G transfer his existing defined benefit pension to L&C in order to facilitate an investment into Carbon Credits.

Mr G has explained that, prior to receiving this call, he had no intention of moving his pension. But he remembers struggling financially at that time, and so the opportunity to access money from his pension seemed like a 'viable option'.

He's said the representative appeared very trustworthy and professional and he had no reason to doubt that the advice he was receiving would be in his best interests. He says he was told the investment would be safe and that it would generate guaranteed returns for his pension and so Mr G agreed to the transfer. Mr G has said that he received approximately £3,000 as an upfront payment in the form of a loan which *"was to be paid back upon accrual of returns from the pension".*

An application to open an L&C SIPP was submitted to L&C in April 2012, having been signed by Mr G on 5 April 2012. The application said that advice had been given at the point of sale and recorded the details of an independent financial adviser (IFA) – Sorensen. It stated the renumeration to be paid to the adviser as 3% initial and 1% ongoing. It also stated that around £32,000 would be transferred from Mr G's defined benefit pension but no initial post-transfer investments are recorded on the application form, despite the intention being to invest in carbon credits.

L&C provided a copy of a suitability report – requested by Henderson and produced by Sorensen - regarding *"the benefits held under [Mr G's] existing defined benefit pension scheme, and the effect of transferring this to a personal arrangement". This* was issued on 3 April 2012 and signed by Mr G on 5 April 2012.

It summarises Mr G's objectives as *"You have discussed with [Henderson] your existing pension provision and the fact you would like to use part of these to invest in Carbon Credits, as you anticipate that these will provide decent returns in the future. You currently have a deferred Defined Benefit pension with [another provider] …. and would like to consider using part of this fund for investment into Carbon Credits."*

It goes on to compare the benefits of Mr G's defined pension arrangements with a SIPP but ultimately makes no substantial recommendation, saying that *"the existing scheme and the potential returns from a personal pension, both offer things that the other does not. Therefor it is difficult for a third party to recommend the most suitable option".*

The report recommends against transferring if Mr G's objectives are a guaranteed lump sum and income, highlighting the fact that the critical yield wouldn't be achievable *"on a regular basis by investments that match [Mr G's] risk profile".* But at the same time, it also says: "*If you are happy to give up guaranteed benefits of the [defined benefit scheme] in favour of the flexibility of a personal pension and you are still intent on investing into Carbon Credits, then I recommend transferring to a Self-Invested Personal Pension (SIPP) with [L&C]."*

It goes on to note that L&C have been recommended as the chosen SIPP administrator *"as they have a flexible approach and* ***will generally allow any investment that is allowable within a pension wrapper under pension legislation.*****"** [my emphasis]

It goes on to highlight some risks specific to Carbon Credits such as:

- *"It may be difficult to obtain true market prices for Voluntary Emissions Reductions Carbon Credits (VER) as many are transacted "over the counter" and as such values may vary from reseller to reseller.*
- *Currently VER's are illiquid in comparison to the compliance EUA credit market.*
- *There may be a big difference between the buying and selling of Carbon Credits.*
- *Trading in Carbon Credits involves risk. You may get back less than your total outlay and in extreme cases make no recovery.*
- *Carbon Credits are not regulated investments under Financial Services Authority (FSA) and so there is no recourse for compensation under the Financial Services Compensation Scheme."*

Mr G's application was accepted by L&C, and his SIPP was established in April 2012.

On 16 May 2012, the transfer of monies from his previous pension, worth approximately £32,000, was then completed.

On 22 May 2012, L&C received a letter of authority requesting for Henderson to be appointed as servicing agents for Mr G's SIPP instead of Sorensen.

Mr G signed an 'Investment Purchase Request' form for the Carbon Credits investment on 28 May 2012, instructing L&C to purchase Carbon Credits for a consideration of £24,999. The document contained a declaration which said amongst other things:

- *"The investment may be high risk and there may not be an established market for selling the proposed holding meaning that it may be difficult to sell at a later date*
- *[L&C] does not guarantee that this investment is acceptable to HMRC or that an HMRC tax charge will not apply*
- *Unregulated investments may not be protected by FSCS and compensation may not be payable in the event of loss caused by a default or failure or fraud of any person or company associated with the investment*
- *I indemnify [L&C] against any and all liability arising from this investment*
- *The responsibility of assessing the merits of this investment and the risks associated with it and the responsibility for the decision to make this investment and for monitoring its performance rests solely with me and with any investment adviser that I have appointed"*

On 25 May 2012, a contract note was issued which confirmed Mr G's SIPP bought 3,846 units from ISP for the total amount of £24,999. The note also confirmed the unit price as £6.50.

On 5 May 2015, L&C wrote to Mr G and enclosed a valuation which gave the value of Mr G's Carbon Credit investment as nil in May 2015. It said, amongst other things, in the letter that L&C had valued the Carbon Credits investment as £0. It was explained that this represented a value that L&C considered it appropriate to attribute to the asset bearing in mind that there was no readily available market on which the asset was traded and no immediate means of determining a sale value.

On 17 May 2016, L&C wrote to Mr G and enclosed a valuation which again gave the value of his Carbon credit investments as nil in May 2016. It was again explained, amongst other things, in the letter that L&C had valued the Carbon Credits investment as £0. And that this represented a value that L&C considered it appropriate to attribute to the asset, bearing in mind that there was no readily available market on which the asset was traded and no immediate means of determining a sale value.

On 17 August 2016, L&C wrote to Mr G and explained that his investment in Carbon Credits had encountered serious trading difficulties. Further, that in the absence of any recognised market there appeared to be no reference from which to establish a value, or any market or means to achieve a sale. The letter went on to say:

> *"For this reason the investment in Carbon Credits has to be regarded for the purposes of your SIPP as having no current value and there appear to be no realistic prospects for a sale in the foreseeable future.*
>
> *With this in mind we feel it would be appropriate to write off the asset which means your SIPP will no longer incur additional charges for holding the asset. However, we are able to transfer the ownership of the asset to you for your benefit in case any value should eventually materialise.*
>
> *The SIPP arrangement itself will still exist and as long as it continues to do so we are required by HMRC and also the regulator (the Financial Contract (sic) Authority) to continue to carry out certain administration work including making regular returns to them. Consequently our normal annual fees for this work continue to apply…"*

I've not seen any response from Mr G until 28 December 2017, following the receipt of the June 2017 valuation of his SIPP. He emailed L&C to note that his pension was showing *"zero returns"* and that it was *"being eaten up by annual fees".* He queried his options as to how he could either stop the fees or close the pension.

L&C replied in February 2018 to explain that *"HMRC rules do not allow us to close a SIPP when it holds an asset (Cash in your case) and the member is under the age of 55, the only option would be to find an alternative pension provider to transfer the cash to…"*

In April 2018, Mr G got in touch with his current representative and made two successful claims with the Financial Services Compensation Scheme (FSCS) against both adviser firms – by then both firms had gone into liquidation. His claim against Henderson paid him £24,999 and his claim against Sorensen paid him the maximum sum of £50,000. However, the FSCS had calculated that his overall loss from the lost DB pension value and the failed investment totalled over £110,000.

And so, on 12 December 2018, Mr G complained to L&C via his representative. In summary, he said that L&C had, in accepting his SIPP application and subsequently facilitating the transfer of his defined benefit scheme, failed to provide him with a duty of care and didn't treat him fairly. The complaint went on to say:

- L&C failed to identify that the investments proposed to be made in Mr G's SIPP were unsuitable for him.
- L&C failed to conduct adequate due diligence on the Carbon Credits investment. Had it done so, it would have identified that the investment was unregulated by any UK financial authorities, that it was high risk and speculative and that it had no realistic open market value.
- As such the investment was wholly inappropriate and unsuitable for a retail client such as Mr G was at the time of the transaction.
- The investment has failed and has no value and Mr G has lost the entirety of his pension.
- L&C breached its duties owed to its client under the rules and regulations set out by the FSA/FCA.
- Had it acted in accordance with its duties, it should never have allowed the transfer to take place in which case Mr G would never have followed through with the subsequent investment.
- L&C should redress his loss so that he was in as close a position as possible to that which he would have been in but for L&C's errors.

L&C issued its responses in February and March 2020 and, amongst other things, said that:

- Mr G's adviser had sent it an investment application form that Mr G completed, this included a signed declaration confirming that he had read, and agreed to, the risks of investing.
- It provides execution-only SIPP administration services and it has complied with its regulatory and contractual obligations.
- It complied with its requirement under the Conduct of Business Sourcebook ('COBS') Rules, specifically COBS 11.2.19R, to execute Mr G's instructions.
- It isn't permitted to provide advice or comment on the suitability of establishing a SIPP, transferring pensions, or the investments made with SIPP monies.
- It isn't permitted to comment on the suitability of a customer's choice of introducer.
- Mr G was guided by L&C to obtain regulated financial advice, if he was unsure of any of the documentation, or information he received.
- Mr G chose to take advice from Sorensen, a regulated firm at the time of Mr G's application and so his complaint should be directed to Sorensen accordingly.
- Mr G chose to invest in Carbon Credits based on the advice he received from Sorensen and it was Sorensen who should have completed sufficient due diligence on the investment to ensure it was suitable for Mr G's circumstances.

L&C concluded that it had provided Mr G with *"the courtesy of a full response*", however it thought his complaint had been made late under the applicable DISP rules as it was brought more than six years after the events complained about, and more than three years from when he was, or reasonably should have been, aware of a cause for complaint. It says this is because in May 2015 he was sent a valuation showing his Carbon Credit investment had been valued at £nil value, so from this point he would have been aware he'd suffered a loss.

Mr G did not agree with L&C's rejection of his complaint, so he referred his complaint to the Financial Ombudsman Service where it was looked at by our investigator.

After considering the information provided by each side, the investigator thought Mr G's complaint wasn't made late and that it should be upheld.

As no agreement could be reached, the matter was passed to me for decision.

My provisional decision

I've recently issued a provisional decision on this complaint. Mr G has told us that he accepts my findings. L&C didn't accept the provisional decision and made further submissions. It sent a 39-page response in which it reiterated its reasons for why it thought the complaint should be rejected, despite my having already responded to most, if not all, those points in detail in my provisional decision.

Whilst I appreciate that considerable time must have been spent composing L&C's response, it's concerning that it doesn't appear to take into account the contents of my provisional decision, where I detailed my reply to many of the same points that had been raised on previous occasions. It also contains quite a number of factual inaccuracies, a lot of which appear to have arisen as a result of the response having been 'cut and pasted' from L&C's replies to other complaints. I've set out a few examples below:

- Throughout the response, L&C refers to me with a number of titles. At times it refers to me correctly as the Ombudsman but also refers to me as the Adjudicator and Investigator on many occasions (and many times within the same paragraph).

- L&C believes Mr G has been fully compensated as he made successful claims with the FSCS. Mr G made two separate FSCS claims and was awarded approximately £75,000 compensation. However, according to the FSCS calculations, Mr G's loss was approximately £110,000 and so he has not been fully compensated. I note that this had already been covered in the background to my provisional decision.

- L&C believes the complaint should be 'time-barred'. It says that "*there have been a large number of complaints relating to Carbon Credit investments, all made within similar time-frames and have had near identical histories, where the [Financial Ombudsman Service] has ruled the cases have been time-barred, for example* [case reference provided]. *It is unreasonable for the Ombudsman to find a different ruling against one case, where the series of events and fact patterns that led to the consumer's complaint are near identical".*
  The example case it provided was made against another business (although I note this business was part of the same corporate group as L&C) and was upheld in full by one of my Ombudsman colleagues, not time barred. No time limit arguments were raised and the respondent business never issued a response to my colleague's provisional decision on that complaint.

- L&C states it has previously requested an oral hearing and that I (although it refers to me as the Adjudicator) had rejected it. I note that there is nothing on file to suggest L&C has requested an oral hearing and so my provisional decision didn't cover that request. I can only assume L&C has quoted this from another complaint in error. Please note that I have now responded to the request below.

- L&C notes Mr G's SIPP closed in August 2016. From the available evidence, I understand the SIPP remains open (although illiquid). I have seen statements from 2018 as well as a transaction history which shows an active cash balance and yearly annual administration fees up until July 2020.

- L&C has made reference to its member declaration including a series of warnings referring to Carbon Credits and its risks. I've not seen evidence of this declaration within any of L&C's submissions. The signed declaration it did provide includes none of the Carbon Credit specific warnings it refers to in its 39-page response (although I

have seen similar member declarations in other complaints against another business which is part of the same corporate group as L&C). I further note that L&C refers to a member declaration which was signed on 8 August 2012. Mr G opened his SIPP in April 2012 and the investment was made in May/June 2012. I can only assume L&C has used details here from another complaint in error.

L&C's response is disappointing, as I think my examples highlight. These SIPP due diligence complaints take a significant amount of time for our ombudsmen to work, and, as L&C will be very aware, we have a good number of customers waiting for an answer. I would therefore request that L&C please take an appropriate level of care when considering our ombudsmen's provisional decisions and responding to them, so that we can endeavour to provide responses to customers' complaints as efficiently as possible.

I would also like to remind L&C that the FCA's handbook provides in DISP 1.3 (Complaints handling rules) and DISP 1.4 (Complaints resolution rules), that respondent firms are required to "*resolve complaints at the earliest possible opportunity"* (DISP 1.4.3G) and in doing so they should *"ensure that lessons learned as a result of determinations by the Ombudsman are effectively applied in future complaint handling"* (DISP 1.3.2A). So, it's important for firms to consider whether complaints should be settled early and indeed that published Final Decisions be avoided.

The ombudsmen handling these complaints are continually having to repeat themselves in decisions and it would be very helpful if L&C were please to consider carefully, and take into account, the responses to arguments that have been made previously by my ombudsmen colleagues when deciding how to reply to any future provisional decisions that may be needed. Indeed, I would hope that ombudsmen's decisions could be avoided in cases where very similar factual profiles arise.

Having carefully considered the points L&C has made in its response to my provisional decision, I haven't been persuaded to depart from my provisional findings. So, I've repeated those findings below, with a few minor changes, to reflect my final decision.

What I've decided – and why

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

I've considered all of the arguments made by the parties. But I haven't responded specifically to them all below; I have concentrated on what I consider to be the main issues in order that I may determine this complaint.

In considering what's fair and reasonable in all the circumstances of this complaint, I need to take account of relevant 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.

Having considered everything carefully, I've come to a similar conclusion to our investigator, but for different reasons. I've decided that this complaint hasn't been made late and that it should be upheld. I'll explain why below.

L&C's request for an oral hearing

L&C says an oral hearing is necessary to explore issues such as *when Mr G had, or ought reasonably to have had, knowledge that he had cause to complain.*

The Financial Ombudsman Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (s.225 FSMA). DISP 3.5.5R of the Financial Conduct Authority's ("FCA") Dispute Resolution rules provides the following:

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

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

The key question for me to consider when deciding whether a hearing should be held is whether or not "*the complaint, and whether or not it falls within our jurisdiction, can be fairly determined without convening a hearing*".

We do not operate in the same way as the Courts. Unlike a Court, we have the power to carry out our own investigation. And the rules (DISP 3.5.8R) mean I, as the ombudsman determining this complaint, am able to decide the issues on which evidence is required and how that evidence should be presented. I am not restricted to oral cross-examination to further explore or test points.

If I decide particular information is required to decide a complaint fairly, in most circumstances we are able to request this information from either party to the complaint, or even from a third party.

I have considered the submissions L&C has made. However, I am satisfied that I am able to fairly determine this complaint without convening a hearing. In this case, I am satisfied I have sufficient information to determine both the jurisdiction and merits aspects of Mr G's complaint. So, I do not consider a hearing is required. The key question when considering our jurisdiction is whether Mr G knew, or should reasonably have known, that he had cause for complaint against L&C and when that was. And we have been able to test this to the extent we thought necessary by asking questions of Mr G in writing and considering the evidence available to us. The key question when considering the merits of the complaint is whether L&C should have accepted Mr G's application at all. Mr G's understanding of matters are secondary to this.

In any event – and I make this point only for completeness – even if I were to invite the parties to participate in a hearing, that would not be an opportunity for L&C to cross-examine Mr G as a witness. Our hearings do not follow the same format as a Court. We are inquisitorial in nature and not adversarial. And the purpose of any hearing would be solely for the ombudsman to obtain further information from the parties that they require in order to fairly determine the complaint. The parties would not usually be allowed direct questioning or cross-examination of the other party to the complaint.

As I am satisfied it is not necessary for me to hold an oral hearing, I will now turn to considering whether Mr G's complaint falls within our jurisdiction.

<u>Our Jurisdiction</u>

I've considered all the available evidence and arguments to decide whether Mr G's complaint is within the jurisdiction of the Financial Ombudsman Service.

Before we can consider something, we need to check, by reference to the Financial Conduct Authority's (FCA) DISP Rules and the legislation from which those rules are derived, whether the complaint is one we have the power to look at and whether it's a complaint we should consider.

DISP Rule 2.8.2 R includes rules about general time limits. It 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 to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;*
>
> *unless:*
>
> > *(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R … was as a result of exceptional circumstances; or…*
> >
> > *(5) the respondent has consented to the Ombudsman considering the complaint where the time limits … have expired …"*

Mr G's complaint relates to events in April and May 2012 when his L&C SIPP was opened and his investment was made in Carbon Credits. Mr G first made a complaint to L&C in December 2018, and so he complained over six years from the events in April and May 2012.

I must therefore consider if Mr G complained within three years of the date on which he became aware (or ought reasonably to have become aware) that he had cause for complaint. Specifically, cause to make this complaint about L&C.

The term '*complaint*' is defined for the purposes of the DISP section in the FCA handbook Glossary 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."*

Accordingly, the material points required for Mr G to have awareness of his cause for complaint about L&C include:

- Awareness of a problem
- Awareness that the problem has or may cause him material loss; and
- Awareness that the problem was or may have been caused by an act or omission of L&C

L&C contends that the May 2015 letter ought to have made Mr G aware of his cause to complain to L&C, as Mr G was *"put on notice for raising concern and he had the opportunity to make a complaint at this stage".*

Mr G has told us that he engaged his representatives' services in April 2018 to conduct a review of his pension arrangements. It was then that he was informed he may have grounds to make a complaint against L&C. Up to that point, he says he was unaware of the duty of care L&C owed him and of the due diligence that should have been conducted before it proceeded with his transfer.

Having reviewed all available evidence, I think it reasonable to conclude that the May 2015 letter ought to have caused Mr G considerable worry, considering his investment had dropped so significantly and was now being valued at nil.

However, I'm not satisfied that Mr G ought to have reasonably been aware he may have cause to complain to L&C when he received that letter in May 2015.

I say this because I've not seen anything that would indicate to Mr G that L&C may be responsible for the loss and that he could complain to L&C about this. He's far more likely to have equated the issue with the advice he received from his financial advisers to invest in Carbon Credits, Sorensen and Henderson, rather than with L&C.

At the time, I consider that consumers and normal retail investors, such as Mr G, generally didn't have a good understanding of the rules and guidance which applied to SIPP providers, or the responsibilities SIPP providers have towards their clients.

By 2016, the regulator had published reports on the results of two thematic reviews on SIPP operators in 2009 and 2012, issued guidance for SIPP operators in 2013 and written to the CEOs of SIPP operators in 2014. A common theme of those communications was that the regulator considered that a SIPP operator had obligations in relation to its customers even where it did not give advice, and that many SIPP operators had a poor understanding of those obligations.

So I don't consider that either Mr G, or reasonable retail investors in his position, should have had an understanding of the obligations SIPP providers were under in 2015 when Mr G received the above communication. And it wouldn't have been easy for them to find out about it if they were to have conducted any research. Particularly because many in the industry disputed that there was such an obligation.

It was only when the judgment for the unsuccessful judicial review challenge in the case of R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service [2018] EWHC 287 (BBSAL) was published in late 2018, that there was increased publicity around SIPP providers' duties. It was then where it became clearer that a SIPP provider could be responsible for the losses a consumer suffered in some circumstances.

And it was around this time that Mr G contacted his representative and made his complaint to L&C. So, I'm satisfied Mr G made his complaint within three years of when he became – or ought reasonably to have become – aware he had cause to complain to Options.

It's therefore my jurisdiction decision that the complaint has been made in time and I will now turn to its merits.

Merits of the complaint

As I said above, I'm required to determine this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable, I am required to take into account: relevant 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.

With that in mind I'll start by setting out what I have identified as the relevant considerations to deciding what is fair and reasonable in this case.

Relevant considerations

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

"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.

Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

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

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

I acknowledge that COBS 2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client)* overlaps with certain of the Principles, and that this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ("the COBS claim"). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

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

I note that in the High Court judgment 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."*

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

And in Mr G's complaint, amongst other things, I'm considering whether L&C ought to have identified that the Carbon Credit investment involved a significant risk of consumer detriment and, if so, whether it ought to have declined to accept applications to invest in Carbon Credits *before* it accepted Mr G's application.

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

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

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

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

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

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

Overall, I'm still 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 G's case.

The regulatory publications

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

- The 2009 and 2012 Thematic Review reports.
- The October 2013 Finalised SIPP Operator Guidance.
- The July 2014 "*Dear CEO*" letter.

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

The 2009 Thematic Review Report

The 2009 report included the following statement:

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

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

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

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

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*
- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*
- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*
- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*
- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*
- *Identifying instances of clients waiving their cancellation rights, and the reasons for this".*

The later publications

In the October 2013 Finalised SIPP Operator Guidance, the FCA stated:

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

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

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

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for unauthorised business warnings.*
- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they*

recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.
- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers.

Examples of good practice we have identified include:

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

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

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

At its introduction, the 2009 Thematic Review Report says:

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

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

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

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 appreciate that some of the publications I've listed above were published after Mr G's SIPP application and investment in Carbon Credits. But like the Ombudsman in the *BBSAL* case, I do not think the fact that the later publications (i.e. those other than the 2009 Thematic Review Report), post-date the events that took place in relation to Mr G's complaint, mean that the examples of good practice they provide were not good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

It is also clear from the text of the 2009 and 2012 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 is clear the standards themselves had not changed.

I note that the judge in *Adams* didn't consider the 2012 Thematic Review report, the 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 to amount to good industry practice at the relevant time.

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

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

I'd also add that, even if I accepted 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 G's SIPP and investment applications.

It's important to keep in mind the judge in *Adams v Options* didn't consider the regulatory publications in the context of considering what's fair and reasonable in all the circumstances,

bearing in mind various matters including the Principles (as part of the Regulator's rules) or good industry practice.

In determining this complaint, I need to consider whether, in accepting Mr G's application to establish a SIPP and accepting his instruction to invest in Carbon Credit, 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.

And, taking account of the factual context of this case, it remains 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 checks on the introducers and the business they were introducing and the Carbon Credit investment before deciding to accept Mr G's applications.

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

And the questions I need to consider include whether L&C ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by Sorensen and/or investing in Carbon Credits were being put at significant risk of detriment. And, if so, whether L&C should therefore not have accepted Mr G' application for the L&C SIPP and/or Carbon Credit investments.

The contract between L&C and Mr G

L&C has said that it provides execution only (i.e. non-advised) SIPP administration services. It said this was clearly set out to Mr G in its product documentation. To be clear, I don't say L&C should (or could) have given advice to Mr G or otherwise have ensured the suitability of the investment for him. I accept that L&C made it clear to Mr G 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 the forms signed by Mr G confirmed, amongst other things, that losses arising as a result of L&C acting on his instructions were his responsibility.

So, 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 G's case is made with all of this in mind. I've proceeded on the understanding that L&C wasn't obliged – and wasn't able – to give advice to Mr G on the suitability of the investment in Carbon Credits that he made.

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 remain 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. To be clear, I don't agree that it couldn't

have rejected introductions or applications without contravening its regulatory permissions by giving investment advice.

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 G) 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.

So, and well before the time of Mr G'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 the introducers to ensure the quality of the business they were introducing. And I think L&C also ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments, like the Carbon Credits holding, before accepting them into a SIPP.

I'm satisfied that, to meet its regulatory obligations when conducting its business, L&C was required to consider whether to accept or reject a particular investment, with the Principles in mind.

To be clear, it's my view that L&C was obliged to carry out due diligence on the Carbon Credits investment – due diligence that went further than simply checking that the investment was 'SIPP-able' under HMRC rules. I say that after taking into account the regulatory publications I've referenced earlier in this decision, amongst other matters, in considering whether L&C acted fairly and reasonably in this case.

And I think that it's fair and reasonable to expect L&C to have looked carefully at the Carbon Credits investment it was allowing Mr G's pension fund to be invested in. To be clear, for L&C to accept the Carbon Credits investment without carrying out a level of due diligence that was consistent with its regulatory obligations, while asking its customer to accept warnings absolving it of the consequences, wouldn't in my view be fair and reasonable or sufficient. And if L&C didn't look at an investment in detail, and if such a detailed look would have revealed that the investment might not be secure, might be fraudulent, or might not exist, it wouldn't in my view be fair or reasonable to say L&C had exercised due skill, care and diligence – or treated its customer fairly – by accepting such an investment.

<u>The due diligence carried out by L&C on the Carbon Credits investment – and what it should have concluded</u>

L&C didn't provide us with evidence of the checks it completed on the Carbon Credits in this case, but I've taken into account what it has said about its due diligence on other similar complaints.

L&C has said that it checked the Carbon Credits investment was permitted to be held in the SIPP before accepting it to be held in its SIPPs. But it's not told us that it did anything else.

Overall, I'm not satisfied that L&C undertook sufficient due diligence on the Carbon Credits investment before it decided to accept it into its SIPPs. So, my current view is that L&C didn't meet its regulatory obligations and didn't act fairly and reasonably in its dealings with Mr G

by not performing sufficient due diligence on the Carbon Credit investment before deciding to accept it into its SIPPs and before accepting Mr G's application to invest in Carbon Credits.

What should L&C have done?

Taking everything into account, I'm satisfied that L&C should – as a minimum – have:

- Identified the Carbon Credits investment as a high-risk, speculative and non-standard investment and carried out due diligence on it.
- Correctly established and understood the nature of the investment.
- Considered whether the investment was an appropriate investment to make available via its SIPPs.
- Made sure the investment was genuine and not a scam, or linked to fraudulent activity.
- Made sure the investment worked as claimed.
- Ensured that the investment could be independently valued, both at the point of purchase and subsequently.

In 2011, i.e. before Mr G made his investment, the FSA (the then regulator) issued a consumer warning about the risks of investing in carbon credit schemes. Although it stressed not all Carbon Credit schemes are scams, it added "*experience and skill*" was needed when trading on over-the-counter markets. It said:

> *"Beware that VERs certificates are often labelled as 'certified', but this certification is voluntary involving a wide range of bodies and different quality standards that are not recognised by any UK financial compensation scheme…"*
>
> *"…Just because the salesperson mentions the Kyoto Protocol or 'government-backed' plans does not tell you anything about the type of carbon credit you are investing in."*

These investments were unlikely to be suitable for the majority of retail investors. And they were only generally likely to be suitable for a small element of the investment portfolio of a sophisticated investor.

A key issue with Carbon Credits is there is no price transparency – there is no independent source regarding the price being set, and nothing to confirm at what price the credits were acquired. So, there was no way to establish how the price was being arrived at. As such, there could've been a very significant difference between the price the units were acquired at and the price these could be sold for. This is something L&C could, and should, have investigated.

There also doesn't appear to be any measure of the quality of the credits in question. In other words, were the units or credits being 'generated' valid?

It doesn't appear that L&C obtained any information about the business selling the credits or the type of carbon credit Mr G was investing in. The contract note gave the project name as 'V Hydro Power' but no further details about this project were provided.

I haven't seen any independent verification that the units met the Verified Carbon Standard ('VCS') standard. So, at the time, there was a risk this validation wouldn't be achieved. I also haven't seen evidence of a registration of the project with the United Nations Framework

Convention on Climate Change ('UNFCCC'). The lack of that registration could suggest that the relevant standard hadn't been met.

I also haven't seen that it was demonstrated that there was any ready market for Carbon Credit units. It wasn't demonstrated how investors would find businesses to buy any allocation of Carbon Credit units.

L&C may consider that carrying out the kind of assessment that would be required to establish and interrogate such factors as I've discussed and carry out appropriate due diligence, imposes on it requirements over and above its responsibilities as a SIPP provider. But I'm satisfied these are the kind of things L&C needed to do before accepting Carbon Credit investments into its SIPPs and before accepting Mr G's proposed investment to meet its regulatory obligations and good practice. And I don't think that this amounts to a conclusion that L&C should've assessed the suitability of the Carbon Credits investment for Mr G's individual circumstances.

So, on the basis of the available evidence, I find that L&C didn't undertake sufficient due diligence into the Carbon Credit investments before it accepted it into its SIPPs, and before accepting Mr G's application to invest in Carbon Credits, and I find its failure to do so was unfair to Mr G.

<u>If L&C had completed sufficient due diligence on the Carbon Credits investment, what should it reasonably have concluded?</u>

It could be that the investment was/is legitimate. I also accept that technically there was a market for Carbon Credits. But it's been highlighted that it often wasn't possible to sell them even though there was a market for them. So, although they technically worked as claimed, the reality was very different.

The FSA warning was published before Mr G's SIPP was set up and this made it clear that there may be issues with selling Carbon Credits. I'm satisfied this is something L&C should've not only identified as part of its due diligence but considered a significant factor in deciding whether to permit the Carbon Credit investment in its SIPPs. The fact investors might have struggled to realise the investment should've caused it significant concern – especially if almost all of their remaining pension funds held in the SIPP were invested in Carbon Credits. It also isn't clear how investors would be able to take any benefits from their pension if the investment was difficult to value or realise.

By the time Mr G's investment was arranged, L&C would've been aware that he was investing the entirety of his pension fund in an unregulated, esoteric and high-risk investment which would likely be difficult to sell. I acknowledge that L&C wouldn't be aware whether that was the entirety of Mr G's pension savings because he may have had other benefits elsewhere. But it was an indicator of the kind of risk to which Mr G and other investors were being exposed. These were 'red flags', so to speak, which should've caused L&C significant concern as to whether or not the investment was appropriate to be held in members' SIPPs.

It could be argued that not being able to independently value an investment wouldn't be indicative of its performance or legitimacy. But the investment was predicated on the credits being sold for more than what was paid for them. And so, I think there should've been concerns if it wasn't possible to independently value them. And if an independent valuation had been possible, it's now been highlighted that voluntary Carbon Credits were often sold at "significantly inflated prices" so it seems likely this would then have been identified. This would effectively render the investment fundamentally unviable.

L&C should also have been aware that investors would be unlikely to benefit, in terms of the investment itself, from any regulatory protections (the investment being unregulated) such as access to the Financial Services Compensation Scheme or the Financial Ombudsman Service.

I think that these points of concern, which I think ought reasonably to have been identified by L&C *before* it accepted Mr G's applications, ought to have led L&C to conclude there was a significant risk of consumer detriment if it accepted the Carbon Credits investment into its SIPPs and that the Carbon Credits investment wasn't acceptable for its SIPPs.

Based on the available evidence, I don't think L&C undertook appropriate steps or drew reasonable conclusions from the information that I'm satisfied would have been available to it, had it undertaken adequate due diligence into the Carbon Credit investment *before* it accepted that investment into its SIPPs. I don't think L&C met its regulatory obligations and, in accepting Mr G's applications to invest in Carbon Credit, it allowed Mr G's funds to be put at significant risk.

To be clear, I reiterate, I'm not making a finding that L&C should've assessed the suitability of the Carbon Credits investment for Mr G. I accept L&C had no obligation to give advice to Mr G, or to ensure otherwise the suitability of an investment for him.

I'm satisfied L&C could've identified the concerns I've mentioned, and ought to have drawn the conclusions I've set out, based on what was known at the time. L&C ought to have identified significant concerns in relation to the investment, and this ought to have led it to conclude it shouldn't accept the Carbon Credit Investment into its SIPPs before it accepted Mr G's application to invest in Carbon Credits. It ought to have identified that there was a high risk of consumer detriment here. And it's the failure of L&C's due diligence that's resulted in Mr G being treated unfairly and unreasonably.

In my opinion L&C didn't meet its regulatory obligations or good practice at the time, and it allowed Mr G's pension fund to be put at significant risk as a result. So, I think it's fair and reasonable to conclude that L&C didn't act with due skill, care and diligence, and it didn't treat Mr G fairly, by accepting the Carbon Credits investment in his SIPP.

L&C's due diligence on the introducers

L&C had a duty to conduct due diligence and give thought to whether to accept introductions from Sorensen (and Henderson). That's consistent with the Principles and the regulators' publications as set out earlier in this decision.

However, given what I've said about L&C's due diligence on the Carbon Credit investment 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 introducers. I'm satisfied that L&C wasn't treating Mr G fairly or reasonably when it accepted the Carbon Credit investment into its SIPPs, so I've not gone on to consider the due diligence it should have carried out on the introducers before accepting Mr G's business from them and whether this was sufficient to meet its regulatory obligations. And I make no findings about this issue.

Did L&C act fairly and reasonably in proceeding with Mr G's application and instructions?

For the reasons previously given above, I think L&C should have refused to accept the Carbon Credits investment in its SIPPs. So things shouldn't have got beyond that.

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

L&C knew that Mr G had signed forms intended to acknowledge, amongst other things, his awareness of some of the risks involved with the Carbon Credits investment and to indemnify L&C against losses that arose from acting on his instructions. And, in my opinion, relying on the contents of such forms when L&C knew, or ought to have known, that allowing the Carbon Credits investment to be held within its SIPPs would put investors at significant risk, wasn't the fair and reasonable thing to do. Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse to accept the Carbon Credits investment in its SIPPs.

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

To be clear, my finding is that, acting fairly and reasonably to investors, L&C should have concluded that it wouldn't permit the Carbon Credits investment to be held in its SIPPs *at all.* And I'm satisfied that Mr G's pension monies were only transferred to L&C because it was allowing Carbon Credit investments – I think it's quite clear from Sorensen's suitability report that's why L&C was the recommended SIPP provider as it "*will generally allow any investment that is allowable within a pension wrapper under pension legislation"*.

The suitability report also contained the following wording:

> "*If you are happy to give up guaranteed benefits of the [defined benefit scheme] in favour of the flexibility of a personal pension and you are still intent on investing into Carbon Credits, then I recommend transferring to a Self-Invested Personal Pension (SIPP) with [L&C]."*
>
> *"You have discussed with [Henderson] your existing pension provision and the fact you would like to use part of these to invest in Carbon Credits, as you anticipate that these will provide decent returns in the future. You currently have a deferred Defined Benefit pension with [another provider] …. And would like to consider using part of this fund for investment into Carbon Credits.*
>
> *A self invested pension is one that will allow investment into alternatives, including the Carbon Credits that you are interested in, a stakeholder plan, personal pension and Section 32 buy out plan have all been discounted as none are allowed to invest in carbon credits. Please note that this report is based on the information provided by Henderson Carter Associates Ltd and the Trustees of "the scheme".*

So it's clear the whole transfer was done on the premise to invest in Carbon Credits and that the L&C SIPP was recommended for that purpose.

And I think it's more likely than not that if L&C hadn't permitted the Carbon Credits investment to be held in its SIPP that Mr G's pension monies wouldn't have been transferred to L&C or invested in Carbon Credits. Further, Mr G wouldn't then have suffered the losses he's suffered as a result of transferring to L&C and investing in Carbon Credits.

So, I'm satisfied that Mr G's SIPP shouldn't have been established and his monies shouldn't have been invested in the Carbon Credits holdings. And that the opportunity for L&C to execute investment instructions to invest Mr G's monies in Carbon Credits or proceed in reliance on an indemnity and/or risk disclaimers shouldn't have arisen at all. I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for L&C to proceed with Mr G's applications to invest in Carbon Credits.

COBS 11.2.19R

In the final response letter, L&C has made the point that L&C complied with COBS 11.2.19R in executing Mr G's written instructions.

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 this point is relevant to L&C's obligations under the Principles to decide whether to accept an investment into a SIPP in the first place.

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

The involvement of other parties

In this decision I'm considering Mr G's complaint about L&C. However, I accept that other regulated parties were involved in the transaction complained about, Sorensen and Henderson, which have since ceased trading and against whom Mr G has made a successful FSCS claims. I note that we have sight of the reassignment of rights for both these claims.

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 G fairly, and the starting point, therefore, is that it would be fair to require L&C to pay Mr G compensation for the loss he's suffered as a result of L&C's failings.

But I've carefully considered if there's any reason why it wouldn't be fair to ask L&C to compensate Mr G for his loss, including whether it would be fair to hold another party liable in full or in part. Whilst I accept that Sorensen and Henderson might have some responsibility for initiating the course of action that led to Mr G's loss, 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 G wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

So it is my view that it's appropriate and fair in the circumstances for L&C to compensate Mr G 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 is liable to pay to Mr G. I have, however, taken into account in the redress provided for below, the FSCS compensation received by Mr G, to ensure that he isn't doubly compensated.

Mr G taking responsibility for his own investment decisions

In reaching my conclusions in this case I've thought about section 5(2)(d) of the FSMA (now section 1C). This section requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions.

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

In my view, if L&C had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Carbon Credits investments into its SIPPs *at all*. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr G 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 the Carbon Credits investment and reach the right conclusions. I think it failed to do this. And just having Mr G sign forms containing declarations wasn't an effective way of L&C meeting its obligations, or of escaping liability where it failed to meet its obligations.

Sorensen and Henderson were regulated firms with the necessary permissions to advise on the transactions this complaint concerns. I'm satisfied that in his dealings with it, Mr G trusted them to act in his best interests. Mr G also then used the services of a regulated personal pension provider in L&C.

I've carefully considered what L&C has said about Mr G being aware of the risks. Mr G has said that the risks were not discussed with him in detail. And, on balance, I also think that Mr G acted with reliance on the advisers he was dealing with which he has said appeared trustworthy and knowledgeable. And I think that Mr G's testimony of being reassured by the advisers that the investments being arranged for him would provide guaranteed returns is credible. In any eventuality, this is a secondary point because, as mentioned above, if L&C had acted in accordance with its regulatory obligations and good industry practice I'm satisfied the arrangement for Mr G wouldn't have come about in the first place.

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

Had L&C declined to accept Mr G's investment in Carbon Credits, would the transaction complained about still have been effected elsewhere?

L&C has said on other similar complaints that if it had refused to permit the investment in Carbon Credits, the investment would still have been effected with a different SIPP provider. But I don't think it's fair and reasonable to say that L&C shouldn't compensate Mr G for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found L&C did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted the Carbon Credit investment into its SIPPs.

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

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

I have considered this point carefully, as Mr G has told us he was paid a sum of £3000 in what he told was a *"loan which was to be paid back upon accrual of returns from the pension".* Mr G has also told us that he had been struggling financially at the time he was cold called by the introducer and that he was told he would be able to access tax free cash from his pension, which he said sounded like a 'viable option'.

But, ultimately, I'm not satisfied that Mr G proceeded knowing that the investment he was making was high risk, and that he was determined to move forward with the transaction in order to take advantage of the cash incentive.

As I said above, there is nothing to show Mr G genuinely understood the risks involved. He says he was told of guaranteed returns and that he could access tax free cash from his pension, and he transferred his entire pension provision into the SIPP.

And I can't see that the 'loan' offered to him meant Mr G would have proceeded regardless. I say this because Mr G has told us that he had no intention of transferring his pension before being contacted by Henderson and being offered the opportunity to access tax free cash from his pension. I'm not persuaded that the incentive was so great that Mr G would have put his pension fund at risk. I'm satisfied that on balance, had he been told of the risks of investing his entire pension provision into a high risk investment such as Carbon Credits, Mr G wouldn't have agreed to transfer his pension and subsequently invest into Carbon Credits. And I don't think a £3000 'loan', a comparatively small cash sum, would have changed his mind.

On balance, I'm satisfied that Mr G, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams.

And having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Carbon Credits in its SIPPs, 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 G 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 G's loss, I consider that L&C failed to comply with its own regulatory obligations when it didn't put a stop to the transactions proceeding. It ought to have declined Mr G's application to open a SIPP to invest in Carbon Credits when it had the opportunity to do so.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr G. 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 G for the full measure of his loss whilst taking into account the payment Mr G received for completing the investment. But for L&C's failings, I'm satisfied that the transactions this complaint concerns wouldn't have occurred in the first place.

As such, I'm not asking L&C to account for loss that goes *beyond* the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I'm not able to determine. However, that fact shouldn't impact on Mr G'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 G wouldn't have suffered the loss he's suffered. And, as such, I'm of the opinion that it's appropriate and fair in the circumstances for L&C to compensate Mr G to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by another third party.

In conclusion

Taking all of the above into consideration, I think that in the circumstances of this case it's fair and reasonable for me to conclude that L&C should have decided not to accept the Carbon Credits investment to be held in its SIPPs before it had received Mr G's application from Sorensen. And I conclude that if L&C hadn't accepted the Carbon Credits investment in its SIPPs, Mr G wouldn't have established a L&C SIPP, transferred his pension provision into it and made the investments he then made. For the reasons I've set out, I also think it's fair to ask L&C to compensate Mr G for the loss he's suffered as a result of L&C accepting the Carbon Credits investment in its SIPPs.

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

Putting things right

My aim in awarding fair compensation is to put Mr G back into the position he would likely have been in had it not been for L&C's failings. Had L&C acted appropriately, I think it's *more likely than not* that Mr G would have remained a member of his existing pension scheme that he transferred into the SIPP.

I require L&C to calculate fair compensation by comparing the current position to the position Mr G would be in if he'd not transferred from his DB scheme. In summary, L&C should:

1. Calculate and pay compensation for the loss Mr G's pension provision has suffered as a result of L&C's failings.

2. 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.

3. If Mr G has paid any fees or charges from funds outside of his pension arrangements, L&C should also refund these to Mr G. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.

4. Pay Mr G £300 for the distress and inconvenience he's suffered.

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

Calculate and pay compensation for the loss Mr G's pension provisions have suffered as a result of L&C accepting his application

A fair and reasonable outcome would be for L&C to put Mr G, as far as possible, into the position he'd now be in if it hadn't accepted his SIPP application. As explained above, had this occurred, I consider it's more likely than not Mr G would have remained in his DB scheme.

The actual value of any current Carbon Credit SIPP investment should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include it being given a nil value for the purposes of ascertaining the current value of Mr G's SIPP.

I think this is fair because it's unlikely the Carbon Credits investment will have any significant realisable value in the future as I understand there is no available market and L&C decided to 'freeze' the SIPP due to its £nil value. Though I think it's unlikely, it is possible that the Carbon Credits investment may have some realisable value in the future. So, in this instance, for any investments assumed to be nil value, L&C may ask Mr G to provide an undertaking to account to it for a sum equivalent to the net amount of any payment the SIPP or himself personally may receive from those investment(s) in the future. That undertaking should allow for the effect of any tax and charges on the amount Mr G may receive from the investment(s) and any eventual sums he would be able to access. L&C should meet any costs in drawing up the undertaking and the reasonable costs of Mr G taking advice in relation to it. L&C should only benefit from the undertaking once Mr G has been fully compensated for his loss (to be clear, this includes any loss that's in excess of our award limit).

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

Mr G has told us he received a £3000 payment in form of a loan which, as I understand it, he has not had to repay. This should be taken into account as a withdrawal under the FCA redress guidance mentioned below.

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

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

- always calculate and offer Mr G redress as a cash lump sum payment,
- explain to Mr G before starting the redress calculation that:
    - his redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest his redress prudently is to use it to augment any defined contribution pension he may have

- offer to calculate how much of any redress Mr G receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr G accepts L&C's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr G for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr G's end of year tax position.

I acknowledge that Mr G has received compensation from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr G'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 G received from the FSCS. And it will be for Mr G to make the arrangements to make any repayments he needs to make to the FSCS.

However, I do think it's fair and reasonable for some allowance to be made for the sums Mr G actually received from the FSCS and has had the use of for a period of the time covered by the calculation.

As such, for the purposes of the calculation that's being carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4, if it wishes, L&C may notionally, for the periods from the point of their payment through until the valuation date (as per the DISP App 4 definition of that term), allow for the payments Mr G received from the FSCS following the claims about Henderson and Sorensen, as a notional deduction (while not an income withdrawal payment, for the purposes of the calculation it may be treated as a notional income withdrawal payment).

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

Redress paid directly to Mr G as a cash lump sum in respect of a future loss includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4.3.31G(3), L&C may make a notional deduction to allow for income tax that would otherwise have been paid. Mr G's likely income tax rate in retirement is presumed to be 20%. In line with DISP App 4.3.31G(1) this notional reduction may not be applied to any element of lost tax-free cash.

SIPP fees

It wouldn't be fair for Mr G to have to continue to pay annual SIPP fees to keep the SIPP open, if it can't be closed after compensation has been paid due to the illiquid investment. 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.

Fees and charges paid outside the SIPP

If Mr G has paid any fees or charges from funds outside of his pension arrangements, L&C should also refund these to Mr G. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.

Pay Mr G £300 for the distress he's suffered

In addition to the financial loss that Mr G has suffered as a result of the problems with his pension, I think it's fair and reasonable to say that the loss of a significant portion, if not all, of his DB pension provision has caused Mr G distress. This has also now been going on for several years. So, I think that it's fair for L&C to compensate him for this as well. I'm satisfied that £300 is an appropriate sum of compensation for this.

Interest

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

Income tax may be payable on any interest paid. If L&C deducts income tax from the interest it should tell Mr G how much has been taken off. L&C should give Mr G a tax deduction certificate in respect of interest if Mr G asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Award limit

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

.

Until the calculations are carried out, I don't know how much the compensation will be, but £160,000 is the maximum sum that I'm able to award in Mr G's complaint. So, I also make a recommendation below in the event that the compensation is to exceed this sum, although I can't require that L&C pays this.

Determination and award: It's my decision than I require Pathlines Pensions UK Limited to pay Mr G the compensation amount calculated as set out in the steps above, up to a maximum of £160,000.

Where the compensation amount does not exceed £160,000, I additionally require Pathlines Pensions UK Limited to pay Mr G any interest on that amount in full, as set out above together with any costs awarded.

Where the compensation amount already exceeds £160,000, I only require Pathlines Pensions UK Limited to pay Mr G any interest as set out above on the sum of £160,000 plus any costs awarded.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Pathlines Pensions UK Limited pays Mr G the balance. I additionally recommend any interest calculated as set out above on this balance and any costs awarded be paid to Mr G.

If Mr G accepts my final decision, the award will be binding on Pathlines Pensions UK Limited. My recommendation is not part of my determination or award. Pathlines Pensions

UK Limited doesn't have to do what I recommend. Further, it's unlikely that Mr G can accept my determination and go to Court to ask for the balance. Mr G may want to consider getting independent legal advice before deciding whether to accept this final decision.

My jursidiction decision

It's my decision that this complaint was made in time and can be considered by the Financial Ombudsman Service

My final decision

It's my final decision to uphold Mr G's complaint. I require that Pathlines Pensions UK Limited calculate and pay the award, and take the actions, set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 27 December 2024.

Catarina Machado Pinto Simoes
Ombudsman