DRN-5181528

The complaint

London & Colonial Services Limited recently changed its name to Pathlines Pensions UK Limited, for ease of reference I'll simply be referring to the business as 'L&C' throughout this decision.

Mr M complains about the due diligence L&C undertook before accepting his applications. It's complained that L&C failed to meet its regulatory obligations and failed to carry out satisfactory due diligence both into the business being introduced to it (specifically in this complaint Mr M's business) and into an investment in The Resort Group's ('TRG's) Dunas Beach Resort ('Dunas Beach') that was made with monies transferred into Mr M's L&C Self-Invested Personal Pension ('SIPP'). Further, that Mr M has suffered loss as a result of this.

Mr M and L&C both have professional representatives and, for simplicity, I simply refer to Mr M and L&C throughout this decision even where the submissions I'm referring to were made on their behalf by their representatives.

What happened

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

Involved parties

Pathlines Pensions UK Limited ('L&C')

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

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

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

Real SIPP LLP ('RealSIPP')

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

The Resort Group ('TRG')

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

What happened?

I've briefly summarised what's happened below.

Mr M had a Defined Benefit Scheme ('DBS') with his former employer.

Mr M says that he'd been chatting with his nephew ('Mr S') about his pension. Mr M says that he'd been thinking about what his sons would get if anything happened to him, so he'd asked Mr S for advice/help.

Mr M explains that Mr S was working for an unregulated introducer, Choices International Properties ('CIP'). And that, prior to the transfer, Mr S/CIP had introduced him to the Dunas Beach investment and Mr S had thought it would be a good investment for him.

On 17 October 2011, Mr M completed a RealSIPP branded application form to open a SIPP with L&C. The Independent Financial Adviser ('IFA') details are on page 3 of the form, details for both RealSIPP and CIB, including their FSA authorisation numbers, are noted. Mr H is the named contact and a CIB email address is given. It's also recorded in the form that initial remuneration of £2,550, and ongoing annual remuneration of £300, would be paid to the IFA.

Elsewhere in the form a ticked box confirms that Mr M wants to manage the fund himself.

CIB wrote to Mr M in a letter dated 8 November 2011. Mr M says he doesn't recall this letter and that the copy he's provided to us was obtained via a subject access request ('SAR'). It was noted, amongst other things, in this letter that:

- Mr M wished to purchase an offshore/offplan commercial property investment with his pension monies.
- Mr M didn't require access to monies prior to his proposed retirement date.
- Mr M had preserved benefits from a previous employer's final salary scheme and he wished *"to consider transferring a cash benefit from this scheme in order to invest in the offshore property from your chosen developer"*.
- It didn't believe the use of a SIPP package matched Mr M's attitude to risk nor would a SIPP be best placed to meet Mr M's objectives.
- Mr M wasn't in a position to give up his occupational pension scheme ('OPS') benefits, he required the security of guaranteed benefits and the security of a guaranteed spouse's benefit.
- The critical yield for transferring was higher than Mr M's attitude to risk would suggest was acceptable. And it was higher than the investment return that could reasonably be expected.
- The monies in the occupational scheme formed a significant part of Mr M's retirement wealth.
- At Mr M's request, its advice was restricted to consideration of transferring the OPS to a SIPP which would then allow him to invest in an offshore development of his choosing.
- It was only providing limited advice.
- A scheme which allowed investment flexibility wasn't available to Mr M and there seemed to be no prospect of such a scheme being available to him in the near future.
- Offshore/offplan commercial property would be deemed to be a speculative and adventurous investment.

- Mr M's views on investment risk for the monies were understood to be aggressively balanced rather than totally balanced or adventurous. Around seven or eight on a scale of one to ten.
- An adventurous attitude would not preclude Mr M from considering an offshore/offplan commercial property investment.

In the complaint that was the subject of published decision DRN-4376465 we were provided with a copy of an *"Investment in Dunas Beach"* form which recorded amongst other things:

- The specific holding monies were to be invested into.
- The initial deposit could be lost if, for any reason, there wasn't enough cash available to pay the balance when due.
- L&C wasn't authorised to give financial or investment advice.
- L&C had obtained legal advice in its capacity as trustee, in order to assess the risks of ownership and to ensure that appropriate title was attained.
- Advice L&C had obtained didn't cover the investment merits, marketability or value of the property.
- The investor had reviewed a due diligence report obtained in January 2010 and the promissory contract of purchase and sale.
- The investor had obtained whatever information, reports, legal and other advice they required regarding investments, including the potential income and the associated costs and expenses which may fall to be paid.
- The investor would indemnify L&C in respect of any loss claim action damage L&C incurred, or suffered, in respect of the investment.
- The investor wished to proceed with the investment.

In the complaint that was the subject of published decision DRN-4376465, we were also provided with a L&C Dunas Beach scheme borrowing form which recorded, amongst other things, that:

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

We've not been provided with copies of the forms that were completed by Mr M for his Dunas Beach investment. But I think it's more likely than not that similar forms to those I've referenced above would have been completed in respect of Mr M's Dunas Beach investment.

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

Further, the contract explained that there was an established date for the conclusion of the construction. And that if the purchaser didn't make any instalment payment that was due the

vendor may (at their discretion and amongst other options), sixty days after the due date, terminate the contract and retain all amounts paid under its terms.

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

In my provisional decision I explained that we've not been provided with copies of any investment request forms, or scheme borrowing forms or copies of the contract that would have been completed for Mr M's Dunas Beach investments. And I requested that L&C provide us with copies of all of these documents, or alternatively confirm that such documents weren't completed for Mr M's Dunas Beach investments, alongside its response to my provisional decision and by the deadline that was set for responding to my provisional decision. L&C didn't provide the information requested, or else the confirmation sought, by the deadline for responding to my provisional decision.

Under DISP 3.5.9(3)R I may *"reach a decision on the basis of what has been supplied and take account of the failure by a party to provide information requested."*

As I understand it, Mr M subsequently made a claim to the Financial Services Compensation Scheme ('FSCS') about CIB. The FSCS wrote to Mr M on 1 March 2017 and said that it had calculated his losses as a little over £98,500 and that the maximum sum it could pay Mr M under its limits was £50,000. The FSCS later gave Mr M a reassignment of rights in which, amongst other things, the FSCS explained it was transferring back to Mr M any legal rights it held against L&C.

L&C provided us with a transaction history for Mr M's SIPP and this records, amongst other things, that:

- The SIPP is shown as having a starting balance as at 1 November 2011 of £0.
- £213,668.45 was transferred into the SIPP in June 2012.
- Sums of £120,563.46 and £70,539.85 were invested with TRG in June 2012.
- In February 2015 a little under £11,000 was credited back to the SIPP following the completion of a TRG consolidation exercise.
- From June 2015 periodic TRG rental payments of differing amounts started to be credited to the SIPP. Rental payments continued to be credited to the SIPP through until March 2018.
- In April 2016 a pension commencement lump sum of a little over £14,600 was taken.

We've also been provided with a valuation report for Mr M's SIPP dated 14 May 2018. This records a total SIPP value of a little over £299,000. A little over £278,000 of this is in respect of two Dunas Beach properties (valued at £215,936.83 and £62,297.77 respectively) and the residual sum, a little over £21,000, is shown as being in cash.

Additional background information

Having explained what's happened above, I've mentioned some additional documentation we've previously been provided on some other complaints involving all of L&C, RealSIPP/CIB and TRG investments below, before then going on to summarise what's happened in Mr M's complaint to date.

I'm aware from the complaint that was the subject of published decision DRN-3587366 that L&C has previously provided us with a third-party investment due diligence document it obtained for a different TRG investment, Llana Beach. The document sets

out some details about the investment, including that:

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

In my provisional decision I explained that in this complaint L&C hasn't provided us with evidence of an any analogous report it might have obtained in respect of the Dunas Beach investment. And that L&C only appears to have provided limited evidence of the due diligence it undertook into the Dunas Beach investments – information previously provided to us includes a document containing some general information about the overall Dunas Beach development, including land registry, land ownership, construction licence, environmental impact and red book valuation details. And I requested that L&C provide us with copies of *all* due diligence it undertook into the Dunas Beach investment alongside its response to my provisional decision and by the deadline that was set for responding to my provisional decision. No further submissions were provided by L&C on this point in response to my provisional decision.

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

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

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

I requested in my provisional decision that, by the deadline set for responding to my provisional decision, L&C provide us with copies of any evidence it has to demonstrate any steps it took to understand the service RealSIPP/CIB would provide to its clients before it accepted Mr M's business, including all documentation it obtained from RealSIPP/CIB in respect of this. No further submissions were provided by L&C on this point in response to my provisional decision.

We've not been provided with a copy of any RealSIPP/CIB client agreement(s) and/or Keyfacts documents that were provided to Mr M. However, we were provided with a copy of RealSIPP's client agreement and Keyfacts document, titled *"about our services for our*

Resort Group SIPP package" in the complaint that was the subject of published decision DRN-3587366. RealSIPP's client agreement described it as an *"administrator and packager"* of pension solutions to clients of various alternative investment providers, and said that:

> *"We are not, however, financial advisers as defined by the Financial Services and Markets Act 2000 and we will not provide financial advice as to whether the SIPP is the right product for you, nor will we recommend or advise upon any investment strategy you should follow. You should seek advice from a suitably qualified and regulated firm or individual."*

Further, that:

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

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

And I've seen archived copies of RealSIPP's website (www.realsipp.com) from 3 February 2011 and 3 December 2011 (so, from before and also shortly after Mr M's SIPP was established) where it's explained, amongst other things, that:

> *"RealSIPP does not provide individual financial advice on any of the developments in which clients may wish to invest. We provide generic information on the considerations and risks associated with property investment."*

Further, that:

> *"If you are in any doubt over your chosen investment and its suitability to your needs and circumstances you should seek professional advice from a suitably qualified Independent Financial Adviser."*

I've also seen a different client agreement (which appears to be CIB's client agreement) on the complaint that was the subject of published decision DRN-4398600, that was another complaint involving L&C where RealSIPP/CIB was the introducer. Amongst other things it's stated in the other agreement that:

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

What has happened in Mr M's complaint so far?

Mr M complained to L&C in a letter dated 26 October 2017 and said, amongst other things that:

- L&C permitted the transfer into the SIPP, this facilitated the purchase of an unsuitable, high risk and illiquid investment.

- L&C has failed to meet its regulatory obligations.
- Had it complied with its obligations then L&C ought to have rejected Mr M's business.
- L&C accepted an application for Mr M who isn't classified as a sophisticated investor.
- Mr M has suffered losses as a result of L&C's failings.

L&C replied to Mr M and said, amongst other things, that:

- It accepts SIPP applications submitted to it by regulated financial advisers.
- It was the responsibility of the adviser (RealSIPP) to advise Mr M on the suitability of both the product and the proposed investments.
- If RealSIPP considered that the proposed arrangements weren't suitable it should have informed Mr M of this.
- As explained in the Open Pension Brochure, L&C's role includes, amongst other things, making sure that investments comply with regulations, trust rules and HMRC rules and regulations.
- Mr M's SIPP application included initial investment instructions to invest €329,000 in two apartments as part of the Dunas Beach investment.
- These investments were structured by way of an initial deposit with an additional amount to be paid upon completion.
- Upon completion, the borrowing facility that had been planned to be made available to investors didn't materialise. As such, by way of consolidation Mr M now has full ownership of one apartment and 50% ownership of a second apartment. He also received a return of the surplus funds.
- The value of the Dunas Beach investments has increased and rental income from both apartments has been received every quarter since June 2015.
- The investments are illiquid.
- In his investment instructions, Mr M confirmed that he understood legal advice obtained by L&C hadn't covered the marketability of the investment.
- The investment had previously been independently valued (in September 2016) by a RICS Registered Valuer.
- It is comfortable with having accepted Mr M's business from RealSIPP and doesn't agree that it should have rejected Mr M's SIPP application. It acted within the rules set out by the regulator at the time.

L&C's response to Mr M's complaint was dated 25 January 2017, but this appears to have been a typographical error given that it followed on from Mr M's letter of complaint to L&C of 26 October 2017. And I note that in submissions it made to us in May 2018 L&C referred to its response as being from 25 January 2018. So, I've proceeded on the basis the correct date for the response was 25 January 2018. In my provisional decision I said that if L&C disagreed with this it should let me know alongside any response it sent to my provisional decision. L&C hasn't submitted that it disagrees with my provisional finding that the correct date for the response was 25 January 2018. And I remain of the view that it's more likely than not the correct date for the response was 25 January 2018.

Following receipt of L&C's response to Mr M's complaint, Mr M then referred his complaint to this Service on 3 April 2018 – so within six months of 25 January 2018.

L&C has said, amongst other things, that:

- DISP 3.3.4A provides grounds for dismissal and this complaint would be more suitably dealt with by the Pensions Ombudsman.
- L&C isn't permitted to, and didn't, provide investment advice.
- With the Dunas Beach investment, the underlying investment is a direct investment in land.

- Investments in land aren't a specified investment under the Financial Services and Markets Act (Regulated Activities) Order 2001.
- Mr M has already made a claim to the FSCS in respect of RealSIPP/CIB.
- Its role is to make sure that an investment is allowed within the trust rules and that the investment doesn't breach HMRC regulations.
- L&C appointed solicitors who were authorised and experienced to advise on the purchase of property in Cape Verde. The solicitors advised, and acted for, L&C on the purchase process and also negotiated certain amendments to associated contracts on L&C's behalf.
- L&C doesn't accept that it failed to carry out satisfactory due diligence on the investment or introducer.
- It accepts business submitted by regulated financial advisers and carries out checks on such advisers. The advisers acting for Mr M were RealSIPP/CIB.
- L&C's checks showed that RealSIPP was acting as an appointed representative of CIB. And CIB was authorised and regulated to provide transfer and investment advice.
- L&C complied with the requirement under COBS 11.2.19 by executing Mr M's specific instructions. L&C would have been in breach of COBS if it hadn't executed Mr M's investment instructions.
- It wasn't L&C's responsibility to ascertain whether underlying investments are suitable for a member. It is the responsibility of the adviser to advise the client on the suitability of both the product and the proposed investments.
- L&C was entitled to expect that RealSIPP would have given Mr M regulated advice on the suitability of the SIPP and on the intended investment.
- Mr M hasn't suffered any loss.

Amongst other things, Mr M has said that:

- L&C failed to carry out satisfactory due diligence checks on the investment.
- L&C failed to complete due diligence checks on the firm introducing the business.
- L&C didn't have adequate controls in place to monitor business being introduced to it.
- L&C failed to investigate obvious risks in the business it was accepting.
- The monies transferred to L&C were from a local government pension scheme.
- He'd been chatting with Mr S about his pension. He'd been thinking about what his sons would get if anything happened to him and so he'd asked Mr S for advice/help.
- He wasn't specifically interested in changing his pension, he just wanted to know what would happen to his pension if he died and then the TRG investment was mentioned.
- He was introduced to the investment a few months prior to the transfer. It was Mr S/CIP who had introduced the idea of the investment.
- He never had any communication from the adviser named on his SIPP application form (Mr H). All contact was via the unregulated introducer and all paperwork was sent to him pre-completed and ready to sign.
- Mr S had thought it would be a good investment for Mr M and once Mr S had *"got the ball rolling"* an individual from CIB took over.
- He was told it was a great idea, that it would protect his pension and that he would receive a regular income from the hotel rentals. Further, that the approach would allow his pension to grow/he could expect his investment to grow in value over time.
- He was told that when he was ready to retire, he could sell the investment and his pension pot would be much higher.
- He didn't believe there was any risk involved. If he'd been told that the investment had any risk he wouldn't have proceeded.

- At the time of the transfer his pension was his only asset for retirement and he didn't have capacity for loss of his pension.
- He had no recollection of having signed an indemnity to say L&C wasn't responsible for the transfer and investment.
- Most of the paperwork was pre-completed and marked where he had to sign. There was a lot of paperwork brought to him for signing. Very little was left with him, signatures were obtained and then paperwork was taken away.
- He had signed what he was told to sign and there were many forms to be signed.
- If L&C refused to allow the investment to go through he doesn't believe he would have considered other avenues. If the investment had been refused he assumes that reasons would have been provided. He believes he would then have gone back to Mr S to ask more questions and he might also have asked his sons for advice.
- He wasn't aware of issues with L&C when he first contacted his representative in March 2016 – he'd first gone to his representative because he believed he might have been given wrong advice to transfer his pension to invest into TRG.
- A claim was made to the FSCS about CIB and an award was made by the FSCS in March 2017.
- The subsequent complaint he'd made about L&C was based on advice he'd received from his representative.
- The copy of CIB's letter of 8 November 2011 that was provided to us was obtained when Mr M's representative made a file request to CIB, Mr M doesn't recall this document and he doesn't have any promotional material or other documents.
- He has no recollection of either Mr H who apparently sent the 8 November 2011 letter, or of the letter itself. He only ever spoke with his nephew (Mr S) and a Mr A of CIB (Mr M's representative has sought to highlight that there was no individual named Mr A on the FCA register for CIB).
- He went ahead with the transfer because it was recommended by his nephew and Mr A .

An investigator reviewed Mr M's complaint and concluded it should be upheld. They said that if L&C had undertaken appropriate due diligence it should have concluded that it was likely the business introduced by RealSIPP would produce unsuitable SIPPs and there was a high risk of consumer detriment. Further, that L&C shouldn't have accepted Mr M's business. And that but for L&C's failings it's more likely than not that Mr M wouldn't have effected the transactions complained about.

L&C didn't agree with the investigator and, amongst other things, it said that:

- Mr M applied to open an L&C SIPP on 17 October 2011.
- As far as L&C is aware, RealSIPP provided advice to Mr M on the establishment of the SIPP and on the Dunas Beach investments.
- The SIPP application was accompanied by initial investment instructions to invest in the Dunas Beach investments.
- On 17 October 2011, Mr M completed investment requests to purchase one apartment for €184,950 and a second apartment for €144,950.
- Upon completion of the properties the borrowing facility that had been planned to be made available to investors didn't materialise, so by way of consolidation Mr M now has full ownership of the €184,950 apartment and 50% ownership of the second apartment. The surplus funds were also returned to Mr M.
- Mr M confirmed that he understood:

    (a) *"that neither the Trustee nor its Administrator* [were] *authorised to give* [him] *financial or investment advice".*

(b) *"that* [he had] *obtained legal advice".*

(c) That he had *"reviewed the due diligence report obtained in January 2010…and…obtained whatever information, reports, legal and other advice* [he required] *regarding the investment including the potential income and the associated costs and expenses which may fall to be paid out of* [his] *arrangement".*

(d) He *"will indemnify* [L&C] *and keep* [L&C] *fully indemnified in respect of any loss claim action damage incurred or suffered … in respect of the asset".*

- Court would be a more appropriate jurisdiction for this complaint and Mr M's oral evidence, including his position on causation, should be tested in Court.
- Alternatively, the Pension Ombudsman ('TPO') would be a more appropriate jurisdiction.
- The Financial Ombudsman Service is attempting to circumvent the *Adams* decision. *Adams* considered the duties of a SIPP provider under COBS at length and the findings of that case should be applied.
- It's not fair or reasonable to use the Principles to artificially impose a duty that goes beyond that accepted and agreed by the parties.
- The investigator's view should have found that L&C's duties to Mr M extended no further than those owed to the claimant in *Adams.*
- At the time of the transaction complained of there was no obligation on a customer to take advice on the transfer of a pension.
- A breach of the Principles cannot, of itself, give rise to any cause of action at law.
- The Principles fall to be construed in light of the COBS rules applicable to L&C, L&C's regulatory permissions, L&C's contractual arrangements and the statutory objective that consumers should take responsibility for their decisions.
- Publications issued after the transactions shouldn't have a bearing on this complaint.
- Regulatory publications can't alter the meaning, or the scope, of the obligations imposed by the Principles.
- Many of the matters which The 2009 Thematic Review Report invites firms to consider are directed at firms providing advisory services.
- Even if the 2009 thematic review had been statutory guidance made under FSMA s.139A (which it wasn't), the breach of such statutory guidance would not give rise to a claim for damages under FSMA s.138D.
- It's not fair or reasonable to determine the complaint by reference to the FCA publications and to do so only exacerbates the problem referred to by Jay J in *R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service [2017]* EWHC 352 (Admin).
- Insufficient weight has been given to contractual arrangements and the demarcation of roles and responsibilities.
- *Adams* held that duties imposed by COBS can't all apply to all firms in all circumstances.
- The COBS rules contain some provisions and obligations that don't apply to execution-only SIPP providers.
- Neither the obligations under COBS 14.2.3R and COBS 14.3 to provide clients with product information, nor the obligation under COBS 19.1.2R to provide clients with pension product information, apply to execution-only SIPP providers.
- The Financial Ombudsman Service seeks to impose on L&C a duty of due diligence that it doesn't owe and which goes far beyond the scope of any duty envisaged by the parties. And seeks to override COBS' careful allocation of duties between different

types of firms conducting different types of business, and to impose duties on L&C in addition to those provided for under COBS.

- The Principles must be applied within the context of the specific duties imposed by the Rules.
- The relationships in this case are similar to those in *Adams*, but RealSIPP wasn't an unauthorised introducer.
- Mr M was aware that L&C would act on an execution-only basis and would accept no responsibility for the quality of the investment business.
- Amongst other things, the judge in *Adams* held that in order to identify the extent of the regulatory duties imposed on Carey*, "one has to identify the relevant factual context"* and that "*the key fact ... in the context is the agreement into which the parties entered, which defined their roles in the transaction".*
- The judge also said that "*a duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed...as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed."*
- In *Adams* the FCA agreed that the function of a firm, as determined by contract, would govern what it had to do to comply with its duties under the FCA Handbook.
- The investigator's view runs contrary to *Adams*, in which it was held that Carey's duties under the regulatory regime fall to be construed in light of its contractual arrangements.
- The investigator's view fails to have regard to the general principle that consumers should take responsibility for their decisions, the fundamental principle of freedom of contract and to the authority of *Adams* and *Kerrigan v Elevate Credit International Ltd* [2020] C.T.L.C. 161.
- It was common practice for SIPP providers to be accepting investments such as this in 2011.
- L&C is left to carry the can as it's the last entity standing, this isn't fair or reasonable.

As agreement couldn't be reached the complaint was passed to me for review.

Following this I issued a provisional decision on this complaint and I concluded Mr M's complaint should be upheld. In brief, I concluded that:

- The complaint had been referred in time and was one we could consider.
- L&C should have been conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.
- On the basis of the available evidence, the due diligence undertaken by L&C into RealSIPP/CIB wasn't sufficient in the circumstances to have met L&C's obligations.
- L&C didn't take appropriate steps or draw reasonable conclusions from the information that was available to it before accepting Mr M's application.
- L&C had some reasons to be concerned about the type of business RealSIPP was introducing. The introductions had anomalous features – high-risk business for unregulated overseas property developments and other esoteric investments. And, even though L&C believed that RealSIPP had the necessary permissions to give full advice on the business it was introducing, a large proportion of the introduced business was execution-only.
- L&C knew all of this, or else ought to have known it from the information available, but it didn't then make further appropriate checks.
- Had L&C made reasonable checks prior to receiving Mr M's application, it would have realised that some introductions from RealSIPP involved a significant risk of consumer detriment.

- L&C should have ceased to accept introductions from RealSIPP before it accepted Mr M's application.
- In the circumstances, it was fair and reasonable for L&C to compensate Mr M to the full extent of the financial losses he's suffered due to L&C's failings.

L&C acknowledged receipt of my provisional decision and explained it would respond by the deadline date if it had any further comments to make. No further comments were provided.

Mr M responded to say that he was happy with the outcome in the provisional decision and that he will be a basic rate taxpayer in retirement.

What I've decided – and why

L&C has said that it believes the complaint is better suited to be considered by TPO or a Court. It's appropriate to address this issue at the outset.

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

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

(1) he considers that it would be more suitable for the matter to be determined by that scheme; and
(2) the complainant consents to the referral."

L&C has argued that Mr M's complaint should be referred to TPO. And I could now refer the complaint to TPO on the basis of DISP 3.4.1R if I take the view it's more suitable for TPO and if, in the light of that view, Mr M consents to a referral to TPO.

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

In reaching this conclusion I've considered the Memorandum of Understanding ('MoU') between our Service and TPO. The MoU is a document about practical cooperation where there's remit overlap between the two organisations – however the MoU doesn't determine the jurisdiction of either organisation. Ultimately, DISP 3.4.1R says that I may refer the complaint to another complaints scheme, not that I must. So I've discretion to decide what I'll do in the circumstances. And, for the reasons I've given above, I've decided to exercise my discretion not to refer Mr M's complaint to TPO.

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

So, overall:

- I don't consider that it would be more suitable for this complaint to be determined by TPO and I've decided not to exercise my discretion to refer it.
- I'm not required to dismiss this complaint, and for the reasons I've given, I'm not exercising my discretion to dismiss it.

As such, I've gone on to consider our jurisdiction and the merits of this complaint below.

jurisdiction

I've considered all the evidence and arguments in order to decide whether we can consider Mr M's complaint.

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

Does the complaint relate to an activity we can consider?

Having carefully considered all of the evidence provided to us, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

As is explained in DISP 2.3.1R, we can consider a complaint if it,

> *"relates to an act or omission by a firm in carrying on… regulated activities... or any ancillary activities, including advice, carried on by the firm in connection with them."*

Regulated activities are defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 as amended ('RAO'). This is a fairly lengthy Order which has been added to many times over the years since it was first made.

As I explained towards the start of this decision L&C is a regulated pension provider and administrator including for Mr M. And L&C is 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.

Mr M has complained that L&C failed to meet its regulatory obligations and failed to carry out satisfactory due diligence into the business being introduced to it (specifically in this complaint his business) and into an investment made with his SIPP monies.

I remain satisfied that the complaint Mr M has asked us to review is one we can consider and that it relates to an act or omission by L&C in carrying out one or more regulated activity, including establishing a personal pension scheme and/or operating a personal pension scheme, and/or ancillary activities carried on by L&C in connection with this.

Has the complaint been brought in time?

Having carefully considered all of the evidence provided to us, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

DISP 2.8.2R sets out that:

> "The *Ombudsman* cannot consider a *complaint* if the complainant refers it to the *Financial Ombudsman Service*:
>
> (1) more than six *months* after the date on which the *respondent* sent the complainant its *final response, redress determination* or *summary resolution communication;…*
> …
> unless:
>
> (3) in the view of the *Ombudsman*, the failure to comply with the time limits in *DISP 2.8.2 R* or *DISP 2.8.7 R* was as a result of exceptional circumstances; or…
>
> (5) the *respondent* has consented to the *Ombudsman* considering the *complaint* where the time limits in *DISP 2.8.2 R* or *DISP 2.8.7 R* have expired*…"*

The respondent in this complaint is L&C. As I understand it, L&C first issued a final response letter to Mr M on 25 January 2018. On 3 April 2018 we received a copy of Mr M's complaint form and supporting documentation from his representative setting out his complaint.

As such, I'm satisfied Mr M's complaint was referred to us within six months of the date on which the respondent, here L&C, sent Mr M its final response.

DISP 2.8.2R also sets out that:

> "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* or *DISP 2.8.7 R* was as a result of exceptional circumstances; or…
>
> (5) the *respondent* has consented to the *Ombudsman* considering the *complaint* where the time limits in *DISP 2.8.2 R* or *DISP 2.8.7 R* have expired*…"*

As I understand it, L&C first received Mr M's complaint letter dated 26 October 2017 on or around the same date. In my provisional decision I requested that if L&C disagreed with this and considered that Mr M's complaint letter was received by it *on or after* 1 November 2017 that it confirm as such, and provide supporting evidence to demonstrate the date on which it first received the complaint, as part of its response to my provisional decision and by the

deadline that was set for responding to the provisional decision. No submissions were provided by L&C on this point in response to my provisional decision.

It appears from the transaction history L&C has provided to us that Mr M's SIPP was established on, or around, 1 November 2011. In my provisional decision I explained that if L&C disagreed with this then it should confirm as such as part of its response to my provisional decision and by the deadline that was set for responding to my provisional decision. No submissions were provided by L&C on this point in response to my provisional decision.

Under DISP 3.5.9(3)R I may *"reach a decision on the basis of what has been supplied and take account of the failure by a party to provide information requested."*

26 October 2017 is fewer than six years from 1 November 2011, so premised on the information that has been supplied to us, I'm satisfied that all of L&C accepting Mr M's business and establishing a SIPP for him, Mr M transferring his DBS monies into the SIPP and Mr M investing the transferred monies into the TRG holdings occurred within six years of Mr M referring his complaint to L&C. As such, I'm satisfied that Mr M's complaint was referred within six years of the events complained about and within the time limits provided for in DISP 2.8.2R.

For completeness, even if I'm wrong about this and Mr M's SIPP was established more than six years before L&C received his 26 October 2017 complaint, for the reasons I've explained below I also think Mr M's complaint was made within three years of the date on which Mr M became aware, or ought reasonably to have become aware, he had cause for complaint. And when I say here cause for complaint, I mean cause to make this complaint about this respondent firm, L&C, not just knowledge of cause to complain about anyone at all.

In thinking about when Mr M was aware, or ought reasonably to have become aware, that he had cause for complaint, I've considered how 'cause for complaint' should be interpreted in the context of the FCA Handbook.

On interpreting the Handbook generally Singh LJ said the following in *The Official Receiver v Shop Direct Finance Company Limited* [EWCA] Civ 367:

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

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

"155. The resemblance to the ordinary limitation periods for claims in negligence where there is also a primary period of 6 years (under s. 2 of the Limitation Act 1980 ("LA 1980")) and a secondary period of 3 years from the date of the claimant's actual or constructive knowledge (under s. 14A LA 1980) is striking. We have in fact been shown evidence that this is not a coincidence, but even without this material (which is of doubtful admissibility) it would have been a reasonable assumption that the general structure was modelled on the LA 1980 provisions and was designed to do the same thing in general terms.

156. What then is the purpose of having these two time-limits? The purpose of an ordinary limitation period is to prevent stale claims from being litigated, the period of 6 years being fixed as a generally reasonable period to bring a claim. This explains the primary period. But as is well-known that could and did lead to some claimants who had suffered latent injury or damage finding that they had lost their rights to sue before they even knew, or could reasonably be expected to know, that they had been injured or suffered loss. Provision was therefore made, first in ss. 11 and 14 LA 1980 (applicable to claims for personal injury) and subsequently in s. 14A LA 1980 (applicable to other claims in negligence), for the claimant to have 3 years from his date of knowledge to bring a claim. The purpose of this is obvious. It was to remedy the injustice of a claimant's claim being time-barred before they knew, or could reasonably be expected to know, that they had a claim. On the other hand the selection of a (relatively short) 3 year time period shows that another purpose was to provide that once they did, or should, have that knowledge they should get on with the claim and bring proceedings reasonably promptly. Precisely the same in my view applies to the secondary time-limit in DISP 2.8.2R(2)(b). The purpose of the rule is to prevent a complainant from losing the right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware."

The Handbook includes the following rule (GEN 2.2.1R):

"Every provision in the Handbook must be interpreted in the light of its purpose."

And guidance in the same section says the purpose of any provision in the Handbook is to be gathered first and foremost from the text of the provision in question and its context amongst other relevant provisions (GEN 2.2.2(G)).

The Handbook also says (GEN 2.2.7(R)):

"In the Handbook …

(1) an expression in italics which is defined in the Glossary has the meaning given there; and
(2) an expression in italics which relates to an expression defined in the Glossary must be interpreted accordingly.'

The term 'cause for complaint' is not defined in the FCA's glossary. But where DISP says the Ombudsman cannot consider a complaint if it is out of time, the word 'complaint' is in italics. So it is a defined term in the FCA Glossary and must be treated accordingly.

And where the Handbook says it sets out how complaints are to be dealt with by respondents, 'complaint' is again in italics. So again it is a defined term.

So although the term 'cause for complaint' isn't in italics in the FCA Handbook, it appears as part of the rule that sets out what 'complaints' (in italics) the Ombudsman cannot consider. And it's reasonable to infer in light of the above rules and guidance on interpreting the Handbook that the Handbook's definition of the word 'complaint' was intended to apply to that phrase.

For the purposes of DISP the FCA Handbook defines 'complaint' as follows:

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

And 'respondent' (which is italicised) means a regulated firm covered by the jurisdiction of the Financial Ombudsman Service.

And so the material points required for Mr M to have awareness of a cause for complaint include:

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

It's therefore my view that it's necessary for Mr M to have had an awareness (within the meaning of the rule) that related to L&C, not just awareness of a problem that had caused a loss. Knowledge of a loss alone is not enough. It can't be assumed that upon obtaining knowledge of a loss a consumer had knowledge of its cause. And I don't accept that the three year time limit necessarily means knowledge of a loss means the consumer has three years to make enquiries to discover all parties who might be responsible, failing which they run out of time to make a complaint. As Nugee LJ said in The Official Receiver case '*the purpose of the rule is to prevent a complainant from losing the right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware.'*

There are a number of points that I think are relevant to this discussion:

- In order to be aware of cause for complaint the complainant should reasonably know there's a problem, that they have or may suffer loss, and that someone else is responsible for the problem – and who that someone is. So, to have knowledge of cause for complaint about L&C, Mr M needs to be aware, or should reasonably be aware, that there's a problem which has caused, or may cause, him loss and that L&C has some responsibility for the position he's in.

- £213,668.45 was transferred into the SIPP in June 2012.

- Sums of £120,563.46 and £70,539.85 were invested with TRG in June 2012.

- In February 2015 a little under £11,000 was credited back to the SIPP following the completion of a TRG consolidation exercise.

- From June 2015 periodic TRG rental payments of differing amounts started to be credited to the SIPP. Rental payments continued to be credited to the SIPP through until March 2018.

- In April 2016 a pension commencement lump sum of a little over £14,600 was taken.

- Mr M says he didn't think there was any risk involved.

- L&C previously submitted that Mr M's SIPP had been receiving rental income from both apartments every quarter from June 2015 and that the value of the investments had increased.

- Mr M made a claim to the FSCS about CIB. The FSCS wrote to Mr M on 1 March 2017 and said that it had calculated his losses as a little over £98,500 and that the maximum sum it could pay Mr M under its limits was £50,000.

- I'm satisfied that by the time he made a claim to the FSCS that Mr M was aware, or ought reasonably to have become aware that there was a problem that had caused him some loss or damage. But, I'm not satisfied from the evidence provided to us to date that Mr M was aware, or ought reasonably to have become aware, that L&C had some responsibility for the position he was in more than three years before he complained to L&C.

- While I'm satisfied it was known by Mr M that the TRG investments were held within his L&C wrapper and that his DBS monies had been transferred into the L&C wrapper, there's nothing I've seen in the evidence provided to us to date that I think would have caused, or ought reasonably to have caused, Mr M, or a reasonable retail investor in his position, to link L&C to the problems with his pension fund more than three years before he complained to L&C. I think it's worth highlighting that Mr M wasn't advised by L&C about setting up the SIPP or the suitability of investments. And I think the obvious first thought when losses were suffered would have been that Mr S and/or RealSIPP/CIB might be responsible for the position he was in.

- I'm not aware of anything L&C said or did at the outset of its relationship with Mr M that would have caused him to think it might be responsible if such a problem occurred. Nor am I aware of anything L&C said or did that ought reasonably to have caused Mr M to become aware that L&C might be responsible for the position he was in more than three years before Mr M complained to L&C.

- By October 2014, various regulatory publications had been published – including the results of two thematic reviews on SIPP operators in 2009 and 2012, guidance for SIPP operators in 2013 and a letter to the CEOs of SIPP operators in 2014.

  A common theme of those regulatory publications was that the regulator considered that SIPP operators had obligations in relation to their customers even where they don't give advice, and that many SIPP operators had a poor understanding of those obligations.

  I don't consider that Mr M was, or ought reasonably to have become, aware of the contents of these publications more than three years before he complained to L&C. I

also don't consider these publications mean that Mr M, or a reasonable investor in his position, should have had an understanding, and more than three years before his complaint was made to L&C in October 2017, that L&C might have responsibility for the position he was in.

- To be clear, I don't think Mr M would need to have understood the details of L&C's obligations to have been aware (or in a position whereby he ought reasonably to have become aware) of his cause for complaint. But I think Mr M would have needed to have actual or constructive awareness that an act or omission by L&C had a causative role in the problem. And I don't think Mr M, or a reasonable investor in his position, ought reasonably to have attributed his problem to acts or omissions by L&C more than three years before he complained to L&C.

- In my view there's nothing in any correspondence we've seen, that was sent to Mr M more than three years before his complaint was referred to L&C, that would indicate to a reasonable retail investor in Mr M's position that L&C had responsibility for the position he was in – the position of having a SIPP with investments in it that were performing badly.

- I've seen no evidence that Mr M had been told by any party, and more than three years prior to his representative raising a complaint with L&C in October 2017, that L&C may have done something wrong and might be wholly or partly responsible for the position he was in.

- Mr M says that he wasn't aware of issues with L&C when he first contacted his representative in March 2016. And that he'd first gone to his representative because he believed he might have been given wrong advice to transfer his pension to invest into TRG. Further, that the subsequent complaint he'd made about L&C was based on advice he'd received from his representative. I consider Mr M's submissions on these points to be plausible, credible and not contradicted by the evidence provided to us to date.

On balance, I think it's reasonable to accept Mr M's explanation of events, including that he wasn't aware of issues with L&C when he first contacted his representative in March 2016.

Overall, having carefully considered all of the available evidence, I don't think Mr M was aware, or ought reasonably to have become aware, that he had cause for complaint against L&C more than three years before his complaint was referred to L&C.

Accordingly, I'm satisfied this complaint has been brought in time and that it's one we can consider. As such, I've gone on to consider the merits of this complaint below.

merits

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

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

As a preliminary point, I should also say the purpose of this decision is to set out my findings on what's fair and reasonable, and explain my reasons for reaching those findings,

not to offer a point by point response to every submission made by the parties to the complaint. And so whilst I have considered all the submissions made by both parties, I've focussed here on the points I believe to be key to my decision on what's fair and reasonable in the circumstances.

Relevant considerations

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

In my view, the FCA's Principles for Businesses are of particular relevance. The Principles for Businesses, which are set out in the FCA's Handbook "*are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G – at the relevant date).

PRIN 1.1.9G at the relevant date stated that:

> *"Some of the other rules and guidance in the Handbook deal with the bearing of the Principles upon particular circumstances. However, since the Principles are also designed as a general statement of regulatory requirements applicable in new or unforeseen situations, and in situations in which there is no need for guidance, the ... other rules and guidance should not be viewed as exhausting the implications of the Principles themselves."*

Principles 2, 3 and 6 provide:

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

I've carefully considered the relevant law and what this says about the application of the Principles. In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) ('BBA') Ouseley J said at paragraph 161:

> *"The Principles are the overarching framework for regulation, for good reason. The FSA has clearly not promulgated, and has chosen not to promulgate, a detailed all-embracing comprehensive code of regulations to be interpreted as covering all possible circumstances…The overarching framework would always be in place to be the fundamental provision which would always govern the actions of firms, as well as to cover all those circumstances not provided for or adequately provided for by specific rules."*

At paragraph 162 Ouseley J said:

> *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirements they cover. The*

general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."

At paragraph 77 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."*

And at paragraph 184 Ouseley J said:

> *"The width of the Ombudsman's duty to decide what is fair and reasonable, and the width of the materials he is entitled to call to mind for that purpose, prevents any argument being applied to him that he cannot decide to award compensation where there has been no breach of a specific rule, and the Principles are all that is relied on."*

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

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

> *"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."*

And at paragraph 107:

> *"The passages in the judgment of Ouseley J. discussed above were essentially directed at the question of whether the FSA could use the Principles to augment the rules. The answer to that question was that it could and there is no suggestion that the concept of augmentation was to be limited in the manner for which BBSAL contended. However, it is also important that the present case concerns the decision of an Ombudsman, rather than the FSA. In that connection, it is clear from the judgment of Ouseley J. that the Ombudsman can permissibly take an even broader approach than the regulator."*

And then, after citing more passages from the *BBA* case, Jacobs J at paragraph 109 stated:

> *"I consider that these passages, too, are fatal to BBSAL's attempts to put limits on the extent to which the Ombudsman was entitled to use the Principles in order to augment existing rules or duties. The Ombudsman has the widest discretion to decide what was fair and reasonable, and to apply the Principles in the context of the particular facts before him."*

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

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

On 18 May 2020, the High Court handed down its judgment in the case of *Adams v Options SIPP* [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. I've taken account of both these judgments and the judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 1188 when making this decision on Mr M's case.

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

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

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

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

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

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

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

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

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

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

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

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

The regulatory publications

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

- The 2009 and 2012 Thematic Review Reports.
- The October 2013 finalised SIPP operator guidance.

- The July 2014 *"Dear CEO"* letter.

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

The 2009 Thematic Review Report

The 2009 Report included the following statement:

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

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

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

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

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

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

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

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

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

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

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

The later publications

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

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

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

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

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

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

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

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

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

they are appropriate to deal with.

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

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

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

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

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

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

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

"***Due diligence***

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

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

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

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

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

- *ensuring all third-party due diligence that the firm uses or relies on has*

been independently produced and verified

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

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

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

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

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

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

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

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

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

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

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

It's relevant that when deciding what amounted to 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'm satisfied it's relevant and therefore appropriate to take it into account.

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

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

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

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

I've carefully considered what L&C has said about publications published after Mr M's SIPP was set up. But like the Ombudsman in the *BBSAL* case, I don't think the fact the publications, (other than the 2009 Thematic Review Report), post-date the events that took place in relation to Mr M's complaint, mean that the examples of good practice they provide

weren't good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

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

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

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

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

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

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

about industry practices at the time.

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

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

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

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

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

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

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

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

The contract between L&C and Mr M

L&C has made a number of references to its contract with Mr M. I've carefully considered what L&C has said about this.

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

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

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

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

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

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

And I think that L&C understood this at the time too, as it did more than just check the FSA entries for RealSIPP and CIB to ensure they were regulated to give advice. It also entered into intermediary agreements with those firms. And it's apparent that L&C had access to some information about the type and volume of introductions it was receiving from RealSIPP, as it's previously been able to provide us with information about this when requested on the complaint that was the subject of published decision DRN-3587366.

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

And I think L&C also ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments before accepting them into a SIPP. So, I'm satisfied that, to meet its regulatory obligations when conducting its business, L&C was also required to consider whether to accept or reject a particular investment (here Dunas Beach), with the Principles in mind.

L&C's due diligence on RealSIPP/CIB

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

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

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

L&C explained to us in the complaint that was the subject of published decision DRN-3587366 that at the date of the SIPP application in that case, which was towards the end of 2011, it wouldn't have accepted applications from a firm that wasn't authorised by the FSA.

L&C also told us in that case that its directors from the relevant period had confirmed that its policy was that applicants effecting a pension transfer, as Mr M was here, had to have had advice made available to them. And that it was then for the applicant to choose whether to take up the intermediary's offer of advice. In my provisional decision I explained that if L&C's policy on this point wasn't the same when it received Mr M's application that L&C should confirm as such to us. In response to my provisional decision, L&C hasn't stated that its policy wasn't the same when it received Mr M's application.

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

- L&C was aware of or should have identified potential risks of consumer detriment associated with business introduced by RealSIPP at the outset of its relationship with RealSIPP, and certainly by the time of Mr M's application:
    - There was insufficient evidence to show RealSIPP (or any other regulated party) was offering or giving full regulated advice (that is advice on all of the transfer or switch to the SIPP, the establishment of the SIPP *and* the intended investment).
    - The introductions had anomalous features – high-risk business, in relatively high volumes, for unregulated overseas property developments and other esoteric investments. And, even though RealSIPP had the necessary permissions to give full advice on the business it was

introducing, it wasn't giving advice on a large proportion of that business.

- L&C should have taken steps to address these risks (or, given these risks, have simply declined to deal further with RealSIPP).
- Such steps should have involved getting a full understanding of RealSIPP's business model – through requesting information from RealSIPP and through independent checks.
- Such understanding would have revealed there *was* a significant risk of consumer detriment associated with introductions of business from RealSIPP.
- In the alternative RealSIPP would have been unwilling to answer or fully answer the questions about its business model.
- In either event L&C should have concluded it shouldn't accept introductions from RealSIPP.

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

Anomalous features

Volume of business

It's clear that L&C had access to information about the number and nature of introductions that RealSIPP made, as it's previously been able to provide us with details about this when requested. An example of good practice identified in the FSA's 2009 review was: *"Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified."*

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

L&C said during the complaint that was the subject of published decision DRN-3587366 that 153 of its members were introduced by RealSIPP, 44 of whom were introduced *before* the consumer in the published decision established their L&C SIPP in November 2011. It also said that 44 of the total introductions involved members with an Occupational Pension Scheme. On a previous complaint, back in January 2018, L&C said that RealSIPP's introductions were made between February 2011 and May 2013. Further, that RealSIPP was involved with a number of investments across members SIPPs and that *"all of these investments would be considered Non- standard by FCA definition."* L&C provided a list of the investments concerned, and confirmed that in 77 cases RealSIPP received fees but didn't advise on the SIPP.

I'm aware that in some more recent complaints, for example the complaint that was the subject of published decision DRN-4484149, L&C has said that 160 clients were introduced by RealSIPP. And that from a sample of 20% of the total clients introduced by RealSIPP 99.94% involved transfers from Occupational Pensions Schemes. L&C has also said all investors invested in overseas commercial properties. And that during the course of the agreement with RealSIPP 23% of L&C's total new business came from RealSIPP's introductions.

We've previously asked L&C what number introduction Mr M was from RealSIPP and L&C hasn't provided us with that information.

Under DISP 3.5.9(3)R I may *"reach a decision on the basis of what has been supplied and take account of the failure by a party to provide information requested."*

In the absence of a response from L&C to our query, it appears from the transaction history L&C provided that Mr M's SIPP was established on, or around, 1 November 2011. So, I think Mr M's SIPP was established shortly before the SIPP was established for the consumer in the complaint that was the subject of published decision DRN-3587366 (the SIPP in that complaint was established in November 2011 and L&C confirmed that the consumer in that complaint was the 45th introduction it received from RealSIPP).

As such, premised on the information available to us, I'm satisfied that by the time it accepted Mr M's business, L&C had already received a number of introductions from RealSIPP over a period of around eight to nine months. And I think that L&C should have been concerned that such a volume of introductions, relating exclusively to consumers investing in higher-risk esoteric investments was unusual – particularly from a small IFA business. And it should have considered how a small IFA business introducing this volume of higher-risk business was able to meet regulatory standards.

And I think this concern ought to have been even greater in a case like Mr M's where a DBS was involved. At the relevant date COBS 19.1.6G stated:

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

While I acknowledge this aims to define the expectation of a regulated financial adviser when determining the suitability of a pension transfer, it emphasises the regulator's concern about the potential detriment such a transaction could expose a consumer to. Given the nature of its business and regulatory status, I'd expect L&C to have been familiar with the guidance contained in the COBS – even if it didn't apply directly to it.

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

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

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

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

High proportion of execution-only business

Around the time of the events that are the subject of this complaint, L&C appears to have had more than one type of SIPP application form in circulation. In some instances, for example in the complaint that was the subject of published decision DRN-3587366, the SIPP application form included boxes to be ticked so as to confirm whether or not advice had been given to the client at the point of sale. And in other instances, such as in Mr M's complaint, the SIPP application form didn't include these boxes. So, the SIPP application form L&C received for Mr M didn't state whether Mr M had received advice at the point of sale or not. But, as I explain below, the available evidence shows that prior to receiving Mr M's SIPP application L&C was, or ought reasonably to have been, aware that not offering or giving advice was something RealSIPP was doing routinely.

As noted above, L&C had access to information about the number and nature of introductions that RealSIPP made, as it's previously been able to provide us with details about this when requested. And I don't think simply keeping records without scrutinising that information would be consistent with good industry practice and L&C's regulatory obligations. As highlighted in the 2009 Thematic Review Report, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

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

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

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

The availability of advice

L&C entered into intermediary agreements with RealSIPP and its principal, CIB. As part of this process, it was open to L&C to mention to RealSIPP/CIB any policy requirements it had for full regulated advice to be made available to applicants where introduced business involved pension transfers. L&C could have highlighted this in the intermediary application form, The Intermediary Agreement for Non-Insured Contracts, or in supplementary correspondence with RealSIPP/CIB. However, no correspondence I've seen between L&C and RealSIPP/CIB mentioned this.

On balance, having carefully considered all of the available evidence, I think it's more likely

than not that Mr M wasn't ever offered full regulated advice on the transactions this complaint concerns by RealSIPP or its principal (or any other regulated advisory firm). As its client agreement makes clear, RealSIPP wasn't offering clients like Mr M the option of *full* regulated advice on the package it was offering. And as CIB's client agreement explained, it was restricting its services to the establishment and set-up of a specific SIPP (here the L&C SIPP). And it wouldn't be providing advice on the suitability of the overall total package for consumers (i.e. including advice on the specific investment(s) that monies were being transferred into the SIPP to effect).

It was explained in CIB's letter dated 8 November 2011 that "*Whenever possible, we would wish to carry out a complete financial review, but at your explicit request, our advice is restricted to the consideration of establishing a Self Invested Personal Pension to allow you to invest in the offshore development of your choice".*

A complete financial review, in my understanding, would include a review of an individual's total financial circumstances, needs and objectives. So, I wouldn't (and don't) read Mr M not wanting a complete financial review as equating to him not wanting full advice on all of the establishment of a SIPP, the transfer of monies into the SIPP and the TRG investments.

Further, I think it's more likely than not that the 'complete financial review' wording was standard wording CIB was incorporating into a number of its letters. I say this mindful of the fact that we've seen no complaints that I'm aware of where CIB gave a complete financial review to consumers effecting transactions similar to those Mr M effected. And in the complaints I'm aware of, where RealSIPP/CIB introduced business to L&C and consumers then invested in TRG investments post-transfer, RealSIPP and/or CIB was either giving no advice, or it was limiting its advice to a specific SIPP to transfer the consumer's pension monies into (and without consideration of the suitability or otherwise of the specific investment that monies were being transferred into the SIPP to effect).

Based on the available evidence, and what L&C ought reasonably to have identified from the pattern of business being introduced to it by RealSIPP/CIB prior to L&C accepting Mr M's business, I don't think there was sufficient basis for L&C to reasonably assume that advice on the overall proposition for the consumer (i.e. including the intended TRG investments) had been given to Mr M, or had been made available to Mr M by RealSIPP/CIB and declined.

The possibility that no regulated advice on the overall proposition had been given or made available was a clear and obvious potential risk of consumer detriment here. Mr M was transferring over £210,000 from a DBS to invest the bulk of those monies in an overseas property development – a move which was highly unlikely to be suitable for the vast majority of retail clients.

The involvement of an unregulated business

I think it's more likely than not from the available evidence that unregulated parties were involved with the promotion of the TRG investments to some consumers introduced to L&C by RealSIPP (including Mr M).

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

Mr M's application involved transferring monies in from a DBS to invest in TRG investments. The SIPP application form L&C received for Mr M didn't record whether Mr M had received

advice at the point of sale. But the available evidence shows that prior to receiving Mr M's SIPP application L&C was, or ought reasonably to have been, aware that not offering or giving advice was something RealSIPP was doing routinely. I say that because L&C has previously told us that a little under half the introductions from RealSIPP were transacted as execution-only business (i.e. with no advice being given by RealSIPP).

And, mindful of what L&C knew, or ought reasonably to have known, *before* it accepted Mr M's business about the pattern of business being introduced to it by RealSIPP/CIB, I think L&C ought to have been alive to the risk TRG and/or unregulated businesses working with it, might be involved in promoting the TRG investments to be held in consumers' (like Mr M's) SIPPs. And that Mr M might have been 'sold' on the idea of transferring his pension so as to invest in Dunas Beach investments before the involvement of any regulated parties.

Although the promotion of TRG wasn't in itself a regulated activity, this was nonetheless another clear and obvious potential risk of consumer detriment – particularly where pension investors were being targeted. L&C should have been alive to the risks associated with an unregulated firm promoting an investment for SIPPs which was unlikely to be suitable for the vast majority of retail clients, particularly so where, on the face of it, full regulated advice on the overall proposition wasn't being received by consumers like Mr M.

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

Having carefully considered all of the evidence provided to us, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

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

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

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

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

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

> *"Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments*

> *they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with."*

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

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

Had L&C done this I think it's more likely than not that the information obtained would have reinforced the position referenced on RealSIPP's website, namely that RealSIPP didn't provide full advice and only provided 'generic information on the considerations and risks associated with property investment'. Further, that CIB was restricting its services to the establishment and set-up of a specific SIPP and that it wouldn't be providing advice on the suitability of the overall total package for consumers, including the specific investment(s) that transfers to SIPPs were being effected to make.

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

Making independent checks

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

The 2009 Thematic Review Report said that:

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

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

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

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

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

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

Having carefully considered all of the evidence provided to us, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

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

- RealSIPP was explaining to consumers that its role was solely as *"administrator and packager"* of the SIPP.
- CIB was explaining to consumers that it was restricting its services to the establishment and set-up of a specific SIPP and that it wouldn't *"be providing any advice on the suitability of this package to your own personal circumstances".*
- Consumers were being introduced to L&C without having been offered full regulated advice.
- Some consumers might have been 'sold' on the idea of transferring pension monies so as to invest in Dunas Beach before the involvement of any regulated parties.
- The other anomalous features I've mentioned *did* carry a significant risk of consumer detriment.

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

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

As previously stated, RealSIPP said it provided 'generic information' about investments, rather than advice. And RealSIPP wasn't offering clients like Mr M the option of full regulated advice on the proposed transactions. It was acting as *"administrator and packager"* of the SIPP – an unusual role for an advisory firm to take. This raises significant questions about the motivations and competency of RealSIPP – particularly where consumers were being introduced to it by unregulated businesses.

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

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

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

I think it's more likely than not that if L&C had made enquiries with some applicants introduced by RealSIPP at the time, like Mr M, their responses would have been consistent with what RealSIPP (and, where relevant, CIB) was stating in the contemporaneous documentation in relation to the extent of its role.

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

I also think L&C should have identified that consumers introduced by RealSIPP who were investing in TRG could be being 'sold' on the TRG investments by an unregulated business. And I think, if asked, Mr M would have explained how his application came about – which, as I mention, was likely the result of the involvement of an unregulated business. Mr M's testimony about it having been Mr S/CIP that introduced/recommended the TRG investment has remained consistent and I'm satisfied that Mr M's testimony on this point is plausible and credible.

Further, I think L&C should have concluded, and before it accepted Mr M's business, that the overall volume of business and the proportion of consumers who weren't apparently receiving *any* advice asked further serious questions about the motivation and competency of RealSIPP.

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

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

Due diligence on the underlying investments

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

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

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

Having carefully considered all of the evidence provided to us, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

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

L&C has referred to forms Mr M signed. In my view it's fair and reasonable to say that just having Mr M sign indemnity declarations wasn't an effective way for L&C to meet its regulatory obligations to treat him fairly, given the concerns L&C ought to have had about his introduction. L&C knew that Mr M had signed forms intended to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on such indemnities when L&C knew, or ought to have known, Mr M's dealings with RealSIPP were putting him at significant risk wasn't the fair and reasonable thing to do.

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

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

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

COBS 11.2.19R

In its response to Mr M's complaint L&C has referenced COBS 11.2.19R and said that it would have been in breach of COBS if it hadn't effected Mr M's investment instructions.

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

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

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

And I don't think that L&C's argument on this point is relevant to its obligations under the Principles to decide whether to accept Mr M's business in the first place.

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

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

Having carefully considered all of the evidence provided to us, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

The involvement of other parties

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

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

As I set out above, in my opinion it's fair and reasonable in the circumstances of this case

to hold L&C accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mr M fairly.

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

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

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

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

Mr M taking responsibility for his own investment decisions

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

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

In my view, if L&C had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr M's application from RealSIPP to open a SIPP *at all*. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr M wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

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

CIB was a regulated firm with the necessary permissions to advise on the transactions this complaint concerns. And RealSIPP was an appointed representative of CIB. I'm satisfied that in his dealings with them, Mr M trusted RealSIPP/CIB to act in his best interests. Mr M 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 M being aware of the risks. I've no reason to doubt Mr M when he says that he was led to believe the TRG investment would protect his pension, that he would receive a regular income from rentals and that when he was ready to retire he could sell the investment and his pension pot would be much higher. And I wouldn't consider it fair or reasonable for L&C to have concluded that Mr M *had* received an explanation of the risks involved with the overall proposition including the TRG investment from RealSIPP and/or CIB given what L&C knew, or ought to have known, about RealSIPP's/CIB's business model by the time it received Mr M's application.

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

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

L&C has contended that other SIPP providers were accepting the type of investments Mr M made at the time. But I don't think it's fair and reasonable to say that L&C shouldn't compensate Mr M for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr M's application from RealSIPP.

Mr M says that if he'd been told the investment involved risk he wouldn't have proceeded, as his pension was his only asset for retirement and he didn't have the capacity for the loss of these monies.

If L&C had declined to accept Mr M's business from RealSIPP, and had Mr M then sought and received advice from a different regulated advisory firm that wasn't RealSIPP/CIB, I think it's fair and reasonable to conclude that such a firm would have acted in accordance with its regulatory obligations and given suitable advice on the overall proposition. And I think it's far more likely than not the advice would have been not to invest *any* of Mr M's pension monies into TRG and to remain in his DBS. I also think it's more likely than not that Mr M would then have followed that advice. Alternatively, Mr M might have simply decided not to seek pensions advice elsewhere and still then remained in his DBS.

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

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

But, in this case, I'm not satisfied that Mr M proceeded knowing that the investments he was making were high-risk and speculative, and that he was determined to move forward with the transactions in order to take advantage of a cash incentive.

I'm not satisfied that Mr M *understood* he was making a high-risk investment. It appears Mr M understood that the TRG investments (which his pension monies were being transferred into the SIPP to effect) would protect his pension, would generate a regular income from rentals and would help to provide a higher pension pot when sold at a later date.

I've also not seen any evidence to show Mr M was paid a cash incentive. It therefore

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

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

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr M – including RealSIPP and CIB. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against L&C that requires it to compensate Mr M for the full measure of his loss. RealSIPP was reliant on L&C to facilitate access to Mr M's pension. And but for L&C's failings, I'm satisfied that Mr M's pension transfer wouldn't have occurred in the first place.

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

In conclusion

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

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

Putting things right

My aim is to return Mr M to the position he'd now be in but for what I consider to be L&C's failure to carry out adequate due diligence checks before accepting Mr M's SIPP application.

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

1. Take ownership of the Dunas Beach investments if possible.
2. Calculate and pay compensation for the loss Mr M's pension provisions have suffered as a result of L&C accepting his application from RealSIPP.
3. Pay Mr M £500 for the trouble and upset he's suffered.

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

1. Take ownership of the Dunas Beach investments if possible.

   In order for the SIPP to be closed and further SIPP fees to be prevented, the TRG investments need to be removed from Mr M's SIPP. To do this, L&C should calculate an amount it's willing to accept as a commercial value for Mr M's TRG investments and pay that sum into Mr M's SIPP and take ownership of the TRG investments. The sums paid into the SIPP to purchase the TRG investments will then make up part of the current actual value of the SIPP.

   If L&C's unwilling or unable to purchase the TRG investments, then the actual value of any TRG investments it doesn't purchase should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include their being given a nil value for the purposes of ascertaining the current value of Mr M's SIPP.

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

   If L&C doesn't take ownership of the TRG holdings, and they continue to be held in Mr M's SIPP, there will then be ongoing fees in relation to the administration of the SIPP. Mr M wouldn't be responsible for those fees if L&C hadn't accepted his application from RealSIPP. So, I think it's fair and reasonable for L&C to waive any SIPP fees until such time as Mr M can dispose of the TRG investments and close the SIPP.

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

   A fair and reasonable outcome would be for L&C to put Mr M, as far as possible, into the position he'd now be in if it hadn't accepted his application from RealSIPP. As explained above, had this occurred then I consider it to be more likely than not that Mr M wouldn't have established the L&C SIPP, or transferred monies into it from his DBS, or invested his pension monies in Dunas Beach. L&C must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:

   https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

   Mr M has previously told us that his planned retirement age had been age 65. And on balance, I'm satisfied that he would have wanted to take benefits from his DBS at that age had he remained in the DBS and been able to do so. So the calculation should assume Mr M took benefits from the DBS from age 65, or the earliest point subsequently that he would have been permitted to.

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, the calculation should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr M's acceptance of my final decision.

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

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

I acknowledge that Mr M has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr M'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 M received from the FSCS. And it will be for Mr M 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 sum(s) Mr M actually received from the FSCS and has had the use of for a period of the time covered by the calculation.

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

Redress paid directly to Mr M 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 M'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.

3. Pay Mr M £500 for the trouble and upset he's suffered.

   In addition to the financial loss that Mr M has suffered as a result of the problems with his pension, I think that the loss of a significant portion of his pension provisions has caused Mr M distress. And I think that it's fair for L&C to compensate him for this as well.

My final decision

For the reasons given, I find that this is a complaint we can consider and my final decision is that I uphold the complaint and Pathlines Pensions UK Limited must calculate and pay fair redress as set out above.

Where I uphold a complaint, I can make an award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend that Pathlines Pensions UK Limited pays the balance.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My final decision is that Pathlines Pensions UK Limited must pay the amount produced by that calculation up to the maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Pathlines Pensions UK Limited pay Mr M the balance plus any interest on the balance as set out above.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 28 December 2024.

Alex Mann
Ombudsman