DRN-5243859

The complaint

Mr H's representative ('CMC') complains about the due diligence Pathlines Pensions UK Limited undertook before accepting the transfer of Mr H's defined-benefit ('DB') occupational pension scheme into a Self-Invested Personal Pension ('SIPP') and making certain investments.

Pathlines Pensions UK Limited was formerly known as London & Colonial Services Limited ('L&C'), so for ease of reference, I'll be referring to L&C throughout.

Mr H's CMC complains that L&C didn't have adequate procedures, systems and controls in place. And that this resulted in L&C accepting Mr H's SIPP application when it shouldn't have done, and allowing him to make investments in The Resort Group's Dunas Beach Hotel Resort, Physical Gold and Green Oil Plantations. Further, that Mr H has suffered loss as a result of this.

What happened

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

Involved parties

Pathlines Pensions UK Limited (referred to as L&C)

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

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

At the time of the events in this complaint, CIB was authorised by the 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 its permissions were cancelled on 4 June 2015. It has since been dissolved.

Real SIPP LLP ('RealSIPP')

RealSIPP was an appointed representative of CIB from 6 April 2010 to 4 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. Mr H invested in TRG's 'Dunas Beach' Resort.

Green Oil Plantations Australia Limited ('GOPA')

GOPA was founded in May 2010. GOPA offered land leases for land pre-planted with green oil producing trees in Queensland Australia. GOPA wasn't regulated by the financial services Regulator.

The Affinity Partnership Ltd ('TAP')

TAP was an appointed representative of First Complete Ltd from 10 May 2010 until 17 April 2012 and of the Mortgage Advice Bureau Limited from 8 February 2012 until 19 April 2012. It ceased to be registered as an appointed representative of any regulated firm on 19 April 2012.

Neither First Complete Ltd nor the Mortgage Advice Bureau Limited had permission to advise on pensions.

The Affinity Partnership Assets Ltd ('TAP Assets')

TAP Assets was a limited company incorporated on 3 December 2010 and dissolved on 15 October 2020. It was not regulated by the financial services Regulator. It appears to have been an introducer of the Green Oil investment.

<u>What happened here?</u>

I've briefly summarised what's happened below.

Mr H says in 2011 he was going through a very painful divorce, which was severely impacting his health. He says he was being assisted by his brother, who ran a financial company called The Affinity Partnership. Mr H hasn't specified whether his brother was acting for TAP or TAP Assets when he spoke with him about his pension, but it appears based on information I've seen on Companies House and the FCA Register that Mr H's brother was connected to both firms.

Mr H says his brother persuaded him to transfer out of his DB scheme to a SIPP with L&C and to invest in TRG, Physical Gold and GOPA. Mr H says that although his brother introduced the investments to him, he recalled speaking to his brother's colleagues from 'an umbrella company' they worked for. Mr H said he trusted his brother to act in his best interests, particularly as he knew Mr H's circumstances. Mr H confirmed he received letters from RealSIPP, which he had paid a commission to. He said RealSIPP appeared to be an upstanding and official company and he presumed it would be diligent and professional in dealing with his investment. Mr H says he wasn't aware that any of the investments being made for him were high-risk and all he was interested in doing was protecting his pension and providing for his family.

On 9 September 2011, Mr H completed a RealSIPP branded application form to open a SIPP with L&C and transfer in his DB scheme. This form was sent to L&C by RealSIPP. The Independent Financial Adviser ('IFA') details are on page three of the form. Details for both RealSIPP and CIB, including their FSA authorisation numbers, are noted. A 'Mr M' is the named contact and a CIB email address is given. And it's recorded 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 H wants to manage the fund himself. And underneath it says 'Dunas Beach Property Investment – See Investment Instruction attached'.

Two L&C 'Dunas Beach Property Investment Request' forms were provided with the SIPP application form, which Mr H had signed on 9 September 2011. Amongst other things, it's noted that:

- Mr H wanted L&C to acquire an apartment in Block 6 of the Dunas Beach Resort for a purchase price of €69,975.
- Mr H wanted L&C to acquire an apartment in Block 7 of the Dunas Beach Resort for a purchase price of €137,525.
- He had selected 'Easy Ownership Option 2' for both purchases.
- It was understood that 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 (here Mr H) wished to proceed with the investment.

A scheme borrowing form was also signed by Mr H on 9 September 2011. Details of sums to be borrowed, and the lender they'd be borrowed from, were left blank. But it was noted in the form that:

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

L&C says it received Mr H's SIPP application and associated documents on 17 October 2011.

The SIPP was opened and L&C received around £181,000 from Mr H's DB scheme in February 2012.

We've not been provided with the contracts for Mr H's Dunas Beach investment. However, I've seen a copy of a contract signed by the vendor in October 2011 for a different customer who has made a complaint to the Financial Ombudsman Service. The contract explained that a total of 85% (consisting of a 45% 'down payment' and an additional 40%) was paid when the contract was signed. The contract explained that the established date for the conclusion of the construction would not be later than 31 December 2012. And the unit would be delivered once the last instalment had been paid. The contract stated 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 H's case, I think it's likely that a not dissimilar contract would have been completed in respect of Mr H's investments in the Dunas Beach Resort.

On 27 February 2012 £102,453.79 was ultimately invested into Dunas Beach in the two apartments Mr H had specified in his investment request form.

We've been provided with a copy of a 5-year project GOPA Lease Application and Buyback Contract form that Mr H signed on 8 March 2012 and which L&C signed on 19 April 2012. The form records Mr H as the applicant and the agent as TAP Assets. The form records that Mr H wishes to purchase a 5-year land lease and Section 3 of the application records that Mr H is looking to lease a land area of *"half hectare"* with 926 trees for a total amount of £20,000. Further, that an additional £250 would be included for payment of legal fees. The monies to fund the investment were to come from L&C. It was explained in the form that:

- Details were being provided for those willing to purchase a 5-year land lease pre-planted with green oil producing trees (Millettia Pinnata) in Queensland Australia. Millettia produces green oil and by-products.
- Investors could do what they wished with the land and trees during the lease.
- The company offering land leases, and an optional buyback management contract, was Green Oil Plantations Australia Limited (GOPA), a private company limited by shares registered under the laws of England and Wales.
- The land lease was fully registered with the land registry in Australia.
- The leaseholder had the option to enter a buyback management contract for the purposes of having their trees purchased by GOPA, GOPA would buy all the trees back from the leaseholder at the original price. The buyback price for the trees would be paid on the fifth anniversary of the contract date.
- Where a buyback management contract was entered into, GOPA would manage and exploit trees' produce for five years for the purpose of generating a revenue. GOPA would also be responsible for running costs and taxes associated with the land/trees.
- GOPA would take out comprehensive insurance to cover crop reinstatement and loss of income. This also covered the leaseholder's loss of income.
- If investors felt that financial advice was needed, they could contact their IFA.
- The grant of the lease wasn't a regulated investment under the Financial Services and Markets Act 2000. The GOPA lease wasn't an investment regulated by the FSA.

The GOPA application included a disclaimer that, *"the parties agree that notwithstanding any provision to the contrary herein the liability of London & Colonial Services Limited and any nominated or associated companies should be limited to the net value of the assets held by London & Colonial Services Limited who is sole trustee of [Mr H] SUN03983 (or any other plans which may become entitled to the fund subject to this clause) at the point in time claims [sic] made".*

Mr H and L&C also signed a form so as to enter into the buyback management contract. It was noted, amongst other things, in the contract that:

- The risk of loss of, or damage to, the crop would pass to GOPA on the execution of the buyback agreement but title to the crop would only pass to GOPA when the price together with all interest had been paid in full to the owner.
- Until the price and interest had been paid, title to the crop would remain with the owner, provided that GOPA was entitled during the term of the agreement to sell or exploit in any way the produce of the crop and to retain as its own any consideration received.
- The price would be paid in full to the owner by GOPA upon the earliest of a number of provisions set out in the agreement.
- Until the price was paid in full, GOPA would pay annual interest to the owner at various rates according to the number of years remaining on the lease.

- GOPA would insure the payment to the owner throughout the duration of the agreement and until its full payment.

L&C says that further instructions, signed by Mr H, were received on the 23 March 2012 which stated:

"Further to the setup of my SIPP account, referenced above, and the funds that have been sent to The Resort Group for the Dunas Beach property investments, please take this letter as my further instruction to confirm the other investments that I wish to make with my remaining SIPP funds – as per my application forms and reservations forms which you should have already received:

Physical Gold £50,000
Green Oil Plantations (5 year) £20,000"

As such, £50,000 was invested in Physical Gold on 3 April 2012, and £20,000 was invested in GOPA on 23 April 2012 in accordance with Mr H's instructions.

GOPA wrote to Mr H on 2 May 2012 confirming the investment and providing him with signed copies of his application, tenancy and buyback agreement.

Mr H made a claim to the Financial Services Compensation Scheme ('FSCS') in 2017 about the advice he received from CIB to transfer out of his DB scheme to the SIPP and to make the subsequent investments. In October 2017 Mr H received the maximum compensation from the FSCS of £50,000, but it had calculated his loss at the time to be £167,403.82.

In January 2020 the FSCS subsequently gave Mr H a reassignment of rights in which, amongst other things, the FSCS explained it was transferring back to Mr H any legal rights he held against L&C.

Mr H made a complaint to L&C via a CMC on 4 June 2020. The CMC said L&C had failed to carry out insufficient due diligence checks on both the introducer of Mr H's SIPP business, and the investments he went on to make before accepting them into the SIPP. Had L&C carried out sufficient due diligence on the introducer it would have concluded that it was not appropriate to accept instructions from them. It should have known that there was a high chance that a lot of, if not all, the business introduced by the introducer would pose a high risk of significant consumer detriment. The CMC added that L&C should have identified that it was anomalous that the introducer was advising clients to transfer from occupational and DB pension schemes into a SIPP.

With regard to the underlying investments, the CMC said L&C had failed to carry out any independent checks as to the viability of the schemes. If it did, it would have determined that there was no real investor protection, no liquidity, they could not be independently valued and they were very high risk. Had L&C acted in accordance with its regulatory obligations and good industry practice at the relevant time, it should have refused to accept Mr H's introduction and the investments.

Mr H explained that because of the loss to his pension, he couldn't see a point in time when he would even be in a position to consider retiring.

L&C said Mr H had made his complaint too late as he'd made a complaint to the FSCS in May 2017 and had instructed a CMC at some point prior to this. It said it knew about this as the CMC had written to L&C on 7 June 2017 to ask for information to assist Mr H with his FSCS claim. L&C said the CMC made a data subject access request ('SAR'). And the SAR requested all files in relation to Mr H, including signed application forms and agreements,

facts-finds, transfer forms, ceding scheme information and transaction statements. L&C said the clear intention was that these papers were needed to consider a complaint against L&C as SIPP provider. This was more than three years before Mr H complained on 4 June 2020, so the complaint was made too late and it didn't consent to the Financial Ombudsman Service considering it.

Our Investigation

An Investigator reviewed Mr H's complaint and concluded it had been made in time as he wasn't persuaded Mr H would've understood he had cause for complaint about L&C until the start of 2019, and he'd complained within three years of this.

The Investigator went on to uphold Mr H's complaint. He said that L&C hadn't carried out sufficient due diligence checks on the business being introduced by RealSIPP. He said the business being introduced by RealSIPP had several anomalous features and carried a risk of consumer detriment. He said a high proportion of customers were transferring out of DB schemes in order to invest in esoteric, speculative assets that would not be suitable for most retail customers. The Investigator said L&C also ought to have known, had it carried out sufficient checks, that RealSIPP was not likely advising customers on both the pension transfer and the investments and appeared to be transacting a large proportion of business on an execution-only basis, which L&C ought to have considered unusual.

Ultimately, the Investigator concluded that L&C should have refused to accept Mr H's SIPP business and had it done so, the transactions complained about wouldn't have gone ahead. The Investigator recommended L&C should compensate Mr H on the basis of him having remained in his DB scheme. He also awarded additional compensation of £500 for the distress and inconvenience caused to Mr H.

L&C didn't agree with the Investigator and, maintained the complaint was time-barred. In addition to the points it had previously made in its final response letter, it said on 18 January 2013 it received notification from GOPA that:

"… the directors of the Green Oil Plantations… have decided to halt all sales of the Green Oil Plantations Investment Project with immediate effect… "

L&C said this notification from GOPA would have been the first notice to both Mr H, and his appointed IFA, that there may be a problem with Mr H's pension scheme investment and that he had or may suffer a loss. And Mr H's 2013 valuation, issued on 20 February 2013, showed that in less than 12 months, his Physical Gold investment portfolio had lost over 8% of its original investment value and would have been the first indication to Mr H that at least one of his elected investments were failing to perform as expected.

Further to this, L&C said it was notified on 15 April 2013, and subsequently it notified Mr H, that GOPA had entered into administration. L&C says it is reasonable to expect that any client being notified that their investment had entered into administration would give them serious cause for concern, and it would have, or should reasonably have, put them on notice that something had gone wrong, that they are likely to have suffered a loss, and that they may have cause for complaint.

L&C added that on 19 November 2013, Mr H contacted L&C directly requesting details of its complaints procedure which was subsequently provided to him. L&C says this clearly evidences that Mr H was investigating matters including that he believed that he may have cause for complaint against L&C.

L&C also said Mr H's 2014 valuation was issued to him on 10 March 2014 and this showed the GOPA investment was valued at £nil, while his Physical Gold portfolio had fallen to £2,745, a loss of over 86% of his original investment value. Again, it said it is reasonable that this would have been further notification to Mr H that something had gone wrong and that he had suffered a loss.

L&C said Mr H ought reasonably to have been aware of his cause for complaint about L&C by April 2013 at the latest and he'd complained more than three years after this date.

L&C added that it first became aware of Mr H's complaint on 22 February 2021 – it had never received the complaint letter of 4 June 2020.

The Investigator asked Mr H for further details about why he was in touch with L&C in 2013 and what prompted him to ask for the complaint procedure. He also asked why Mr H didn't make a complaint at the time.

Mr H said at the time he was very unwell so didn't recall the details. However, he thought it was not likely to do with the performance of his SIPP investments. He said he can't find any information he received about GOPA going into administration until he received a letter from a business dated 21st November 2013, which was two days after he asked L&C for details of their complaints procedure.

Mr H thinks that the contact with L&C was most likely to do with the fact that he was looking to release a tax-free sum from his pension following a house move, and that this had been delayed. Mr H has provided some email chains from January 2014 showing that he intended to sell some gold to fund this but it hadn't been actioned. He'd also queried the drop in the value of the gold with the investment provider.

Mr H added that L&C's 2014 valuation wouldn't have given him any cause for concern about his gold investment because he'd sold the majority of his gold portfolio to release a tax-free sum of around £30,000 in February 2014.

Regardless of the above, Mr H says he would not have considered L&C at fault for the losses to his pension, he says he would have (and still does) consider his brother was at fault for recommending the investments to him.

In light of this, the Investigator told L&C that he still considered the complaint had been made in time. As no agreement could be reached, the complaint was passed to me to make a decision on the matter.

Additional background information

As L&C maintains that Mr H's complaint was made too late, it has provided limited information on this case. So, I've mentioned some of the additional documentation we've been provided by L&C and complainant representatives in cases with similar circumstances to Mr H's complaint, as this information is relevant to my consideration of this complaint.

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

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

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

A customer's representative sent us RealSIPP's client agreement and Keyfacts document, titled *"about our services for our Resort Group SIPP package."* RealSIPP's client agreement describes it as an *"administrator and packager"* of pension solutions to clients of various alternative investment providers, and says that:

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

Further, that:

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

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

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

In response to another customer's complaint L&C said, amongst other things, that:

- Its role is to make sure that investments are allowed within the trust rules and that they don't breach HMRC regulations. It isn't authorised to provide financial advice.
- It establishes liabilities and responsibilities it would have as owner of an asset.
- Consumers are encouraged to seek financial advice from a regulated adviser, but L&C doesn't require advice to have been given.
- It was for RealSIPP to advise the consumer on their DB scheme transfer. If RealSIPP hadn't considered it suitable, it wouldn't have submitted the consumer's application form to L&C.
- L&C's relationship with RealSIPP was that it permitted RealSIPP to introduce SIPPs, and it paid RealSIPP the fees agreed by the client.
- The only relationship it had with TRG was liaising with it during the purchase process, and on ongoing matters relating to the administration of investments.
- It accepts business submitted by regulated financial advisers who have an intermediary agreement with it.
- Its controls included ensuring that business was submitted by a regulated financial adviser, whose responsibilities included advising on the suitability of the transfer, the SIPP and the underlying investments.
- The customer completed 'investment request' and 'loan application' forms. These

included details about the TRG investment, the units the customer wished to acquire and the selected payment basis. The forms drew attention to the extent of L&C's role and some features of the investment. The customer signed these to confirm their understanding.

- The rules of the SIPP are set out in a trust deed. They state that L&C would only, subject to a small number of exceptions including where it was of the opinion doing so would be otherwise improper or inappropriate, exercise its investment powers in accordance with directions given by the member.
- It had checked the FSA register; this showed that CIB was regulated and authorised to give financial advice and that RealSIPP was an appointed representative of CIB.
- It's entitled to rely on the presumption that advice was given by CIB on DB transfers, this is consistent with the remuneration agreement.
- L&C decided that *"provided clients had had pensions and investment advice made available, even if that available advice were not taken up or followed"* that it would allow the TRG investment to be held in its SIPP.
- It appointed solicitors to advise on property purchases in Cape Verde and on the associated contracts. A solicitors' report, a draft copy of the promissory contract, draft management/rental agreements and an investor pack were available to the customer. And the customer confirmed that they'd taken any advice they needed on the investment.
- At the time of the customer's application, many advisers were claiming to advise on the SIPP but not on the underlying investments. The FSA later clarified that advisers must consider the merits of the investment proposition when recommending a SIPP. Following this L&C changed its application form, and applications where an adviser indicated they'd not given advice at the point of application would be declined.
- It's reasonable to assume that the customer didn't walk into RealSIPP's offices and state that they wanted an L&C SIPP and to invest in TRG. If the consumer had done this it would have been an execution-only case, and L&C didn't accept execution-only cases.
- Execution-only cases wouldn't have involved an adviser fee, as was charged in that case.

An Ombudsman issued a provisional decision on that complaint and said:

- He was satisfied that L&C's policy from the relevant date, as confirmed by its directors, was to only accept applications from a firm authorised by the FSA and *"to ensure that* [the customer] *had advice made available to* [them]*, in this case through RealSIPP."*
- 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.
- The evidence provided of the due diligence undertaken by L&C into RealSIPP 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 the customer'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 of RealSIPP's business model.
- Had L&C made reasonable checks prior to receiving the customer'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 the customer's application.
- In the circumstances, it was fair and reasonable for L&C to compensate the customer to the full extent of the financial losses they'd suffered due to L&C's failings.

L&C didn't accept the provisional decision and solicitors for L&C provided a detailed response. Below, I set out a summary of what I consider to be the main points made in the response to that provisional decision.

- The provisional decision imposed a duty on L&C beyond that envisaged by the parties. And imposed additional duties on L&C to those provided for under the COBS.
- L&C only offered an execution-only service, the customer knew and accepted this.
- The introduction was from a FCA regulated entity and COBS 2.4.4 provides for division of responsibility in such circumstances. Insufficient weight has been given to contractual arrangements and the demarcation of roles and responsibilities.
- No regard had been paid to the respective duties of the parties under the contract. The entities who brought about the transaction should be held responsible.
- As RealSIPP/CIB are no longer extant, we've concluded that L&C is responsible.
- The Financial Ombudsman Service may dismiss a complaint. The Pensions Ombudsman ('TPO') or Court would be a more appropriate forum for this complaint.
- The provisional decision quoted at length from *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) but gives only a passing reference to *Adams v Options SIPP UK LLP (formerly Carey Pensions UK LLP)* [2020] EWHC 1229 (Ch).
- The provisional decision didn't properly address using the Principles as the basis for finding against L&C in preference to the COBS rules or established case law.
- 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.
- The provisional decision assumed examples of good practice observed by the Regulators would have been known to the wider SIPP industry at the time.
- By linking findings to good practice instead of the interpretation of the COBS rules as set out in case law, L&C was held to an unreasonable standard. The standard that L&C should be held to is that of a reasonably competent SIPP provider.
- L&C wasn't required to request information or copies of advice. And L&C couldn't comment on advice without potentially being in breach of its permissions.
- Duties imposed by the COBS can't all apply to all firms in all circumstances.
- The COBS rules contain some provisions and obligations that don't apply to execution-only SIPP providers.
- The relationships in this case are similar to those in *Adams*, the distinguishing factor is that RealSIPP wasn't an unauthorised introducer.
- Amongst other things, the judge in *Adams* held that in order to identify the extent of the regulatory duties imposed on Carey, "*one has to identify the relevant factual context"* and that *"the key fact ... in the context is the agreement into which the parties entered, which defined their roles in the transaction"*.

- The judge also said that *"a duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed...as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed."*
- In *Adams* the FCA agreed that the function of a firm, as determined by contract, would govern what it had to do to comply with its duties under the FCA Handbook.
- L&C acted in accordance with the contract and in full satisfaction of its duty.
- The provisional decision should have found that L&C's duties extended no further than those owed in *Adams*. But the conclusion reached is effectively that the scope of L&C's duties is the same as the position advanced by the claimant in *Adams*.
- The provisional decision ran contrary to *Adams* by suggesting that, notwithstanding the clear contractual terms, L&C owed due diligence obligations under the Principles.
- The provisional decision failed 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.
- The Financial Ombudsman Service was enabling recovery of losses flowing from non-contractual obligations, which are inconsistent with express obligations in the parties' contractual arrangements.
- There was no restriction on L&C accepting business from RealSIPP without advice having been given. And at the time there was no requirement that a member had to take advice before transferring a DB scheme, or for L&C to ensure that advice was taken.
- L&C wasn't in breach of any rule, guidance or law in accepting the investment.
- Making a value judgment on advice wasn't within L&C's role.
- Insisting advice be offered to the customer would have made no practical difference, as the decision to transfer was made before the SIPP/investment applications were signed.
- The customer knew that the TRG investments were illiquid holdings in property and that this was high-risk business. Further due diligence wouldn't have unearthed information that the customer wasn't already aware of when they invested.
- Good title was obtained and the investments produced a return before the pandemic.
- In *Adams* the Store First investment being high-risk didn't make it manifestly unsuitable and the same's true of the TRG investment.
- The customer was more than capable of making their own decisions. The customer's submission that they were told there was little or no risk as the investment had guarantees runs contrary to the literature. And the submission that if the risks had been explained they wouldn't have proceeded runs contrary to the evidence.
- The case of *Gestmin SGPS v. Credit Suisse* [2013] EWHC 3560 emphasises the importance of contemporaneous documents when making factual findings.
- The starting point should be the documents and any recollection that runs contrary to the contents of these should be discarded.
- A SIPP provider can't reject business without completing a full suitability assessment.
- L&C couldn't reject business without making a value judgment on suitability for each individual client, this fell outside of its expertise and the terms of the contract.
- L&C hasn't ever had permission to advise on investments.
- A consumer who requested (and received) an execution-only service, after signing numerous disclaimers should be responsible for the consequences of their actions.
- It was common practice for SIPP providers to accept such investments in 2011. If L&C had rejected the application, it would have proceeded with a different SIPP provider.
- Had L&C rejected the investment it wouldn't have been able to give reasons for this

without breaching its permissions.

I issued a provisional decision on 9 December 2024, explaining that I thought Mr H had made his complaint in time and that I was minded to uphold it. I said I didn't think L&C should have accepted the introduction of Mr H's SIPP business from RealSIPP because of the anomalous features and the risk of consumer detriment associated with the introductions it had received prior to Mr H's application. If L&C hadn't accepted Mr H's applications, I was satisfied that Mr H wouldn't have transferred out of his DB scheme to a SIPP and wouldn't have gone on to invest as he did. So, I recommended that L&C should compensate Mr H on the basis of him having remained in his DB scheme and that it should also pay him £500 for the distress and inconvenience caused.

Mr H accepted my provisional findings. L&C didn't accept my provisional decision and made the following points:

- The complaint is time-barred – the DISP rules are not open to interpretation and have not been properly applied.
- The FCA's Definition for a complaint is;
    - [a complaint] that alleges that the complainant has (or may suffer) financial loss material distress or inconvenience
    - Relates to an activity of that respondent, or of any other respondent with whom that respondent has some connection in marketing or providing financial services or products.
- My findings in respect of whether the complaint is time-barred are inconsistent with other decisions L&C has received.
- L&C hasn't been provided with evidence that Mr H referred his complaint to the Financial Ombudsman Service within six months of the final response letter being issued.
- L&C maintained that Mr H had contacted it asking for details of the complaints procedure in 2013 and this was after his GOPA investment had failed so he had reason to complain at that time. A search of the internet would've shown Mr H could've complained against both the respondent (RealSIPP) or a connected respondent (L&C).
- Mr H also appointed a CMC in 2016 to pursue a complaint so he was aware something had gone wrong by that point.

Once Mr H was aware something had gone wrong, that is when the investigation into what had gone wrong should have started. Mr H, and/or his appointed representative, then had three years from this point to investigate what had happened, who was responsible, and bring a complaint against that party or parties before the three year deadline expired.

What I've decided – and why

Jurisdiction

L&C maintains that the complaint has been made too late. So, I've reconsidered whether we can consider Mr H's complaint.

The rules applying to the Financial Ombudsman Service say that, where a business doesn't consent, I can't consider a complaint made more than six years after the event complained of, or if later, more than three years after the complainant was aware, or ought reasonably to have been aware, of their cause for complaint. DISP 2.8.2R can be found online in the Dispute Resolution section of the Regulator's handbook.

L&C says that Mr H's complaint was raised outside of these time limits. That's because it says it didn't receive notification of Mr H's complaint until 22 February 2021, when we sent it a copy of Mr H's complaint letter dated 4 June 2020. As such, it says the complaint was received more than six years after the events Mr H complains about here. L&C also says that Mr H's complaint was made more than three years after he ought reasonably to have been aware of his cause for complaint about L&C as follows:

- Mr H's annual valuation sent to him in February 2013 showed Mr H had suffered a loss of 8% of the value of his gold portfolio.
- Mr H was notified in April 2013 that GOPA had entered into administration.
- Mr H got in touch with L&C in November 2013 to request details of L&C's complaints procedure.
- The annual valuation sent to Mr H in March 2014 showed the GOPA investment had been valued at £nil and his gold portfolio had lost over 86% of the original investment value.

L&C said Mr H ought reasonably to have been aware of his cause for complaint about L&C by April 2013 at the latest given the problems he was experiencing with his investments, and he's complained more than three years after this date.

L&C says that it didn't receive a copy of Mr H's complaint letter until February 2021. I haven't seen evidence to persuade me that L&C received Mr H's complaint letter of 4 June 2020. But I'm satisfied that Mr H's complaint was referred to L&C on 10 November 2020 – I can see that our Service emailed a copy of Mr H's complaint form to L&C and we received an automatic acknowledgment from L&C on the same day.

In response to my provisional decision, L&C has also said that it hadn't been provided with any evidence to show that Mr H had referred his complaint back to the Financial Ombudsman Service within six months of L&C's final response letter being issued. But by the time L&C issued a final response letter, which although wasn't dated, appears to have been issued in September 2022, it wasn't relevant as we were already able to consider Mr H's complaint.

Under DISP 1.6.2R, L&C had eight weeks from the date it received Mr H's complaint to send him a final response letter or to tell him that it was not in a position to issue a final response and inform him that he could refer the complaint to the Financial Ombudsman Service. As I've said above, the complaint was referred to L&C by us via email on 10 November 2020 and we received an automatic acknowledgment. This gave L&C until 5 December 2020 to provide Mr H with a final response letter, but none was forthcoming. Mr H's CMC contacted us on 17 February 2021 to request an update. The CMC was told on 22 February 2021 that L&C had been sent details of the complaint and they should hear from L&C soon. On 19 April 2021, Mr H's representative said it still hadn't heard from L&C and asked us to continue with the investigation of Mr H's complaint.

DISP 2.8.1R says that the Ombudsman can only consider the complaint if the respondent has sent the complainant its final response letter or eight weeks have elapsed since the respondent received the complaint. As no final response letter had been issued and over eight weeks had elapsed since the complaint was received by L&C on 10 November 2020, we were able to take the complaint forward for investigation and no final response letter was necessary. As such, on 12 May 2021, L&C was told that Mr H's representative asked us to look into the complaint and L&C's file was requested.

Although the six-month time limit isn't relevant here, I still have to consider whether the complaint was made more than six years after the event complained of, or if later, more than

three years after the complainant was aware, or ought reasonably to have been aware, of their cause for complaint.

Mr H applied for the SIPP and investments in late 2011 and early 2012. These events took place more than six years before L&C received the complaint on 10 November 2020. Therefore, Mr H's complaint has been brought too late under the six-year part of the rule.

So, I've also gone on to consider whether Mr H referred his complaint more than three years from the date on which he either was aware, or ought reasonably to have become aware, he had cause for complaint. This means if Mr H ought reasonably to have been aware of his cause for complaint before 10 November 2017, he made his complaint to L&C too late under the Regulator's rules.

In thinking about when Mr H was aware, or ought reasonably to have been 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.

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

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

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

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

Ombudsman Service. Although Mr H may separately also have cause for complaint about RealSIPP/CIB, L&C is the respondent here, as Mr H alleges that its actions have also caused him a loss.

So the Glossary definition of complaint requires that the act or omission complained of must relate 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.

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

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

It's therefore my view that it's necessary for Mr H 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 which 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 H 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 is responsible.

- Mr H transferred a little over £181,000 into his SIPP and around £102,500 was invested in Dunas Beach in February 2012. A further £50,000 and £20,000 was invested in Physical Gold and GOPA respectively, in April 2012.

- Mr H says he wasn't aware that any of the investments he made were high-risk.

- Mr H was notified on 15 April 2013 that GOPA had entered into administration.

- On 19 November 2013, Mr H contacted L&C directly requesting details of its complaints procedure which was subsequently provided to him.

- Mr H's 2014 annual valuation was issued to him on 10 March 2014 and this showed the GOPA investment was valued at £nil, while his Physical Gold portfolio had fallen to £2,745, a loss of over 86% of his original investment value.

- Mr H got in touch with his CMC in 2017 about the problems with his pension. Mr H made a claim to the FSCS in May 2017 and on 7 June 2017 the CMC asked L&C for

all files in relation to Mr H, including signed application forms and agreements, facts-finds, transfer forms, ceding scheme information and transaction statements. And Mr H went on to make a claim to the FSCS.

I think it's possible Mr H may have been aware of an issue with his GOPA investment in 2013 – but L&C hasn't sent evidence to demonstrate Mr H was actually made aware of GOPA going into administration. But having considered the above points, I think Mr H was most likely aware there was problem with his pension investments by March 2014 at the latest. I say this because on receipt of his statement Mr H would've seen the value of his investment in gold had reduced, and the investment in GOPA had been given a £nil valuation.

It's unclear how Mr H's investment in TRG was performing at this point because L&C hasn't provided us with Mr H's statements. But I think the failure of the investment in GOPA, and the reduction in the value of the Gold investment was sufficient enough for Mr H to have been aware that the there was an issue with the pension investments he'd been advised to make. I think Mr H would've been aware that this had caused a loss to his pension, even though I note the reduction in the Gold portfolio was mostly down to Mr H disinvesting from it in order to take a lump sum. But, I'm not satisfied that Mr H would have, or ought to have, been aware that L&C had any responsibility for the position he was in more than three years before he complained to L&C.

There's nothing I've seen that was sent to Mr H more than three years before his complaint was referred to L&C that would have caused Mr H, or a reasonable retail investor in his position, to link L&C to the losses he'd experienced with the pension investments. I think it's worth highlighting that Mr H wasn't advised by L&C about setting up the SIPP or the suitability of the investments. And I think the obvious first thought when problems arose would have been that the people who recommended those investments to him, including his brother, might have misled him. Or that the people who ran the Gold and GOPA investments might have caused the issue.

I'm not aware of anything L&C said or did at the outset of its relationship with Mr H 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 to have caused Mr H to think it was responsible once the problems had occurred.

I acknowledge that Mr H contacted L&C in November 2013 and asked for details of its complaint procedure, which were provided. But I don't think this alone demonstrates that Mr H was aware of his cause to make this complaint about L&C. Mr H could've been thinking about complaining about any number of things.

Our Investigator asked Mr H what prompted this contact. Mr H couldn't recall why he'd asked for these details – that isn't surprising given the length of time that's since passed and given that no complaint was actually made. However, he offered that it may have been to do with the fact that he was looking to take a lump sum from his pension at the time, but his request hadn't been actioned. In the absence of any other details from L&C, I think that is the most likely explanation. I say this as Mr H has provided email chains from January 2014, which refer to earlier conversations with L&C about taking a lump sum from the pension. Mr H's email wasn't acknowledged and had to be chased. So, based on the evidence I've seen, I don't think that Mr H's contact in November 2013 demonstrates that he had any awareness that L&C might be responsible for the problems with his pension investments.

To be clear, I don't think Mr H 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 been aware) of his cause for complaint. But I think Mr H would have needed to have actual or

constructive awareness that an act or omission by L&C had a causative role in the problem causing him loss or damage. So, I've thought about whether there was anything else that ought to have prompted Mr H, or a reasonable investor in his position, to have attributed his problem to acts or omissions by L&C more than three years before he complained to it.

On 30 October 2018 the unsuccessful judicial review challenge in *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) ('BBSAL') was published. In that case, an Ombudsman had decided that a SIPP operator was responsible for the losses a consumer suffered in some circumstances and the court had rejected the SIPP operator's challenge to that decision. There was a lot of publicity and commentary surrounding it and it could be seen from this that much of the industry's position that SIPP provider's obligations were very limited wasn't correct.

Mr H was facing a significant loss – in October 2017 Mr H received the maximum compensation from the FSCS of £50,000, but it had calculated his loss at the time to be over £167,000. So, after allowing time to notice the change in the landscape following the *BBSAL* judgment and work out the implications for him (either through his own research or by appointing an expert) I think Mr H ought reasonably to have been aware of his cause for complaint by the start of 2019. And this would've given him until the start of 2022 to complain to L&C about its role in the transactions he's complained about here.

Even if I accepted that L&C did not receive Mr H's complaint until February 2021 (which I don't), I think the complaint was made within three years of when I think Mr H ought reasonably to have been aware of his cause for complaint about L&C. Accordingly, I think the complaint was made in time and is one our Service can consider the merits of. As such, I've gone on to consider the merits of this complaint below.

Merits of the complaint

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

Given that Mr H accepted my provisional decision and L&C didn't make any comments on the findings I made on the merits of the complaint, I see no reason to depart from my provisional findings. As such, I've decided to uphold Mr H's complaint and I've largely repeated my findings, as per my provisional decision, below.

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

Relevant considerations

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

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

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

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The regulatory publications

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

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

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

The 2009 Thematic Review Report

The 2009 Report included the following statement:

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

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

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

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

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

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

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

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

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

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

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

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

The later publications

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Due diligence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

L&C may also reference the *R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017] EWHC 352 (Admin) case. However, whilst the judge in that case made some observations about the application of our statutory remit, that remit remains unchanged. And, as noted above, in considering what's fair and reasonable in all

the circumstances of a case, I'm required to take into account (where appropriate) what I consider to have been good industry practice at the relevant time.

L&C's also said in many complaints similar to Mr H's 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."*

Based on other complaints I've seen involving this introducer, I'm also satisfied that L&C, at the time of the events under consideration here, most likely thought the 2009 Thematic Review Report was relevant. L&C's acknowledged in its submissions on other similar complaints that the Report's relevant to how it conducts its business and highlights some areas of good practice. And although L&C hasn't provided evidence of it on this case, L&C did carry out some due diligence on RealSIPP. So, it clearly thought it was good practice to do so, at the very least.

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

I've carefully considered what L&C has said in other complaints about publications published after Mr H'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 H's complaint, mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

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

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

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

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

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

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

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

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

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

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

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

Submissions may be 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 points 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, my view is that in order for L&C to meet its regulatory obligations (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into RealSIPP and the business RealSIPP was introducing, both initially and on an ongoing basis.

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

As I've said, L&C has provided limited information on this case because it maintains it is time-barred. But I can see that in other similar cases to Mr H's complaint, L&C said it carried out due diligence on RealSIPP before accepting business from it. And from what I've seen in those cases, I accept that it undertook some checks. However, the questions I need to consider are whether L&C ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by RealSIPP were being put at significant risk of detriment. And, if so, whether L&C should therefore not have accepted Mr H's application from RealSIPP.

The contract between L&C and Mr H

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

So, I've 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 H's case is made with all

of this in mind. So, I've proceeded on the understanding that L&C wasn't obliged – and wasn't able – to give advice to Mr H on the suitability of the SIPP or the 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 H) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

And based on what I've seen in other cases, 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 been able to provide us with information about this when requested.

So, and well before the time of Mr H'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 investments (here Dunas Beach, Physical Gold and GOPA), with the Principles in mind.

<u>L&C's due diligence on the introducer</u>

Mr H has said that his brother, who ran a business called The Alliance Partnership, introduced the investments to him and persuaded him to transfer out of his DB scheme to make those investments. As I've set out above, Mr H's brother was connected to TAP and TAP Assets. TAP was an appointed representative of a regulated firm (primarily a mortgage broker), but TAP Assets was not regulated in any capacity.

I've considered all the evidence we've been sent in relation to Mr H's SIPP and investment applications. But the only business mentioned in any of the paperwork other than RealSIPP/CIB was TAP Assets. This appeared in the GOPA application which was completed in March 2012, where TAP Assets was named as the 'Authorised Agent'. So, it

seems to me that Mr H's brother was most likely acting on behalf of TAP Assets in his dealings with Mr H. As such, there is evidence of an unregulated party being involved in introducing at least one of the investments to Mr H.

However, I don't think L&C ought reasonably to have been aware of the involvement of TAP Assets when Mr H's SIPP business was introduced to it. L&C has confirmed that it received Mr H's SIPP application form and Dunas Beach investment requests from RealSIPP on 17 October 2011. RealSIPP/CIB is named as the IFA in the SIPP application form and there is no mention or suggestion of TAP Assets' involvement. The SIPP was established and Mr H's DB scheme was transferred into it in February 2012, before the GOPA investment instruction was given. So, I think it was reasonable for L&C to treat RealSIPP as the introducer of Mr H's SIPP business here.

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

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

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

L&C has explained that at the date of another customer's application, which was made at a similar time to Mr H's application, it wouldn't have accepted applications from a firm that wasn't authorised by the FSA. And L&C also said its directors from the relevant period have confirmed its policy was that applicants effecting a pension transfer, like Mr H, 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.

Clarity on the specifics of L&C's policy at the relevant time hasn't been helped by L&C's comments about this changing during our investigation of that complaint. But on balance, I think it's *most likely* that the position confirmed by L&C's directors from the relevant period is the correct one. And L&C hasn't disputed this in its response to my provisional decision.

These steps go some way towards meeting L&C's regulatory obligations and good industry practice. But I think L&C failed to conduct sufficient due diligence on RealSIPP before accepting business from it or draw fair and reasonable conclusions from what it did know about RealSIPP. And, that L&C ought reasonably to have concluded it should *not* accept business from RealSIPP, and have ended its relationship with it, before Mr H's application was made. 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 H'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 the transfer or switch to the SIPP *and* the intended investment).
    - The introductions had anomalous features – high-risk business, in relatively high volumes, for unregulated overseas property developments and other esoteric investments. And, even though RealSIPP had the necessary permissions to give full advice on the business it was introducing, it wasn't giving 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 H's application. These points overlap, to a degree, and should have been considered by L&C cumulatively.

The availability of advice

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

L&C may say it was entitled to believe that Mr H had received full regulated advice from RealSIPP, given that its details were provided in Mr H's application form, and it was being paid initial and ongoing remuneration from the SIPP. And further, that by signing the Dunas Beach Property Investment Request forms, Mr H confirmed he'd obtained whatever advice he required regarding the investment. But having carefully considered all of the available evidence, I think it's *most likely* that Mr H wasn't ever offered full regulated advice by a regulated advisory firm with the necessary permissions.

L&C may say that there's some evidence that advice might have been given to Mr H by RealSIPP/CIB, given the fee agreements. But I don't agree this is evidence that advice was given by RealSIPP/CIB. The annual fee of £300 wasn't for advice; as the Keyfacts document explains it was for ongoing administration and correspondence. So, I've seen no evidence that Mr H was 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 and Keyfacts document make clear, RealSIPP wasn't offering clients like Mr H the option of *any* regulated advice on the proposed transactions, let alone *full* regulated advice.

So, based on the available evidence, I think there was insufficient basis for L&C to reasonably assume that advice had been given to Mr H or had been made available to Mr H and declined.

The possibility no regulated advice had been given or made available was a clear and obvious potential risk of consumer detriment here. Mr H was transferring around £180,000 from a DB scheme, with the majority of it to be invested in an overseas property development – a move which was highly unlikely to be suitable for the vast majority of retail clients.

Anomalous features

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 – Dunas Beach – Mr H was investing in. As mentioned, I think it's fair to say that such investments are highly unlikely to be suitable for the vast majority of retail clients. They will generally only be suitable for a small proportion of the population – sophisticated and/or high net worth investors. The risks are multiplied where the property is "off plan" and further funding is necessary from investors to complete the purchases, as was the case with many of the deposit based TRG investments, including those Mr H made.

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

High proportion of execution-only business

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

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

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

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

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

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

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

I think this ought to have been a red flag for L&C in its dealings with RealSIPP. It's highly unusual for regulated advice firms to be involved in execution-only transactions involving pension transfers to invest in high-risk esoteric investments, such as unregulated overseas

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

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

Volume of business

During our investigation of another complaint that was the subject of a published decision, L&C said 153 members were introduced by RealSIPP, 44 of whom were introduced in the nine months before that consumer established their L&C SIPP in November 2011. I note this was only weeks after Mr H's was introduced to it in mid-October 2011. L&C also said that 44 of the total introductions involved members with an occupational pension scheme.

L&C confirmed in information provided in respect of another complaint I've seen that a total of 160 clients were introduced by RealSIPP. And that following a sample of 20% of the total number of these, 99.94% were from occupational pension schemes. L&C 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.

I don't know how many applications L&C had received by the time it received Mr H's application on 17 October 2011. And L&C hasn't clarified this in response to my provisional decision. But as I've said above, L&C told us in another complaint that 44 customers were introduced by RealSIPP before that consumer established their L&C SIPP in November 2011. And in other complaint involving RealSIPP but a different investment, L&C told us that RealSIPP had already introduced 32 applications to it by the time that customer's application was received on 12 October 2011. So I think it's clear that L&C had received at least 32 introductions from RealSIPP before it received Mr H's application form on 17 October 2011.

Further, on another previous complaint, back in January 2018, L&C said that RealSIPP's introductions were made between February 2011 and May 2013. It said 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.

So, to summarise, L&C has told us that 153/160 members were introduced by RealSIPP and over a quarter of these had an occupational pension scheme. Prior to Mr H's application, RealSIPP had introduced at least 32 customers in around eight months. I think that L&C should have been concerned that such a volume of introductions, relating exclusively to consumers investing in higher-risk esoteric investments was unusual – particularly from a small IFA business. And it should have considered how a small IFA business introducing this volume of higher-risk business was able to meet regulatory standards. This was a further clear and obvious potential risk of consumer detriment.

And I think this concern ought to have been even greater in a case like Mr H's where a DB scheme 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.

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

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

Requesting information directly from RealSIPP

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

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

The October 2013 Finalised SIPP Operator Guidance gave an example of good practice as:

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

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

I think it's *most likely* if L&C had asked RealSIPP for this information that RealSIPP would have provided a full response to the information sought. And that, amongst other things, L&C would have then been provided with copies of client agreements and Keyfacts documents that RealSIPP was providing to different consumers it was introducing to L&C. Including a copy of the *"about our services for our Resort Group SIPP package"* document.

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

Making independent checks

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

The 2009 Thematic Review Report said that:

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

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

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

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

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

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

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

- RealSIPP was explaining to consumers like Mr H that its role was solely as *"administrator and packager"* of the SIPP.
- Consumers were being introduced to L&C without having been offered full regulated advice.
- The other anomalous features I've mentioned *did* carry a significant risk of consumer detriment.

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

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

As previously stated, RealSIPP wasn't offering clients like Mr H the option of *any* regulated advice on the proposed transactions, let alone *full* advice. It was acting as *"administrator and packager"* of the SIPP – an unusual role for an 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 to CIB for advice. But in those instances I'm aware of where CIB did advise consumers to consider establishing a L&C SIPP, it didn't offer full regulated advice; it restricted its advice to the transfer of existing pension scheme(s) to the SIPP, referencing generic risks and without the specific TRG investment being named or discussed. As CIB explained in its client agreement:

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

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

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

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

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

As such, I think L&C should have concluded – certainly by the time of Mr H's application and long before it – that it wasn't in accordance with its obligations, or 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 H's application from RealSIPP.

L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr H fairly by accepting his application from RealSIPP. To my mind, L&C didn't meet

its regulatory obligations or good industry practice at the relevant time, and allowed Mr H to be put at significant risk of detriment as a result.

Due diligence on the underlying investments

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

On receipt of Mr H's SIPP application, L&C would've understood he intended to invest in Dunas Beach. The investment instructions to invest in Physical Gold and GOPA came after this.

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 or other investments.

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

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

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

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

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

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

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

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

The involvement of other parties

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

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

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

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

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

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

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

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

Mr H taking responsibility for his own investment decisions

L&C may say 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 H's actions mean he should bear the loss arising as a result of L&C's failings.

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

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

Further, I don't think L&C could have taken any meaningful comfort from the declarations contained in the forms Mr H signed that he had, in fact, been offered full regulated advice on the SIPP, the DB scheme transfer in and the investments he made. As I've said above, I'm satisfied from the available evidence that RealSIPP wasn't offering clients like Mr H the option of *any* regulated advice on the proposed transactions, let alone *full* advice.

I'm satisfied that if L&C had carried out adequate due diligence on RealSIPP prior to receiving Mr H's application it ought reasonably to have been aware of this fact. And, once aware of this, I don't think L&C could have reasonably taken any meaningful comfort from declarations contained in forms that were contrary to the information L&C had obtained.

In other words, once it was apparent to L&C that RealSIPP wasn't, in fact, offering clients like Mr H the option of *any* regulated advice on the proposed transactions, let alone *full* advice, I don't think it would have been fair or reasonable for L&C to have taken any meaningful comfort from a statement in a form that ran contrary to something L&C already knew, or ought to have known, had it undertaken adequate due diligence.

L&C may say that Mr H was aware of the risks of the investments he was making. I've carefully considered this, but from the evidence I've seen, I've no reason to doubt Mr H when he says that he didn't receive an explanation of the risks involved, and that he was led to believe there'd be little or no risk. And in any event, I wouldn't consider it fair or reasonable for L&C to have concluded that Mr H *had* received an explanation of the risks involved with the overall proposition from RealSIPP and/or CIB given what L&C knew, or ought to have known, about RealSIPP's business model by the time it received Mr H's application.

CIB was a regulated firm with the necessary permissions to advise on the transactions this complaint concerns. And RealSIPP was an appointed representative of CIB. While it seems that Mr H initially dealt with his brother, he says he was aware of RealSIPP's involvement. He said RealSIPP appeared to be an upstanding and official company and he presumed it would be diligent and professional in dealing with his investment. So, I'm satisfied that in his dealings with it, Mr H trusted RealSIPP to act in his best interests. Mr H also then used the services of a regulated personal pension provider in L&C.

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

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

L&C may say that Mr H would likely have proceeded with the transfer and investments regardless of the actions it took. That's because other SIPP providers were accepting such investments at the time, so it may say that another SIPP operator would have accepted Mr H's application, had it declined it. And that it's *most likely* the transactions would have been effected with another provider.

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

It seems that Mr H's brother influenced him to transfer his pension and make the investments. But I'm not satisfied that Mr H was so keen to make the specific Dunas Beach investment, or other esoteric investments, that he'd have sought to submit his application to L&C, or any other provider, through a different regulated firm. Mr H has been clear that he had no intention of transferring his pension before his brother and then RealSIPP's involvement. And he also says that if the risks had been explained to him that he wouldn't have proceeded with the transactions. He was going through a difficult divorce and he was experiencing severe mental health problems – he says his only concern was protecting his pension and providing for his family.

Furthermore, I think it's far more likely than not that if Mr H had approached another regulated advisory firm he'd have been told in no uncertain terms that he should leave his DB scheme as it was, given the Regulator's expectation that a transfer out of such an arrangement won't usually be suitable. And I think it's *most likely* that Mr H would have listened to that advice given his circumstances.

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

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

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

I'm not satisfied that Mr H understood he was making high-risk investments. Mr H says he was never informed that what he was doing could even be slightly risky – he hadn't taken any risks with his finances before this.

I've also not seen any evidence to show Mr H was paid a cash incentive. It therefore cannot be said he was *"incentivised"* to enter into the transaction. And, on balance, I'm satisfied that Mr H, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams. And having carefully considered all of the circumstances, I'm satisfied it's fair

and reasonable to conclude that if L&C had refused to accept Mr H's application from RealSIPP, the transactions this complaint concerns wouldn't still have gone ahead.

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

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr H – including RealSIPP and CIB. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against L&C that requires it to compensate Mr H for the full measure of his loss. RealSIPP was reliant on L&C to facilitate access to Mr H's pension. And but for L&C's failings, I'm satisfied that Mr H's pension 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 H'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 H's application from RealSIPP. For the reasons I've set out, I also think it's fair to ask L&C to compensate Mr H for the loss he's suffered.

I say this having given careful consideration to the *Adams v Options* judgment 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 H 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 H's SIPP application.

I consider Mr H would have most likely remained in the occupational pension scheme but for L&C's failings.

What should L&C do?

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

1. Take ownership of any illiquid investments that remain in the SIPP if possible.
2. Calculate and pay compensation for the loss Mr H's pension provisions have suffered as a result of L&C accepting his application from RealSIPP.
3. Pay Mr H £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 any illiquid investments that remain in Mr H's SIPP if possible.*

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

   If L&C is unwilling or unable to purchase the remaining investments, then the actual value of any 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 H's SIPP.

   Provided Mr H is compensated in full then, if L&C doesn't purchase the investments, it may ask Mr H to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Mr H 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 investments, and they continue to be held in Mr H's SIPP, there'll likely be ongoing fees in relation to the administration of the SIPP. Mr H 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 H can dispose of the investments and close the SIPP.

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

   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.

   As I understand it, Mr H has not yet retired, and he has no plans to do so at present. So, compensation should be based on his DB scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

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

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

   - always calculate and offer Mr H redress as a cash lump sum payment,
   - explain to Mr H before starting the redress calculation that:
     - his redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption

used in the calculation), and
    - a straightforward way to invest his redress prudently is to use it to augment his DC pension
- offer to calculate how much of any redress Mr H receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr H accepts L&C's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr H 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 H's end of year tax position.

I acknowledge that Mr H has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr H's reassignment of rights require him to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required.

So, I think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the compensation Mr H received from the FSCS. And it will be for Mr H to make the arrangements to make any repayments he needs to make to the FSCS. However, I do think it's fair and reasonable for some allowance to be made for the sums Mr H 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 payments through until the valuation date (as per the DISP App 4 definition of that term), allow for the payment Mr H received from the FSCS following the claim about CIB, as a notional deduction (while not an income withdrawal payment, for the purposes of the calculation it may be treated as a notional income withdrawal payment). Where such an allowance is made then L&C must also, at the end of the calculation, allow for a notional addition to the overall calculated loss that's equivalent to the payment Mr H 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 Mr H received from the FSCS.

Redress paid directly to Mr H 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 H'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 H £500 for the trouble and upset he's suffered.*

In addition to the financial loss that Mr H has suffered as a result of the problems with his pension, I think that the loss has caused him distress. As a result of L&C's failings, Mr H lost the benefit of a guaranteed pension in retirement, which has had a significant impact on his retirement plans. As such, I think that L&C should pay him £500 to compensate him for this

as well.

My final decision

For the reasons given, it's my final decision that Mr H's complaint should be upheld and that Pathlines Pensions UK Limited must pay fair redress as set out above.

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

Determination and award: I uphold Mr H's complaint and require Pathlines Pensions UK Limited to pay Mr H the compensation amount as set out in the steps above, up to a maximum of £160,000.

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

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

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

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

If Pathlines Pensions UK Limited agrees to pay the full calculated redress, and elects to take an assignment of rights before paying compensation, it must first provide a draft of the assignment to Mr H for his consideration and agreement. Any expenses incurred for the drafting of the assignment should be met by Pathlines Pensions UK Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 4 February 2025.

Hannah Wise
Ombudsman