

The complaint

Mr D complains London & Colonial Services Limited ('L&C') didn't carry out sufficient due diligence before it allowed him to transfer his two existing pensions into a new L&C Self-Invested Personal Pension ('SIPP') and invest his SIPP monies in Llana Beach. Mr D says this caused him a financial loss which L&C should compensate him for.

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

Mr D has a professional representative, but for ease I'll refer only to Mr D.

What happened

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

Involved parties

L&C

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

(Life & Pensions) Limited ('CIB')

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

Real SIPP LLP ('RealSIPP')

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

The Resort Group ('TRG')

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

The transactions

Mr D had two existing pensions. Both parties agree that one of these was a defined benefit ('DB') pension. There's nothing in the evidence provided to suggest that Mr D's other pension had any guaranteed or safeguarded benefits or was anything other than a defined

contribution ('DC') pension, so I've proceeded on this understanding and neither party has disputed this.

Mr D says that at the start of the relevant events, his nephew was working within a financial firm and his nephew's colleague put him in touch with RealSIPP/CIB.

In April 2012, Mr D signed a RealSIPP branded application form to open a SIPP with L&C. The 'Independent Financial Adviser (IFA)' Details' section recorded details for both RealSIPP and CIB, including their FSA authorisation numbers. 'Mr H' was the named contact and a RealSIPP email address is given. A box stating "*Advice given at point of sale to client*" was ticked. 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, ticked boxes confirmed that Mr D wanted to manage the fund himself and that he wanted L&C to act on instructions from his financial adviser. And the initial investment instruction page recorded that two Llana Beach investments were to be made.

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

L&C accepted Mr D's SIPP application and established his SIPP on 2 August 2012. Later that month, approximately £169,758 was transferred in from Mr D's DB pension. In September 2012, approximately £33,073 was transferred in from his DC pension. And by September 2012, Mr D had invested a total of approximately £182,511 (£101,582 plus £80,928) into two Llana Beach holdings, with the remainder left as cash in his SIPP account. I understand the amounts Mr D invested were deposits for the holdings – the remaining balance was due on completion of the hotel rooms.

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

From the evidence provided, it's not clear to me whether Mr D took up an offer to 'consolidate' his holdings. His SIPP statements do show that on 27 August 2015, approximately £20,279 was paid from Mr D's SIPP cash balance to TRG for "*Funds for [sic] Funds to TRG- Llana Beach Purchase*". But his SIPP statements don't show any 'consolidation fees' being paid around this time - a fee that I've seen other consumers in similar complaints paid when they consolidated their TRG holdings.

Mr D says he has no recollections regarding this additional payment but thought his SIPP transaction list suggested one of his Llana Beach holdings may have been 'underpaid' in 2012 and the balance settled by payment of £20,279 in August 2015.

For its part, L&C says this £20,279 payment was an additional investment Mr D made into TRG. But despite my request, it hasn't provided any documentary evidence in relation to this.

Over the years, L&C sent Mr D statements for his SIPP, and I've been provided with copies

of most of these, for 2013 to 2016, and 2018 to 2023.

Mr D and L&C also had other communication over the years. L&C has provided a copy of an internal email dated 14 July 2015 regarding Mr D's SIPP account, which says, "*The member has called, please can you send him a full valuation and also log on details as he seems to have lost everything*".

L&C has also provided a copy of a letter dated 29 August 2017 that Mr D sent it regarding his SIPP, which said,

"I am in the process of getting divorced and require the following asap;

- *An up to date valuation of my pension, including property valuations (as I know the resort has now opened).*
- *Copies of my Promissory Contracts.*

I need all the above in writing as soon as possible please, please call me on the number below if you need any further information."

Mr D's complaint

Mr D says that in February 2018 his brother engaged a professional representative to make a claim about transferring out of a DB scheme pension, because he was concerned he might have lost all his money. Mr D's brother prompted him to enquire how this professional representative might also be able to help Mr D, because they had both transferred out of the same DB scheme and invested in TRG investments. Mr D says he first contacted his professional representative on 31 August 2018 and then engaged it in September 2018.

A claim was submitted to the Financial Services Compensation Scheme ('FSCS') regarding RealSIPP/CIB's advice to Mr D. In August 2020, the FSCS calculated Mr D's total loss was over £623,000 and paid him £50,000 in compensation, its maximum amount at that time. The FSCS later provided Mr D with a reassignment of rights to enable him to pursue a complaint against L&C, which our Service has been provided with a copy of.

In October 2020, Mr D's professional representative complained to L&C that, in summary, it hadn't completed sufficient due diligence on the Llana Beach investment – if it had done so, it should have refused to accept the investment in its SIPPs. So, L&C should put Mr D back into the position he should have been in if he hadn't invested in Llana Beach through a SIPP.

In December 2020, L&C issued its final response to Mr D's complaint. Amongst other things, L&C said:

- It provides execution-only (i.e. non-advised) SIPP administration services, as explained in the documents provided to Mr D at the start of his SIPP. And Mr D didn't question this.
- It is not permitted to provide any advice or comment in relation to the suitability of a SIPP, the underlying investment(s) or transfers of any previously held arrangements into the SIPP. It's not permitted to assess suitability for a client's individual circumstances. L&C had suggested Mr D seek independent advice, which he did.
- Mr D's SIPP application form recorded RealSIPP/CIB as his financial adviser and confirmed "*Advice given at point of sale*". Before he contacted L&C, Mr D was advised by CIB on the establishment of his SIPP, the transfers he instructed and the underlying investment he chose. So prior to his first contact with L&C, Mr D

chose to use RealSIPP/CIB and to make those transactions, and L&C didn't influence those decisions.

- Fundamentally, as an execution-only (i.e. non-advised) provider, L&C would have been in breach of COBS 11.2.19 had it not followed Mr D's instruction to invest.
- RealSIPP/CIB had advised Mr D, and at that time it was regulated by the FCA and held the appropriate permissions to advise Mr D on the transactions he went on to make. And it was RealSIPP/CIB's responsibility to ensure the investment was suitable for Mr D in his particular circumstances. So Mr D's complaint should be directed to RealSIPP/CIB.
- L&C had carried out appropriate due diligence on RealSIPP/CIB. This included obtaining a completed introducer profile and providing Terms of Business. There was nothing within the due diligence that indicated any reason why L&C shouldn't accept introductions from RealSIPP/CIB.
- L&C also carried out appropriate due diligence on the Llana Beach investment, to ensure it was suitable for holding within a SIPP, in accordance with HM Revenue & Customs ('HMRC') pension scheme rules - which was the extent of the due diligence it was required to undertake on the investment. This included reviewing investment information, company background checks and an independent report from a third-party compliance entity. L&C concluded the investment was suitable to hold within a SIPP. L&C isn't responsible for the management, performance, level of income or liquidity of the investment, or for the investment not meeting Mr D's expectations.
- The judgment in *Adams* contains arguments that very closely match Mr D's complaint points. In *Adams*, the judge agreed with the SIPP provider that:
 - It acted on an execution only basis and that the members were responsible for their own investment decisions and that it was not in breach of duty in this regard.
 - It was not obliged under COBS to assess the suitability of the SIPP or the investments for the member, and to do so would have put it in breach of their permissions.
 - The FCA Thematic Review of 2009 didn't constitute formal guidance, and all publications post-dating the investments in question can have no direct relevance.
- A breach of the Principles cannot, of itself, give rise to any cause of action at law.
- L&C conducted itself in line with the 2009 Report. But in any case, the 2009 Report is not a rulebook and doesn't have the force of statutory guidance. Further, it's not an exhaustive and prescriptive list of criteria SIPP operators must comply with. So it's not appropriate to refer to the 2009 Report as the test for reasonable skill and care.
- A retail client can legitimately hold a proportion of their portfolio in speculative and high-risk assets. Whether or not this is appropriate would need to involve a full assessment of the client's asset position, risk profile, capacity for loss and retirement plans – which goes beyond the scope of duty of a SIPP provider.

- The COBS rules contain some provisions and obligations that don't apply to execution-only SIPP providers.
- L&C is acutely aware of the standards it must meet as part of the provision of its services as an execution-only SIPP provider and has continually acted in accordance with its regulatory and statutory requirements and improved its processes over the years in line with guidance from the regulators.
- Mr D's complaint was in relation to an execution-only SIPP, so it should be heard by The Pensions Ombudsman ('TPO').

Mr D was unhappy with L&C's response so in January 2021 he brought his complaint to our Service, saying L&C hadn't carried out sufficient due diligence when it allowed him to transfer his pension and invest in Llana Beach. He thought L&C should refund his investment loss and pay him 8% interest. Mr D's later submissions to our Service included that:

- At the start of the events in question, his nephew's colleague arranged contact with RealSIPP/CIB and Mr D understood his nephew's colleague to be an introducer.
- He hadn't been looking to make changes to his pension, and only considered doing so as a result of being contacted about transferring his pensions.
- He'd not had direct contact with RealSIPP/CIB. He is not financially sophisticated and trusted that his nephew's colleague was working on his behalf.
- He'd not understood how the Llana Beach investment worked.
- He'd not been offered or paid any inducement to transfer his pensions to an L&C SIPP.

Additional background information

Having explained what's happened above, I've mentioned some of the additional documentation we've been provided by the parties below, before then going on to summarise what's happened in Mr D's complaint to date.

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

L&C has also provided us with copies of print outs from the FSA Register. These record that, as at July 2012, RealSIPP was an appointed representative of CIB. And CIB's permissions included advising on Pension Transfers and Pension Opt Outs.

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

Although it has not been provided in relation to this complaint, on another similar complaint that was the subject of published decision DRN3587366, I have seen copies of RealSIPP's

client agreement and Key facts document, titled “*about our services for our Resort Group SIPP package*”. RealSIPP’s client agreement describes it as an “*administrator and packager*” of pension solutions to clients of various alternative investment providers, and says that:

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

Further, that:

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

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

- Our Service has largely ignored the disclaimers contained within the SIPP application form and states that L&C should have recognised that the investment was high risk.
- The 2009 Thematic Review Report does little more than highlight some “*examples of measures*” that “*SIPP operators could consider, taken from examples of good practice that [the FCA] observed*”.
- The FCA’s Enforcement Guide makes it clear that guidance is not binding on those to whom the FCA’s rules apply. Nor are the variety of materials, for example generic letters written by the FCA to Chief Executives, published to support the rules and guidance in the FCA Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules.
- Stating that high risk holdings such as TRG can generally only be suitable for a small proportion of the population ignores the fact that a SIPP provider offering an execution-only service is wholly unable to assess the suitability of any particular investment for a customer.
- L&C discharged its obligations in respect of the due diligence that it was required to conduct on Llana Beach Resort. And it’s L&C’s view that the investment made via a wrapper was classified by the FCA as a standard asset, provided arrangements were in place with the investment provider to ensure that it only comprised of standard assets. So, in this case the consumer only invested in standard assets and therefore, L&C discharged its duties in relation to the Llana Beach investment.
- Our Service ‘cherry picks’ from relevant case law. It largely ignores the decision in Adams, which examined at length the responsibility of a SIPP provider offering an execution only services under the Conduct of Business: Sourcebook (‘COBS’) so is more relevant to this case.
- There’s no reason why L&C should have had any concerns about accepting business from RealSIPP/CIB. It was an FCA regulated entity and L&C was able to take comfort from that. There was no restriction at the time on a customer transferring a pension without receiving advice and there was no obligation on L&C to ensure advice was

taken. Furthermore, it's accepted that RealSIPP/CIB had permission to give investment advice.

- L&C was aware of references to suitability reports in a 2009 review by the FCA, but SIPP operators weren't required to view suitability reports. Suitability, advice and recommendations were a matter between client and adviser.
- Clients were introduced by a reputable company and, where appropriate, were warned to take further investment advice before proceeding.
- FCA guidance in 2013 said SIPP operators weren't responsible for advice from third parties.
- L&C had controls in place to monitor business introduced, and the source and volume of business. And that was under constant review. Where L&C saw anomalies, it took appropriate action, such as ceasing to accept business.
- L&C had limited powers to veto an investment and it didn't provide advice or comment on the merits of an investment. It added that:
"Our responsibilities in connection with SIPP investments are to satisfy ourselves, in our capacity as Trustee and hence the potential owner of the investment, that they are allowed within the Trust rules and do not breach HMRC regulations. We also establish what liabilities and responsibilities we would be required to take on as the owner of the asset such as any ongoing financial liabilities which would need to be met from the SIPP fund. On an ongoing basis we maintain records of the pension arrangement including all transactions, monitoring receipt of income due from investments and make appropriate reports to HMRC and the FCA."
- A consumer who requested (and received) an execution-only service after signing disclaimers should be responsible for the consequences of their actions.
- There was no restriction on L&C accepting business from RealSIPP/CIB without advice having been given.
- L&C acted in accordance with the contract and in full satisfaction of its duty.

One of our Investigator's reviewed Mr D's complaint and concluded it should be upheld. She thought L&C ought to have been concerned that the business introduced by RealSIPP/CIB posed a high risk of consumer detriment, given that a third of this business involved DB pension transfers in order to invest in an esoteric and unregulated investment, that RealSIPP/CIB were acting as introducers for that same investment, and that RealSIPP/CIB client agreement documents were making it clear to clients RealSIPP/CIB was not providing advice on entering a SIPP or any investments. Overall, our Investigator thought L&C shouldn't have accepted any business from RealSIPP/CIB. She said L&C should put things right by carrying out a redress calculation for Mr D and also paying him £500 compensation for the distress and inconvenience its failings caused him.

Mr D agreed with the outcome our Investigator had reached, but added that his loss was likely over £160,000 and our Investigator hadn't mentioned our Service's award limit or recommended L&C compensate his loss in excess of that limit. He also provided a copy of the August 2023 SIPP statement he'd received from L&C, saying he thought the valuations within it were 'fictitious' given his professional representative's work with other clients involving the same investments.

L&C disagreed with our Investigator's view. Solicitors acting on L&C's behalf provided our Service with further comments, and the new points made included that:

- Mr D signed forms to confirm he understood:
 - *"that neither the Trustee nor its Administrator [were] authorised to give [him] financial or investment advice"*
 - *"that [he had] reviewed:*
 - *Due Diligence Report / Report on Title*
 - *Promissory Contract of Purchase and Sale.*
 - *Management / Rental agreement*
 - *Investor Pack*
 - *"[he had] obtained whatever information, reports, legal and other advice [he required] regarding the investment including the potential income and the associated costs and expenses which may fall to be paid out of [his] arrangement".*
 - *"I hereby agree to be responsible for any claims, losses, costs, charges or expenses which may be raised against London & Colonial or incurred by London & Colonial in consequence of London & Colonial acting on instructions received...by me".*
- It should be confirmed whether Mr D has been granted a reassignment of rights by the FSCS, and whether he has complained about any other party.
- Mr D had brought his complaint too late for our Service to be able to consider it. Because he brought it more than six years since the events complained of. And more than three years since Mr D asked L&C in 2017 about the value of his SIPP, which ought to have put him on a train of enquiry.
- Our Service may dismiss a complaint if dealing with it would impair the effective operation of our Service, for example where a case is more suitable for the Court or another Alternative Dispute Resolution entity. The Court is a more appropriate jurisdiction for Mr D's complaint, because his oral evidence should be tested in Court and the wider impact of the findings on L&C and the SIPP industry mean the claim should be subjected to full judicial scrutiny.
- Alternatively, Mr D's complaint should be considered by TPO as it has specialist knowledge of pension complaints. The Memorandum of Understanding ('MoU') between our Service and TPO states that both should take reasonable steps to co-operate and exchange best practice around the resolution of similar complaints. TPO takes a different view to our Service on these matters, and L&C pointed to what it saw to be a similar complaint that wasn't upheld by TPO. So our Service should liaise with TPO on this matter to ensure best practice is observed.
- Insufficient weight has been given to contractual arrangements and the demarcation of roles and responsibilities. No regard's been paid to the respective duties of the parties under the contract. The entities who brought about the transaction should be held responsible.
- As RealSIPP/CIB are no longer extant, we've concluded that L&C's responsible.

- L&C reasonably understood that Mr D was being provided with investment advice from RealSIPP/CIB because this was alluded to in his SIPP application form where he informed L&C that he had authorised his financial adviser to act on his behalf in dealing with the investments. Furthermore, RealSIPP/CIB held the relevant permissions to provide independent financial advice on the pension transfer and investments.
- Our Service quotes at length from *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878 but gives only a passing reference to *Adams*.
- Our Service doesn't properly address using the Principles as the basis for finding against L&C in preference to the COBS rules or established caselaw.
- Our Service is attempting to use the Principles to circumvent the *Adams* decision.
- The Principles fail to be construed in light of the COBS rules applicable to L&C, L&C's regulatory permissions, L&C's contractual arrangements and the statutory objective that consumers should take responsibility for their decisions.
- Regulatory publications can't alter the meaning, or the scope, of the obligations imposed by the Principles.
- Publications issued after the transactions shouldn't have a bearing on this complaint.
- Even if the 2009 Thematic Review report had been statutory guidance made (which it was not), the breach of such statutory guidance would not give rise to a claim for damages.
- Many of the matters which the 2009 Thematic Review Report invites firms to consider are directed at firms providing advisory services.
- Our Service wrongly assumes examples of good practice observed by the regulators would have been known to the wider SIPP industry at the time.
- By linking findings to good practice instead of the interpretation of the COBS rules as set out in case law, L&C's held to an unreasonable standard. The standard that L&C should be held to is that of a reasonably competent SIPP provider.
- The Llana Beach investments themselves were exactly as advertised; an illiquid investment in real property with no established secondary market. Mr D was aware of this when he made the investment. Good title was obtained, and the investments produced a return – returns only ceased with the onset of the Covid pandemic and Llana Beach is trading again and its book value has increased.
- Mr D knew at the time of the advice that Llana Beach was a high risk and unregulated investment, and there was nothing preventing L&C from accepting such business. In the alternative, no SIPP provider could ever accept high risk investments into a SIPP, which would be an illogical outcome based on the nature of a SIPP.
- There was no restriction on L&C accepting business from an unregulated introducer. But Mr D's business was introduced to L&C by a regulated firm, RealSIPP/CIB.
- L&C wasn't required to request information or copies of advice. And L&C couldn't comment on advice without potentially being in breach of its permissions.

- Duties imposed by the COBS rules can't all apply to all firms in all circumstances.
- Our Service seeks to impose on L&C a duty of due diligence that it doesn't owe and which goes far beyond the scope of any duty envisaged by the parties. It seeks, in effect, to override COBS' careful allocation of duties between different types of firm conducting different types of business, and to impose duties on L&C in addition to those provided for under COBS, by means of a generalised appeal to the Principles.
- The relationships in this case are similar to those in *Adams*, the distinguishing factor is that RealSIPP/CIB wasn't an unauthorised introducer.
- Amongst other things, the judge in *Adams* held that in order to identify the extent of the regulatory duties imposed on Carey, "*one has to identify the relevant factual context*" and that "*the key fact ... in the context is the agreement into which the parties entered, which defined their roles in the transaction*".
- The judge also said that "*a duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed...as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed.*"
- In *Adams* the FCA agreed that the function of a firm, as determined by contract, would govern what it had to do to comply with its duties under the FCA Handbook.
- Our Service should find that L&C's duties extended no further than those owed in *Adams*. But the conclusion reached is effectively that the scope of L&C's duties is the same as the position advanced by the claimant in *Adams*.
- Our Service's conclusions run contrary to *Adams* by suggesting that, notwithstanding the clear contractual terms, L&C owed due diligence obligations under the Principles.
- Our Service fails to have regard to the general principle that consumers should take responsibility for their decisions, the fundamental principle of freedom of contract and to the authority of *Adams* and *Kerrigan v Elevate Credit International Ltd* [2020] C.T.L.C. 161.
- We're enabling recovery of losses flowing from non-contractual obligations, which were inconsistent with express obligations in the parties' contractual arrangements.
- 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.
- In *Adams* the Store First investment being high-risk didn't make it manifestly unsuitable and the same's true of the TRG investment.
- A SIPP provider can't reject business without completing a full suitability assessment.
- L&C couldn't reject business without making a value judgment on suitability for each individual client, this fell outside of its expertise and the terms of the contract.

- A consumer who requested (and received) an execution-only service, after signing numerous disclaimers should be responsible for the consequences of their actions.
- Whilst the investments may have been high risk there were no restrictions on promotion and Mr D made exactly the investments he intended to. In these circumstances, it is bizarre to state that the business should not have been accepted because of the business practices of the introducer. In effect, our Service can find no fault with the investments (or justification for upholding the complaint based on this) and instead concludes that there was a responsibility on a SIPP provider at the time to police the provision of pension transfer advice, quite distinct from any obligation at law.
- It was common practice for SIPP providers to accept such investments in 2012. 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.
- If our Service's view stands, there will be serious wider consequences for consumers and execution-only SIPP providers. If execution-only SIPP providers are made liable for the poor investment choices of consumers, the execution-only SIPP market will cease to exist, depriving consumers of the ability to choose to invest through an important low-cost investment route. And it would be unfair if the SIPP provider is liable for the poor investment choices of consumers, since its business is structured on the provision of execution-only services and its fees reflect that. Further, where a consumer chooses an execution only service, it would be unfair if the SIPP provider couldn't rely on express representations the consumer made when signing contractual documentation.

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

At my request, Mr D provided some further comments and evidence, which I've included in the background already set out.

And at my request, L&C also provided further comments and evidence, including that:

- Mr D's divorce proceedings led him to contact L&C in 2017 about his SIPP and its investments. These proceedings would likely affect his pension's value and performance and his subsequent retirement planning, so it's reasonable to think Mr D would've been aware of his SIPP and its performance, and this would have placed him in a suitable position to investigate his pension further. L&C provided Mr D with copy statements in 2017 which ought to have given him cause for concern about any issues regarding his investment.
- L&C doesn't hold a copy of Mr D's 2017 SIPP statement, but Mr D received copies of his statements, and these showed his investments made little or no growth over the years, which should have prompted him to start investigating. But instead, Mr D invested a further £20,278 in TRG in August 2015.

I issued a provisional decision in which I said that, as preliminary matters, I had decided not to exercise my discretion to refer this complaint to TPO or to exercise my discretion to dismiss it under DISP 3.3.4A R, and that I thought this complaint had been brought within the relevant time limits. I then concluded this complaint should be upheld. In summary, I said L&C ought to have had significant concerns about the introductions it was receiving from

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

In his response to the provisional decision, Mr D said he had nothing further to add.

In its response to the provisional decision, L&C maintained it had acted properly and to the standards expected at all times, and it wasn't fair or reasonable to hold it responsible for Mr D's decisions to transfer his pension to a SIPP and invest in Llana Beach. However, it said it was willing to offer Mr D redress in line with that set out in the provisional decision. Mr D agreed and so L&C set about making its settlement offer.

There was further communication between Mr D and L&C regarding the offer. Mr D was unhappy L&C's offer letter specified that by accepting its redress of £160,000, Mr D was *"To assign all rights and claims that you have or may have against any third party in respect of the investment(s), and/or the establishment of the SIPP or the transfer of your previous pension(s) into your SIPP. This may allow Pathlines UK to recover some money from a third-party if it believes another party to be wholly or partly responsible for the loss but will not require any further involvement from you."* Mr D said he wished to potentially litigate against a third party, so he didn't want to gift any rights or claims against involved third parties to L&C and thought L&C shouldn't have an opportunity to recover its loss in paying him £160,000 redress. Mr D also said he wished to have control of the investment after this complaint was concluded, because he intended to sell the property held within the SIPP in order to close the SIPP.

I had further communication with both parties to clarify how I expected L&C to put things right for Mr D.

L&C told us it had never objected to Mr D's request, but before it could give him ownership of the investment asset, it had to first take ownership of it and could only then reassign it to Mr D. And it was having problems taking ownership due to lack of response from TRG, though L&C was actively chasing TRG in order to have the asset reassigned to Mr D. Therefore L&C thought the asset should stay in Mr D's SIPP (where any rent would also be paid) until Mr D was fully compensated. It said this had been covered in its settlement offer, which Mr D hadn't agreed to. L&C said that if it still hadn't achieved the reassignment of the asset by the time Mr D had been fully compensated, it would then seek to arrange the written undertaking provided for in the provisional decision in the event L&C had difficulties in purchasing the asset.

Ultimately, Mr D and L&C couldn't reach agreement. As both parties have now had the opportunity to respond to my provisional decision and the communications I sent afterwards, I'm now in a position to make my decision.

What I've decided – and why

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

Preliminary point - time limits

I've thought about whether this complaint has been brought in time for our Service to be able to consider its merits.

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

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

(2) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;

unless:

(3) in the view of the Ombudsman, the failure to comply with the time limits...was as a result of exceptional circumstances.

The complaint Mr D has brought to our Service is that L&C didn't carry out sufficient due diligence when it allowed him to transfer his pensions to a SIPP and invest his SIPP monies in Llana Beach. These events took place in 2012, more than six years before Mr D complained to L&C about its due diligence in October 2020. Therefore, Mr D's complaint has been brought outside the six-year part of the rule.

I appreciate Mr D suggests he was first aware there might be a problem with his SIPP in around February 2018, after his brother (who had made a similar DB pension transfer and SIPP investments) prompted him to enquire how this professional representative might also be able to help Mr D. But under the three-year part of the rule, I need to consider not only when Mr D did become aware he had cause for complaint, but also when he *ought reasonably to have become aware* he had cause for complaint.

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

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

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

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

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

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

L&C says that the statements it sent Mr D over the years, and particularly the copy statements it provided in 2017 at his request, showed his investments made little or no growth over the years. And that Mr D's divorce proceedings in 2017 would likely affect his pension's value and performance and his subsequent retirement planning. So these things ought to have given Mr D cause for concern about any issues in regards to his investment and potential cause for complaint, and prompted him to start investigating his pension further.

Despite my invitation, Mr D hasn't provided a copy of the 2017 SIPP statement. And L&C says it doesn't hold a copy of the 2017 SIPP statement. So it's not clear to me what this statement shows. But in any case, I can see that prior to July 2016, Mr D's SIPP statements showed that the total value of his SIPP was increasing each year. However, the July 2016 statement showed the total value of his SIPP had fallen so that it was significantly less than both the previous statement in July 2015 and the total amount he'd originally transferred into his L&C SIPP from his previous pensions about four years earlier (even setting fees aside).

I'm satisfied that L&C correctly sent these statements to Mr D, as I can see they were correctly address to him at the same address Mr D gave our Service. In addition, I think it's more likely than not that Mr D would've had online access to his statements around this time, given L&C's internal email of July 2015 regarding providing Mr D with login details regarding his SIPP account.

It may be that Mr D might have thought this fall in value was due to the £20,279 paid from his SIPP cash balance to TRG for "...*Llana Beach Purchase*" in August 2015. But even if I were to accept that the July 2016 SIPP statement ought to have made Mr D aware there was a problem with his SIPP which may have caused him a financial loss, I've not seen anything that ought to have made him think at this time that any act or omission by L&C was responsible for this problem.

Mr D transferred his pensions into an L&C SIPP and made his Llana Beach investments after RealSIPP/CIB provided him with advice. So I think it's reasonable to conclude that Mr D's first thoughts would have been that RealSIPP/CIB were responsible for the problem with his SIPP investment. And I note Mr D went on to make an FSCS claim about RealSIPP/CIB's advice.

Mr D says he first became aware L&C might bear a responsibility for the problems with his SIPP when his professional representative told him so in August 2020, after the FSCS told him his total financial loss was more than £623,000, over its £50,000 compensation limit at that time. And I've not been provided with any evidence to suggest that Mr D had any information prior to his discussions with his professional representative that ought reasonably to have made him aware he had cause for complaint about the due diligence L&C carried out when it accepted his SIPP and investment applications in 2012.

So in the circumstances of this particular complaint, even if the earliest point at which Mr D became aware he had cause for complaint against L&C was when he engaged his professional representative in September 2018, I don't consider that he ought reasonably to have been aware any earlier that there was a problem with his SIPP that had caused him a loss which L&C might also bear a responsibility for.

Mr D complained to L&C about the due diligence it had carried out when it accepted his investment application within three years of this, in October 2020. Therefore, I'm of the view that Mr D's complaint about L&C has been brought in time under the three-year part of the rules.

Given all this, I'm satisfied Mr D's complaint has been brought in time under the relevant time limit rules and so is a complaint our Service can consider.

Preliminary point - should Mr D's complaint be referred to another complaints scheme or be dismissed?

L&C has said that it believes the complaint is better suited to be considered by TPO or a Court. Having carefully considered L&C's submissions on this point, I'm satisfied that Mr D's complaint is one we can and should consider. We have a statutory duty to resolve complaints referred to us which are within our jurisdiction, subject to certain discretions which are set out in our rules.

Regarding L&C's submission about TPO; the rules set out in the FCA Handbook, at DISP 3.4.1R, say:

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

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

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

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

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

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

In summary, I don't consider that it would be more suitable for this complaint to be

determined by TPO and I've decided not to exercise my discretion to refer it. I'm also not required to dismiss this complaint, and for the reasons I've given, I'm not exercising my discretion to dismiss it.

Therefore, I've gone on to consider the merits of Mr D's complaint.

The merits of Mr D's complaint

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

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

Relevant considerations

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

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

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

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

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

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

I’ve considered whether *Adams* means that the Principles should not be taken into account in deciding this case. And I’m of the view that it doesn’t. I note that the Principles for Businesses didn’t form part of Mr Adams’ pleadings in his initial case against Options SIPP. And, HHJ Dight didn’t consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of the judgments say anything about how the Principles apply to an Ombudsman’s consideration of a complaint. But, to be clear, I don’t say this means *Adams* isn’t a relevant consideration at all. As noted above, I’ve taken account of both judgments when making this decision on Mr D’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 D'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 D's complaint, amongst other things, I'm considering whether L&C ought to have identified that the introductions from RealSIPP/CIB involved a significant risk of consumer detriment and, if so, whether it ought to have ceased accepting introductions from RealSIPP/CIB *before* entering into a contract with Mr D.

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

So I've considered COBS 2.1.1R - alongside the remainder of the relevant considerations, and within the factual context of Mr D'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 D on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mr D 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 D's case.

The regulatory publications

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

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

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

The 2009 Thematic Review Report

The 2009 Report included the following statement:

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

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

...

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

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

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

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

clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.

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

The later publications

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

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

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

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

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

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved*

persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un- authorised business warnings.

- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

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

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

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

"Due diligence

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

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*
- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes*

that are in place in order to identify and mitigate any risks to the members and the scheme

- *having checks which may include, but are not limited to:*
 - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
 - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*
- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*
- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm”*

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

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

- *correctly establishing and understanding the nature of an investment*
- *ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*
- *ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*
- *ensuring that an investment can be independently valued, both at point of purchase and subsequently, and*
- *ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)*

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

L&C says the 2009 Thematic Review Report isn’t statutory guidance. I acknowledge that the 2009 and 2012 Thematic Review Reports and the “*Dear CEO*” letter aren’t formal guidance (whereas the 2013 finalised guidance is). However, the fact that the reports and “*Dear CEO*” letter didn’t constitute formal guidance doesn’t mean their importance should be underestimated. They provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it’s treating its

customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take them into account.

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

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

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

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

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

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

I'm also satisfied that L&C, at the time of the events under consideration here, thought the 2009 Thematic Review Report was relevant. L&C's acknowledged in its submissions that the Report's relevant to how it conducts its business and highlights some areas of good practice. And L&C *did* carry out some due diligence on RealSIPP/CIB. So, it clearly thought it was good practice to do so, at the very least.

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

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

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

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

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

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

"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes).

*...
Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.*

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

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

To be clear, I don't say the Principles or the publications obliged L&C to ensure the transactions were suitable for Mr D. It's accepted L&C wasn't required to give advice to Mr D, 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 D'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 D's SIPP application from RealSIPP/CIB, L&C complied with its regulatory obligations: to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and treat them fairly; and to act honestly, fairly and professionally. In doing that, I'm looking to the Principles and the publications listed above to provide an indication of what L&C should have done to comply with its regulatory obligations and duties.

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

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

In deciding what's fair and reasonable in the circumstances, it's appropriate to take an inquisitorial approach. And, ultimately, what I'll be looking at here is whether L&C took reasonable care, acted with due diligence and treated Mr D 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 D's complaint is whether it was fair and reasonable for L&C to have accepted Mr D's

SIPP application in the first place. So, I need to consider whether L&C carried out appropriate due diligence checks on RealSIPP/CIB before deciding to accept Mr D's SIPP application.

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

The contract between L&C and Mr D

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

But my decision is made on the understanding that L&C acted purely as a SIPP operator. I don't say L&C should (or could) have given advice to Mr D or otherwise have ensured the suitability of the SIPP or the Llana Beach investment for him. I accept that L&C made it clear to Mr D 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 D signed confirmed, amongst other things, that losses arising as a result of L&C acting on his instructions were his responsibility.

I've not overlooked or discounted the basis on which L&C was appointed. And my decision on what's fair and reasonable in the circumstances of Mr D'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 D on the suitability of the SIPP or the Llana Beach investment. But I'm satisfied that, to meet its regulatory obligations when conducting its operation of SIPP's 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?

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

L&C was under a regulatory obligation to conduct its business with due skill, care and diligence, organise and control its affairs responsibly and effectively, and pay due regard to the interests of its customers (including Mr D) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

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

provide us with information about this when requested.

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

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

L&C's due diligence on RealSIPP/CIB

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

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

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

L&C also gave us copies of print outs from the FCA register showing that, in February 2011 and January 2012, RealSIPP was an appointed representative of CIB. And CIB's permissions included advising on pension transfers and pension opt outs.

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

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

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

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

In the published decision L&C previously explained to us that it wouldn't have accepted applications from a firm that wasn't authorised by the FSA. And L&C also said that its directors from the relevant period had confirmed its policy was that applicants effecting a pension transfer had to have had advice made available to them which would, as L&C put it,

“in [that] case [have been] through RealSIPP.” And that it was then for the applicant to choose whether to take up the intermediary’s offer of advice. As Mr D was introduced to L&C by RealSIPP/CIB at a similar period of time to the consumer in the published decision then my understanding is that L&C’s policy in respect of the above would also have been in effect when it accepted Mr D’s applications. And L&C hasn’t disputed this.

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

- L&C was aware of, or should have been aware of, potential risks of consumer detriment associated with business introduced by RealSIPP/CIB at the outset of its relationship with RealSIPP, and certainly by the time of Mr D’s application:
 - There was insufficient evidence to show RealSIPP/CIB (or any other regulated party) was offering or giving full regulated advice (that is advice on the transfer to the SIPP *and* the intended investment).
 - The introductions had anomalous features – high-risk business, in relatively high volumes, for unregulated overseas property developments and other esoteric investments. And, even though RealSIPP/CIB had the necessary permissions to give full advice on the business it was introducing, it wasn’t giving advice on a large proportion of that business.
- L&C should have taken steps to address these risks (or, given these risks, have simply declined to deal further with RealSIPP/CIB).
- Such steps should have involved getting a full understanding of RealSIPP/CIB’s business model – through requesting information from RealSIPP/CIB and through independent checks.
- Such understanding would have revealed there *was* a significant risk of consumer detriment associated with introductions of business from RealSIPP/CIB.
- In the alternative RealSIPP/CIB would have been unwilling to answer or fully answer the questions about its business model.
- In either event L&C should have concluded it shouldn’t accept introductions from RealSIPP/CIB.

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

Volume of business

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

An example of good practice identified in the FCA’s 2009 review was:

“Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size

of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPP's can be identified."

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

L&C has previously told us that 153 members were introduced by RealSIPP/CIB, 44 of whom

were introduced in the nine months before the consumer in the published decision established their L&C SIPP in November 2011. L&C also said that 44 of the total introductions involved members with an Occupational Pension Scheme.

On another previous complaint, back in January 2018, L&C said that RealSIPP/CIB's introductions were made between February 2011 and May 2013. So I think it's clear that by the time of Mr D's application L&C had already received a number of introductions from RealSIPP/CIB over a period of around 18 months. Further, that RealSIPP was involved with a number of investments across members SIPP's and that *"all of these investments would be considered Non-standard by FCA definition."* L&C provided a list of the investments concerned and also confirmed that in 77 cases RealSIPP/CIB received fees but didn't advise on the SIPP. And L&C said that, during the course of the agreement with RealSIPP, 23% of L&C's total new business came from its (RealSIPP/CIB's) introductions.

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

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

RealSIPP was introducing consumers who were all investing in high- risk non-standard esoteric holdings, such as the unregulated overseas property development Llana Beach that Mr D 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 the one Mr D made.

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

The availability of advice

As I've said, I've seen from evidence provided on the complaint that was the subject of the published decision that L&C entered into intermediary agreements with RealSIPP and its principal, CIB. As part of this process, it was open to L&C to mention to RealSIPP any policy requirements it had for full regulated advice to be made available to applicants where introduced business involved pension transfers. L&C could have highlighted this in the intermediary application form, The Intermediary Agreement for Non-Insured Contracts, or in

supplementary correspondence with RealSIPP/CIB. But no correspondence I've seen between L&C and RealSIPP/CIB mentioned this.

I acknowledge that Mr D's SIPP application form confirmed "*Advice given at point of sale*". And I note L&C says that it reasonably understood that Mr D was being provided with investment advice from RealSIPP/CIB because this was alluded to in his SIPP application where he informed L&C that he had authorised his financial adviser to act on his behalf in dealing with the investments, and furthermore, that RealSIPP/CIB held the relevant permissions to provide independent financial advice on the pension transfer and investments. But I've not seen anything in the documentary evidence provided that sets out or otherwise confirms the extent of the advice given to Mr D.

And in any case, as I'll come to, the available evidence shows that prior to receiving Mr D's SIPP application L&C was, or should have been, aware that not offering or giving advice was something RealSIPP was doing routinely. The available evidence also shows L&C was, or should have been, aware that not offering or giving advice was something RealSIPP, or its principal CIB, was doing routinely. 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.

So, based on the available evidence, I think there was insufficient basis for L&C to reasonably assume that advice on the overall proposition had been given to Mr D at the point it received and reviewed his application. The details L&C has provided to us about the type of introductions it received from RealSIPP/CIB demonstrates that L&C was, or should have been, already aware that not offering or giving advice was something RealSIPP/CIB was doing routinely. And, based on the available evidence and on what L&C ought to have identified from the pattern of business introduced to it by RealSIPP/CIB from outset, I don't think there would have been sufficient basis for L&C to reasonably assume at the point it

received and reviewed Mr D's application that full regulated advice had been given to him by RealSIPP/CIB.

The possibility that full regulated advice on the overall proposition had not been given was a clear and obvious potential risk of consumer detriment here. Mr D was transferring his pensions to invest entirely in an esoteric overseas investment scheme – a move which was highly unlikely to be suitable for the vast majority of retail clients

High proportion of execution-only business

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

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

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

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

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

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

Although it has not been provided in relation to this complaint, on another similar complaint that was the subject of published decision DRN3587366, I have seen copies of RealSIPP's client agreement and Key facts document, titled *"about our services for our Resort Group SIPP package"*. RealSIPP's client agreement describes it as an *"administrator and packager"* of pension solutions to clients of various alternative investment providers, and says that:

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

Further, that:

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

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

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

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

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

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

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

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

Requesting information directly from RealSIPP/CIB

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

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

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

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

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

I think it’s more likely than not that if L&C had asked RealSIPP/CIB for this information that RealSIPP/CIB would have provided a full response to the information sought. And that, amongst other things, L&C would have then been provided with copies of client agreements and Keyfacts documents that RealSIPP/CIB was providing to different consumers it was introducing to L&C. Including a copy of the *“about our services for our Resort Group SIPP package”* document. From these, L&C ought to have been concerned that RealSIPP described itself as an *“administrator and packager”* of pension solutions to clients of various alternative investment providers, and made clear it only offers products from a single company and that clients wouldn’t receive advice or recommendations from RealSIPP i.e. that it wasn’t undertaking to proffer advice on the overall proposition.

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

Making independent checks

I think, in light of what I’ve said above, it would also have been fair and reasonable for L&C, to meet its regulatory obligations and good industry practice, to have taken independent steps to satisfy itself that full regulated advice was being offered to applicants like Mr D. 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 D, directly and to ask whether they’d been offered full regulated advice on their

transactions and seek copies of the suitability reports.

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

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

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

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

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

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

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

I therefore think L&C ought to have concluded that RealSIPP clients like Mr D – and applicants before him – didn't have full regulated advice on the overall proposition made available to them by RealSIPP. And have viewed this as a significant point of concern. As retail consumers, like Mr D, were transferring their existing pension monies to L&C to invest entirely in higher-risk esoteric investments, including unregulated overseas property developments such as Llana 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 raised further serious questions about the motivation and competency of RealSIPP.

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

circumstances to say L&C shouldn't have accepted Mr D's application from RealSIPP/CIB.

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

Due diligence on the underlying investments

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

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

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

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

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

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

The indemnity

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

L&C knew that Mr D 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 D's dealings with RealSIPP/CIB 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 D's application.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr D 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 D'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 D's application.

COBS 11.2.19R

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

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

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

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

So I don't think that L&C's argument on this point is relevant to its obligations under the Principles to decide whether to accept Mr D's application to open a SIPP in the first place.

I'm satisfied that Mr D'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 D's application.

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

The involvement of other parties

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

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

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

The starting point therefore, is that it would be fair to require L&C to pay Mr D 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 D 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 D to the full extent of the financial losses he's suffered due to L&C's failings.

I accept it may be the case that TRG, RealSIPP or CIB might have some responsibility for initiating the course of action that led to Mr D'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 D wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

I want to make clear that I've carefully taken everything L&C's said into consideration. And it's my view that it's appropriate and fair in the circumstances for L&C to compensate Mr D 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 D.

To be clear, I'm not making a finding that L&C should have assessed the suitability of the SIPP or the Llana Beach holdings for Mr D. I accept that L&C wasn't obligated to give advice to Mr D, 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 D taking responsibility for his own investment decisions

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

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

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

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

escaping liability where it failed to meet these.

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

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

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

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

Mr D says he's not financially sophisticated and trusted that his nephew's colleague (who he considered an introducer) was working on his behalf. That he'd not understood how the Llana Beach investment worked. I've seen no evidence that he was warned it was high risk and speculative. And I'm not satisfied that Mr D was determined to move forward with the transactions in order to take advantage of a cash incentive.

Mr D says he wasn't offered or paid any inducement to transfer his pensions to an L&C SIPP, and I've seen no evidence to show he was paid a cash incentive. It therefore cannot be said Mr D was incentivised to enter into the transaction. And, on balance, I'm satisfied that Mr D, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams.

L&C's contended that Mr D would likely have proceeded with the transfer and investments regardless of the actions it took. L&C's highlighted that other SIPP providers were accepting such investments at the time, and it's *most likely* the transactions would have been effected with another provider.

But I don't think it's fair and reasonable to say that L&C shouldn't compensate Mr D 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 D's application from RealSIPP/CIB.

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

Having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mr D's application from RealSIPP/CIB, the transactions this complaint concerns wouldn't still have gone ahead. So, overall, I do think

it's fair and reasonable to direct L&C to pay Mr D compensation in the circumstances.

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

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

In conclusion

Taking everything into account, I think that in the circumstances of this case it's fair and reasonable for me to conclude that L&C should have decided not to accept business from RealSIPP/CIB before it had received Mr D's application from it. I conclude that if L&C hadn't accepted Mr D's introduction from RealSIPP/CIB, he wouldn't have established an L&C SIPP, transferred two existing pensions into it or invested in the TRG investment.

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

Putting things right

I consider that L&C failed to comply with its own regulatory obligations and didn't put a stop to the transactions that are the subject of this complaint. My aim in awarding fair compensation is to put Mr D back into the position he would likely have been in had it not been for L&C's failings. Had L&C acted appropriately, I think it's *more likely than not* that Mr D would have remained a member of the pension schemes he transferred into the SIPP.

Mr D transferred monies from a DB pension and a DC pension into the SIPP. To put things right L&C will need to undertake different types of loss calculations, one in relation to the monies that originated from DB schemes and another in relation to monies that originated from DC schemes. As part of doing this L&C will need to calculate the portion of Mr D's current SIPP value that's attributable to each of the respective transfers/switches and apply them to the relevant calculations.

In summary, L&C should:

- Obtain the actual transfer value of Mr D's SIPP, including any outstanding charges.
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Undertake loss calculations as set out below in respect of each of the pension schemes from which monies were transferred into the SIPP and pay any redress owing in line with the steps set out below.

- Make an allowance in the form of a notional withdrawal (deduction) equivalent to the payments Mr D received from the FSCS following the claim about RealSIPP/CIB.
- If the SIPP needs to be kept open only because of the illiquid investment and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- If Mr D has paid any fees or charges from funds outside of his pension arrangements, L&C should also refund these to Mr D. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this to reflect Mr D having been deprived of the use of these monies. Income tax may be payable on any interest paid. If L&C deducts income tax from the interest, it should tell Mr D how much has been taken off. And L&C should also then give Mr D a tax deduction certificate in respect of interest if he asks for one.
- Pay to Mr D £500 to compensate him for the distress and inconvenience he's been caused by this matter.

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

Treatment of the illiquid assets held within the SIPP

While I note Mr D's request to retain the asset within his SIPP so that he has control of the investment after this complaint is concluded, because he intends to sell it in order to close the SIPP, I still think it would be best if any illiquid assets held could be removed from the SIPP. Mr D would then be able to close the SIPP and transfer away from L&C if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investment/s may prove difficult, as there may be no market for it. L&C should establish an amount it's willing to accept for the investment/s as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment/s.

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

Following my provisional decision, it is clear that L&C is having difficulties in buying Mr D's illiquid investment/s and may be unable to do so. Therefore, it should give the holding a nil value for the purposes of calculating compensation. To be clear, this would include the investment/s being given a nil value for the purposes of ascertaining the current value of Mr D's SIPP.

If L&C doesn't purchase the investment/s, and if the total calculated redress in this complaint is less than £160,000, L&C may ask Mr D to provide an undertaking to account to it for the net amount of any future payment the SIPP may receive from these investment/s. That undertaking should allow for the effect of any tax and charges on the amount Mr D may receive from the investment/s after the date of my final decision, and any eventual sums he would be able to access from the SIPP in respect of the investment/s. L&C will need to meet any costs in drawing up the undertaking.

If L&C doesn't purchase the investment/s, and if the total calculated redress in this complaint is greater than £160,000 and L&C doesn't pay the recommended amount, Mr D should retain the rights to any future return from the investment/s until such time as any future benefit that he receives from the investment/s together with the compensation paid by L&C (excluding any interest) equates to the total calculated redress amount in this complaint. L&C may ask Mr D to provide an undertaking to account to it for the net amount of any further payment the SIPP may receive from these investment/s thereafter. That undertaking should allow for the effect of any tax and charges on the amount Mr D may receive from the

investment/s from that point, and any eventual sums he would be able to access from the SIPP in respect of the investment/s. L&C will need to meet any costs in drawing up the undertaking

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

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

Therefore I think it's appropriate to say 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>.

For clarity, it is my understanding that Mr D has not yet retired, and he has no plans to do so at present – I've seen nothing in the evidence provided so far to suggest he has retired or is currently planning to do so. And neither party has disputed my understanding. So, compensation should be based on the 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 D's acceptance of the 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 D redress as a cash lump sum payment,
- explain to Mr D 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 defined contribution pension
- offer to calculate how much of any redress Mr D receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr D accepts L&C's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr D 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 D's end of year tax position.

Redress paid directly to Mr D 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 D's likely income tax rate in retirement is presumed to be 20%, and neither party has disputed this. In line with DISP App 4.3.31G(1) this notional reduction may not be applied to any element of lost tax-free cash.

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

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

L&C should first contact the provider of the plan(s) which was transferred into the SIPP and ask it to provide a notional value for the policy as at the date of calculation. For the purposes of the notional calculation the provider should be told to assume no monies would have been transferred away from the plan, and the monies in the policy would have remained invested in an identical manner to that which existed prior to the actual transfer.

Any contributions or withdrawals Mr D has made from the SIPP will need to be taken into account whether the notional value is established by the ceding provider or calculated as set out below.

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would have enjoyed is allowed for.

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

The notional value of Mr D's existing plan(s) if monies hadn't been transferred (established in line with the above) less the proportion of the current value of the SIPP that's attributable to monies transferred in from the same existing plan(s) (as at the date of calculation) is Mr D's loss.

Pay an amount into Mr D's SIPP so that the transfer value is increased by the loss calculated above in relation to monies originating from his DC pension

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

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

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

I acknowledge that Mr D has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. And I can confirm that our Service

has been provided with a copy of Mr D's FSCS reassignment of rights. The terms of Mr D'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 D received from the FSCS. And it will be for Mr D to make the arrangements to make any repayments he needs to make to the FSCS. However, I do think it's fair and reasonable to allow for a temporary notional deduction equivalent to the payment(s) Mr D actually received from the FSCS for a period of the calculation, so that the payment(s) ceases to accrue any return in the calculation during that period.

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

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

SIPP fees

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

Distress & inconvenience

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

My final decision

For the reasons given, my decision is that I uphold Mr D's complaint against Pathlines Pensions UK Limited.

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

Determination and Award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Pathlines Pensions UK Limited should pay the amount produced by that calculation up to the maximum of £160,000 (including

distress and/or inconvenience but excluding costs) plus any interest set out above.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Pathlines Pensions UK Limited pays Mr D the balance plus any interest on the balance as set out above.

If the loss does not exceed £160,000, or if Pathlines Pensions UK Limited accepts the recommendation to pay the full loss as calculated above, Pathlines Pensions UK Limited should have the option of taking an assignment of Mr D's rights in relation to any claim he may have against a third-party, and an assignment of the right to any future payment a third-party may make to Mr D as part of the settlement agreed following the third-party review.

If the loss exceeds £160,000 and Pathlines Pensions UK Limited does not accept the recommendation to pay the full amount, any assignment of Mr D's rights should allow him to retain all rights to the difference between £160,000 and the full loss as calculated above.

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

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 18 September 2025.

Ailsa Wiltshire
Ombudsman