DRN-4398600

The complaint

Mr M complains about the due diligence London & Colonial Services Limited ('L&C') undertook before accepting his Self Invested Personal Pension ('SIPP') application. Mr M says this has resulted in him suffering a substantial loss to his pension funds. Options UK Personal Pensions LLP ('Options'), which is part of the same group as L&C, has been dealing with the complaint on behalf of L&C. For ease of reference, I have referred to L&C throughout this decision even where submissions have been provided by Options or L&C's legal advisers.

What happened

I issued a provisional decision to this complaint on 11 October 2023. Both parties have provided submissions in response to my provisional decision. Before I set these out, I've explained the background to this complaint as follows:

Main parties involved in this case

L&C

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

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

At the time of the events in this complaint, CIB was authorised by the regulator who at the time was the Financial Services Authority ('FSA'), which later became the Financial Conduct Authority ('FCA' - I will refer to both bodies as the 'regulator'), 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 voluntary liquidation, and was dissolved on 1 February 2018. The Financial Services Compensation Scheme ('FSCS') accepted claims against this company when it failed.

RealSIPP LLP ('RealSIPP')

RealSIPP was an Appointed Representative ('AR') of CIB from April 2010 to May 2015.

The Resort Group ('TRG')

TRG was founded in 2007. TRG owned a series of resorts in Cape Verde and sold luxury hotel rooms to UK consumers, either as whole entities, or as fractional share ownership in a company. Mr M's complaint relates to the purchase of two of TRG's investments.

The RealSIPP/CIB letters and recommendations

Mr M retired from work in 2009 due to ill health and other personal reasons. At that point, he had several pension plans with various providers. One of his pension's had a Guaranteed Annuity Rate ('GAR'). Mr M says that at the time he entered into the transactions this complaint concerns he had some medical issues and was taking medicine to assist with this. Further, that at this time his cognitive skills and concentration were affected.

Mr M's recollection from the time is that he was informed by someone who claimed to be a RealSIPP 'regulated' adviser – I will refer to this latter person as Mr M2 – that he'd (Mr M) would be financially better off transferring his pension funds into the L&C SIPP and then investing in the TRG investments. Mr M said he was given the understanding from Mr M2 that he (Mr M) would purchase one whole unit and one half of a unit in hotels based in Cape Verde, which were being sold at the resort set out below. Mr M2 doesn't appear on the FCA register, and I've not seen reference to him in the correspondence I've seen between RealSIPP and Mr M and/or RealSIPP and L&C. From our records I can see in his recollections Mr M has referred to Mr M2 'of CIB' and has also mentioned Mr M2 as acting as an introducer for RealSIPP.

Mr M received a letter from RealSIPP dated 7 November 2011, with the heading: *"**Re: The Resort Group Offshore & Offplan Property Purchase Exclusive Self Invested Personal Pension"*** (bold RealSIPP's emphasis). The letter notes, amongst other things, that: *"We understand from The Resort Group that you wish to purchase your offshore/offplan property within a pension plan environment. We are therefore pleased to accept your instruction and now enclose further details of the exclusive package we have designed for such investments. This plan will allow the purchase of your chosen property in line with the developer's normal procedures".*

Another page which appears to be from the November 2011 letter went on to say:

> *"Our Independent Financial Adviser partner, C.I.B (Life & Pensions) Ltd will provide you with advice on the suitability of establishing the SIPP product to facilitate the purchase of your chosen offshore property investment.*
>
> *If your considering transferring existing pension benefits then we will provide you with information and analysis of these plans by obtaining information from your current providers, and describe the general costs and benefits of moving to a Self Invested Personal Pension.*
>
> *This report is provided free of charge."*

Mr M was asked to complete and return an enclosed Client Information Questionnaire in order to proceed. In my provisional decision I said *"The RealSIPP letter from November 2011 appears to have been followed by another letter from CIB dated 9 February 2012."* I went on to say that this letter had the 'Client Form', Key Fact document, and Client Agreement attached. However, after reviewing the information, I'm amending this as I now consider these documents were attached to the RealSIPP letter dated 9 February 2012. The November 2012 letter seems to have been an introductory letter only with the other key documents such as the Client Agreement and adviser's recommendation letter sent in February 2012.

As I said in my provisional decision, I noted a RealSIPP Key Facts document was sent to Mr M. This document appeared to be part of another document called the *"Client Financial Information Form"* (the 'Client Form'). It would appear that the Key Facts document was page five of the Client Form.

The Key Facts document at the start said: *"about our services for the SIPP package from RealSIPP*." And under: *"Whose products do we offer?"*, it had the box marked which said: *"We only offer products from a single company*". The 'company' in this context was not named. The Key Facts document also said: *"You will receive advice and a recommendation from us in respect of your pension arrangements. We may ask some questions to narrow down the selection of products that we will provide details on. You will then need to make your own choices about how to proceed."*

The Key Facts document noted: *"RealSIPP LLP will pay CIB (Life & Pensions) Ltd for the Initial Advice & Review, of your pension arrangements."* But went on to say that for all other advice, RealSIPP would agree the rate it would charge before beginning any work.

The Client Form at pages six and seven was entitled 'Client Agreement' and appears to have been the terms of business for CIB. Amongst other things this said: *"Our* [CIB] *firm is independent and we offer products from the whole market. In this particular instance we are restricting our services to the establishment and set-up of a specific SIPP to enable a commercial property purchase. We will not be providing any advice on the suitability of this package to your own personal circumstances and you should seek professional advice where necessary."*

The Client Form set out Mr M's personal details and it was explained that: *"This information will be used to report on your current pension arrangements and the costs and benefits of transferring to a Self Invested Personal Pension package, for the express purpose of purchasing an off-plan/offshore commercial property/alternative investment. We are not offering full advice and only providing a report to your pension requirements. We will not provide any further advice. If you are in any doubt about how you should complete this form please ask an adviser for help."*

Whilst the Client Form did ask some questions about Mr M's attitude to risk (at page three), it did not assign him an attitude to risk score which would have provided him with an explanation of what this score meant. Some parts of the Client Form were completed by hand, which I assume was by Mr M, such as his personal details and his retirement objectives. And the Client Form appears to have been dated by him as follows: *"Nov 2011".*

As I said in my provisional decision, there was a CIB letter which was part of 9 February 2012 letter. I've now clarified that the other sections I've referred to above was also part of the same letter (i.e. the Client Form).

In terms of the CIB letter which contained the recommendations to Mr M, although the pagination at the bottom of the letter says there are nineteen pages in total, some of these pages I've referred to above, Mr M doesn't appear to have been able to provide all nineteen pages. But at least, I can see that some recommendations', were made by the CIB adviser in the pages paginated one to five. At page five the CIB adviser put in his 'conclusions' and signed this section with the CIB firm name directly under his (the adviser's) name and signature.

Amongst other things, the CIB letter stated the following:

- Aviva – a personal pension with an approximate value of £49,166 which included a GAR.
- Other provider – a personal pension with an approximate value of £45,253.
- Other provider – a personal pension with an approximate value of £10,677.
- Other provider – a personal pension plan had already been put into capped drawdown and had a value of around £84,010.

In the CIB letter, Aviva's plan was noted to be a 'Self Employee Retirement Annuity' plan and as such, it said this pension was a GAR policy. From Mr M's SIPP statements it shows that when he transferred from Aviva his pension funds were split into two payments. Mr M has provided the Financial Ombudsman with evidence of this GAR policy and the benefits he was entitled to. This showed that at age 65 he would receive a guaranteed monthly income of £101.05 for every £1,000 held in the plan. Other than the Aviva plan, all the other pension plans had no guarantees.

In the CIB letter it said it's normal *"recommendation"* would be to retain the GAR. But it went on to say that Mr M felt the benefits to be gained from the new pension product (i.e. the L&C SIPP) would outweigh this guarantee. However, the adviser also said to Mr M "*As mentioned previously we believe that the use of a SIPP package matches your attitude to investment risk, as confirmed in the fact find, and will best meet your agreed objectives,…".* Mr M accepted this recommendation.

The CIB letter said Mr M had decided he wanted to purchase the TRG (Dunas/Llana Beach Resorts) investments listed in the CIB letter. But no advice about the suitability, or otherwise, of these investments was given. The CIB letter noted the property investments at the Llana Beach Resort and the Dunas Beach Resort would cost Mr M 139,950 euros and 149,950 euros respectively. And it went on to say: *"We* [CIB] *are pleased to recommend that you consider establishing a Self Invested Personal Pension to facilitate the purchase of your chosen investment".* The CIB letter went on to recommend L&C as Mr M's SIPP provider.

I note from the CIB letter the following statements were included:

> *"You wish to invest in a pension plan which allows you to purchase a specific offshore/offplan commercial property. We currently only recommend one provider for this purpose as they have an existing relationship with your developer and are experienced in the investment process."*

And:

> *"**Type of Advice***
>
> *Whenever possible, we would wish to carry out a complete financial review, but at your explicit request, our advice is restricted to the consideration of establishing a Self Invested Personal Pension to allow you to invest in the offshore development of your choice. Should you wish us to consider any other areas, we would be very happy to provide further advice, in accordance with the costs and charges laid out in our Client Agreement."*

Finally, under the heading 'Conclusion' the adviser noted:

> *"As mentioned previously we believe that the use of a SIPP package matches your attitude to investment risk, as confirmed in the fact find, and will best meet your agreed objectives, because:*
>
> - *Your current providers do not permit investments into commercial property*
> - *Your current providers do not permit offshore investments*
> - *Your overall speculative view to your investment goals and retirement planning*
> - *The flexibility of when and how you take your benefits is important to you and is not currently offered by your current providers"*

CIB noted that if Mr M wanted to proceed with the recommendation, he needed to complete the letter of instruction. And then CIB would send him a full application pack and other necessary documents to enable him to establish his SIPP and proceed with completing his property investments.

Mr M's application for an L&C SIPP and his investments

In early 2012, RealSIPP submitted Mr M's SIPP application form to L&C on his behalf. In the application Mr M, amongst other things, instructed L&C to arrange the transfer of his pension plans to one of its SIPP's marketed under the name of 'Open Pension'.

Whilst I have not been provided with an L&C's SIPP 'Open Pension Brochure' on this case, I've seen this document on other similar cases. The L&C Open Pension brochure said, amongst other things, 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 explained that L&C had no responsibility for investment decisions but that it would ensure assets are correctly registered and are compliant with HM Revenue & Customs ('HMRC') rules and regulations.

The Independent Financial Adviser ('IFA') details are contained on page 3 of the SIPP application form. Details for both RealSIPP and CIB, including their respective FSA authorisation numbers, are noted. In the section immediately below these details, a box that says *"Advice not given at point of sale to client"* has been ticked. Initial fees for RealSIPP were stated in this section to be £2,550 and its annual fee was £300.

A question in the application asked Mr M if he wished to manage the fund himself – this question was marked 'Yes'. And directly after this Mr M was asked to answer 'yes' or 'no' to the question as to whether he wanted L&C to act on instructions from his IFA - this question was left blank.

In the *"Initial Investment Instruction"* part of the application Mr M was asked how he'd like L&C to purchase his investments. To this question, Mr M ticked a pre-filled text box which said: *"Directly with the fund providers or Plot Trust/ OEIC companies".* Also in this section it said: *"If you* [Mr M] *select this option, then please let us* [L&C] *have the application forms for the specific funds you have selected. Please only complete the fund information on the forms and arrange for your financial adviser to complete their details in the relevant section."*

The application recorded that Mr M wanted to purchase two investments as follows:

- 139,950 euros – Llana Beach Hotel
- 149,950 euros – Llana Beach Hotel

Whilst the amounts were the same as the earlier CIB forms, one investment had changed (i.e. the Dunas Beach investment was no longer referred to).

Under the 'Transfer Scheme/Policy' section of the application Mr M listed four separate pension plans with a total value of around £190,000.

In, what appears to be the Open Pension 'Investment Form', Mr M provided further details of the investments he wanted to purchase. He gave the name of the development, address, and location as 'Llana Beach Hotel & Resort, Sal Island, Cape Verde'. And under the *"Nature of development"* it stated *"Delux Orchid Apartments"*. He said the units he wanted to purchase were 'Plot 160' and 'Plot 163'.

The basis of the payment for the investments was ticked as 'Staged Payment' (the other option was to make a 'single payment'). For Plot 160 it stated that Mr M wanted to select 'Option 2' which was to pay a deposit of 65%. And for Plot 163 he wanted to select 'Option 3' which was to pay a deposit of 85%. Directly after this section, under the heading *"Information and Advice",* Mr M was asked to confirm that:

- He understood that neither L&C as trustee/administrator was authorised to give him financial and/or investment advice. And that no information given to him by L&C was intended to be, and would not be, taken as advice of any kind of recommendation in the investments.
- He understood that whilst L&C had obtained legal advice this was only in its capacity as trustee in order to assess the risks of ownership and to ensure the acquisition of the appropriate title.
- He understood that the advice L&C had obtained did not cover the investment merits, marketability, or value of the property but only the risks of ownership.

Under the same section, Mr M was asked to confirm that he'd reviewed the due diligence report; report on title; the promissory contracts of purchase and sale; management/rental agreement; and an 'Investor Pack'. And that he'd: *"…obtained whatever information, reports, legal and other advice I require regarding the investment including the potential income and the associated costs and expenses which may fall to be paid out of my Arrangement."*

Under the heading *"Sale"*, L&C stated the investments could be sold either:

(a) upon the signed request of Mr M, or
(b) if a benefit became payable under his arrangement and the sale was necessary to provide sufficient liquidity to pay that benefit, or
(c) if it became necessary to do so in order to comply with any law or regulatory requirement applying to the Open Pension account.

It went on to say that Mr M understood: *"…in the circumstances described in (b) or (c) above, the asset must be sold within one year of the date on which the relevant event occurs and if a sale cannot be achieved by any other means then the asset may be sold at auction without reserve without further reference to* [Mr M]."

Under the heading *"General"*, amongst other things, it stated: *"All information supplied by* me [Mr M] *to you* [L&C] *or your* [L&C] *Solicitors either direct or through my legal or other advisers is true and accurate in all respects."* And: *"I will Indemnify and keep you fully indemnified in respect of any loss claim action damage incurred or suffered by you in respect of the asset."*

Mr M signed the final page of the form, and various sections of it, dating it 26 March 2012.

<u>Contracts relating to the property investments</u>

As part of the purchase, there was a 'Promissory Contract' (the 'contract') between Dunas Beach Resort, Lda (named in the contract as the 'Promissory Vendor' or 'First Party'), which was noted in the contract to be a company organised, and existing, under the laws of Cape Verde with its registered office in that country. Note that this promissory note referred to Dunas Beach so it's unclear when Mr M changed his investment from two Llana beach investments to one Dunas Beach investment and one Llana Beach investment (see further below). The second party to the contract was 'The Fiduciary Corporation (Properties 7) Limited' ('FC Properties') – this company was named in the contract as the 'Promissory Purchaser' or 'Second Party'.

The contract noted that the Promissory Vendor was the sole owner of a plot of land located in Cape Verde. It went on to say that the plot of land would be developed as a 'touristic resort' by the Promissory Vendor and referred to as the *"Dunas Beach Resort".* And that the Promissory Purchaser had a 'serous interest' in the acquisition of Unit 163 which was marked out in an attached plan and was yet to be built.

The contract said that the Promissory Purchaser will hold Unit 163 on behalf of L&C in its capacity as the sole trustee of the 'Sunlight Account' which was described as a 'Personal Pension Plan'. It should be noted that on 16 May 2006, L&C entered into a deed with a company called 'The Fiduciary Corporation Limited'. Under this deed the personal pension plan was referred to as "The Sunlight Account: A Personal Pension Plan". The Fiduciary Corporation was the Trustee of the Scheme whilst L&C was the Scheme Administrator and Provider.

The contract went on to say that Unit 163 was to be held only in relation to an arrangement to provide benefits in respect of Mr M. The price of Unit 163 was given as 149,950 euros. The contract was signed by the first and second party on 24 May 2012 and 9 May 2012 respectively.

Another promissory contract in relation to the Llana Beach Hotel, S.A. was made with the same parties and had similar terms. And was signed by the same first and second parties on 11 July 2012 and 22 June 2012 respectively. However, since that contract was signed Mr M's actual investment appears to have changed to another Unit at Dunas Beach Resort referred to in his valuation statements as 'Unit BV1'. We have not been provided with a copy of the contract that relates to this particular Unit.

The reason for the change to Unit BV1, was explained by L&C to Mr M's representative in 2018. L&C said that scheme borrowing which was indicated would be available to assist members with the completion of their balance did not materialise. So, TRG introduced the idea of consolidation to ensure members did not lose their investments. The amounts paid at the outset essentially allowed Mr M to consolidate in 100% ownership of Unit 163 and a 50% ownership of another property 'Apartment BV1' (i.e. Unit BV1) both based at the Dunas Beach Resort.

<u>The transfer of Mr M's pension funds and transactions since the transfer</u>

L&C has provided the Financial Ombudsman with Mr M's transaction statement dated 12 June 2018. Amongst other things, the statement shows that between 12 April 2012 and 21 June 2012, Mr M's previous pension plans were transferred in the amounts as follows:

- Aviva - £13,608.13
- Aviva - £36,786.35
- Another provider - £44,784.91
- Another provider - £85,473.11
- Another provider - £5,572.62

Other notable transactions in the 2018 statement, which covers the period from the start of the SIPP up until the statement date are as follows:

- 17 April 2012 – a fee of £2,550 was paid to RealSIPP. Three payments of £300 were made to RealSIPP up until 28 April 2015.
- 9 May 2012 – funds of £73,399.89 was paid to TRG.
- 22 June 2012 – funds of £75,657.54 was paid to TRG.
- 4 July 2012 – TRG paid in funds to the SIPP of £26,240.
- 17 July 2012 – funds of £24,350.44 was paid to TRG.

- 24 September 2012 – Mr M received a Pension Commencement Lump Sum (commonly known as a 'tax free lump sum') of £24,981.37.
- 11 March 2013 – a payment of £4,066.12 was paid towards the purchase of Unit BV1.
- 21 November 2014 – 'legal fees' and 'completion taxes' in respect of the property investments of £655.78 and £3,146.76 were paid from the SIPP.
- Several rental payments from TRG were received into the SIPP between October 2012 and June 2018 – these payments ranged from just over £65 up to just over £1,400.

A summary of Mr M's holdings/investments in the 2018 statement showed the following:

- Cash balance of £9,688.86 as of 11 June 2018.
- A 100% shareholding in Unit 163 was valued at £148,157.82 as of 30 October 2017.
- A 50% shareholding in Unit BV1 was valued at £49,416.92 as of 30 March 2017.

A SIPP statement dated 18 August 2023, showed a cash balance of £1,388.29. Unit 163 was valued at £73,929.96 as of 22 February 2021. And Unit BV1 was valued at £35,778.

Due diligence reports

To the Financial Ombudsman, L&C has provided a document which it said it commissioned entitled: *"DUE DILLIGENCE REPORT – SALINAS SEA PROJECT"* which was dated 25 January 2011. But this doesn't appear to relate to the Dunas Beach or Llana Beach Resort investments. Nonetheless, L&C says it obtained a due diligence report about the TRG investments showing good title.

Another report provided to us by L&C was one that was commissioned by TRG entitled *"Holiday resort units in Cape Verde"* (the 'TRG report'). The sole 'terms of reference' for the appointed legal counsel was to establish whether the investments being purchased could be considered a collective investment scheme as defined by section 235 of the Financial Services and Markets Act 2000 ('FSMA'). The TRG report concluded that the investment(s) could not be considered as a collective investment scheme. But nonetheless, the TRG report did not appear to be related to the Dunas Beach or the Llana Beach Resorts.

Mr M's complaint

Mr M became dissatisfied with his investments when he stopped receiving rental payments in 2018. His main complaint points were:

- L&C was not doing enough to help him in its role as the trustee/administrator of the SIPP to resolve the issue around the rental payments.
- The level of due diligence L&C had done was insufficient in respect of his investments, which he considered to be a collective investment scheme.
- The valuation of the property investments provided to him in his SIPP statements from L&C were *"utter rubbish"*.
- He understood that RealSIPP was regulated and so was L&C. However, Mr M said he didn't realise the investments themselves were not regulated.
- He'd asked L&C for a 'revocation repayment' from TRG in August 2016, in respect of the Unit BV1 which it (TRG) had agreed to do within six months. But the return of £49,416.92 has never been paid to Mr M.
- Mr M told us that: *"…threats and aggressive nature of the communications from The Resort Group is taking its toll on my health*." And that he was "…*being hounded with all manner of legal agreements and offered interim payments in respect of an asset you* [L&C] *have allowed The Resort Group to remove from my personal pension* [L&C SIPP account]*."* Mr M believed that part of his property investment had been

removed from his account leaving it open for him to receive an unauthorised tax charge from HMRC.

L&C rejected Mr M's complaint. In summary, it said:

- It didn't provide investment advice as it was an execution only service. Advice was provided by RealSIPP, which was an appointed representative of CIB. L&C considered Mr M's main concern is about the investment and the advice he received from his adviser and therefore, it believes the complaint should be properly re-directed to RealSIPP and/or CIB.
- In any event, the application indicates that no advice was given to Mr M on the sale of the SIPP, but that he (Mr M) had agreed to pay RealSIPP a fee, both initially and on an annual basis and he would be managing the SIPP himself.
- It referred Mr M to the regulator's (FCA) Handbook. Specifically, sections 2.4.4 and 11.2.19 of COBS ('Conduct of Business: Sourcebook'). L&C considered these sections make it clear that once an instruction is given by a customer, it, as an execution only SIPP provider, has no option but to carry out those instructions.
- In the L&C application, Mr M confirmed that he understood the legal advice obtained by L&C had not covered the merits or the marketability of the investments.
- The due diligence reports and other actions show L&C did carry out appropriate due diligence on RealSIPP and CIB as well as on Mr M's investment choices.
- L&C complied with its obligations placed upon it by the regulator and by the contractual documents governing the relationship between it and Mr M.
- Mr M was made aware of L&C's limited role and signed its declaration to acknowledge that it didn't provide advice and to also acknowledge he had reviewed all the documents which had been provided to him including the due diligence report.
- In terms of the valuation of the investments, these have been previously independently valued (in September 2016) by a *"RICS Registered Valuer".* And Mr M's investment values have been amended accordingly on L&C's records. The value of the investments has increased.
- Mr M has received rental income every quarter since June 2015 except for the last two quarters (as of January 2018), where the SIPP has only received rental payments in relation to Plot 163.
- L&C reassured Mr M it was continuing to liaise with TRG in regard of the (revocation) refund whilst continuing to monitor receipt of the rental income.
- L&C confirmed that none of Mr M's investments had been removed from his SIPP. And any refund will be paid back into his SIPP if this is received. This will mean that there will be no tax charge levied against his pension as he thinks there will be.

Mr M made a claim via the FSCS against the principal of RealSIPP, CIB. He was paid £50,000 by the FSCS which was in line with its compensation limits. His total loss was calculated by the FSCS to be £147,199.51. The FSCS valued the property investments at £238,712.61, and a deduction was made within the calculation before arriving at the figure of £147,199.51 to take into account the valuation of these investments at that time. Mr M maintains the investments have no value. The FSCS provided Mr M with a Reassignment of Rights which enabled him to bring his complaint to us about L&C.

After Mr M brought his complaint to us, our investigator upheld the complaint. He (our investigator) considered that L&C had not carried out sufficient due diligence of RealSIPP before accepting Mr M's SIPP application. And as a result it had acted unreasonably in accepting Mr M's application to open one of its (L&C's) SIPPs, because there was a real risk of consumer detriment by doing so. Given this, our investigator thought L&C should not have accepted Mr M's SIPP application in the first place. Our investigator set out the way L&C should

put things right but didn't include a redress calculation for the GAR policy. He recommended an award of £1,250 to be paid to Mr M for the distress and inconvenience caused by L&C.

In summary, in response to the investigator's view L&C said:

- It reiterated its points about being an execution only service. It said the investigator's interpretation of events would mean it had obligations that amounted to assessing suitability, which it didn't have the regulatory permissions to do.
- The investigator ignored the findings in the 'Adams cases' namely that rules such as COBS 9 (suitability) and COBS 10 (appropriateness) of the investment, do not apply to execution only SIPP providers.
- The Principles for Businesses (the 'Principles') relied on by the investigator, do not give rise to a breach of duty in themselves but need to be considered alongside the COBS rules.
- L&C acted in accordance with the contract and its regulatory duties. Insufficient weight has been given to the relevant parties' contractual obligations and the demarcation of roles and responsibilities.
- No further due diligence beyond that which was undertaken by L&C would have unearthed any information that Mr M was not already aware of.
- As Mr M was receiving an execution only service, FSMA section 5(2)(d) applies, namely: *"…the general principle that consumer's should take responsibility for their own decisions."* If Mr M was unsure of anything, RealSIPP had permission to give investment advice if this was needed.
- The investments still had value. And performed exactly *"as advertised".* So, Mr M can't have any legitimate cause for complaint.
- There was no reason for L&C to have any concerns about accepting business from RealSIPP, which was a regulated entity via CIB.
- The only regulatory publication referred to by the investigator that can be relied upon is the 2009 Thematic Review Report – the later publications have no relevance as they were published after Mr M's investment/SIPP purchase. And even in the case of the 2009 Thematic Review, this was mainly aimed at the types of actions firms providing advice should take. The 2009 Thematic Review is also not formal guidance. L&C also noted that in the Adams case, the publications were not considered of any relevance to that decision.
- L&C said if Mr M had not transferred to its platform, he would've found another SIPP provider to accept his transfer and investment request. Therefore, L&C is not the *cause* of his loss as this would have happened in any event.
- The complaint should be dismissed by us on the basis that The Pensions Ombudsman ('TPO'), or the Court, are more appropriate forums for this complaint.
- L&C made a request for an oral hearing with the Ombudsman.

As no agreement could be reached the case was passed to me for a decision. In response, I issued a provisional decision on the merits of Mr M's complaint and I said I was minded to uphold the complaint. In summary, this was for the following reasons:

- I was satisfied that L&C's policy from the relevant date, as confirmed by its directors, was to only accept applications from a firm authorised by the FSA.
- L&C should have been conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.
- The evidence provided of the due diligence undertaken by L&C into RealSIPP wasn't sufficient in the circumstances to have met L&C's obligations.
- L&C didn't take appropriate steps or draw reasonable conclusions from the information that was available to it before accepting Mr M's application.

- L&C had some reasons to be concerned about the type of business RealSIPP was introducing. The introductions had anomalous features including high risk business for unregulated overseas property developments and other esoteric investments.
- Further, even though L&C believed that RealSIPP had the necessary permissions to give full regulated advice on the business it was introducing, a large proportion of the introduced business was execution only.
- L&C knew all of this, or else ought to have known it from the information available, but it didn't then make further appropriate checks of RealSIPP's business model.
- Had L&C made reasonable checks prior to receiving Mr M's application, it would have realised that some introductions from RealSIPP involved a significant risk of consumer detriment.
- L&C should have ceased to accept introductions from RealSIPP before it accepted Mr M's application.
- In the circumstances, it was fair and reasonable for L&C to compensate Mr M to the full extent of the financial losses he had suffered due to L&C's failings.

I also considered L&C's request for an oral hearing and explained to both parties why I was satisfied that I was able to fairly determine this complaint without convening a hearing. And I provided explanations as to why I thought the Financial Ombudsman was the appropriate body to consider the complaint. L&C didn't provide any further submissions on these two points. But on the merits, L&C didn't accept my provisional findings and provided reasons for this. I've set out below a summary of what I consider to be the main points made in the response. However, the list isn't exhaustive and before making this decision I've carefully considered L&C's response in full:

- The Ombudsman failed to take account of the law. Specifically the Ombudsman has departed from legal precedent setting out the importance of the contract between the SIPP provider and the customer, and the scope of an execution only SIPP provider's due diligence obligations.
- The Ombudsman 'cherry picks' from case law. For example, the findings from the decision in Adams v Options SIPP UK LLP (formerly Carey Pensions UK LLP) [2020] EWHC 1229 (Ch) is largely ignored.
- The decision quotes at length from the Berkeley Burke case whilst giving only a passing reference to Adams. The Berkeley Burke judgment was a judicial review whereas the Adams case examined, at length, the responsibility of a SIPP provider offering an execution only service, both under COBS and contract.
- It is not fair nor reasonable to determine the complaint by reference to the regulator's publications referred to and to do so would only exacerbate the problem referred to in the Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service [2017] EWHC 352 (Admin) case.
- The Ombudsman does not properly address using the Principles as the basis for finding against L&C in preference to the COBS rules or established case law, especially where a breach of these cannot, of itself, give rise to any cause of action at law.
- L&C accepts it should take into account the Principles but the Ombudsman makes no attempt to apply the Principles in light of the COBS as interpreted by the Adams cases.
- The Ombudsman applies the Principles wholly in contrast to the terms of the contract between the parties.
- The Ombudsman distinguishes this case from the Adams v SIPP case relating to a breach under COBS 2.1.1R. The Ombudsman's rationale is the Court was considering the contractual relationship between the parties *after* the contract was entered into. And the Judge wasn't asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP. L&C considers the Ombudsman's finding on these points inconsistent with the law.
- The regulatory permissions that L&C held at the time meant that it could not give

advice but there is no attempt by the Ombudsman to explain how L&C could effectively have completed 'adviser level' due diligence without breaching its permissions.

- The Court in Adams held that, while the COBS rules contain express provisions dealing with the need to advise clients on both the *"suitability"* (COBS 9) and *"appropriateness"* (COBS 10) of their investment, those rules did not apply to execution only SIPP providers.
- SIPP providers don't have obligations to provide clients with product information.
- At the time of the transaction complained of there was no obligation on a customer to take advice on the transfer of a pension (and there continues to be no obligation to obtain advice on the transfer from a defined contribution arrangement). It's not fair or reasonable to use the Principles to artificially impose a duty that goes beyond what was agreed by the parties and which is not provided for in the guidance/rules/case law.
- The assessment of suitability of any pension product, transfer of pension rights or investments was wholly the responsibility of Mr M and/or his financial adviser.
- In compliance with its obligations pursuant to COBS 11.2.19R, L&C acted on Mr M's written instructions in the setting up of the SIPP and the transfer of monies to TRG via instructions received from RealSIPP.
- The Ombudsman seeks to impose on L&C a duty of due diligence that goes far beyond the scope of any duty envisaged by the parties involved. The Ombudsman seeks to override COBS' careful allocation of duties between different types of firms conducting different types of business.
- The Ombudsman placed insufficient weight on the parties' contractual arrangements, and on the clear demarcation of roles and responsibilities. The relevant documents setting out the contractual relationship between the parties made it clear that L&C was acting on an execution only basis. The Ombudsman makes no reference to these documents.
- The Ombudsman's reasoning runs wholly contrary to that in Adams v SIPP in which it was held that a SIPP provider's duties under the regulatory regime fall to be construed in light of its contractual arrangements. The Ombudsman seeks to circumvent the Adams decision by ignoring this fact.
- Despite FSMA section 5(2)(d), now section 1C, namely: *"the general principle that consumers should take responsibility for their decisions",* the Ombudsman does not hold Mr M responsible for any of his own decisions.
- The Ombudsman's reliance on various FCA publications is misplaced and if anything, supports L&C's position.
- The publication of any reports, guidance and correspondence issued by the regulator has no bearing on the construction of the Principles as their contents cannot found a claim for compensation of itself.
- Regulatory publications cannot alter the meaning of, or the scope of the obligations imposed by, the Principles.
- The 2009 and 2012 Thematic Review Reports do not provide *"guidance"* in any meaningful sense and are not statutory guidance – they do little more than highlight some *"examples of measures"* that *"SIPP operators could consider, taken from examples of good practice that* [the FSA] *observed"*.
- Even if the 2009 and 2012 Thematic Review Reports had been statutory guidance, the breach of such statutory guidance would not give rise to a claim for damages under FSMA section 138D (only the breach of rules can give rise to such a right).
- Many of the matters which the Thematic Review Reports are plainly directed at firms providing advisory services, not execution only SIPP providers.
- The FCA's Enforcement Guide in essence says that: *"Guidance is not binding on those to whom the FCA's rules apply."* And such material is intended to be illustrative only (and not the only way) in which a person can comply with the relevant rules.
- In accordance with good industry practice at the time, L&C ensured that RealSIPP (and by extension, CIB) were listed on the FSA Register and duly authorised to

provide financial advice, including investment advice, and also entered into intermediary agreements with RealSIPP/CIB.

- The outcome of L&C's due diligence on RealSIPP (and CIB) did not raise any cause for concern.
- The Ombudsman recognises the due diligence steps taken by L&C but makes no real further comment about this.
- L&C considers it carried out the appropriate level of due diligence in this case but the Ombudsman finds that L&C was under further obligations to protect against 'consumer detriment'. L&C didn't have the permissions to assess suitability. This was the reason that L&C entered into intermediary agreements with RealSIPP/CIB, so that financial advice could be provided to prospective clients.
- Adams considered the duties of a SIPP provider under COBS at length and the findings of that case should be applied.
- L&C accepts it had an obligation to conduct due diligence on RealSIPP/CIB and it did so as was required at the time (and was in line with industry practice).
- RealSIPP/CIB's appointment as Mr M's regulated financial adviser was required to operate under a set of regulatory obligations at all material times to ensure they have their client's best interests in mind when providing their professional services. And under COBS 2.4.8 it is generally considered reasonable (in accordance with COBS 2.4.6R (2)) for a firm to rely on information from an authorised person/professional firm, unless that firm (L&C) was aware, or ought reasonably to be aware, of any fact that would've given it reasonable grounds to question the accuracy of that information.
- The Ombudsman does not provide a view on the appropriateness of the investment. L&C can only assume this is because it is accepted that the investment was exactly what it was advertised to be.
- Whilst these types of investments may have been illiquid there were no restrictions on the promotion of these investments and Mr M made exactly the investment he intended to.
- Mr M received a total of £52,955.92 in rental income from the investment between 2012 and 2019. The rental income only ceased to be paid when the Global Pandemic effectively halted international travel, something that was clearly not foreseeable at the time the investment was made.
- The Ombudsman can find no fault with the investments and instead concludes that there was a responsibility on a SIPP provider to police the provision of pension transfer advice.

Mr M also provided some submissions in response to my provisional decision. He provided a copy of Mr M2's business card that he was able to locate on his old computer files – this showed the name of the adviser as Mr M2 and had the logo of RealSIPP on the business card. Mr M said that L&C said he had dealt with someone else but he again said, he never met with another person claiming to be from RealSIPP and reiterated that all his dealings were with Mr M2. In terms of the fact find, he said this was completed by Mr M2.

Mr M said he had thought an asset had been removed from his SIPP account because he wasn't receiving any rental income. Therefore he'd assumed the property had been removed. He said that he had not checked the investment portal for some time because he had lost all confidence in how things were being handled on his behalf by L&C.

Mr M confirmed he's not receiving any rental income from either of the two Dunas Beach investment properties. And that the value of the properties has 'plummeted'. However, Mr M provided an L&C statement showing that as of 31 December 2017, Unit BV1 was valued at 80,500 euros and Unit 163 was valued at 190,000 euros. He sent a copy of correspondence from TRG which provided an update about 'lower occupancy across all' it's resorts which was affecting rental incomes. TRG also sent him a statement which showed this was the

case in relation to Unit 163.

The matter has now been passed back to me for a final decision.

What I've decided – and why

In response to my provisional decision, L&C (or its representatives) didn't repeat its request or provide any further submissions regarding the holding of an oral hearing and/or for the matter to be considered by TPO and/or the Court. But for completeness, I'll repeat what I said in my provisional decision which was as follows:

The TPO request

In response to the view, amongst other things, L&C said it believes the complaint is better suited to be considered by TPO or a Court. It doesn't dispute that our Service has jurisdiction in respect of this case, which I'm satisfied we do. And having carefully reconsidered L&C's submissions on this point, I'm satisfied that Mr M's complaint is one we can, and should, consider.

We've a statutory duty to resolve complaints referred to us which are within our jurisdiction, subject to certain discretions, which are set out in our rules. Regarding L&C's submissions about TPO, the rules set out in the regulator's 'Dispute Resolution: Complaints Sourcebook' ('DISP') 3.4.1R state that: *"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 says Mr M's complaint should be referred to TPO. And I could now refer the complaint to TPO on the basis of DISP 3.4.1R, if I take the view it's more suitable for TPO and if, in the light of that view, Mr M consents to a referral to TPO. But I don't consider this is a complaint that would be more suitable for determination by TPO. This complaint requires consideration to be given to the rules and principles set down by the regulator.

In my view, these are matters that the Financial Ombudsman is particularly well placed to deal with. I'm also satisfied we possess the necessary knowledge and expertise to fairly determine the complaint. Further, 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.

I've also considered the Memorandum of Understanding ('MoU') between our service and TPO in reaching my conclusion. 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, in other words, I've discretion to decide what I'll do in the circumstances. And, for the reasons I've given above, I've decided to exercise my discretion not to refer Mr M's complaint to TPO.

For similar reasons, I'm satisfied that I don't need to exercise my discretion to dismiss the complaint under DISP 3.3.4AR 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 (alternative dispute resolution) entity. As I've explained, I'm satisfied the complaint's well suited to the work of this service. We have significant experience of dealing with complaints of this type and are well-placed to consider them. And I do not consider Mr M's complaint would seriously impair our effective operation.

Oral Hearing request

L&C has said the following: *"We note that FOS has contacted the Complainant to ask a series of questions. It is clearly procedurally irregular, and highly inappropriate, that a fact-sensitive matter such as this should be decided on the papers, especially when it is apparent from the Adjudication that specific and important questions have been put to, and answers received from, the Complainant, without the FOS having had the opportunity to hear directly the responses to those questions or LCS having been invited to be part of the process. For these reasons, we request that FOS holds an oral hearing."*

I've taken these submissions into account. But I don't agree that L&C hasn't had an opportunity to provide evidence to the same extent as Mr M. It's been given every opportunity to provide any evidence it feels is relevant to our investigation.

The Financial Ombudsman provides a scheme under which certain disputes may be resolved quickly and with minimum formality under section 225 of FSMA. DISP 3.5.5R of the DISP rules provides the following: *"If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by any means which the Ombudsman considers appropriate in the circumstances, including by telephone. No hearing will be held after the Ombudsman has determined the complaint."*

Given my statutory duty under FSMA to resolve complaints quickly and with minimum formality, I'm satisfied that it would not normally be necessary for me to hold a hearing in most cases - see the Court of Appeal's decision in R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service [2008] EWCA Civ 642. The key question for me to consider when deciding whether a hearing should be held is whether or not: *"…the complaint can be fairly determined without convening a hearing".* We do not operate in the same way as the Courts. Unlike a Court, we have the power to carry out our own investigation. And the rules (DISP 3.5.8R) mean I, as the Ombudsman determining this complaint, am able to decide the issues on which evidence is required and how that evidence should be presented. I am not restricted to oral cross-examination to further explore or test points.

If I decide particular information is required to decide a complaint fairly, in most circumstances, I'm able to request this information from either party to the complaint, or even from a third party. In this case, our investigator sought some further information from Mr M and he (our investigator) referred to what he considered to be the key points in his view. L&C has had the opportunity to consider, and comment, on that view. And had an opportunity to do the same with the provisional decision I issued.

I've carefully considered the submissions L&C has made. However, I'm satisfied that I am able to fairly determine this complaint without convening a hearing. In this case, I'm satisfied I have sufficient information to make a fair and reasonable decision. So, I do not consider a hearing is required. As I am satisfied it is not necessary for me to hold an oral hearing, I will now turn to considering the merits of Mr M's complaint.

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

And having reconsidered all the available evidence and arguments in this case, I'm still of the view that this complaint should be upheld.

Merits

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.

I will also say at this point that the purpose of this decision is to set out my findings on what's fair and reasonable, and explain my reasons for reaching those findings, not to offer a point by point response to every submission made by the parties to the complaint. And so whilst I have considered all the submissions made by both parties and have reconsidered all the points covered in my provisional decision, I've focussed here on the points I believe to be key to my decision on what's fair and reasonable in the circumstances.

Relevant considerations

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

Having carefully reconsidered all of the evidence, including the submissions in response to my provisional decision, I'm still of the view that the relevant considerations in this case are those that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

In my view, the regulator's Principles (the Principles for Businesses) are of particular relevance to my decision. The Principles, 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). I consider the Principles particularly relevant to this complaint include Principles 2, 3 and 6 which say:

> *"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 it says about the application of the Principles. In R (British Bankers Association) v Financial Services Authority [2011] EWHC 999 (Admin) ('BBA') Ouseley J said at paragraph 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 had upheld a consumer's complaint against it. The

Ombudsman considered the regulator's 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 (Berkeley Burke) had done so, it would have refused to accept the investment. The Ombudsman found Berkeley Burke had therefore, not complied with its regulatory obligations and had not treated its client fairly.

Jacobs J, having set out some paragraphs of BBA including paragraph 162 which I've 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 considered section 228 of FSMA and the approach an Ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the Ombudsman in that complaint, which I have described above, and included the Principles and good industry practice at the time as relevant considerations that were required to be taken into account.

As outlined above, Ouseley J in BBA 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 M's case.

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

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

The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim, on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams'

appeal didn't so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

I note that in Adams v Options SIPP, HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at paragraph 148: *"In my judgment in order to identify the extent of the duty imposed by Rule 2.1.1 one has to identify the relevant factual context, because it is apparent from the submissions of each of the parties that the context has an impact on the ascertainment of the extent of the duty. The key fact, perhaps composite fact, in the context is the agreement into which the parties entered, which defined their roles and functions in the transaction."*

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

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

The facts of Mr Adams' and Mr M's cases are also different. And I need to construe the duties L&C owed to Mr M under COBS 2.1.1R in light of the specific facts of Mr M's' case. So I've considered COBS 2.1.1R - alongside the remainder of the relevant considerations, and within the factual context of Mr M's case, including L&C's role in the transaction.

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

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

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

The regulatory publications

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

- The 2009 and 2012 Thematic Review Reports (the 'review' or 'reviews')
- 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 review

The 2009 review 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 clients. 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* [treating customers fairly] *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* [Independent Financial Advisers]*. 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 member 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 the 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 clients' 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."*

<u>The later publications</u>

In the October 2013 finalised SIPP operator guidance, the regulator 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 clients fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a "client" for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."

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

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

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

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

the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.

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

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

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

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

*"**Due diligence***

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

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*
- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
- *having checks which may include, but are not limited to:*
    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*
- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the*

firm is prepared to accept to either deal with introducers or accept investments, and

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

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

In its response to my provisional decision, L&C said the 2009 review isn't formal guidance. That's a point I acknowledged in my provisional decision. And I again acknowledge here that the 2009 and 2012 reviews and the Dear CEO letter, aren't formal guidance (whereas the 2013 finalised guidance is). However, I remain of the view that the fact the reviews and the Dear CEO letter didn't constitute formal guidance doesn't mean their importance should be underestimated. They provide a reminder that the Principles apply. And are 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. In that respect, the publications which set out the regulator's expectations of what SIPP operators should be doing, also go some way to indicate what I consider amounts to good industry practice. I'm therefore satisfied it's appropriate to take them into account.

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

L&C also said the 2009 review didn't provide guidance in any meaningful sense. But as the review's introduction says: *"In this report* [review]*, 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 2009 review 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 the 2009 review 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 2009 review sets out the regulator's expectations of what SIPP operators should be doing and, therefore, indicates what I consider amounts to good industry practice at the relevant time. So, I remain satisfied it's relevant and therefore, appropriate to take it into account.

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

L&C also said that many of the matters which the 2009 review invites firms to consider are directed at firms providing advisory services. It's not specified which parts of the review it thinks are directed at such firms but, to be clear, I think the review is also directed at firms like L&C acting purely as SIPP operators. The review 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 review was relevant. L&C acknowledged in its submissions that the review is relevant to how it conducts its business and highlights some areas of good practice. And L&C did carry out some due diligence on RealSIPP. So, it clearly thought it was good practice to do so, at the very least.

The remainder of the publications also provide a *reminder* that the Principles 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 this respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I, therefore, remain satisfied it's appropriate to take them into account too.

I've carefully reconsidered what L&C's said about publications issued after Mr M's SIPP was set up. But I remain of the view stated in my provisional decision that, like the Ombudsman in the BBSAL case, I don't think the fact the publications, (other than the 2009 review), post-date the events that took place in relation to Mr M's complaint, mean the examples of the 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 them.

It's also clear from the text of the 2009 and 2012 reviews (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 regulator's comments suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it's clear the standards themselves hadn't changed.

I note L&C's point that the judge in the Adams case didn't consider the 2012 review, 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 reviews, 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.

And as I said in my provisional decision, 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. Amongst other things, the Alert stated:

> *"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 of 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, as I confirmed in my provisional decision, I don't say the Principles and/or the publications obliged L&C to ensure the transactions were suitable for Mr M. It's accepted L&C wasn't required to give advice to him and couldn't give advice under its permissions held at the time. 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, as I've said, 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 review together with the Principles provide a very clear indication of what L&C could, and should, have done to comply with its regulatory obligations that existed at the relevant time before accepting Mr M's introduction from RealSIPP.

It's also 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.

Further, in determining this complaint, I need to consider whether, in accepting Mr M's SIPP application from RealSIPP, L&C complied with its regulatory obligations which were 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 by L&C about breaches of the Principles not giving rise to any cause of action at law, and breaches of guidance not giving rise to a claim for damages under the FSMA. I've carefully reconsidered 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 remains my view that in order for L&C to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things, it should have undertaken sufficient due diligence into RealSIPP and the business it (RealSIPP) was introducing, both initially and on an ongoing basis.

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

L&C says it did carry out due diligence on RealSIPP before accepting business from it. And from what I've seen I accept that it undertook some checks. However, the questions I need to consider are whether L&C ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by RealSIPP were being put at significant risk of detriment. And, if so, whether L&C should've accepted Mr M application from RealSIPP in the first place.

The contract between L&C and Mr M

In its response to my provisional decision, L&C's made a number of references to its contract with Mr M. I've carefully considered what L&C's said about this.

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

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

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

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

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

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

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

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

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

L&C's due diligence on RealSIPP

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

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

And, prior to accepting Mr M's application, it also had access to some information about the type and volume of introductions it was receiving from RealSIPP. L&C has previously told us (for example in the case that was the subject of a published decision DRN-3587366) its policy was that it wouldn't have accepted applications from a firm that wasn't authorised by the FSA. This step goes 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 before accepting business from it. Or to draw fair and reasonable conclusions from what it did know about RealSIPP.

As I said in my provisional decision, the steps L&C took went some way towards meeting its regulatory obligations and good industry practice. But I remain of the view L&C failed to conduct sufficient due diligence on RealSIPP before accepting business from it or draw fair and reasonable conclusions from what it did know about RealSIPP. My view remains that L&C ought reasonably to have concluded it should not accept business from RealSIPP and have ended its relationship with it before Mr M's' application was made. I say this because:

- L&C was aware of, or should have, identified potential risks of consumer detriment associated with the business introduced by RealSIPP and certainly by the time of Mr M's application.
    - There was insufficient evidence to show RealSIPP (or any other regulated party) was offering or giving *full* regulated advice (that is advice on the switch and advice on 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 CIB had the necessary permissions to give full advice on the business its AR RealSIPP was introducing, it wasn't giving advice on a large proportion of that business.
    - I've seen from a document on other cases that TRG was working with an unregulated business called First Resort Property Services Limited who was promoting the Llana Beach Resort investment that was promoted to Mr M at the outset.

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

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

The availability of advice

L&C entered into intermediary agreements with RealSIPP and its principal, CIB. As part of this process, it was open to L&C to enquire whether full regulated advice would be made available to applicants introduced to L&C by RealSIPP. No correspondence I've seen between L&C and RealSIPP mentioned this. And, as I've mentioned above, Mr M's SIPP application also made it clear that advice hadn't been given at the point of sale.

On balance, I remain of the view that having carefully reconsidered all of the available evidence, I think it's more likely than not that Mr M wasn't ever offered full regulated advice on the transactions this complaint concerns by RealSIPP, or its principal CIB (or any other regulated advisory firm). As its client agreement makes clear, CIB wasn't offering clients like Mr M the option of *full* regulated advice on the package it was offering. Other documents provided to Mr M also make this point clear.

And, based on the available evidence, I don't think there would have been sufficient basis for L&C to reasonably assume at the point it received and reviewed Mr M's application that *full* regulated advice had been given to Mr M, or had been made available to Mr M and declined. I think L&C's understanding would simply have been that Mr M hadn't received advice at the point of sale, as that is what was stated in the application form.

The possibility no full regulated advice had been given, or made available, was a clear and obvious potential risk of consumer detriment here. It was clear from the SIPP application form that Mr M was intending to transfer monies in from existing pension plans to invest (entirely) in an overseas property development – a move which was highly unlikely to be suitable for the vast majority of retail clients.

Anomalous features

<u>Volume of business</u>

As I've said, it's clear that L&C had access to information about the number and nature of introductions that RealSIPP made, as it's been able to provide us with details about this when requested. An example of good practice identified in the FSA's 2009 review was: *"Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified."* Given all that I've said above, I don't think simply keeping records without scrutinising the information would be consistent with good industry practice and L&C's regulatory obligations. As highlighted in the 2009 review, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

L&C said during the complaint that was the subject of a published decision DRN-3587366 that 153 of its members were introduced by RealSIPP, 44 of whom were introduced *before* the consumer in the published decision established their L&C SIPP in November 2011. It also said that 44 of the total introductions involved members with an Occupational Pension Scheme.

On a previous complaint, from January 2018, L&C said RealSIPP's introductions were made between February 2011 and May 2013. Further, that RealSIPP was involved with a number

of investments across members SIPPs and that: *"all of these investments would be considered Non-standard by FCA definition."* L&C provided a list of the investments concerned and confirmed that in 77 cases RealSIPP received fees but indicated it didn't advise on the SIPP.

On more recent cases I've seen, L&C provided information showing that a total of 160 clients were introduced by RealSIPP. And following a sample of 20% of the total number of clients introduced by this introducer, 99.94% were from Occupational Pensions Schemes. L&C also said all investors invested in overseas commercial properties. And during the course of the agreement with RealSIPP, 23% of L&C's total new business came from RealSIPP's introductions.

As noted above, L&C has told us in previous cases that while the intermediary agreement might have been in effect since 2010 it (L&C) didn't actually start accepting introductions until February 2011. Mr M's SIPP was established on 2 April 2012. As I said in my provisional decision, by the time the matter came to me for a decision, our investigator estimated that by the time of Mr M's application, RealSIPP had introduced around 60 applications. L&C hasn't disputed this figure in response to my provisional decision. I still can't say for certain that the number of around 60 is correct but it is clear that L&C had by the time of Mr M's application, received a sizeable number of introductions from RealSIPP over a short period.

All in all, I remain of the view that by the time of Mr M's application, 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. And it should've considered how a small IFA business introducing this volume of high risk business was able to meet regulatory standards.

RealSIPP introducing consumers investing in high risk non-standard assets

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

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

High proportion of execution only business

The application form L&C received from RealSIPP for Mr M recorded that *"Advice not given at point of sale to client."* So, I think when accepting Mr M's SIPP application L&C's understanding would have been that Mr M hadn't received advice from RealSIPP/CIB, mindful of what was stated in L&C's SIPP application form. In addition to the possibility no advice had been given to Mr M, the available evidence also shows L&C was, or should have been, aware that not offering or giving advice was something RealSIPP was doing routinely.

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

An example of good practice identified in the FSA's 2009 review was: *"Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified."*

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 review, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

From the figures L&C's previously provided to us, a little under half the introductions from RealSIPP were transacted as execution only business (i.e. with no advice being given). That's a large proportion of the total business RealSIPP introduced, and I think it's likely that it had introduced business to L&C where advice hadn't been provided on a number of occasions before Mr M's introduction.

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

I think this ought to have been a red flag for L&C in its dealings with RealSIPP. It's highly unusual for regulated advice firms to be involved in execution only transactions involving pension transfers or switches to invest in high risk esoteric investments, such as unregulated overseas property developments. That's because the risks involved in such transactions are unlikely to be fully understood by most people, without obtaining regulated advice. I consider 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 remain of the view that L&C ought to have viewed this as a serious cause for concern and that this was a further clear and obvious potential risk of consumer detriment.

The involvement of an unregulated business

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

A third-party report L&C obtained dated 2 September 2011, that provided commentary about the Llana Beach Hotel rooms, which I've seen on another case, explained that TRG was promoting its products in the UK through 'First Resort Property Services Limited'. Neither TRG nor First Resort Property Services Limited were regulated by the FSA.

As I set out above, Mr M received a letter from RealSIPP dated 7 November 2011. In this letter RealSIPP noted the following: *"We understand from The Resort Group that you wish to purchase your offshore/offplan property within a pension plan environment. We are therefore pleased to accept your instruction and now enclose further details of the exclusive package we have designed for such investments."*

Mr M's application involved transferring monies in the SIPP from several pension plans to invest solely in TRG overseas property investments. And, as I've mentioned above, it was explained in the SIPP application form L&C received that Mr M hadn't been given advice at the point of sale. Further, L&C has also previously told us that a little under half the

introductions from RealSIPP were transacted as execution only business (i.e. with no advice being given at all).

I think it's unlikely that consumers, like Mr M, were making the decision to establish a L&C SIPP, transfer their existing pension monies into a L&C SIPP and invest in TRG investments of their own volition. And I think L&C ought to have been alive to the risk TRG and/or an unregulated business working with it, was involved in promoting some TRG investments to be held in Mr M's SIPP. And that Mr M might have been 'sold' on the idea of transferring his pension so as to invest in TRG investments before the involvement of any regulated parties.

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

The investments still have value

In its initial submissions, although it has not referred to this again in response to my provisional decision, L&C has said the TRG investments still have value, so he (Mr M) hasn't suffered any loss. But I still remain of the view that there is sufficient evidence to show that Mr M has, or may have suffered, material loss as a result of the TRG investments he made. Whilst the 2017 L&C statements Mr M has provided to the Financial Ombudsman, shows the properties, at that time still had value, he hasn't received any refund from the revocation request he submitted. Further, it appears he is receiving no or very little rental income from any of the two properties which was one of the main benefits of investing in the TRG investments.

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 continue accepting introductions from RealSIPP. That would have been a fair and reasonable step to take, in the circumstances. Alternatively, L&C could have taken fair and reasonable steps to address the potential risks of consumer detriment. I've set these out below.

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

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

As set out above, the FSA 2009 review explained 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, this then could have been addressed in an appropriate manner *"…for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification."*

The October 2013 finalised SIPP operator guidance gave an example of good practice as: "*Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with."*

And I think that L&C, before accepting further applications from RealSIPP, should have checked with it (RealSIPP) about things like: how it came into contact with potential clients; what agreements it had in place with its clients; whether all of the clients it was introducing were being offered full regulated 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 for this *type of* information it (RealSIPP) would've 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 Key Facts documents which RealSIPP was providing to different consumers it was introducing to L&C. I consider this was a fair and reasonable step to take in all the circumstances to meet its (L&C's) regulatory obligations and good industry practice.

Making independent checks

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

The 2009 review 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 review also said that an example of good practice was: *"Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely."* So I think it would have been fair and reasonable for L&C to speak to some applicants, like Mr M, directly and to ask whether they'd been offered full regulated advice on their transactions and/or seek copies of the suitability reports.

L&C said it couldn't comment on advice without potentially being in breach of its permissions. Again, I confirm I accept L&C couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps included addressing a potential risk of consumer detriment by speaking to applicants and/or having sight of advice/suitability letters. This could have provided L&C with further insight into RealSIPP's business model and practices. These were reasonable steps 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 M's application:

- Consumers were being introduced to L&C without having been given full regulated advice.
- RealSIPP was having business referred to it which involved the selling of investments to consumers by an unregulated business, TRG. It follows that some consumers might have been 'sold' on the idea of transferring pension monies so as to invest in TRG investments before the involvement of any regulated parties.
- The other anomalous features I've mentioned carried a significant risk of consumer detriment.

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

Had L&C carried out the due diligence I've mentioned above, I think it should have identified that some consumers introduced by RealSIPP hadn't received full regulated advice from RealSIPP and/or CIB on their transactions. So, I think it would have been fair and reasonable for L&C to speak to some applicants, like Mr M, directly and to ask whether they'd been offered full regulated advice on their transactions and/or seek copies of the suitability reports.

As was explained in published decision DRN-3587366 there appear to have been *some* instances where RealSIPP wasn't offering consumers *any* regulated advice on the proposed transactions. In Mr M's case RealSIPP, or more likely, its principal CIB, did give some advice. RealSIPP was referring its clients to CIB to be advised about establishing a L&C SIPP. But CIB didn't offer full regulated advice; it restricted its advice. As CIB had explained in its Client Agreement: *"In this particular instance we are restricting our services to the establishment and set-up of a specific SIPP to enable commercial property purchase. We will not be providing any advice on the suitability of this package to your own personal circumstances and you should seek professional advice where necessary."*

So, in cases like Mr M's, CIB wasn't discussing the specific risks associated with the Dunas Beach and Llana Beach investments or advising on the suitability of the overall proposition for the consumer (i.e. including the intended TRG investment). This raises significant questions about the motivations and competency of CIB and its AR, RealSIPP. I think that if L&C had made enquiries with some applicants introduced by RealSIPP at the time, like Mr M, their responses would have been consistent with what RealSIPP (and its principal CIB) had disclosed to them (the consumers) in the contemporaneous documentation in relation to the extent of its role.

Therefore, I think L&C ought to have concluded Mr M – and applicants before him – didn't have full regulated advice made available to him/them by RealSIPP/CIB. And have viewed this as a significant point of concern given as retail consumers they were transferring their existing pension monies to L&C to invest entirely in high risk esoteric investments, including unregulated overseas property developments such as the TRG investments. Mr M's and other clients like him were investing monies without the benefit of having been offered full regulated advice, by a business which appeared to be actively avoiding any responsibility to give advice about this.

I also think L&C should have concluded that some consumers introduced by RealSIPP who were investing in TRG were likely being 'sold' on some of TRG's investments by an unregulated third party by an unregulated business. As mentioned, the third-party due

diligence report L&C obtained on Llana Beach Resort discloses the involvement of TRG and another unregulated business. And as I've also said, the letter I referred to above from RealSIPP addressed to Mr M, from November 2011, makes it clear that TRG had introduced him to the 'property investments' it (TRG) was selling before he (Mr M) approached a regulated entity for advice.

With the above in mind, I think L&C should also have concluded that, with the overall volume of business and the proportion of consumers who weren't apparently receiving any advice at all, along with those that were receiving limited advice, there was serious questions about the motivation and competency of RealSIPP and CIB as its principal.

I, therefore, conclude it's fair and reasonable in the circumstances to say that L&C shouldn't have accepted Mr M's application from RealSIPP in the first place. In my view, L&C didn't act with due skill, care, and diligence; organise and control its affairs responsibly; or treat Mr M fairly by accepting his application from RealSIPP. So, to my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant time and allowed Mr M to be put at significant risk of detriment as a result.

Due diligence on the underlying investments

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

I accept the TRG investments didn't appear to be fraudulent or a scam. But this doesn't mean that L&C did all the checks it needed to do. In any event, given what I've said about L&C's due diligence on RealSIPP and CIB and my conclusion that it failed to comply with its regulatory obligations as well as 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 TRG investments.

I'm satisfied that L&C wasn't treating Mr M fairly or reasonably when it accepted his introduction from RealSIPP. So, I've not gone on to consider the due diligence it may have carried out on the TRG investments and whether this was sufficient to meet its regulatory obligations. And I make no findings about this issue. I take on board what L&C said about the fact that it considers that by making no findings on this issue, I (the Ombudsman) accepts the investment performed as it should have done. But I am not making a finding on this issue because, I have found that for the reasons I've set out above, L&C should not have accepted Mr M's application in the first place.

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

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

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

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

ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr M signed meant L&C could ignore its duty to treat him fairly.

To be clear, I'm satisfied that the indemnities contained within the contractual documents don't absolve, nor do they attempt to absolve, L&C of its regulatory obligations to treat customers fairly when deciding whether to accept or reject business.

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

L&C has said under COBS 2.4.8 it is generally considered reasonable (in accordance with COBS 2.4.6R (2)) for a firm to rely on information from an authorised person/professional firm, unless that firm (L&C) was aware, or ought reasonably to be aware, of any fact that would've given it reasonable grounds to question the accuracy of that information. So, it would generally be reasonable for L&C to rely on information provided to it *in writing* by RealSIPP, unless L&C was aware or ought reasonably to have been aware of any fact that would give reasonable grounds to question the accuracy of the information.

L&C says it was reasonable for it to be afforded a significant level of comfort in relation to RealSIPP's/CIB's appointment as Mr M's financial adviser because an FCA-authorised financial adviser is required to operate under a set of regulatory obligations at all material times to ensure they have their client's best interests in mind when providing their professional services. However, as I've explained above, I think L&C ought reasonably to have identified the type of issues I've mentioned above about the introductions it was receiving from RealSIPP. And I think L&C ought to have identified the clear and obvious potential risk of consumer detriment in respect of the business being introduced to it by RealSIPP *before* it accepted Mr M's application.

Further, I'm satisfied that if L&C had undertaken adequate initial and ongoing due diligence it ought to have stopped accepting introductions from RealSIPP *before* it received Mr M's application. So, in failing to take this step, I think it's fair and reasonable to conclude that L&C didn't act with due skill, care, and diligence, organise, and control its affairs responsibly, or treat Mr M fairly. And to my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant times and allowed Mr M to be put at significant risk of detriment as a result.

COBS 11.2.19R

In its response to Mr M's complaint L&C has referenced COBS 11.2.19R and said that it would have been in breach of COBS if it hadn't affected Mr M's investment instructions. However, in the circumstances it's my view that the crux of the issue in this complaint is whether L&C should have accepted Mr M's application from RealSIPP in the first place.

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

> *"The heading to COBS 11.2.1R shows that it is concerned with the manner in which orders are to be executed: i.e. on terms most favourable to the client. This is consistent with the heading to COBS 11.2 as a whole, namely: "Best execution". The text of COBS 11.2.1R is to the same effect. The expression "when executing orders" indicates that it is looking at the moment when the firm comes to execute the order, and the way in which the firm must then conduct itself. It is concerned with the "mechanics" of execution; a conclusion reached, albeit in a different context, in Bailey*

& Anr v Barclays Bank [2014] EWHC 2882 (QB), paras [34] – [35]. It is not addressing an anterior question, namely whether a particular order should be executed at all. I agree with the FCA's submission that COBS 11.2 is a section of the Handbook concerned with the method of execution of client orders, and is designed to achieve a high quality of execution. It presupposes that there is an order being executed, and refers to the factors that must be taken into account when deciding how best to execute the order. It has nothing to do with the question of whether or not the order should be accepted in the first place."

Given the arguments about COBS 11.2.1R and its intended purpose made in the above judgement, I remain of the view, that I don't think that L&C's argument on this point is relevant to its obligations under the Principles to decide whether to accept Mr M's business from RealSIPP.

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

L&C has contended it's RealSIPP and/or CIB that's really responsible for Mr M's losses. CIB would be the respondent for complaints about activities RealSIPP undertook as an appointed representative of CIB. And the Financial Ombudsman 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 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).

In my view, for the reasons set out in my provisional decision, it's fair and reasonable in the circumstances of this case to hold L&C accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mr M fairly. Given this, the starting point is that it would be fair to require L&C to pay Mr M compensation for the loss he's suffered as a result of its failings. I've carefully considered if there's any reason why it wouldn't be fair to ask L&C to compensate Mr M for his loss, including whether it would be fair to hold another party liable in full or in part. And, for the following reasons, I consider it appropriate and fair in the circumstances for L&C to compensate Mr M to the full extent of the financial losses he's suffered due to L&C's failings.

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

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

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

Mr M taking responsibility for his own investment decisions

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

I've reconsidered this point carefully and I remain satisfied it wouldn't be fair or reasonable to say Mr M's actions mean he should bear the loss arising as a result of L&C's failings. In my view, if L&C had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr M's application from RealSIPP to open a SIPP at all. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr M wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

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

I've carefully considered what L&C's said about Mr M being aware of the risks. But, as I've said above, from the evidence I've seen, I'm satisfied that Mr M's testimony is credible, that he didn't receive an explanation of the risks involved, and he was led to believe the investments were 'regulated'. He was also told he'd earn more by investing as he did. And I wouldn't consider it fair or reasonable for L&C to have concluded that Mr M *had* received an explanation of the risks involved with the overall proposition from RealSIPP and/or CIB given what L&C knew, or ought to have known, about RealSIPP's business model by the time it received Mr M's application.

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

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

L&C has contended that Mr M would likely have proceeded with the transfer of his pension and purchase of the investments regardless of the actions it took. L&C argues that another SIPP operator would have accepted Mr M's application had it (L&C) declined it. But I don't think it's fair and reasonable to say L&C shouldn't compensate Mr M for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr M's application from RealSIPP in the first place.

Further, if Mr M had sought advice from a different adviser, who had given full regulated advice on the overall proposition, I think it's more likely than not that the advice would have been not to establish a SIPP and transfer pension monies so as to affect the TRG investments. And I think it's more likely than not that Mr M would have listened to that advice. Alternatively, if L&C hadn't accepted his business from RealSIPP, Mr M might have

simply decided not to seek pensions advice elsewhere from a different advisor and still then retained his existing pension plans.

I note what L&C say about Mr M taking a tax-free lump sum when he transferred. However, on balance, I don't think this issue would have come about if he had not transferred to the SIPP. Mr M already had a drawdown pension and I think given he was transferring this just gave him the option to take a tax-free lump sum. I don't think it was the main or key motivation for Mr M transferring his pension. I think that he was sold on the idea of transferring his pension as I've set out above. And there is no indication or evidence that being able to take a tax-free cash lump sum played a role in his decision making to transfer to the L&C SIPP.

In *Adams v Options SIPP*, the judge found that Mr Adams would have proceeded with the transaction regardless. HHJ Dight says (at paragraph 32): *"The Claimant knew that it was a high risk and speculative investment but nevertheless decided to proceed with it, because of the cash incentive."* But, in this case, I'm not satisfied that Mr M proceeded knowing that the investments he was making were high-risk and speculative, and that he was determined to move forward with the transactions in order to take advantage of a cash incentive.

I'm not satisfied that Mr M understood he was making a high risk investment. And I've also not seen any evidence to show Mr M was paid a cash incentive. It therefore cannot be said he was *incentivised to* enter into the transaction. And, on balance, I'm satisfied that Mr M, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams. And having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mr M's application from RealSIPP, the transactions that have led to this complaint, would not have gone ahead.

I remain of the view that in considering what fair compensation looks like in this case, it's reasonable to make an award against L&C that requires it to compensate Mr M for the full measure of his loss. RealSIPP was reliant on L&C to facilitate access to Mr M's pension. And but for L&C's failings, I'm satisfied Mr M's pension switches wouldn't have occurred in the first place. I'm not asking L&C to account for losses that go beyond the consequences of its failings. I am satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I'm not able to determine. However, that fact shouldn't impact on Mr M's right to fair compensation from L&C for the full amount of his loss.

L&C has reiterated the point about RealSIPP/CIB no longer being in existence. I accept this is true. However, the key point here is that but for L&C's failings, Mr M wouldn't have suffered the loss he's suffered. As a result, the trading/financial position of RealSIPP/CIB, doesn't lead me to change my overall view on this point. And, as such, I remain of the opinion that it's appropriate and fair in the circumstances for L&C to compensate Mr M to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by the other parties involved.

Removal of Mr M's assets from his SIPP and revocation request

In my provisional decision, I said that I didn't think any Dunas Beach investment had been removed from Mr M's SIPP as he had stated in his initial complaint. Mr M has clarified this point and said that because he was not receiving any income from one of the investments, he thought the property had been removed from his SIPP. He now appears to understand this is not the case. I remain of the view that, on balance, the Dunas Beach investments have remained in Mr M's SIPP account.

In conclusion

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

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

Putting things right

As noted above, Mr M transferred monies from a number of different pension schemes into the SIPP. Therefore, to put things right L&C will need to undertake different types of loss calculations which I've set out below. As part of doing this L&C will need to calculate the portion of Mr M's current SIPP value that's attributable to each of the respective switches and apply them to the relevant calculations.

In summary, L&C should:

- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value). If the SIPP needs to be kept open only because of the illiquid investments and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- Undertake loss calculations as set out below in respect of each of the schemes from which monies were transferred into the SIPP and pay any redress owing in line with the steps set out below.
- L&C should pay Mr M £1,250 for the distress and inconvenience caused to him by the avoidable problems he has had with his pension funds.

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

Treatment of the illiquid assets held within the SIPP

I consider it would be best if any illiquid assets held could be removed from the SIPP. Mr M 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 investments may prove difficult, as there may be no market for them. L&C should establish an amount it's willing to accept for the investments as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investments.

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

If L&C is unable, or if there are any difficulties in buying Mr M's illiquid investments, it should give the holdings a nil value for the purposes of calculating compensation. To be clear, this would include the investment being given a nil value for the purposes of ascertaining the current value of Mr M's SIPP. In this instance L&C may ask Mr M to provide an undertaking to account to it for the net amount of any payments the SIPP may receive from the relevant holdings. That undertaking should allow for the effect of any tax and charges on the amount Mr M may receive from the investments and any eventual sums he would be able to access from the SIPP. L&C will have to meet the cost of drawing up any such undertaking.

Mr M did receive a tax-free lump sum when he transferred his pension plans so this will need to be taken into account across all of his pensions as I've set out below.

Calculate the loss Mr M has suffered as a result of making the transfer in relation to monies originating from the Guaranteed Annuity Rate policy (the 'GAR policy') Before I set out how L&C should put things right, I need to make a finding on what I think Mr M would have done if the Aviva GAR policy had not been transferred. Given the guarantee that came with this policy, and based on the evidence available to me, I consider that it is more likely than not that Mr M would have used the funds from this policy to purchase an annuity exercising the available GAR. I also think he would have taken the maximum tax-free cash allowance as this would have allowed him to take a proportion of his pension tax free. So, I have taken this into account when setting out the redress below.

L&C must undertake a redress calculation based on the normal retirement age for the GAR policy which, in Mr M's case, was 65 years old. Mr M is now a few years over this age. So, L&C must calculate past loss as well as future loss as follows:

For Mr M's Past Loss (GAR)

1. L&C should contact the provider (Aviva) of the GAR policy and ask it to provide a notional value for the policy as at Mr M's 65th birthday. 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 plan would have remained invested in an identical manner to that which existed prior to the actual transfer.

   If there are any difficulties in obtaining a notional valuation from Aviva, then L&C should instead arrive at a notional valuation by assuming the monies would have enjoyed a return, from the point of their transfer to the L&C SIPP through until Mr M's 65th birthday, in line with the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return index). That is a reasonable proxy for the type of return that could have been achieved over the period in question.

   This sum (notional valuation from either Aviva or the benchmark above) should then be used, for the purposes of the steps below, as the overall GAR policy fund value as at Mr M's 65th birthday when calculating the tax-free cash and income that would have been available to Mr M had he taken benefits and exercised the GAR as at age 65.

2. Establish the annuity Mr M could have secured from his Aviva GAR plan had he exercised the GAR and purchased an annuity at age 65, having first taken the maximum available tax-free cash sum. In terms of the annuity, I think it's fair and reasonable to conclude that Mr M would have opted to take the highest available monthly income on a single life basis. Calculate the total accumulated net annuity and tax-free cash payments Mr M would have received from this plan from age 65 to the date of my final decision.

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

4. If the accumulated notional net annuity and tax-free cash payments provided for in

step 2 are greater than the total accumulated actual net income and tax-free cash payments provided for in step 3 then L&C must pay the difference directly to Mr M plus interest. To calculate the interest element, L&C must calculate the earliest point in time when the accumulated payments provided for in step 2 would have become greater than the total accumulated payments provided for in step 3. L&C must then add interest at 8% simple to any further payments in step 2 that Mr M would have received from that point in time through until the date of the final decision. Interest should be added from the date each of the further payments would have been paid to Mr M through until the date of the final decision.

5. Income tax may be payable on any interest paid. If L&C deducts income tax from the interest, it should tell Mr M how much has been taken off. And L&C should also then give Mr M a tax deduction certificate in respect of interest if Mr M asks for one. I know L&C says that this is not usually necessary but if does become necessary then it must provide a certificate to Mr M if he requests one.

For Mr M's future loss (GAR)

1. L&C must ascertain if there is a future loss by way of ascertaining the capital cost of purchasing an annuity equivalent to the one that Mr M would have secured from the Aviva GAR policy. And this then needs to be compared to the actual value of that portion of Mr M's actual current L&C SIPP transfer value that's attributable to monies transferred in from the GAR policy. If the former is greater than the latter, there is a future loss.
2. If there's a future loss L&C should pay this future loss sum into Mr M's SIPP. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the SIPP if it would conflict with any existing protection or allowance. If a payment into the pension plan isn't possible or has protection or allowance implications, it should be paid directly to Mr M as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. It's reasonable to assume that Mr M is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%.
3. For the purpose of ascertaining the capital cost of purchasing an annuity equivalent to the one Mr M would have secured from the GAR policy, L&C may ask Mr M to participate in a obtaining an enhanced annuity quotation. But mindful of the disruption to Mr M, L&C shouldn't ask him to assist with more than one enhanced annuity quotation.

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

To do this L&C must:

1. Obtain the notional transfer values of Mr M's previous non-GAR policies.
2. Calculate the portion of Mr M's current SIPP value, including any outstanding charges, that's attributable to monies transferred in from Mr M's previous non-GAR policies.
3. Deduct the value in step 2 from the total accumulated values in step 1.
4. Pay an amount into a pension arrangement for Mr M, so that the transfer value of that pension arrangement is increased by an amount equal to the loss calculated in step 3. This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

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

1. Obtain the notional transfer values of Mr M's previous non-GAR policies.

Having thought about this issue further, I've come to the conclusion that it would be fair and reasonable for L&C to seek notional values from the previous providers as I originally said in my provisional decision.

I've carefully reconsidered what L&C has said about the 28 day period. I acknowledge that the 28 day period means L&C has to act promptly to avoid paying additional interest, but I'm satisfied that there are steps available to it so as to reasonably undertake the calculation in the period provided. If there are any difficulties in obtaining the notional valuations from the previous providers within a reasonable amount of time, I have also provided for an alternative means for arriving at notional valuations elsewhere in this decision.

So, to that end L&C should first contact the providers of the non-GAR policy plans which were transferred into the SIPP and ask each of them to provide a notional value for the policy as at the date of my final decision. For the purposes of the notional calculation the providers should be told to assume no monies would have been transferred away from the plans, and the monies in these plans would have remained invested in an identical manner to that which existed prior to the actual transfer.

L&C must also ask the same operators to make a proportionate notional allowance in the calculations, so as to allow for any additional sums Mr M has contributed to, or withdrawn from, his L&C SIPP since its outset. To be clear this doesn't include SIPP charges or fees paid to third parties like an adviser but would include tax-free cash or income payments made to Mr M. Further, the total notional contributions or withdrawals to be allowed for across all calculations in this decision shouldn't be any more than the total contributions or withdrawals Mr M actually made/took.

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 the notional valuations from the previous providers, 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. And, again, there should be a notional allowance in this calculation for any additional sums Mr M has contributed to, or withdrawn from, his SIPP since its inception.

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

about CIB, and on the date the payment(s) was actually paid to Mr M. Where such a deduction is made there must also be a corresponding notional contribution (addition), at the end 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(s) that it's reasonable to apportion to each of the non-GAR plan transfers (i.e. the plans that weren't the Aviva plan with the GAR attached) into the SIPP, this should be proportionate to the actual sums transferred in from those other plans. And L&C should then ask the operators of those plan(s) to allow for the relevant notional withdrawal(s) in the manner specified above. The total notional deductions allowed for shouldn't equate to any more than the actual payment(s) from the FSCS that Mr M 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(s) notionally deducted by the operators of Mr M's previous pension plan(s).

Where there are any difficulties in obtaining notional valuations from the previous operators, L&C can instead allow for both the notional withdrawal(s) and contribution(s) in the notional calculation it performs, provided it does so in accordance with the approach set out above.

2. Calculate the portion of Mr M's current SIPP value, including any outstanding charges, that's attributable to monies transferred in from Mr M's previous non-GAR policies. This should be the current value of these monies as at the date of this decision.

3. Deduct the value in step 2 from the total accumulated values in step 1. The total sum calculated in step 1 minus the sum arrived at in step 2, is the loss.

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

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

If a payment into the pension plan isn't possible or has protection or allowance implications, it should be paid directly to Mr M as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid.

It's reasonable to assume that Mr M is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%. However, if Mr M would have been able to take a further tax-free lump sum, the reduction should only be applied to that portion of the compensation that couldn't have been taken as a tax-free lump sum. For example, if Mr M would have been able to take a tax-free lump sum of 25%, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

Distress and Inconvenience

The investigator recommended compensation for the distress and inconvenience caused to Mr M of £1,250. I think this sum is fair and reasonable given that Mr M has not been able to access his full pension benefits, for a considerable amount of time given the age he is now. He has also been suffering from ill health over an extended period of time and I think the

issues with his pension caused him significant upset when nearly all the value of the pension has been lost. I consider the impact of this would have been extremely distressing for Mr M given his particular situation. So, for these reasons, I am awarding Mr M £1,250 for the distress and inconvenience caused to him.

Interest

L&C should pay Mr M 8% simple on the calculated loss if redress isn't paid within 28 days of its notification of Mr M's acceptance of the final decision.

Income tax may be payable on any interest paid. If L&C deducts income tax from the interest, it should tell Mr M how much has been taken off. And L&C should also then give Mr M a tax deduction certificate in respect of interest if Mr M asks for one. As I've noted, L&C has said about there is little likelihood of a certificate being needed because of the way it accounts to HMRC. But if one is needed, it will need to provide this to Mr M if requested.

My final decision

For the reasons given above, it's my final decision that this complaint should be upheld and that London & Colonial Services Limited must pay Mr M fair redress as I've set out above.

Where I uphold a complaint, I can award fair compensation to be paid by London & Colonial Services Limited of up to £150,000 plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £150,000, I may recommend that London & Colonial Services Limited pays the balance.

Decision and award: My final decision is that I uphold the complaint. I think that fair compensation should be calculated as set out above. My decision is that London & Colonial Services Limited must pay Mr M the amount produced by that calculation – up to a maximum of £150,000 and the interest as I've set out above.

Recommendation: If the amount produced by the calculation of fair compensation is more than £150,000, I recommend that London & Colonial Services Limited pays Mr M the balance. Plus any interest on the balance as set out above.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 7 March 2024.

Yolande Mcleod
Ombudsman