DRN-4629438

The complaint

Mr A complains about the due diligence London & Colonial Services Limited (L&C) undertook before accepting his application for a Self-Invested Personal Pension (SIPP).

Mr A complains that L&C failed to carry out sufficient due diligence on both the introducer that proposed the business to L&C, and the underlying investments. And that in its acceptance of the pension transfer and investment instructions, L&C was in breach of both the regulator's guidance and rules.

Both L&C and Mr A are represented by professional third parties, and they have both made submissions at various times. For simplicity, I have referred to L&C and Mr A throughout, whether the submissions came directly from L&C, Mr A, or were made on their behalf.

What happened

The following is a summary of the parties involved in this complaint:

L&C

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

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

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

Real SIPP LLP (RealSIPP)

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

The Resort Group (TRG)

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

Background

Mr A, following a conversation with his then mortgage adviser, met with a representative of CIB, who I'll refer to as Mr H. As a result of this discussion, on 4 September 2011 Mr A signed an application for an L&C Open Pension (the SIPP).

The application form named his independent financial adviser (IFA) as Mr H who was working for RealSIPP LLP / CIB (Life & Pensions) Ltd. The form showed that the IFA would be paid an initial fee of £1,250 and a further £300 annually, and that Mr A wished to manage the investments himself, and the investment was named underneath this as DBR. (The form indicated that an investment instruction form was attached but neither Mr A nor L&C have provided a copy of this).

Scheme borrowing forms were also signed by Mr A on 11 October 2011. Details of sums to be borrowed, and the lender they'd be borrowed from, were left blank. No other parts of this form have been provided to our service to date.

L&C accepted Mr A's application and the SIPP was opened on 28 September 2011. Mr A had a personal pension plan worth £41,475.80 and this was transferred into the newly opened SIPP on 24 October 2011.

On 8 November 2011 £36,078.85 was paid to TRG for the purchase of a 50% share in "*Apartment 381b, Block 7, Dunas Beach Resort."*

Additional background information

There has been some further documentation provided to our service in relation to this complaint alongside some other relevant material related to similar complaints against L&C.

The RealSIPP branded L&C 'Investment request' form specific to Mr A is missing. However on other complaints considered by our Service relating to similar events at around the same time copies have been retained. It is reasonable to assume that Mr A's form indicated he wished to purchase a DBR investment and how much he was to pay for it. The forms also explained that with staged payments the initial deposit and interim payments could be lost if the balance couldn't be paid when due. The forms said that L&C wasn't authorised to give financial or investment advice, but that it had obtained legal advice in its capacity as trustee, in order to assess the risks of ownership and to ensure the appropriate title was attained.

In similar complaints there were also 'Scheme borrowing forms' signed by the investor. Although we have only seen the signed page pertinent to Mr A's complaint, other pages that I've seen in similar complaints detailed the future funding would need to be obtained by the developer, but the sums to be borrowed, and the lender they'd be borrowed from, were left blank. But it was noted in the forms that:

- This was an unusual investment structure involving property in a foreign jurisdiction, with a long period between the contract being entered into and completion, when the balance (including any scheme borrowing) would be due.
- There were no standard or previously agreed terms with any potential lender.

Where scheme borrowing was needed, it was for the investor to choose a lender and obtain an offer. And this would then be sent to L&C to review.

L&C has also provided us with a third-party investment due diligence document that it obtained. It is dated 16 April 2012, which postdates Mr A's application and investment, and sets out some details about the DBR investment, including that:

- It provided the ability to invest in hotel room ownership, and returns were to be achieved through a 50% share of room rental and possible capital growth. Rooms could be owned 100% or in a fractional ownership agreement.
- There was no fixed term to the investment although the rental agreement the

investors entered into was fixed for 15 years and renewable thereafter for five-year terms.

- Funds would only be realized through sale of the room – subject to the acceptance by the buyer of abiding by the agreements already in force.
- The resort manager and developer had been identified.
- There was, at that time, some uncertainty as to who owned and was responsible for the furniture, fixtures and fittings, so there was a potential for taxable property to arise.
- SIPP operators should seek their own independent tax advice.
- The investment was unregulated so no protections would be offered via the Financial Services Compensation Scheme (FSCS).

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

L&C has also provided us with copies of print outs from the FSA Register. These record that as of 31 January 2012, RealSIPP was an appointed representative of CIB. And CIB's permissions included advising on Pension Transfers, Pension Opt Outs and investments.

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

Although it has not been provided in relation to this complaint, on another similar complaint that was the subject of published decision DRN-3587366, I have seen copies of RealSIPP's client agreement and Key facts document, titled "*about our services for our Resort Group SIPP package."* RealSIPP's client agreement describes itself as an 'administrator and packager' of pension solutions to clients of various alternative investment providers, and says that:

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

Further, that:

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

Mr A's complaints

Mr A engaged his representative in August 2017. He has told our Service that he did so as shortly before that time his investment wasn't performing well, and his representatives were familiar with the TRG investment. His representatives assisted him in submitting a claim against CIB to the Financial Services Compensation Scheme (FSCS). This was successful and in April 2018 he was awarded some compensation. The FSCS subsequently gave Mr A a reassignment of rights in which, amongst other things, the FSCS explained it was transferring back to Mr A any legal rights it held against L&C.

On 18 April 2020, via his representatives, Mr A complained to L&C that, in summary, L&C had shown a lack of due diligence on CIB, and that it ought not to have accepted its business. And L&C had shown a lack of due diligence on the DBR investment, and it should not have been accepted into his SIPP.

On 11 June 2020 L&C sent Mr A its final response (FRL) to his complaint, which it did not uphold. In its FRL it referenced Mr A having invested £72,475.00 into Llana Beach Hotel, but it has since stated this was an error, and it confirmed Mr A invested as previously stated, in DBR. It's FRL said, in summary:

- L&C provided execution only (non-advised) SIPP administration services and this had been made clear to Mr A when he applied for the SIPP and submitted the investment instructions.
- COBS 11.2.19 meant L&C had to act on Mr A's investment instructions.
- Mr A was advised to transfer his pension into the SIPP and to invest [in DBR] by RealSIPP / CIB who was FCA regulated at the time and had the required permissions.
- Mr A's complaint is about the advice he was given by RealSIPP / CIB, and L&C accepted his instructions on an execution only basis following the advice he had received from RealSIPP / CIB.
- Mr A's complaint should be properly directed towards his advisers, RealSIPP as they were the regulated advisers responsible.
- L&C undertook due diligence on both RealSIPP / CIB, both of which were regulated by the FCA, and [DBR], the investment recommended to Mr A by his regulated adviser.
- RealSIPP / CIB's regulated status only changed in June 2015 which was after Mr A's transaction had completed.
- RealSIPP / CIB was listed as Mr A's chosen financial adviser on the application form, and had submitted both the application and investment instructions to L&C.
- Mr A was paying RealSIPP / CIB an ongoing annual advice fee, indicating he was receiving ongoing advice.
- All the forms sent to Mr A for completion contained clear information and risk warnings, and guided him to seek financial advice.
- L&C was not authorised to provide advice nor to assess the suitability of the investment instructions Mr A had given L&C to carry out.
- L&C's due diligence provided no cause for concern or reason to suspect the FCA regulated firm or the advice they offered to Mr A was in any way inappropriate.
- L&C acted on an '*execution-only'* basis at all material times.

- L&C was not an investment manager and has no involvement in the operation of the underlying investments chosen by its members. It was not its responsibility, nor was it permitted to provide any form of advice, including the suitability of the SIPP, pension transfer, investment or Mr A's chosen financial adviser.
- Whilst pointing out that it was not a rule book, L&C was satisfied that it had conducted itself in line with the behaviour and type of conduct that the FCA indicated in the SIPP report [referring to the FSA's September 2009 report entitled "*Self-Invested Personal Pension (SIPP) operators. A report on the findings of a thematic review]* it hoped to see from reasonable SIPP operators.
- The FCA's "*Dear CEO letter"* of July 2014 was published after the events complained of, so was not relevant.
- The investment [DBR] was appropriate for a pension scheme: good title was obtained, and the asset was capable of being held in a SIPP.
- Any suggestion that the investment was unsuitable for Mr A was not something L&C was able to assess as it went beyond the scope of duty of a SIPP provider.
- The application documents show that Mr A was aware of the high risk and speculative nature of the investment.
- L&C complied with all of the relevant and applicable COBS rules in its dealings with Mr A.
- L&C did not act negligently or in breach of its statutory duty by accepting instructions from Mr A. It had reminded Mr A that he had the opportunity to seek regulated advice before proceeding (and it understood he had).
- L&C is acutely aware of the standards it must meet and has continually acted in accordance with its regulatory and statutory requirements and improved its processes over the years in line with guidance from the regulators.

Mr A did not agree with this outcome and on 30 July 2020 he referred his complaint to our Service where it was considered by an Investigator. Our Investigator thought L&C hadn't treated Mr A fairly. He said, in summary:

- The TRG investment should be considered unsuitable for the majority of clients due to the unregulated, high-risk, illiquid and opaque nature of the investment. Therefore, L&C should have conducted enhanced due diligence on the investment prior to investing Mr A's pension funds.
- L&C should have identified and gathered MI on the type of referrals it was receiving from RealSIPP which should've raised concerns about the business model of RealSIPP/CIB and the risk of consumer detriment that followed the advice given by that firm.
- The pattern of business should have flagged to L&C that there was a high risk of consumer detriment, so L&C should've taken steps to find out how this business was coming about – to understand RealSIPP's business model. This should've included asking for an example of the agreement RealSIPP had with its customers.
- The FSA's September 2009 report explicitly indicated that requesting copies of suitability reports was an example of what it regarded as good practice. L&C had not done this.
- There was no evidence that L&C carried out anything other than minimal checks on the business it was accepting from RealSIPP.

- L&C should have been aware that RealSIPP was acting as an introducer for essentially the same esoteric, unregulated investment through TRG. This investment was unlikely to be suitable for most retail investors; it'd only be suitable for a small portion of a sophisticated investor's portfolio.
- As L&C received a significant amount of similar business from RealSIPP it should've alerted it to the importance of treating these introductions with caution.
- L&C ought to have found out more about RealSIPP's business model, and how it was obtaining its customers. It should have also found out that RealSIPP was taking unregulated referrals from TRG and not providing any advice.
- By the time Mr A had submitted his application L&C should have spotted a trend and seen similarities in each of the applications being submitted. This ought to have acted as a red flag and instigated a higher level of due diligence checks.
- Reviewing what L&C ought reasonably to have known at the time of Mr A's application, it should have concluded it was likely that the business introduced by RealSIPP would produce unsuitable SIPPs and there was a high risk of consumer detriment.
- L&C ought not to have accepted Mr A's application for a SIPP.
- Had L&C refused Mr A's business it is more likely than not that Mr A wouldn't have opened a SIPP or entered into this transaction at all. No other SIPP provider, acting fairly, should have accepted the business.
- If L&C had acted fairly and reasonably it would have refused Mr A's application and the transaction, and the subsequent loss would not have occurred. Therefore L&C should redress this loss.

The Investigator then set out how the losses to Mr A's pension fund should be calculated and redress paid.

But L&C didn't agree with this outcome. It stated that Mr A had complained too late under the regulator's rules as he had made his complaint more than six years after the 2012 transfer, and Mr A was aware he had cause for complaint more than three years before his complaint was received. Amongst other things L&C stated:

- Mr A had contacted RealSIPP on 5 October 2011 with queries regarding his investment, prompting RealSIPP to email L&C to warn it that Mr A may cancel his investment. RealSIPP also asked when Mr A's cooling off period would end.
- On 1 September 2017 L&C received a request for information from Mr A's representative.

L&C stated the first point showed Mr A had doubts about the suitability of the investment in TRG as far back as October 2011, but he did not complain. L&C also stated the enquiry from his representative showed Mr A was aware he had cause for complaint sometime in 2017.

It also provided a comprehensive response to the Investigator's findings on the merits of the complaint, which is summarised below:

- The wording in the investment request forms confirmed that Mr A had obtained any reports, legal or other advice that he required on the investments. It also confirmed Mr A was aware L&C was unable to, and did not give, advice.
- The SIPP application form also included a declaration which was signed by Mr A on 24 January 2012:

"I hereby agree to be responsible for any claims, losses, costs, charges or expenses which may be raised against London & Colonial or incurred by London & Colonial in consequence of London & Colonial acting on instructions received…by me".

- Mr A signed to indemnify L&C from any loss claim arising from the investment.
- The Ombudsman may dismiss a complaint if dealing with it would impair the effective operation of the Financial Ombudsman Service. A Court would be a more appropriate jurisdiction than the Financial Ombudsman Service for this complaint and Mr A's evidence, including his position on causation, should be tested in Court.
- The wider impact of the findings, on L&C and the wider SIPP industry, are such that the claim should be subjected to full judicial scrutiny.
- Alternatively, the Pension Ombudsman (TPO) would be a more appropriate jurisdiction given its specialist knowledge of pension complaints. The Memorandum of Understanding between the Financial Ombudsman Service and TPO contains a clause which states that the Financial Ombudsman Service and TPO should take reasonable steps to co-operate and exchange best practice around the resolution of similar complaints.
- The disclaimers contained in the SIPP had been largely ignored by the Investigator, and he'd failed to take into account the ruling in *Adams*.
- Primacy should be given to the contract agreed between the parties, which was on an execution only basis – L&C accepted no responsibility for checking the quality of the investment business, and less so the decision to transfer and invest.
- The examples of good practice provided within the regulator's reports and guidance were not known to the wider SIPP industry (other than the guidance contained within the 2009 Thematic Review) due to having been published after the event. And these were examples, not guidance, and being held to these, rather than the COBs rules was an unreasonable standard.
- The Investigator made no comment on the 'quality' of the investment itself, which L&C presumed was because the investments were exactly as advertised.
- There was nothing to prevent a SIPP provider from accepting such business, and L&C could not have rejected such business without making a judgement on its suitability for each client, which was outside of its expertise, its regulatory permissions and terms of the contract.
- RealSIPP, as the financial adviser, was responsible for advising on the suitability of both the SIPP and proposed investment. L&C did not have the required permissions to do either.
- L&C accepted it did have an obligation to conduct due diligence on RealSIPP and it complied with this obligation.
- There was no requirement at the time for L&C to understand RealSIPP's business model as part of the due diligence, and for the Investigator to determine that L&C ought to have followed guidance that was published after the event was using hindsight.
- That some RealSIPP clients were on occasion investing in high-risk investments was not a cause for concern.
- RealSIPP was a regulated entity and therefore ought to have been aware of its own obligations when it came to suitability.

- The level of due diligence required by the Investigator went far beyond what was agreed between all parties. There was no reason L&C should have been concerned about accepting business from RealSIPP, which was an FCA regulated entity, and L&C was able to take comfort from that.
- There was no obligation on L&C to ensure clients had received advice, and it acted in good faith when acting on Mr A's instructions.
- A SIPP provider cannot assess the suitability of any particular investment for a customer. Its role in such a transaction is not to make a value judgement on the investment, but to obtain good title and hold it within a pension wrapper.
- The Investigator's conclusion that L&C ought to have refused the application as unsuitable is irrational. Furthermore, there was nothing which required it to request details of the advice that had been provided, and it wouldn't have been able to comment on this advice without breaching its permissions.
- L&C conducted adequate due diligence on the investments
- L&C should be held to the standard of a reasonably competent SIPP provider – not whether it followed best practice, which is the test for breach of duty at law. Using examples of best practice published in 2013, which was after the events concerned in the complaint ran contrary to logic, common sense, the position in *Adams* and led to an irrational conclusion.
- The Investigator's view appears to have ignored established caselaw, in particular *Adams*.
- The view didn't properly explain why it used the Principles as a basis for the finding in preference to the COBS rules or established case law. A breach of the Principles cannot, of itself, give rise to any cause of action at law.
- The duties imposed on L&C within the Principles must be construed in light of the COBS rules, the regulatory permissions that it holds, its contractual arrangements, and the statutory objective in FSMA [The Financial Services & Markets Act 2000], namely "…*consumers should take responsibility for their decisions".*
- The decision in *Adams* made clear that publications after the event could not be applied to the SIPP operator's conduct at the time. This should be followed in this case.
- The only publication with any relevance is the 2009 thematic review – however this has no bearing on the construction of the Principles as the contents of this document cannot found a claim for compensation of itself.
- The 2009 thematic review does not provide statutory "guidance" and many of the matters the review invites firms to consider are directed at businesses providing advisory services, so not L&C.
- The FCA's Enforcement Guide says that *"Guidance is not binding on those to whom the FCA's rules apply. Nor are the variety of materials (such as case studies showing good or bad practice, FCA speeches and generic letters written by the FCA to Chief Executives in particular sectors) published to support the rules and guidance in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules."*
- The Investigator's view largely ignored the findings of the High Court in *Adams* on the duties imposed by COBS. And the need to advise clients on 'suitability' and 'appropriateness' of investments under COBS 9 and 10 did not apply to execution-only SIPP providers, nor did the requirement to provide the client with product information.

- The view sought to impose a greater emphasis on the Principles, overriding the allocation of duties to different types of businesses within COBS. COBS should take primacy with the Principles applied to it.
- L&C had no permission to carry on the regulated activity of advising on investments, and at no time did it provide advice as to whether a consumer should open or transfer monies into a SIPP or as to the underlying investments. However the Investigator found that L&C was under an obligation to protect against 'consumer detriment' to ensure Mr A understood the level of risk involved and to have outlined the risk involved with an occupational pension transfer. This was in addition to the obligation to complete due diligence on DBR and ongoing due diligence on RealSIPP.
- The relationships in this case are similar to those in *Adams*.
- At all times, Mr A was aware that L&C would act on an execution-only basis and would accept no responsibility for the quality of the investment business.
- Amongst other things, the judge in *Adams* held that in order to identify the extent of the regulatory duties imposed on Carey, "*one has to identify the relevant factual context"* and that *"the key fact...in the context is the agreement into which the parties entered, which defined their roles in the transaction"* and that there was no duty on the SIPP provider to consider the appropriateness of the SIPP or underlying investment.
- The judge also said that *"a duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed...as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed."*
- In *Adams* the FCA agreed that the function of a firm, as determined by contract, would govern what it had to do to comply with its duties under the FCA Handbook.
- Insufficient weight has been given to contractual arrangements and the demarcation of roles and responsibilities.
- The contractual relationship between the parties was clear – L&C was acting on an execution-only basis.
- In suggesting that, notwithstanding the clear terms of the relevant contractual arrangements, L&C owed obligations of due diligence under the Principles, the reasoning of the investigator's view runs wholly contrary to that in *Adams*, and the Investigator had made no attempt to consider this divergence.
- 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 was no obligation on L&C to ensure that advice was taken. It's not fair or reasonable to use the Principles to artificially impose a duty that goes beyond that accepted and agreed by the parties.
- *Adams* required that the parties' contractual arrangements should be taken into account. Had the Investigator paid proper regard to this the view would have found that L&C's duties to Mr A extended no further than those owed to the complainant in *Adams*, so it is neither reasonable nor fair for L&C to pay compensation in this case.
- L&C reiterated that in *Adams* the judge held that "*…the general principle that consumers should take responsibility for their decisions"* and the FCA did not disagree with this approach.

- The investigator's view fails to have regard to the general principle that consumers should take responsibility for their decisions, the fundamental principle of freedom of contract and to the authority of *Adams* and *Kerrigan v Elevate Credit International Ltd* [2020] C.T.L.C. 161. In doing so it enabled Mr A to recover against L&C losses flowing from non-contractual obligations inconsistent with the parties' contractual arrangements.
- It was common practice for SIPP providers to accept investments such as those this complaint concerns, and another SIPP provider would have accepted Mr A's application.
- L&C being left to *"carry the can"* as it's the last entity standing isn't fair or reasonable. L&C was not responsible for Mr A's decision to invest, and regardless of whether or not it is still in existence, RealSIPP, the entity which brought about the transaction, should be held responsible.

A second Investigator reviewed L&C's contention that Mr A had made his complaint too late. But she didn't agree. She thought that it was quite normal for enquiries to be made by a consumer at the outset of a transaction. And Mr A's representatives had made the information request to L&C in September 2017. And while no complaint was made to L&C at this time, one was made in April 2020, which was within three years of his representative's initial request. So she believed Mr A had made his complaint in time and so was one we could consider.

L&C maintained that Mr A ought to have been aware of his cause for complaint in October 2011. But even if that wasn't the case, the facts around the instruction to his representative demonstrate the complaint was made more than three years after Mr A ought to have been aware that he could make one against L&C. L&C thought it reasonable to conclude that a professional and claims specialist would have been aware of issues with SIPP provider due diligence by April 2017 at the latest. L&C stated it was unaware of the date the representative was engaged by Mr A, but it must have been prior to September 2017, so as the complaint was made in April 2020 it needed to know the date on which the representative was first engaged.

The Investigator provided L&C evidence that Mr A had engaged his representative in July 2017, so she was satisfied that he made his complaint (in April 2020) regarding L&C's due diligence failings in time.

As an agreement on both our Service's jurisdiction and the merits of Mr A's complaint could not be reached, the matter came to me for to review.

On 14 December 2023 I issued a provisional decision on this complaint. I concluded that Mr A's complaint was within the jurisdiction of our Service as it had been made in time, so I went on to consider its merits.

And having done so, I concluded that the complaint should be upheld. I thought there was a significant risk of consumer detriment associated with introductions from RealSIPP/CIB which I considered L&C ought to have recognised and acted upon. I thought L&C had not carried out sufficient due diligence on RealSIPP/CIB, and should not have accepted Mr A's SIPP application. And had it not accepted it, Mr A would not have suffered the losses to his pension fund.

I then went on to set out how I thought L&C ought to calculate and redress any loss that Mr A had suffered to the value of his pension fund.

Mr A accepted the findings in my provisional decision with no further comment. But L&C did not, and solicitors for L&C provided a detailed response. This included some points raised in earlier correspondence that I've already summarised earlier in this decision. So I've set out below a summary of what I consider to be the main points made in the solicitors' response to my provisional decision. However, the list isn't exhaustive and before making this decision I carefully considered the response in full.

L&C maintained it thought the complaint had been made too late under the Regulator's rules. It thought:

- Mr A was aware from the outset that the investment was illiquid, so he clearly knew of the issues that form the substance of his complaint more than three years before it was brought.
- L&C has not had sight of the email chain referred to in the jurisdiction section of the provisional decision, and as such had not had the opportunity to make submissions regarding it.
- L&C did not know when Mr A became aware of the issue which prompted him to engage his representative in July 2017, as this would be the point he became aware he had cause for complaint.

In relation to the merits of Mr A's complaint it thought:

- The provisional decision 'cherry picks' from case law whilst largely ignoring *Adams v Options SIPP UK LLP* which is more relevant.
- No attempt has been made to explain why the Principles have been relied on rather than the High Court decision in *Adams,* despite the decision forming a much more solid foundation for any consideration of a complaint against a SIPP provider.
- The provisional decision ignores the fact that the Principles, and the duties imposed on L&C by these, must be construed in light of the COBS rules applicable to L&C and the regulatory permissions that L&C held at the time – it was unable to provide advice to Mr A.
- The provisional decision finds that Mr A was not responsible for any of his decisions despite the findings in *Adams.*
- The publication of the Regulator's documents and their contents cannot found a claim for compensation of itself.
- There was no obligation imposed on L&C by the Principles to consider and act on the suitability of the SIPP or underlying investment, and the Regulator's publications referred to cannot impose such a duty.
- The 2009 and 2012 thematic reviews did not provide "guidance" and were not statutory guidance. They only highlighted some "examples of measures" that SIPP operators could consider. And many of these were aimed at advisory firms, not execution-only businesses like L&C.
- Despite many of the COBS rules not being applicable to execution-only SIPP providers (a position confirmed in *Adams)* the provisional decision seeks to impose on L&C a duty of due diligence that it does not owe and which goes far beyond the scope of any duty envisaged by the parties, by a generalised appeal to the Principles.
- The Ombudsman was attempting to create a relationship between L&C and Mr A before a contract is entered into and before any funds were received by L&C.

- The due diligence carried out by L&C on RealSIPP was sufficient and did not raise any cause for concern.
- It is wrong of the Ombudsman to conclude that L&C was under obligations to conduct further due diligence to protect against 'consumer detriment' and to ensure Mr A understood the level of risk involved.
- L&C was unable to provide advice on either the suitability of the SIPP or the investment. That is why it entered into an intermediary agreement with RealSIPP. The provisional decision has largely ignored the parties' contractual arrangements and demarcation of the roles and responsibilities.
- The Ombudsman provided no rational reason for failing to consider the duties of a SIPP operator under COBS and for imposing obligations on L&C beyond its contractual relationship (contrary to *Adams).*
- The provisional decision should have found that L&C's duties to Mr A extended no further than those owed to the claimant in *Adams* and accordingly it is neither fair nor reasonable for L&C to pay redress in this case.
- The Ombudsman has failed to properly take into account FSMA s.5(2)(b) – the general principle that consumers should take responsibility for their actions, as held in *Adams.*
- L&C complied with COBS 11.2.19R when it acted on Mr A's written instructions in the setting up of the SIPP and the transfer of monies to TRG.
- It was reasonable for LCS to be afforded a significant level of comfort from the fact that RealSIPP/CIB was an FCA authorised firm, and as such were required to operate under a set of regulatory obligations to keep their clients' best interests in mind. And this is confirmed within COBS.
- L&C should not be held responsible for decisions made by Mr A prior to its involvement. Mr A's decision to transfer his pension was outside of L&C's control.
- The finding that L&C must pay interest on any redress outstanding after 28 days is neither fair nor reasonable when any delays may be out of its control. It should instead either allow L&C to undertake the benchmark calculation two weeks after it requested the information from the ceding scheme, or alternatively, pay interest after three months from the point of Mr A's acceptance of the final decision.
- Mr A has already received £50,000 compensation from the FSCS. This amount should either be taken off the amount of redress L&C is required to pay, or alternatively should reduce any losses that Mr A is found to have suffered to take into account the benefit those funds would have gained since they were received.
- Any interest it should pay should be at most 2.5% above base rate. 8% contains a punitive element and as such is inappropriate.
- It had not been provided any evidence that Mr A will be a basic rate tax payer in retirement. It is unfair to assume this will be 20% where there is a potential for this to be factually incorrect.

And in relation to the £500 award for distress and inconvenience, L&C thought it did not take into account that which was caused by Mr A's own actions resulting in the loss of monies from his SIPP.

What I've decided – Jurisdiction.

I've reconsidered all the available evidence and arguments to decide whether we can consider Mr A's complaint.

In doing this I've also taken into account both Mr A's and L&C's submissions in response to my provisional decision. And having done so I am not persuaded to change my findings. I am satisfied that Mr A's complaint is one that is within the jurisdiction of our Service.

Time limits.

L&C has maintained that it believes Mr A has made his complaint too late under the regulator's rules as he submitted it more than six years after the event he is complaining about. In addition it has submitted that Mr A was aware from the outset that the investments were illiquid, so he was aware of the issues that form the substance of his complaint more than three years before it was brought, and that it has not had sight of all the evidence under consideration.

But I don't agree. I think Mr A's complaint has been made within the time limits set down in the Regulator's rules. I do not think Mr A had, or ought reasonably to have had, cause for complaint against L&C until he was advised this may be the case by his professional representative, whom he engaged in July 2017, and as such Mr A's complaint is one I can consider. I'll explain.

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

The section of the rules that applies to this complaint means that, unless L&C consents, we can't look into this complaint if it's been brought:

- more than six years after the event complained of;
- or, if later, more than three years after Mr A was aware – or ought reasonably to have become aware – he had cause for complaint;

L&C says that Mr A's complaint was raised on 18 April 2020. Having seen the complaint letter I'm satisfied that this is correct. I can also see that the crux of the complaint was that L&C didn't undertake sufficient due diligence on RealSIPP/CIB, nor the investment itself, and that, as a result of this, Mr A has suffered losses that L&C should compensate him for.

The application for the L&C SIPP was completed on 4 September 2011. Mr A's pension funds were transferred into it on 24 October 2011 and invested in DBR on 8 November 2011. All of this occurred more than six years before Mr A had referred his complaint to either L&C or us.

So I've gone on to consider whether Mr A referred his complaint more than three years after the date on which he either was aware, or ought reasonably to have become aware, he had cause for complaint. And when I say here cause for complaint, I mean cause to make this complaint about this respondent firm, L&C, not just knowledge of cause to complain about anyone at all.

L&C has cited an email from RealSIPP to itself on 5 October 2011 which says Mr A was considering cancelling his investment instruction, and RealSIPP wanted to know how long was left of his cooling off period. And L&C has provided me a copy of this email chain. This is the email chain that L&C referred to in its response to my provisional decision, and said it

had not seen it. But as it was the entity that submitted it originally, I'm satisfied that it is fully aware of its contents.

And having reconsidered it, I remain in agreement that it provides some evidence that Mr A had concerns about the proposed investment in DBR, and he was looking for more information from his advisers, RealSIPP, but I cannot see that this email chain provides any evidence to show Mr A was, at that point in time, dissatisfied with L&C or had any reason to think L&C had done anything wrong. And, as I've said above, for me to determine when the three-year part of the rule ought to commence, I need to be satisfied when Mr A was aware, or ought reasonably to have been aware of cause for complaint about L&C.

The term 'cause for complaint' is not defined in the Handbook. The term *complaint* (in italics) is defined, and it is reasonable to infer in light of the above guidance on interpreting the Handbook (and guidance in GEN 2.2.1R in the Handbook: *"Every provision in the Handbook must be interpreted in the light of its purpose."*) that the definition of the word *complaint,* was intended to apply to the phrase cause for complaint.

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

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

So the Glossary definition of complaint requires that the act or omission complained of must relate to an activity of "**that *respondent***" or firm (my emphasis) – in this case, L&C.

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

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

So taking each of these points in turn:

- The evidence of the email shows that Mr A may have been having second thoughts about the proposed investment itself, and he was looking for further information from his financial adviser. But the emails don't, in my view, show he was aware that anyone had done anything wrong, or that there may be a problem, just that he may have been having second thoughts about making an investment.
- At the time of the email Mr A had suffered no loss as his funds hadn't been invested, and they weren't invested until about one month later.
- I'm not satisfied from the evidence in the email chain (or in any other evidence supplied) that Mr A had any awareness that L&C may have been responsible for a problem at that time. It's not obvious why Mr A should, initially at least, consider L&C

> to be responsible for the investments proposed to be held within the SIPP. Mr A knew L&C hadn't recommended the investments to him, and he knew, or should have known from the content of L&C's SIPP 'Open Pension Brochure' document, the SIPP application and property investment document, that it wasn't L&C's role to give advice.

So I don't agree that the email dated 5 October 2011 shows that Mr A knew, or ought reasonably to have known, he had cause for complaint about L&C, and that he had three years from October 2011 to make his complaint. And accordingly, I don't agree that this email shows Mr A's complaint has been made too late.

I have also reconsidered all SIPP statements sent to Mr A that I have seen since its inception, and these covered all the years up until 2018, with only the 2017 statement missing. The statements and valuations sent to Mr A did not show any significant fall in overall value, and rental payments continued throughout this time.

In reconsidering all of these, there is nothing that I have seen that was sent to Mr A more than three years before his complaint was referred to L&C that would have caused Mr A, or a reasonable retail investor in his position, to link L&C to any losses or problems associated with his SIPP or investments. And as I've said above, Mr A wasn't advised by L&C about setting up the SIPP or the suitability of investments, and the obvious first thought when any losses or problems with the investment occurred, would have been that his financial advisers, RealSIPP/CIB, might have given poor advice.

Mr A has told our Service, via his representatives, that he engaged his representative in July 2017. He did this soon after he'd noticed his investment was performing poorly, and had engaged these representatives to investigate the suitability of the advice he'd received from CIB. His representatives assisted him in submitting a successful claim against CIB to the FSCS, and he was provided some compensation. And it was his representatives who explained to Mr A, at some point after their initial engagement, that L&C may also be liable for a lack of due diligence. After he had been paid compensation by the FSCS his representatives then assisted Mr A in submitting his complaint to L&C on 18 April 2020.

L&C has said that Mr A must have been aware his investment was illiquid from the outset, which is the basis of his complaint. But I've seen nothing to suggest that Mr A would have known at the outset that his investment was illiquid. And it is a reasonable assumption to make that had he thought this was a problem at the outset then it is unlikely he would have made the investment in the first place.

L&C has questioned exactly when Mr A noticed the problem with his pension which caused him to engage his representatives. But in determining when I think Mr A either had, or ought reasonably to have had awareness of cause for complaint, he needed to be aware of a problem, *and* who may be responsible for it.

As I've mentioned above, although he may have been aware of a problem with his pension, I don't think Mr A had, or ought reasonably to have had, cause for complaint against L&C until he was advised this may be the case by his professional representative, whom he engaged in July 2017. It's apparent Mr A's professional representative subsequently made Mr A aware L&C might have some responsibility for what had happened and that Mr A complained to L&C in April 2020. So, I'm satisfied that Mr A complained to L&C within three years of the date he was aware, or ought reasonably to have become aware, he had cause for complaint about L&C.

As such, I'm satisfied this complaint was made in time.

Better suited to be considered by TPO or a Court

L&C has also said that it believes the complaint is better suited to be considered by TPO or a Court.

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

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

(1) he considers that it would be more suitable for the matter to be determined by that scheme; and

(2) the complainant consents to the referral."

L&C has argued that Mr A'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 A consents to a referral to TPO.

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

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

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

So, overall:

- I'm satisfied that Mr A's complaint was made within the time limits set out in DISP 2.8.2
- I don't consider that it would be more suitable for this complaint to be determined by TPO and I've decided not to exercise my discretion to refer it.
- I'm not required to dismiss this complaint, and for the reasons I've given, I'm not exercising my discretion to dismiss it.

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

What I've decided – and why

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

And in doing so I have fully considered L&C's submissions in response to my provisional decision. But whilst I have considered all the submissions made by both parties, I've focussed here on the points I believe to be key to my final decision on what is fair and reasonable in the circumstances.

And when considering what's fair and reasonable, 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. This goes wider than the rules and guidance that come under the remit of the FCA. Ultimately, I'm required to make a decision that I consider to be fair and reasonable in all the circumstances of the case.

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

Relevant considerations

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 said about this point in my provisional decision.

I have carefully taken account of the relevant considerations to decide what is fair and reasonable in the circumstances of this complaint.

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

On 18 May 2020, the High Court handed down its judgment in the case of *Adams* v Options SIPP [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in *Adams* v

Options UK Personal Pensions LLP [2021] EWCA Civ 474. I have taken account of both these judgments when making this decision on Mr A's case.

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

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

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

I note that in the High Court judgement 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."*

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

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

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

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

- law and regulations;
- regulators' rules, guidance and standards;

- codes of practice; and,
- where appropriate, what I consider to have been good industry practice at the relevant time.

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

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

Overall, and having considered closely L&C's submissions both initially and in response to my provisional decision, I am satisfied that COBS 2.1.1R is a relevant consideration – but that it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Mr A's case.

The regulatory publications

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

- The 2009 and 2012 thematic review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 "Dear CEO" letter.

The 2009 Thematic Review Report

The 2009 report included the following statement:

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

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

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

Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or

potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their customers' interests in this respect, with reference to Principle 3 of the Principles for Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

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

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

The later publications

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

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

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

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

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

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un-authorised business warnings.*
- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

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

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

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

"Due diligence

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

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

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

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

- *Correctly establishing and understanding the nature of an investment*
- *Ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*
- *Ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*
- *Ensuring that an investment can be independently valued, both at point of purchase and subsequently*
- *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 have considered them in their entirety.

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

It is 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.

At its introduction, the 2009 Thematic Review Report says:

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

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

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

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

L&C's representatives have also said that many of the matters that the Report invites firms to consider are directed at firms providing advisory services. It's not specified which parts of the Report L&C's representatives think are directed at such firms, but to be clear, I think the Report is also directed at firms like L&C acting purely as SIPP operators. The Report says:

> "*We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses*…"

And it's noted prior to the good practice examples quoted above that:

> "*We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs*."

I'm also satisfied that L&C, at the time of the events under consideration here, thought the 2009 thematic review report was relevant, and thought that it set out examples of good industry practice. L&C *did* carry out due diligence on RealSIPP. So, it clearly thought it was good practice to do so, at the very least.

Like the Ombudsman in the BBSAL case, I do not think the fact the publications, (other than the 2009 report), post-date the events that took place in relation to Mr A's complaint, mean that the examples of good practice they provide were not good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

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

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

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

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

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

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

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

And in determining this complaint, I need to consider whether, in accepting Mr A's SIPP application from RealSIPP, L&C complied with its regulatory obligations:

- to act with due skill, care and diligence;
- to take reasonable care to organise and control its affairs responsibly and effectively;
- to pay due regard to the interests of its customers and treat them fairly; and
- to act honestly, fairly and professionally.

In doing that, I'm looking to the Principles and the publications listed above to provide an indication of what L&C should've done to comply with its regulatory obligations and duties.

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

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

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

The contract between L&C and Mr A

I accept that L&C made it clear to Mr A 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 A signed confirmed, amongst other things, that losses arising as a result of L&C acting on his instructions were his responsibility. So I've proceeded on the understanding that L&C wasn't

obliged – and wasn't able – to give advice to Mr A on the personal suitability of the SIPP or DBR investment.

But I'm satisfied that, to meet its regulatory obligations when conducting its operation of SIPPs business, L&C had to decide whether to accept introductions of business with the Principles in mind. I don't agree that L&C 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. I'm satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business. The regulators' reports and guidance provided some examples of good practice observed by the FSA and FCA during its work with SIPP operators. This included being satisfied that a particular introducer/investment is appropriate to deal with/accept. That involves conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.

L&C says that it checked the FSA's register to ensure that RealSIPP and CIB were regulated, and it also entered into intermediary agreements with those firms. I think this was evidence of good practice, but I don't think these steps were the only steps L&C should've taken.

I have considered L&C's response to my provisional decision, but as set out above, to comply with the Principles I remain satisfied that 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 A) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

And I think that L&C understood this at the time too, as it did more than just check the FSA entries for RealSIPP and CIB to ensure they were regulated to give advice. It also entered into intermediary agreements with those firms. It is 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.

So, and well before the time of Mr A's application in September 2011, 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 think L&C's submissions on the due diligence it undertook prior to allowing DBR holdings 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 DBR), with the Principles in mind.

What due diligence did L&C carry out 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 were regulated and authorised to give financial advice.
- It entered into intermediary agreements with RealSIPP and its principal.

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

Was this sufficient due diligence in the circumstances?

These steps go some way towards meeting L&C's regulatory obligations and good industry practice. But I remain of the view L&C failed to conduct sufficient due diligence on RealSIPP before accepting 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 A's application was made. I say this because:

- Based on the available evidence, it would've been unreasonable to assume that full advice on the overall proposition, (i.e. advice on the establishment of the SIPP, the transfers of pensions to the SIPP, and the intended investment) was being offered by RealSIPP to applicants like Mr A.
- The introductions had anomalous features – high-risk business for unregulated overseas property developments and other esoteric investments.
- And, even though L&C believed that RealSIPP had the necessary permissions to give full advice on the business it was introducing, a large proportion of the introduced business was execution-only.

L&C 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 may not have been willing to provide the required information, 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 A's application. These points overlap, to a degree, and should have been considered by L&C cumulatively.

The availability of advice

L&C, in its submissions on this complaint, has suggested that there's some evidence that advice might've been given to Mr A, highlighting comments about a fee agreement. And again it was L&C's "*expectation that* [RealSIPP] *would have been providing a regular service to the client for these fees, including monitoring of his retirement planning."* But I don't agree this is evidence that advice was given; the annual fee of £300 doesn't appear to have been for advice. As RealSIPP's 'Key facts' document explains it's for ongoing administration and correspondence. So, I've seen no evidence that Mr A was ever offered full regulated advice by RealSIPP or its principal. As its client agreement and 'Key facts' document make clear, RealSIPP wasn't offering clients like Mr A full advice.

The possibility that full regulated advice on the overall proposition hadn't been given or made available was a clear and obvious potential risk of consumer detriment. Mr A was transferring a little over £41,000 and investing the bulk of those monies into an overseas property development – a move which was highly unlikely to be suitable for the vast majority of retail clients.

So, based on the available evidence, I think there was insufficient basis for L&C to reasonably assume that full regulated advice on the overall proposition had either been given to Mr A, or had been made available to Mr A and he had declined it.

RealSIPP was introducing applications for high-risk investments

As part of our enquiries into this complaint we asked L&C how many of its members were introduced by RealSIPP, and how many of these were introduced before Mr A. L&C informed us that a total of 160 of its members were introduced by RealSIPP since the introducer agreement commenced in September 2010, and there had been 33 introductions before Mr A's. And L&C has previously told us back in 2018, 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.

The introductions L&C received from RealSIPP were for applicants looking to invest in high risk esoteric holdings, this included unregulated overseas property developments such as DBR. And I think it's fair to say that such investments can generally only be suitable for a small proportion of the population – generally sophisticated and/or high net worth investors. The risks are multiplied where further funding is necessary from investors to complete the purchases, as was the case with many of the deposit based TRG investments, including that which Mr A 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.

The business introduced by RealSIPP

<u>High proportion of execution-only business</u>

In addition to the possibility that full regulated advice on the overall proposition hadn't been given or made available to Mr A, the available evidence also shows L&C was, or should have been, aware that not offering or giving advice was something that RealSIPP was doing routinely.

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

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

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

So I don't think simply keeping records without scrutinising that information would be consistent with good industry practice and L&C's regulatory obligations. As highlighted in the

2009 Thematic Review Report, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

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

And 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 all the business being introduced, wasn't a firm that was doing things in a conventional way. The business RealSIPP was introducing, and in not insignificant volumes, involved consumers instructing their pension monies be invested in high-risk esoteric investments. And, mindful of the large proportion of execution-only business RealSIPP was introducing, I think L&C ought to have recognised that there was a risk here that RealSIPP might be choosing to introduce some consumers on an execution-only basis, and without those consumers having been offered full 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 and switches to invest in high-risk esoteric investments, such as unregulated overseas property developments. That's because the risks involved in such transactions are unlikely to be fully understood by most people, without obtaining regulated advice. I think it's fair to say that most advice firms decline to be involved in such transactions and certainly don't transact this kind of business in significant volumes.

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

Volume of business

L&C has said in response to this complaint, that 160 members were introduced by RealSIPP and the vast majority (over 99%) of these involved the transfer of an Occupational Pension Scheme. The figures provided by L&C to the complaints with our Service have varied somewhat, but it is consistent that a large proportion of the introduced business from RealSIPP involved occupational pension transfers. I think that L&C should have been concerned, and before it received Mr A's application, that the volume of introductions it was receiving from RealSIPP, relating exclusively to consumers investing in higher-risk esoteric investments was unusual – particularly from a small IFA firm. And it should have considered how a small IFA firm introducing this volume of higher-risk business was able to meet regulatory standards.

And although Mr A's application specifically did not involve an occupational pension scheme transfer, I think this concern ought to have been even greater given the amount of business introduced by RealSIPP which involved the transfer of occupational pensions with defined benefits. At the relevant date COBS 19.1.6G stated:

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

While I acknowledge this aims to define the expectation of a regulated financial adviser when determining the suitability of a pension transfer, it emphasises the regulator's concern about the potential detriment such a transaction could expose a consumer to. Given the nature of its business and regulatory status, I'd expect L&C to have been familiar with the guidance contained in the COBS – even if it didn't apply directly to it. And even though Mr A's pension switch did not involve defined benefits, L&C has told us that the majority of the other applications introduced by RealSIPP did so.

This was a further clear and obvious potential risk of consumer detriment in the business L&C was receiving from RealSIPP *before* it accepted Mr A's application.

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

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

Requesting information directly from RealSIPP

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

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

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

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

And I think that L&C, before accepting further applications from RealSIPP, should have checked with RealSIPP about things like:

- how it came into contact with potential clients,
- what agreements it had in place with its clients,
- whether all of the clients it was introducing were being offered advice,
- what its arrangements with any unregulated businesses were,
- how and why retail clients were interested in making these esoteric investments,
- whether it was aware of anyone else providing information to clients,

- how it was able to meet with or speak with all its clients, and
- what material was being provided to clients by it.

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

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

Making independent checks

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

The 2009 Thematic Review Report said that:

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

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

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

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

Again, I confirm that I accept L&C couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps included addressing a potential risk of consumer detriment by speaking to applicants and/or having sight of advice letters, as this could have provided L&C with further insight into RealSIPP's business model, and helped to clarify to L&C whether full regulated advice on the overall proposition was being offered/given. This was a fair and reasonable step to take in reaction to the clear and obvious risks of consumer detriment I've mentioned.

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

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

- RealSIPP was explaining to some consumers that its role was solely as "administrator and packager" of the SIPP.
- Consumers were being introduced to L&C without having been offered full regulated advice.

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

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

As previously stated, RealSIPP wasn't offering clients like Mr A the option of *full* advice. It was acting as *"administrator and packager"* of the SIPP – an unusual role for an advisory firm to take. This raises significant questions about the motivations and competency of RealSIPP.

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

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

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

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

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

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

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

Due diligence on the underlying investments

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

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

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

Having carefully reconsidered all of the evidence on this point, including the submissions in response to my provisional decision, I remain of the view as set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

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

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

L&C knew that Mr A 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 A'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 A's application.

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

COBS 11.2.19R

L&C has reiterated the point that it complied with COBS 11.2.19R in executing Mr A's written instructions.

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

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

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

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

I remain satisfied that Mr A'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 A's application.

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

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

The involvement of other parties

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

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

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

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

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

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

To be clear, I'm not making a finding that L&C should've assessed the suitability of the SIPP or the DBR holdings for Mr A. I accept that L&C wasn't obligated, and indeed was not authorised to give advice to Mr A, or to otherwise 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 A taking responsibility for his own investment decisions

I note the point is made by L&C that consumers should take responsibility for their own investment decisions, and regard should be had to section 5(2)(d) of FSMA. This section requires the FCA, in securing the 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 alongside all of the other submissions, and I remain satisfied that it wouldn't be fair or reasonable to say Mr A's actions mean he should bear the loss arising as a result of L&C's failings.

L&C, in its response to my provisional decision, has said that it should not be held responsible for decisions made by Mr A prior to its involvement, including making the decision to switch his pension arrangements. But the steps Mr A took, including obtaining the value of his existing personal pension, were all part of the SIPP application process. In my view, if L&C had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr A'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 A 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. And I think it failed to do this. Just having Mr A sign forms that contained declarations wasn't an effective way of L&C meeting its obligations, or of escaping liability where it failed to meet its obligations.

Mr A says that he believe there was low risk, and had he known the investment in DBR was high risk he would not have agreed to the transfer. And I wouldn't consider it fair or reasonable for L&C to have concluded that Mr A had received an explanation of the risks involved with the overall proposition from RealSIPP, given what L&C knew, or ought to have known, about RealSIPP's business model by the time it received Mr A's application.

I don't think it would be fair to say in the circumstances that Mr A should suffer the loss because he ultimately instructed the transactions be effected. I say this because 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. And given that I consider Mr A's testimony credible, I'm satisfied that in his dealings with it, despite him not being offered full regulated advice on the overall proposition, Mr A trusted RealSIPP to act in his best interests. Mr A also then used the services of L&C - a regulated personal pension provider. So overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair to say L&C should compensate Mr A for the loss he's suffered.

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

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

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

Further, if Mr A 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 effect the DBR investment. And I think it's more likely than not that Mr A would have acted in accordance with that advice. Alternatively, if L&C hadn't accepted his business from RealSIPP, Mr A might have simply decided not to seek pensions advice elsewhere from a different adviser and still then retained his existing pension plans.

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 A proceeded knowing that the investment he was making was 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 A understood he was making a high-risk investment. It appears Mr A understood that his pension monies were being moved into a low risk pension arrangement which would out-perform his existing arrangement. I've also not seen any evidence to show Mr A 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 A, 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 A's application from RealSIPP, the transactions this complaint concerns would not have still gone ahead.

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

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

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

In conclusion

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

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

Putting things right

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

In light of the above, L&C should:

- Obtain the notional transfer value of Mr A's previous pension plan.

- Obtain the actual transfer value of Mr A's SIPP, including any outstanding charges.

- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).

- Pay an amount into Mr A's SIPP so as to increase the transfer value to equal the notional value established. This payment should take account of any available tax relief and the effect of charges.

- If the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

- If Mr A has paid any fees or charges from funds outside of his pension arrangements, L&C should also refund these to Mr A. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this. I remain satisfied that interest at 8% simple per year is appropriate to reflect Mr A having been deprived of the use of these monies.

- Pay to Mr A £500 to compensate him for the distress and inconvenience he's been caused.

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 think it would be best if any illiquid assets held could be removed from the SIPP. Mr A would then be able to close the L&C SIPP and transfer away from L&C if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investment may prove difficult, as there may be no market for it. L&C should establish an amount it's willing to accept for the investment as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment.

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

If L&C is unable, or if there are any difficulties in buying Mr A's illiquid investment, it should give the holding 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 A's SIPP. In this instance L&C may ask Mr A to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding. That undertaking should allow for the effect of any tax and charges on the amount Mr A may receive from the investment 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.

Calculate the loss Mr A has suffered as a result of making the transfer

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

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

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. The same applies for any contributions made - these should be added to the notional calculation from the date they were actually paid, so any growth they would've enjoyed is allowed for. To be clear withdrawals here doesn't include SIPP charges or fees paid to third parties like an adviser. But it would include any pension commencement lump sums or pension income Mr A actually took after his pension monies were transferred to L&C.

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

I acknowledge that Mr A 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 A'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 A received from the FSCS. And it will be for Mr A 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 A 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 payments Mr A received from the FSCS following the claim about CIB, and on the date the payments were actually paid to Mr A. 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 payments notionally deducted earlier in the calculation.

To do this, L&C should calculate the proportion of the total FSCS' payments that it's reasonable to apportion to each transfer into the SIPP, this should be proportionate to the actual sums transferred in. And L&C should then ask the operators of Mr A's previous pension plan to allow for the relevant notional withdrawals and contributions 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 A 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 payments notionally deducted by the operators of Mr A's previous pension plan.

Where there are any difficulties in obtaining notional valuations from the previous operator, L&C can instead allow for both the notional withdrawals and contributions in the notional calculation it performs, provided it does so in accordance with the approach set out above.

The notional value of Mr A's existing plan if monies hadn't been transferred (established in line with the above) less the current value of the SIPP (as at the date of my final decision) is Mr A's loss.

Pay an amount into Mr A's SIPP so that the transfer value is increased by the loss calculated above.

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

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

At the time of the transfer of Mr A's personal pension into the L&C SIPP, Mr A was 48 years old, and his entire personal pension provision, worth a little over £40,000, was transferred. Mr A hasn't disagreed with what was said in my provisional decision about it being reasonable to assume he is likely to be a basic rate taxpayer in retirement. L&C does dispute this, but I haven't seen any evidence that makes me think it's more likely than not Mr A will be anything other than a basic rate taxpayer in retirement. On balance, and having carefully considered all of the evidence we've received, I think it's fair and reasonable to conclude it is more likely than not that Mr A will be a basic rate taxpayer at his selected retirement age. So the reduction would equal 20%. However, if Mr A would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

SIPP fees

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

Interest

The compensation resulting from this loss assessment must be paid to Mr A or into his SIPP within 28 days of the date L&C receives notification of his acceptance of my final decision. The calculation should be carried out as at the date of my final decision. Interest must be added to the compensation amount. I remain satisfied that the rate of 8% per year simple from the date of my final decision to the date of settlement, if the compensation is not paid within 28 days, is appropriate. Income tax may be payable on any interest paid. If L&C deducts income tax from the interest, it should tell Mr A how much has been taken off. And L&C should also then give Mr A a tax deduction certificate in respect of interest if Mr A asks for one.

Distress & inconvenience

I have taken into account L&C's response to my provisional decision. But having done so I remain satisfied that what I set out in my provisional decision is fair and reasonable in the circumstances.

In addition to the distress that Mr A has suffered as a result of the problems with his pension since the transfer into the L&C SIPP, I think the impact of L&C's failings and the loss of a significant portion of his pension provision caused Mr A distress. I think it is fair and reasonable that L&C should pay Mr A £500 to compensate him for this.

My final decision

For the reasons given, my final decision is that I uphold Mr A's complaint and London & Colonial Services Limited must pay fair redress as set out above.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000 I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out above. My final decision is that London & Colonial Services Limited must pay Mr A the amount produced by that calculation – up to a maximum of £160,000 (including the award for distress and inconvenience but excluding costs) plus any interest set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that London & Colonial Services Limited pay Mr A the balance plus any interest on the balance as set out above.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 18 March 2024.

Chris Riggs
Ombudsman