DRN-4644215

The complaint

Mr H complains about the conduct of London & Colonial Services Limited ('L&C') in relation to his Self Invested Personal Pension ('SIPP'). Mr H complains this has resulted in him suffering a substantial loss to his pension funds.

Mr H is being represented by a Claims Management Company ('CMC'). Any reference to Mr H will include submissions/evidence made on his behalf by his CMC.

What happened

I issued a provisional decision in this case on 8 February 2024. I said that whilst I agreed with the investigators' view to uphold the complaint, this was for slightly different reasons. So, I issued a provisional decision.

Both parties have now responded so I'm issuing my final decision. In brief, I'm still upholding the complaint for the reasons set out in my provisional decision. Before I set out my reasoning, I'll set out the background to this complaint. I've made some amendments to, amongst other things, reflect the further submissions received from both parties in response to my provisional decision.

The parties involved

L&C

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

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

CIB was authorised by the regulator who, at the time of the complaint, was the Financial Services Authority ('FSA'), which later became the Financial Conduct Authority ('FCA' - I will refer to both bodies as the 'regulator' or by their respective initials when relevant). CIB had permissions from the regulator to advise on regulated products and services including giving investment advice and arranging deals in investments such as pensions. In May 2015, CIB went into voluntary liquidation, and was later dissolved.

Real SIPP LLP ('RealSIPP')

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

TRG

TRG was founded in 2007. It owned a series of resorts in Cape Verde and it sold luxury hotel rooms to UK consumers, either as whole entities, or a as fractional share ownership in a company.

Mr H's dealings with TRG and RealSIPP/CIB

Mr H explained the background to this complaint as follows:

- Mr H and his wife ran a business which went into Administration in 2008. They were approached by family members who offered to help with the process. Mr H said they (the family members) were both 'financial advisers' so Mr H was pleased that they could help.
- Mr H was told by the family members that a pension he'd been paying into for eighteen years was going to pay badly. So, because he trusted these family members, he was attracted to the investment, which was the TRG investment. Mr H said the family members claimed the TRG investment(s) would generate returns of £1,000 to £2,000 per month.
- Mr H said the family members took care of every detail of the transaction of purchasing the investment – he said he trusted they would be acting in his best interests, so he just signed the documents he was given.
- When asked whether he was given 'advice' from anyone else Mr H provided documents that had the 'RealSIPP' and TRG 'Dunas Beach Resort' logo on it.
- Mr H said his understanding was that he was going to be financially better off with these investments than if he'd stayed with his old pension. Mr H was able to provide us a copy of the CIB advice letter dated 19 July 2011 which I will refer to in detail below
- Mr H said that in terms of risk, he was told that there was very little risk to his pension monies.
- Following my provisional decision, I reviewed the information regarding Mr H's payments/receipts regarding his SIPP account. Mr H said that the payments he referred to as 'compensation' from L&C were, in fact, refunds. But looking at the SIPP statements these appear to be classified as 'contributions' or 'Pension Payments'. In any event, the redress will take into account any contributions or withdrawals, so I do not need to discuss them further at this point. Mr H clarified the only 'compensation' he received was £29,168.42 from the Financial Services Compensation Scheme ('FSCS') in relation to his CIB claim.
- When asked what had first caused him to complain, Mr H said that a family member who had also invested in TRG investments raised the alarm. He said that this family member drew Mr H's attention to the fact that maintenance costs for the property he (Mr H) had invested in could be *"swallowing up any returns".* I didn't note in my provisional decision that the date Mr H was alerted to their being a problem with his investment was in or around November 2017. Mr H said that he first made his complaint through an online complaint tool around this time. However, his CMC said Mr H's initial complaint was simply about his investment and not about L&C.
- Mr H added that statements from TRG showed his investments were performing extremely poorly. And following CIB's failure, he made a claim via the FSCS against this firm and received an award classed as an interim payment in March 2019. As this meant there was a substantial short fall in terms of how much he invested, he contacted a CMC for advice on 22 April 2019. It was at this point that the CMC suggested that Mr H should make a complaint against L&C as the SIPP provider.
- Further, in terms of when Mr H was aware of a problem with his investments, he also provided an article from a newspaper dated 28 June 2018 which involved discussing the TRG investments and L&C as one of the SIPP operators who had accepted these investments. Amongst other things, this article said:
    - *"A group of investors in luxury hotel complex The Resort Group (TRG) fear for their nest egg after returns from an offshore investment are not reaching the levels expected."*

    - The article gave examples of investors who had lost money due to the lack of rental income. The article said that: *"Part of the problem seems to be that the management fee gets deducted after the returns have been calculated".*
    - The article also said the problem was people who invested through their pensions weren't getting what they thought they would be getting and that *"…Sipp providers should never have accepted the investments into their Sipp books."*
    - A commentator said: *"The Sipp trustee has a specific duty not to accept an underlying asset without taking reasonable steps to ensure they are able to undertake realistic annual valuations."* And that: *"If the investment is high risk and illiquid then it shouldn't be accepted as it is inappropriate for a Sipp investment by a retail customer."*
    - The article noted that IFAs (Independent Financial Advisers)/financial advisers' were responsible for the advice given to clients. But the article noted that L&C had said that it had: *"undertaken the appropriate due diligence"* at the time its clients chose to invest in TRG.
    - The article also noted that the FSCS had paid out on some of the TRG claims (but note the claim was actually against CIB as the regulated adviser).
- When asked why he waited from 2008 (when he was first approached by his family members about the TRG investments) until 2011 to make the investment, Mr H said he left everything to his family members who he trusted implicitly and was assured that it was the legalities which were taking time.

<u>The RealSIPP documents</u>

Mr H was given various RealSIPP documents which included an outline of benefits, explanations of how SIPPs worked, details about contributions and funds, various legal aspects relating to pensions more generally, product risks (SIPP), a Key Facts document and a Client Agreement. Mr H hasn't said when he received these documents but RealSIPP became an Appointed Representative for CIB in 2010 and the document makes reference to various legal changes that happened to pensions from April 2011. So, I think it's likely that Mr H was given these documents sometime between 2010 and 2011.

The RealSIPP documents (the 'document') that Mr H was provided with started with the heading 'Introduction' and, amongst other things said: *"You have been provided this pack because you expressed an interest in purchasing a Resort Group Property under a special pension structure, generally referred to as a Self Invested Personal Pension Plan. In conjunction with ourselves, The Resort Group and our Pension Administrators have created an exclusive package to allow such investments to be made. This pack includes a copy of our Terms of Business, Initial Disclosure document which confirms how our advice will be provided related to this product, and a summary of our fees and charges."*

The introduction of the document went on to say: *"It is important to remember that this type of pension plan is a bespoke arrangement and thus should only be used by persons and individuals who are fully aware of its benefits and restrictions. Real SIPP LLP does not provide financial advice. Our partner, C.I.B (Life & Pensions) Ltd are able to advise you on the suitability and use of this pension scheme to meet your requirements. You should however be aware that your chosen property investment is not regulated under the Financial Services & Markets Act (2000) and thus you will not be protected by any legislation surrounding "normal" investments. Neither Real SIPP LLp nor C.I.B (Life & Pensions) Ltd are able to make any recommendations as to the personal suitability of your chosen property investment for your own financial circumstances."*

At the end of the introduction it noted that: *"If you have any doubts as to whether this pension plan is suited to your needs or is affordable, or about the investment risks you*

should seek expert advice. However, you should be aware that you might have to pay for this advice. Our partner, C.I.B (Life & Pensions) Ltd is able to provide such advice as part of our overall process."

The document went on to discuss the various benefits of holding the property including it being fully managed and that the owner would receive any net income from the property. The document also went on to discuss SIPPs. Amongst other things, it said that SIPPs were not low cost and that various fees and charges would apply. Please note the SIPP provider in this document was referred to as 'Rowanmoor Pensions'.

The sales document went on to discuss other aspects of having a SIPP, what pension benefits were available and how the SIPP could be funded.

Under the heading 'Current Pension Arrangements' it noted, amongst other things, that: *"If you have existing pension arrangements and you wish to consider transferring these into the SIPP we arrange for our partner, C.I.B (Life &Pensions) Ltd, to provide you with advice on the suitability of such a transfer to a SIPP for the purposes of enabling your property investment. This initial advice will be provided free of charge as part of their normal process. If you require additional advice, our partners C.I.B (Life & Pensions) Ltd are more than happy to provide this under their normal terms and conditions. Alternatively you can seek advice from another suitably qualified company, but you should be aware that you may have to pay for this advice. A suitably qualified adviser can be found by searching your postcode on* [name of a website]."

A RealSIPP Key Fact document was provided to Mr H. This noted that RealSIPP only recommended products from a single company. The company was not named in this document. And said that: *"You will not receive advice or a recommendation from us. We may ask some questions to narrow down the selection of products that we will provide details on. You will then need to make your own choice about how to proceed."*

Under the 'Client Agreement', amongst other things, it noted that: *"Our Services RealSIPP LLp is an administrator and packager of pension solutions to clients of various alternative investment providers The role of RealSIPP LLp as Administrator and Packager enable us to provide information and interpretation of the rules and legislation surrounding pensions and investments that are acceptable within regulated pension schemes. 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."*

And under the heading *'Objectives'* it said: *"RealSIPP LLp does not make specific investment recommendations, nor will we confirm your objectives and any restrictions on the types of product that you wish to buy. We act upon your instructions."*

In a letter dated 21 June 2011, RealSIPP wrote to Mr H saying: *"We understand from The Resort Group that you wish to purchase your offshore/offplan property within a pension plan environment. We are therefore pleased to accept your instruction and now enclose further details of the exclusive package we have designed for such investments. This plan will allow the purchase of your chosen property in line with the developer's normal procedures".*

The letter set out the investments Mr H would be investing in which was at the Dunas Beach Resort and would be Apartments 37B and 280B (the 'TRG investments'). The total cost was stated to be 265,900 euros (note this is a correction from my provisional decision. In my provisional decision I said '£265,900 euros' but the correct amount which was shown in the RealSIPP letter dated 21 June 2011 was 265,000 euros).

The letter went on to say (bold RealSIPP's emphasis):

> ***"Required Advice***
> *A Self Invested Personal Pension is considered to be a complex product and therefore it is imperative that you receive financial advice before you act.*
>
> *If you are considering transferring existing pension benefits to this SIPP in order to fund your property purchase, then you must obtain relevant advice from an independent financial adviser.*
>
> ***Without receiving this advice,*** *we will be* ***unable to proceed*** *with your application.*
>
> *Our Independent Financial Adviser partner, C.I.B (Life & Pensions) Ltd will provide you with advice on the suitability of establishing this SIPP product to facilitate the purchase of your chosen offshore property investment.*
>
> *If you are considering transferring existing pension benefits then we will provide you with information and analysis of these plans by obtaining information from your current providers, and describe the general costs and benefits of moving to a Self Invested Personal Pension.*
>
> *This report is provided free of charge."*

In 2011, Mr H said he was contacted by CIB and one of its adviser's recommended that he (Mr H) switched his existing personal pension plans, which all appeared to be defined contribution plans, to a SIPP with L&C. I understand that one of these plans may have previously been an occupational pension plan but I can't see that it was a defined benefit pension from the documents I've seen.

<u>CIB suitability report</u>

The suitability report by CIB was dated 19 July 2011. It noted that: *"We wish to draw your attention to the fact that we originally recommended Rowanmoor as the SIPP provider, but because you have decided to invest in more than one offshore commercial property we now recommend London & Colonial as the SIPP provider. The reason for this is that London & Colonial offer a far more competitive fee structure on multiple properties."* CIB went on to say that L&C's application form was attached and Mr H was asked to complete and return this as soon as possible.

Under the 'Requirement and Needs' heading the suitability report said, amongst other things that:

> *"You wish to purchase an offshore/offplan investment property within a registered pension scheme environment.*
> *…*
> *You wish to establish a plan which allows an extremely wide selection of investment vehicles rather than a limited number of traditional investment funds."*

Under the heading, 'Type of Advice' the suitability report said: *"Whenever possible, we would wish to carry out a complete financial review, but at your explicit request, our advice is restricted to the consideration of establishing a Self Invested Personal Pension to allow you to invest in the offshore development of your choice. Should you wish us to consider any*

other areas, we would be very happy to provide further advice, in accordance with the costs and charges laid out in our Client Agreement."

Reference was made to a fact find which CIB asked Mr H to check for accuracy but we have not been provided with a copy of this fact find.

Under the heading 'Summary of Recommendations', amongst other things, the suitability report said:

> *"You wish to invest in a pension plan which allows you to purchase a specific offshore/offplan commercial property. We currently only recommend one provider for this purpose as they have an existing relationship with your developer and are experienced in the investment process.*
>
> *A traditional Stakeholder, Personal Pension, Executive Pension and/or an employers Final Salary scheme would not permit this type of investment.*
>
> *From the information provided (as summarised below), you have sufficient existing pension funds available to create a Self Invested Personal Pension and provide enough assets to meet your initial payments and charges associated with your chosen investment."*

It went on to say that: *"We are pleased to recommend that you consider establishing a Self Invested Personal Pension."*

The suitability report then went on to list Mr H's pensions. He had three pensions, all were listed as 'Personal Pension Plans' with a total value of £156,047.67 at the time of the suitability report. The IFA listed L&C as the new pension (SIPP) provider.

The suitability report concluded by saying that the IFA believed that the use of a SIPP package matched Mr H's attitude to risk, as confirmed in the fact find, and would best meet his agreed objectives which included, investing in offshore/off-plan investments.

The suitability report was signed by an IFA and under his name was the full name of CIB.

<u>The L&C SIPP application process</u>

On 9 August 2011, L&C SIPP application was received by L&C. Mr H completed, or had completed for him, the L&C SIPP application form. The SIPP was marketed under the name of the 'Open Pension'.

Mr H's IFA details were given as a Mr B who worked for the IFA firm CIB. RealSIPP was also named on the form. The IFA's initial remuneration was noted to be £2,500 and there was an ongoing annual fee of £300. This was in line with what was set out in the Key Facts document.

The application did not provide a question as to whether Mr H had received advice from his IFA. Under 'Investments' it noted that Mr H wanted to manage the funds himself which was named as the 'Dunas Beach Property Investment' (i.e. TRG investments).

Under the heading 'Declaration', amongst other things Mr H agreed to the statement: *"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 facsimile or email from the address stated on this application form and/or provided by me. I understand that email is not a secure*

method of communication and confidential or sensitive information will not be transmitted in this format by London & Colonial unless I agree otherwise."

The application form was signed and dated by Mr H on 22 July 2011.

In a 'Welcome Letter' from L&C dated 3 September 2011, L&C confirmed that Mr H's Open Pension SIPP was now in force.

Key payments from and to Mr H's SIPP account

On 15 September 2011, a SIPP statement showed that Mr H had purchased Apartment 87b at the Dunas Beach Resort for £66,553.69. And on 22 September 2011, he had purchased Apartment 280b at the Dunas Beach Resort for the same amount. The statement stated that both payments were for a 100% share in each property. Cash of £5,171.63 was the only other asset Mr H held in his SIPP account as shown in the statement from his total holdings of £138,279.01.

The SIPP statement also showed that on 5 September 2011, £6,777.34 was switched into the SIPP from Standard Life. And the statement showed that a sum of £135,385.13 was switched to his SIPP from Mr H's Winterthur pension on 15 September 2011. On 19 September 2011, £6,060.78 was switched from Mr H's Aviva pension plan to his SIPP account.

On 29 September 2011, £6,102.25 tax-free cash payment was paid into Mr H's account. In a letter dated 18 May 2012, L&C noted that Mr H was now receiving benefits referred to as 'capped drawdown'. However, it was further noted Mr H had elected to receive nil income from the payments that had been calculated he could receive.

L&C's arrangements with RealSIPP/CIB

When asked when the 'introducer' who in this case was RealSIPP first proposed to become an introducer, it was noted by L&C that this was on 13 September 2010. And that there was an agreement in place dated 27 September 2010. Whilst L&C said it had attached a copy of the agreement, this wasn't attached to the correspondence it sent to us. However, I have seen a copy of the 'Intermediary Agreement' which was with both CIB and RealSIPP on other similar cases.

L&C said in terms of due diligence that it carried out, it said that it made checks on the FSA register to ensure that they (RealSIPP/CIB) held the appropriate permissions.

L&C was asked by our investigator about what it understood the business model of RealSIPP/CIB L&C to be. This included the question *"…was any advice being given by the introducer on the pension transfer and/or the underlying investments",* as well as questions about the number of introducers L&C were expecting to receive. L&C said in response: *"The expectation was they would be advising on the whole transaction. I haven't found anything to indicate that there was an expectation of a certain amount of introductions per month. Introductions were over a period of 12/08/2010 to 14/05/2013, so almost 3 years (33 months to be exact) which was on average 4.79 cases per month."*

After the initial discussions with RealSIPP (as introducer), L&C confirmed it had no further discussions with it. L&C was also asked by the investigator: *"After the initial agreement did you conduct any ongoing checks on the introducer? If so, please provide copies of the checks."* To which L&C said: *"NO – there doesn't appear to be a specific re-review of this IFA however, it should be noted that as part of our process when completing member instructions the member has an appointed IFA, we check the FCA register to ensure the IFA is still regulated by the regulator but we don't necessarily do a screen print of the IFA's FCA record*

every time we administer a member instruction – we did however when we established [Mr H's] *SIPP and attached is the FCA register at the time."* (capital 'NO' L&C's emphasis).

L&C said the only commission and/or fees was to the IFA of £2,500 for the initial advice and £300 to the IFA for its annual ongoing advice.

Our investigator asked L&C if it could provide a copy of any suitability reports it received about Mr H. But L&C said in response that it was unable to because it wasn't in a position to comment on whether the IFA's advice to the client was unsuitable or not as it (L&C) was not permitted to do so.

L&C confirmed that its relationship with RealSIPP and CIB came to an end in 2015 as both firms lost their permissions at that time and it (L&C) only dealt with regulated businesses.

L&C further confirmed it had received 160 introductions from RealSIPP during its relationship with it. And Mr H was the sixteenth client introduced and that this was thirteen months after the first introduction.

When asked what the total number of clients who were introduced by RealSIPP had invested in non-mainstream investments, L&C said: *"We understand all held an investment that was considered non-standard by FCA definition but weren't necessarily non-mainstream investments by definition. The investments were a mix of commercial property, unquoted shares, land and carbon credits."*

When asked: *"What % of your total new business did the introducer's introductions constitute during the course of your agreement with it? Alternatively, if there was no agreement in effect, then what % of your total new business did the introducer's introductions constitute between the dates of the first and last introduction you received from the introducer?",* L&C said this was approximately 8%

Mr H's complaint

Mr H complained to L&C in a letter from his CMC on 28 November 2019. The CMC said the SIPP was totally unsuitable for Mr H. The CMC said that CIB as an IFA was responsible for providing the negligent advice to transfer Mr H's existing pension plans to the L&C SIPP. But that L&C failed to provide any valuation or to advise as to the nature, or extent of any legal interest held by Mr H. The CMC said that L&C had failed in its duty to Mr H to protect his investment. And that L&C have failed to treat Mr H honestly and professionally and that it continued to take management fees despite the investment being valueless.

L&C responded to Mr H in a letter dated 25 February 2020. Amongst other things it said:

- L&C provided an execution only service. What that entailed was explained to Mr H in the SIPP application form, the Members Declaration, the L&C Terms and Conditions and Key Features Documents, which were all provided to Mr H in or around August 2011
- The regulator's rules include the Conduct of Business Source ('COBS') 11.2.19R, which say that *"Whenever there is a specific instruction from the client, the firm must execute the order following the specific instruction…A firm satisfies its obligation under this section to take all reasonable steps to obtain the best possible result for a client to the extent that it executes an order, or a specific aspect of an order, following specific Instructions from the client relating to the order or the specific aspect of the order."* In short, this meant that when L&C is provided with an instruction from a client it has to execute it as instructed - and this is what happened in Mr H's case.

- The complaint should be properly directed to CIB as Mr H's advisers'. This is the basis of the advice that Mr H is complaining about.
- L&C could only be guided by what was instructed by Mr H and was not privy to the conversations between him and CIB. All forms provided by L&C told Mr H to seek appropriate advice before making his decision to open his SIPP with L&C. He was also provided with risk warnings, which Mr H signed to acknowledge he understood.
- Mr H's investment appears to be performing as advertised and he is receiving income from the rental properties. L&C did not know the value of the properties. But Mr H was advised to seek a valuation from an appropriately qualified person if he had any concerns.
- L&C said that the main obligations on an execution only SIPP provider, amongst other things, were to *"Act honestly, fairly and professionally in accordance with the best interests of its client (COBS 2.11R)"* and to *"Take reasonable steps to ensure that its communications with its clients were clear, fair and not misleading (COBS 4 21R)".* L&C said it met with these and the other obligations that applied to it under COBS.
- L&C was not obliged to assess the suitability of Mr H's SIPP and/or underlying investments (COBS 9) and/or to assess the appropriateness of either the SIPP itself or the underlying investments (COBS 10) for Mr H.
- L&C cannot, and is not obligated, to go beyond the paperwork that Mr H has signed and it acted in good faith and proceeded on the unambiguous instructions that Mr H provided to it throughout the establishment of his SIPP and his subsequent investments.

Mr H via his CMC referred his complaint to the Financial Ombudsman on 12 February 2020 prior to receiving L&C's final response.

Our investigator took an inquisitorial approach to Mr H's complaint and looked at whether L&C had carried out sufficient due diligence on RealSIPP before accepting Mr H's SIPP application. In brief, she didn't think L&C had carried out sufficient due diligence on RealSIPP and/or its principal CIB before agreeing to accept business from them. She considered that if L&C had it would never have accepted Mr H's application from RealSIPP in the first place. As a result, she considered the matter should be upheld and recommended a way to put matters right which included paying Mr H £500 for the distress and inconvenience caused.

In summary, L&C responded as follows:

- The SIPP was set up on an execution only basis; L&C accepted no responsibility for checking the quality of the investment business, much less the decision to transfer and invest.
- The investigator is imposing a duty that goes far beyond what was agreed between the parties. And which is not provided for either at law and/or in any regulatory guidance/rules and/or case law.
- As stated in the Adams cases (full court reference below), the starting point should be the contractual relationship between the parties. And in this case, the IFA was responsible for the advice given to Mr H and should therefore be held responsible.
- The investigator largely ignored the disclaimers contained in the SIPP and investment forms which were both signed by Mr H.
- The investigator's view makes no comment on the 'quality' of the investment itself, presumably because it is beyond doubt the investments were exactly as advertised.

- It's accepted by everyone that these were high risk investments. But an investment being high risk, doesn't make it unsuitable for a SIPP. In any event, Mr H knew that the investment was high risk.
- A SIPP provider can't refuse to accept or reject an instruction simply based on an investment being high risk because to do so would require a full suitability assessment which L&C does not have the regulatory permissions to do.
- In compliance with its obligations pursuant to COBS 11.2.19R, L&C acted on Mr H's written instructions in the setting up of the SIPP and the investment. L&C could not refuse to accept Mr H's instructions based on this section of COBS.
- The view says the introduction involved a significant risk of consumer detriment because of the type of business being introduced and L&C should've been concerned about this. But Mr H knew about the risks involved in the type of investments he was purchasing and there was nothing preventing a SIPP provider from accepting such business.
- It is accepted that L&C had an obligation to conduct due diligence on RealSIPP and it complied with this obligation in that it carried out checks of the FSA Register and it showed RealSIPP was an AR of CIB, who was a regulated entity.
- The investigator view is that L&C accepted over 150 introductions from RealSIPP and that where high volumes of introductions were taking place by intermediary recommending investment in esoteric investments, with advice on the SIPP but not the investment, this ought to have raised concerns for L&C. But the regulator's finalised guidance issued in October 2013, only raises this as an issue. And it is not fair nor responsible to use the benefit of hindsight to judge the actions of L&C and the due diligence it took at the time of Mr H's investment/SIPP.
- Prior to the October 2013 guidance there was no requirement for the SIPP provider to understand the introducers' business model. And even if the Financial Ombudsman finds against L&C on this point, there is no evidence that the information identifying RealSIPP's clients were investing in high-risk investments was available at the time the due diligence was conducted.
- The standard that L&C should be held to in looking to ascertain whether there was a breach of duty is that of a reasonably competent SIPP provider – not whether it followed the best possible practice. This is the test for breach of duty at law and if the Financial Ombudsman is deviating from this and applying a higher standard, it is required to give reasons.
- A SIPP provider's role in such a transaction is not to make a value judgement on the investment – it is to obtain good title to the investment and hold it within a pension wrapper. It was not to assess suitability which was the role of the IFA.
- L&C was in possession of all the relevant information at the time of the due diligence and this information did not raise concerns.
- It remains the case that the Financial Ombudsman 'cherry picks' from the case law. This is particularly apparent in the 'relevant considerations' section of the view, which quotes at length from the Berkeley Burke case whilst giving only a passing reference to the Adams cases. The Berkeley Burke case was a judicial review of the Financial Ombudsman whereas the Adams case examined at length the responsibility of a SIPP provider offering an execution only service, both under COBS and contract. To apply the former at the expense of the latter makes no logical sense.
- The investigator says that high risk holdings such as Dunas Beach are generally only suitable for a small proportion of the population. This ignores the fact that a SIPP provider offering an execution only service is wholly

unable to assess the suitability of any particular investment for a customer. A SIPP provider's role in such a transaction is to obtain good title to the investment and hold it within a pension wrapper. L&C correctly fulfilled its role.

- The view states that no other SIPP provider should have accepted this business and if it wasn't for L&C, Mr H would not have suffered any losses as a result of his investments as he would not have opened a SIPP in the first place. But L&C disagrees with this as it was common practice for SIPP providers to accept investments such as those purchased by Mr H in 2011. So, he would have likely found another provider to carry out the transaction if L&C didn't.
- The relationships in the present case between L&C, the complainant, RealSIPP and TRG are similar to those in Adams. Therefore, the criticisms levelled at Options (the respondent in the Adams case) for accepting business from an unregulated introducer do not apply.
- The investigator points to the FSA/FCA publications citing them showing areas of good practice. These publications do not constitute 'formal guidance'. And other than the regulator's 2009 Thematic Review Report these were not published before Mr H's investments and therefore, are not relevant to this complaint.
- This complaint has similar facts to the Adams case, but the investigator's view doesn't explain why she reached a different conclusion to that arrived at in Adams.
- The Adams decision made clear that any reports, guidance and correspondence issued after the events at issue could not be applied to the Respondent's conduct at the time.
- The only publication which could have any bearing is the 2009 Thematic Review Report. Even this has no bearing on the construction of the regulator's Principles as the contents of this document cannot found a claim for compensation of itself.
- The 2009 Thematic Review does not provide guidance in any meaningful sense – it merely highlights some 'examples of measures' that SIPP operators could consider.
- Even if the 2009 Thematic Review had been statutory guidance made under the Financial Services Markets Act ('FSMA') section 139A (which it did not), the breach of such statutory guidance would not give rise to a claim for damages under FSMA section 138D - only the breach of rules can give rise to such a right.
- Perhaps most importantly, the view largely ignores the findings of the High Court in Adams on the duties imposed by COBS. In particular, the Court held that, while the COBS rules contain express provisions dealing with the need to advise clients on both the *"suitability"* (COBS 9) and *"appropriateness"* (COBS 10) of their investment, those rules did not apply to execution only SIPP providers.
- Despite this, the investigator seeks to impose on L&C a duty of due diligence that it does not in fact owe and which goes far beyond the scope of any duty envisaged by the parties. It seeks, in effect, to override COBS' careful allocation of duties between different types of firms conducting different types of business, and to impose duties on L&C in addition to those provided for under COBS by means of a generalised appeal to the Principles.
- The view doesn't properly explain its preference for using the Principles as opposed to the COBS rules and/or established case law.
- The investigator justifies upholding the complaint despite accepting the culpability of both RealSIPP and (it seems) Dunas Beach. At law, the only logical conclusion would be that L&C was not responsible for the decision to

invest (this was the outcome in Adams) and, regardless of whether they are extant, the entities who brought about the transaction should be held responsible.
- The investigator goes on to conclude that there was an obligation on L&C to carry out appropriate checks to ensure the quality of the business it was introducing. However, they make no comment on the 'quality' of the investment itself, presumably because it is beyond doubt that the investments themselves were exactly as advertised; for example, the TRG investment was an illiquid investment in real property with no established secondary market. Mr H was aware of this when he made the investment. Good title was obtained, and the investments produced a return.
- The statutory objective previously set out in FSMA section 5(2)(d), now section 1C, namely *"the general principle that consumers should take responsibility for their decisions"* should be applied in this case.
- The L&C representative said The Pension Ombudsman ('TPO') and/or the Court was a more appropriate forum for this complaint to be decided. And should be dismissed on that basis.
- L&C said if this view is permitted to stand, the wider consequences will be very serious, both for consumers and for execution only SIPP providers.

As L&C disagreed with the investigator's view, the matter was passed to me for a decision.

As noted above, I issued a provisional decision on this matter. And for the reasons I will repeat below, I concluded that I would be upholding the complaint unless either party provided further information and/or evidence which changed my mind. Both parties have provided a response to my provisional decision. And I don't think anything that has been provided has changed my mind and therefore, my view remains that this decision should be upheld.

Mr H, through his CMC, said that he accepted the provisional findings.

L&C disagreed. In its response to the provisional decision, it largely repeated what it has previously said in its submissions set out above. For completeness, in response to the provisional decision, through its representative L&C said:

- L&C considers there are a number of points that haven't been addressed and/or given sufficient weight to. The Ombudsman's failure to take account of the law (as they are required to do under Dispute Resolution: Complaints Sourcebook ('DISP') 3.6.4) and specifically, an explanation of why the Ombudsman has departed from legal precedent is of particular importance.
- The Ombudsman's reliance on various FCA publications is misplaced and if anything, supports L&C's position.
- The Ombudsman 'cherry picks' from case law. For example, Berkeley Burke is cited, but the decision in Adams is largely ignored despite the fact that the relationships in the present case between L&C and Mr H are similar to those in Adams. The Berkeley Burke judgment was a judicial review of the Ombudsman whereas the Adams case examined, at length, the responsibility of a SIPP provider offering an execution only service, both under COBS and contract.
- The Ombudsman does not properly address using the Principles as the basis for finding against L&C in preference to the COBS rules or established case law.
- Whilst the Ombudsman accepts that L&C didn't give advice and could not give advice to Mr H in accordance with its permissions at the time, no attempt is made to explain how it (L&C) could effectively have completed adviser level due diligence and communicated this to Mr H without breaching its permissions.
- The Ombudsman applies the Principles wholly in contrast to the terms of the contract

and to the statutory objective previously set out at FSMA s.5(2)(d), now s.1C, namely: *"the general principle that consumers should take responsibility for their decisions".*

- L&C asks that the Ombudsman takes into account the following:
    - The publication of any reports, guidance and correspondence issued by the FCA had no bearing on the construction of the Principles as the contents of the documents (or the Principles) cannot found a claim for compensation of itself.
    - Regulatory publications cannot alter the meaning of, or the scope of the obligations imposed by the Principles.
    - The 2009 and 2012 Thematic Review Reports did not provide guidance in any meaningful sense and did not claim to do so.
    - Even if the 2009 and 2012 Thematic Reviews had been statutory guidance the breach of such statutory guidance would not give rise to a claim for damages under FSMA section138D.
    - The regulator has said the publications are a variety of materials published to support the rules and guidance in the FCA Handbook. Such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules.
- The Ombudsman ignores the findings of the High Court in Adams – in particular, the Court held that, while the COBS rules contain express provisions dealing with the need to advise clients on both the *"suitability"* (COBS 9) and *"appropriateness"* (COBS 10) of their investment, those rules did not apply to execution-only SIPP providers such as L&C.
- The Ombudsman seeks to impose on L&C a duty of due diligence it does not owe, and which goes far beyond the scope of any duty envisaged by the parties.
- The Ombudsman seeks, in effect, to override COBS' careful allocation of duties between different types of firms conducting different types of business. The Ombudsman has ignored, or has placed insufficient weight on, the fundamental fact of the parties' contractual arrangements, and on the clear demarcation of roles and responsibilities thereunder.
- The outcome of L&C's due diligence on RealSIPP and CIB did not raise any cause for concern this included checking their regulated status and entering into Intermediary Agreements with both firms.
- Given the checks carried out on RealSIPP/CIB as COBS 2.4.8 states, it is reasonable for a firm to rely on the information provided to it in writing by an unconnected authorised person, unless it is aware or ought to have been aware of any fact which would give reasonable grounds to question the accuracy of that information.
- Notwithstanding the appropriate level of due diligence carried out by L&C the Ombudsman finds that L&C was under further obligations to protect against 'consumer detriment' and ensure that Mr H understood the level of risk involved. This is wrong.
- It is noted that the Ombudsman accepts that L&C has not at any time had permission to carry on the regulated activity of advising on investments and at no time has it provided advice as to whether a consumer should open or transfer monies into a SIPP or as to the underlying investments. This was the very reason that L&C entered into an Intermediary Agreement with RealSIPP/CIB, so that financial advice could be provided to prospective clients through that means, if requested.
- The Ombudsman seeks to differentiate Adams by stating that: *"HHJ Dight didn't consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of the judgments say anything about how the Principles apply to an Ombudsman's consideration of a complaint".* This can only be seen as an attempt to circumvent the Adams decision.

- L&C also notes the Ombudsman does not provide a view on the appropriateness of the investment. L&C can only assume that this is because it is accepted that the investment was exactly what it was advertised to be. Whilst the investment may have been illiquid there were no restrictions on promotion and Mr H made exactly the investment he intended to. It should be noted that Mr H received a total of £34,480.16 in rental income from the investment between 2014 and 2019. This suggests the investment was suitable to be held within a SIPP.
- Further, the Ombudsman accepts that TRG investment does not appear to be fraudulent or a scam. On this basis, receiving a number of referrals to invest in TRG would not be a red flag.
- The Ombudsman has made no findings in respect of the due diligence conducted by L&C on the investment on the basis that: *"L&C wasn't treating Mr H fairly or reasonably when it accepted his application from RealSIPP".* Therefore, L&C has no further comment to make in this regard.
- In compliance with its obligations pursuant to COBS 11.2.19R, L&C acted on Mr H's written instructions in the setting up of the SIPP and the transfer of monies to TRG (via instructions from RealSIPP).
- In addition to this, Mr H concealed the fact that he was using other IFAs, being members of his family. It is therefore not entirely correct to assert that Mr H was not receiving advice on the investment. Mr H clearly did receive advice and therefore should be directing his complaint towards his family and not towards L&C. We ask that the Ombudsman consider whether Mr H's family members had the appropriate permissions to provide investment advice.
- The Ombudsman's findings create a relationship between L&C and Mr H before a contract is entered into and before any funds are received by L&C. L&C should not be held responsible for decisions made by Mr H prior to its involvement. The decision that Mr H undertook to transfer his pension plans were outside of L&C's control.
- L&C is conscious that attempting to obtain the notional transfer value from the ceding providers could add months to the settlement process. This could result in delayed payment of redress to Mr H and accrue large sums of interest payable by L&C 28 days after the date the final decision is accepted. In the circumstances where the delay is outside of its control, L&C does not consider this fair or reasonable to be held to this timescale.
- Notwithstanding L&C's objections to the Provisional Decision's findings, to the extent that any part of the complaint is upheld, and that interest is said to be payable, L&C disagrees that interest at a rate of 8% is fair and reasonable. The application interest should at most, be 2.5%. And any greater would be punitive.
- Mr H has also already received compensation from the FSCS which L&C submits that the payment should be taken into account in its entirety as CIB's contribution to Mr H's losses. Or if the Ombudsman refuses to take account of the redress from the FSCS in full, she should reduce any losses from the date of receipt of funds from the FSCS on the basis that Mr H has had the benefit of those funds. So, to ignore them gives Mr H a windfall.
- Mr H should be put to proof of all of his available pension provisions and other income to consider his tax rate and it is neither fair nor reasonable to assume a basic rate taxpayer of 20%.
- L&C requests confirmation from the Ombudsman that the award of £500 takes account of distress and inconvenience caused by Mr H's own actions.

Given no agreement could be reached, the matter has been passed back to me for a final decision.

What I've decided – and why

Jurisdiction – time limits

L&C has not specifically mentioned the issue of jurisdiction in terms of time limits but as this matter has been brought more than six years after the event being complained of, I will need to assess whether this matter falls within the relevant time limits that apply.

The time limits to bring a complaint to the Financial Ombudsman are set out in the DISP section of the FCA Handbook. At the time Mr H referred his complaint to us, DISP 2.8.2R said:

> *"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
>
> *(1) more than six months after the date on which the respondent sent the complainant its final response, redress determination or summary resolution communication; or*
>
> *(2) more than:*
>
> *(a) six years after the event complained of; or (if later)*
>
> *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint; unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;*
>
> *unless:*
>
> *(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R or DISP 2.8.7 R was as a result of exceptional circumstances; or*
> *…*
> *(5) the respondent has consented to the Ombudsman considering the complaint where the time limits in DISP 2.8.2 R or DISP 2.8.7 R have expired (but this does not apply to a "relevant complaint" within the meaning of section 404B(3) of the Act)."*

As a preliminary note, L&C has not said it consents to the Financial Ombudsman looking at the complaint if it has been brought too late. And I can't see any exceptional circumstances that would have prevented Mr H from bringing his complaint before the relevant time limits set out in the DISP rules I've set out above expired.

In terms of the six-month time limit rule, it should be noted that L&C's final response letter was dated 25 February 2020 following Mr H's complaint made on 28 November 2019. Mr H referred his complaint to the Financial Ombudsman on 12 February 2020 prior to receiving the final response letter from L&C. Given this, I'm satisfied the matter has been brought within the six-month time limit rule. I will now consider the six-year and three-year time limit rules.

Mr H referred his complaint to L&C on 28 November 2019. And the SIPP being complained about was set up on 3 September 2011. So this means the matter was clearly referred to L&C outside of the six-year time limit rule.

Turning now to the three-year time limit rule. In thinking about when Mr H was aware, or ought reasonably to have been aware, that he had cause for complaint, I've considered how 'cause for complaint' should be interpreted in the context of the FCA Handbook.

In *The Official Receiver v Shop Direct Finance Company Limited* [EWCA] Civ 367 Singh LJ said:

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

And Nugee LJ said the following in relation to DISP2.8.2R

> *"155. The resemblance to the ordinary limitation periods for claims in negligence where there is also a primary period of 6 years (under s. 2 of the Limitation Act 1980 ("LA 1980")) and a secondary period of 3 years from the date of the claimant's actual or constructive knowledge (under s. 14A LA 1980) is striking. We have in fact been shown evidence that this is not a coincidence, but even without this material (which is of doubtful admissibility) it would have been a reasonable assumption that the general structure was modelled on the LA 1980 provisions and was designed to do the same thing in general terms.*
>
> *156. What then is the purpose of having these two time-limits? The purpose of an ordinary limitation period is to prevent stale claims from being litigated, the period of 6 years being fixed as a generally reasonable period to bring a claim. This explains the primary period. But as is well-known that could and did lead to some claimants who had suffered latent injury or damage finding that they had lost their rights to sue before they even knew, or could reasonably be expected to know, that they had been injured or suffered loss. Provision was therefore made, first in s. 11 and 14 LA 1980 (applicable to claims for personal injury) and subsequently in s. 14A LA 1980 (applicable to other claims in negligence), for the claimant to have 3 years from his date of knowledge to bring a claim. The purpose of this is obvious. It was to remedy the injustice of a claimant's claim being time-barred before they knew, or could reasonably be expected to know, that they had a claim. On the other hand the selection of a (relatively short) 3 year time period shows that another purpose was to provide that once they did, or should, have that knowledge they should get on with the claim and bring proceedings reasonably promptly. Precisely the same in my view applies to the secondary time-limit in DISP 2.8.2R(2)(b). The purpose of the rule is to prevent a complainant from losing the*

right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware."

The FCA Handbook includes the following rule (GEN 2.2.1R): *"Every provision in the Handbook must be interpreted in the light of its purpose."* And guidance in the same section that says the purpose of any provision in the Handbook is to be gathered from the text of the provision in question and its context amongst other relevant provisions (GEN 2.2.2(G)).

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

"In the Handbook …

(1) an expression in italics which is defined in the Glossary has the meaning given there; and

(2) an expression in italics which relates to an expression defined in the Glossary must be interpreted accordingly.' (GEN2.2.7(R))"

The term 'cause for complaint' is not defined in the FCA's glossary. But where DISP says the Ombudsman cannot consider a complaint if it is out of time, the word *"complaint"* is in italics. So it is a defined term in the FCA Glossary and must be treated accordingly. And where that section of the Handbook says it sets out how complaints are to be dealt with by respondents, *"complaint"* is again in italics. So again it is a defined term.

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

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

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

(a) Alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and

(b) Relates to an activity of that respondent, or any other respondent with whom that respondent has some connection in marketing or providing financial services or products …which comes under the jurisdiction of the Financial Ombudsman Service."

And 'respondent' (which is italicised) means a regulated firm covered by the jurisdiction of the Financial Ombudsman Service. So, the Glossary definition of complaint requires that the act or omission complained of must relate to an activity of 'that respondent' or firm.

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

- awareness of a problem
- awareness that the problem had or may have caused him material loss, and

- awareness that the problem was or may have been caused by an act or omission of L&C (the respondent in this complaint).

It is therefore my view that it is necessary for Mr H to have an awareness (within the meaning of the rule) that related to L&C not just awareness of a problem that had caused a loss. Knowledge of that there may be a loss alone is not enough. It cannot be assumed that upon obtaining knowledge of a loss and/or a problem that a consumer had knowledge of its cause.

I don't accept the three-year time limit limb of the rules necessarily means that knowledge of a potential loss means the consumer has three years to make enquiries to discover all parties who might be responsible, failing which they run out of time to make a complaint. As Nugee LJ said in The Official Receiver case: "*the purpose of the rule is to prevent a complainant from losing the right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware."*

To be clear, I don't think Mr H would need to have understood the details of the SIPP provider's obligations to have been aware (or in a position whereby he ought reasonably to have been aware) of his cause for complaint. But I think Mr H would've needed to have actual or constructive awareness that an act or omission of L&C had a causative role in the loss.

Mr H has said that he became aware of a complaint about his TRG investment but not the L&C SIPP, when the TRG investment started to perform 'extremely' poorly. As noted above, which I did not refer to in my provisional decision, this was in or around late 2017. So, late 2017 is when Mr H became aware of a problem and that this problem may have caused him material loss.

In terms of when Mr H became aware that the problem was or may have been caused by an act or omission of L&C, as I said in my provisional decision, I think this was in or around June 2018. I say this because this is when the article I referred to above, was dated. And it would appear Mr H received a copy of it at that time. As I noted above, amongst other things, this article referred not only to losses being made due to the TRG investment but that a SIPP provider could be responsible in some way if there were problems or losses to the investments held in the SIPP. L&C said in response to the article at the time (June 2018), that it had undertaken the appropriate due diligence' at the time clients chose to invest in TRG.

So, I remain of the view that at this point (June 2018), having read this article from a reputable newspaper, that Mr H knew or ought to have known that he had cause to complain. And that he had cause to complain not just about the investment and the advice he received about this from CIB, but also about L&C as the SIPP provider. I know he received advice in 2019 from his CMC about a claim against L&C. However, having read the article dated June 2018, I think there was sufficient information in this for Mr H to be aware or reasonably become aware, that a SIPP provider had due diligence duties and that it (the provider) could be held responsible for losses made on an investment held within a SIPP. And I should also note that the article referred specifically to L&C who was Mr H's SIPP operator.

From what I can see after this point Mr H made a claim through the FSCS against CIB and was awarded just over £29,000 which he received on 29 March 2019. So, I think it's likely that he put in his claim form to the FSCS a few months before this time - either in late 2018 or in early 2019. His CMC said that when his claim was successful with the FSCS, Mr H received an interim payment which was less than the amount he says he has lost as a result of the TRG investment. So it was shortly after his claim on 29 March 2019, that Mr H contacted a CMC for advice which was in April 2019. A letter of complaint was then sent to L&C by Mr H's CMC in November 2019.

So, the relevant dates for the purposes of jurisdiction, in my view, are that Mr H became aware of a problem that may have caused him material loss in regard to his pension in November 2017. And in June 2018, he knew or ought reasonably to have known he had cause to complain against L&C in or around that time (June 2018) about the losses he had made in relation to his pension. Mr H made his complaint to L&C in November 2019.

Given all that I've said above, I consider Mr H made his complaint to L&C within three years of when he knew, or ought to have reasonably known, he had cause to complain about the losses he suffered as a result of the TRG investments and/or the transfer of his pension to the SIPP. And as a result, the Financial Ombudsman Service does have the power to look at Mr H's complaint as it has been brought within the relevant time limits that apply.

Dismissal

In response to the investigator's view, amongst other things, L&C said that it believes the complaint is better suited to be considered by TPO (The Pensions Ombudsman) or a Court. It's appropriate to reconsider this issue before I consider my final decision.

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

> *"The Ombudsman may refer a complaint to another complaints scheme where:*
>
> *(1) he considers that it would be more suitable for the matter to be determined by that scheme; and*
> *(2) the complainant consents to the referral."*

L&C's argued that Mr H 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 H consents to the referral.

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

For similar reasons, I'm satisfied that I don't need to exercise my discretion to dismiss the complaint under DISP 3.3.4 AR on the basis it would significantly impair our effective operation, as it is more suitable to be dealt with by a Court or a comparable ADR (alternative dispute resolution) entity. As I've explained, I'm satisfied the complaints well suited to the work of the Financial Ombudsman. We have significant experience of dealing with

complaints of this type and are well-placed to consider them. Considering Mr H's complaint would not in my view seriously impair our effective operation.

Given my determination in respect of L&C's dismissal points, I'll now go on to consider the merits of this complaint below.

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

And having reconsidered all the evidence, including the further submissions from both parties following my provisional decision, my view remains that I am upholding this complaint for the same reasons I set out in my provisional decision which I'll explain again below.

Before I set out my reasoning for upholding this decision, I think it is important to note that when considering what's fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

As a preliminary point, I should also say the purpose of this decision is to set out my findings on what's fair and reasonable, and explain my reasons for reaching those findings, not to offer a point by point response to every submission made by the parties to the complaint. And so, whilst I've taken into account all the submissions made by both parties including those that have been submitted in relation to my provisional decision, I've focussed here on the points I consider to be key to my decision on what's fair and reasonable in all the circumstances.

I should also note that as L&C has largely repeated the submissions it made prior to my provisional decision, which means I had already taken these into account, what I've set out below largely repeats what I've said in my provisional decision. However, as I've said, I have fully taken account of all the submissions and evidence made by both parties.

Relevant considerations

I've carefully taken account of the relevant considerations to decide what's fair and reasonable in the circumstances of this complaint. In my view, the regulator's Principles (the Principles for Businesses) are of particular relevance to my decision. The Principles, which are set out in the FCA's Handbook: *"…are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G). I consider that the Principles relevant to this complaint include Principles 2, 3 and 6 which say:

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

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

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

And at paragraph 77 of BBA, Ouseley J said: *"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."*

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

Jacobs J, having set out some paragraphs of BBA including paragraph 162 which I've set out above, said (at paragraph 104): *"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles-based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."*

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

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

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

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

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

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

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

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

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

The facts of Mr Adams' and Mr H's cases are also different. I make that point to highlight there are factual differences between Adams v Options SIPP and Mr H's case. And I need to construe the duties L&C owed to Mr H under COBS 2.1.1R in light of the specific facts of his (Mr H's) case. So, I've considered COBS 2.1.1R, alongside the remainder of the relevant considerations, and within the factual context of Mr H's case, including L&C's role in the transaction.

However, as I've indicated above, I also think it's important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all

the circumstances of the case. And, in doing so, I'm required to take into account relevant considerations which include the law and regulations; regulators' rules; guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in Adams v Options SIPP. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

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

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

The regulatory publications

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

- The 2009 and 2012 Thematic Review Reports (the 'review' or 'reviews')
- The October 2013 finalised SIPP operator guidance
- The July 2014 'Dear CEO' letter

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

<u>The 2009 review</u>

The 2009 review included the following statement:

> *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its clients and treat them fairly') insofar as they are obliged to ensure the fair treatment of their clients. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients. It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF* [treating customers fairly] *consumer outcomes.*
>
> *We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.*
>
> *Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of*

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

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

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

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

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

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

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

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

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

- *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)."*

The later publications

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

> *"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*
>
> *All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat clients fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a "client" for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."*

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

> *"**Relationships between firms that advise and introduce prospective members and SIPP operators***
>
> *Examples of good practice we observed during our work with SIPP operators include the following:*
>
> - *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for 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 regulator's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles. And it also sets out how a SIPP operator might meet its obligations in relation to investment due diligence. It says those obligations could be met by:

- correctly establishing and understanding the nature of an investment
- ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation

- ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)
- ensuring that an investment can be independently valued, both at point of purchase and subsequently
- ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc)

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

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

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

L&C has also indicated that the 2009 review didn't provide guidance in any meaningful sense. But as the review's introduction 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 2009 review goes on to provide: *"…examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms."*

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

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

L&C says that it took into account that the investments had 'good title' but it hasn't said what action it took to ensure this was the case. L&C has also said that it carried out due diligence on both RealSIPP and CIB. L&C says that in this respect, it checked the FSA register for both firms. I've seen copies of the print outs from the register that L&C has provided from the time of the search. I also note that it had Intermediary Agreements with both RealSIPP and CIB. Both these businesses completed an Intermediary Application form. I've seen these documents as well as the Intermediary Application forms on other similar cases. I've also seen a copy of L&C's letter where it approved each business (RealSIPP and CIB) as introducers which is dated 27 September 2010 – again I have seen this document on other similar cases. So, clearly L&C thought it was good practice to carry out some checks before accepting business from RealSIPP/CIB.

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

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

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

I note L&C's point that the judge in the Adams case didn't consider the 2012 review, 2013 SIPP operator guidance and 2014 Dear CEO letter to be of relevance to his consideration of Mr Adams' claim. But it doesn't follow that those publications are irrelevant to my consideration of what's fair and reasonable in the circumstances of this complaint.

I'm required to take into account good industry practice at the relevant time. As mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time. That doesn't mean that in considering what's fair and reasonable, I'll only consider L&C's actions with these documents in mind. The reviews, the Dear CEO letter and guidance, gave non-exhaustive examples of good practice. They didn't say the suggestions given were the limit of what a SIPP operator should do. As the annex to the

Dear CEO letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

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

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

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

To be clear, I don't say the Principles and/or the publications obliged L&C to ensure the transactions were suitable for Mr H. It's accepted L&C wasn't required to give advice to him and couldn't give advice under its permissions held at the time. And I accept the publications don't alter the meaning of, or the scope of the Principles. But they're evidence of what I consider to have been good industry practice at the relevant time, which, as I've said, would bring about the outcomes envisaged by the Principles.

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

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

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

Submissions have been made by L&C about breaches of the Principles not giving rise to any cause of action at law, and breaches of guidance not giving rise to a claim for damages under 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 have undertaken sufficient due diligence into RealSIPP/CIB and the business it (RealSIPP) was introducing, both initially and on an ongoing basis.

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

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

The contract between L&C and Mr H

In its response to the investigator's view and which it repeated in response to my provisional decision, L&C's made a number of references to its duties as Mr H's Administrator/Trustee of his SIPP. I've carefully considered what L&C's said about this. This decision is made on the understanding that L&C acted purely as a SIPP operator. I don't say L&C should (or could) have given advice to Mr H or otherwise have ensured the suitability of the SIPP or TRG investments for him. I accept that L&C made it clear to Mr H in various documents, that it wasn't giving, nor was it able to, give advice. And that it played an execution-only role in his SIPP investments.

The forms Mr H signed confirmed, amongst other things, that losses arising as a result of L&C acting on his instructions were his responsibility. I've not overlooked or discounted the basis on which L&C was appointed. And my decision on what's fair and reasonable in the circumstances of Mr H's case is made with all of this in mind. So, I've proceeded on the understanding that L&C wasn't obliged – and wasn't able – to give advice to Mr H on the suitability of the SIPP or the TRG investments. But I'm satisfied that, to meet its regulatory obligations when conducting its operation of SIPPs business, L&C had to

decide whether to accept introductions of business from a firm with the Principles in mind. And I don't agree it couldn't have rejected introductions and/or applications without contravening its regulatory permissions by giving investment advice.

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

In this case, the business L&C was conducting was its operation of SIPPs. And I'm satisfied that to meet its regulatory obligations when conducting its operation of SIPPs business, L&C had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind. The regulators' reviews 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 and/or accept. That involves conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.

As set out above, to comply with the Principles, L&C needed to conduct its business with due skill, care, and diligence; organise and control its affairs responsibly and effectively; and pay due regard to the interests of its clients (including Mr H) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis. And, as I've said, I think that L&C understood this at the time too, as it did more than just check the FSA entries for RealSIPP and CIB to ensure they were regulated to give advice. It also entered into Intermediary Agreements with those firms, which I've seen in other cases.

It's also apparent that L&C had access to some information about the type and volume of introductions it was receiving from RealSIPP, as it's been able to provide us with information about this when requested.

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

L&C's due diligence on RealSIPP/CIB

L&C says it accepts that it had an obligation to conduct due diligence on RealSIPP and CIB and it says it complied with this obligation. As noted above, L&C said that it checked the FSA register to ensure that RealSIPP was an Appointed Representative of CIB. And L&C checked the FSA register to ensure CIB was regulated and authorised to give financial advice. L&C also told us that it entered into Intermediary Agreements with both RealSIPP and CIB.

L&C told us in its submissions that its policy at the time of Mr H's SIPP application was that it wouldn't have accepted applications from a firm that wasn't authorised by the FSA. These steps go some way towards meeting L&C's regulatory obligations and good industry practice. But I'm of the view L&C failed to conduct *sufficient* due diligence on RealSIPP before accepting business from it. Or to draw fair and reasonable conclusions from what it did know about RealSIPP.

I've reached the view that L&C ought reasonably to have concluded it should not have accepted business from RealSIPP and it should've ended its relationship with it before Mr H's application was made for the following key reasons:

- L&C was aware of, or should have, identified potential risks of consumer detriment associated with the business introduced by RealSIPP at the outset of its relationship with this business, and certainly by the time of Mr H's application.
- There was insufficient evidence to show RealSIPP (or any other regulated party including CIB) was offering or giving *full* regulated advice – that is advice on the transfer or switch to the SIPP *and* the intended investment.
- The introductions had *"anomalous"* features – high-risk business, in relatively high volumes, for unregulated overseas property developments and other esoteric investments. And even though RealSIPP and/or CIB had the necessary permissions to give full advice on the business RealSIPP was introducing, neither it nor CIB was giving advice on a large proportion of that business.
- TRG, an unregulated business, was promoting its investments such as the Dunas Beach Resort and was using unregulated introducers to promote this and other similar investments.

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.

Whilst L&C said there was no obligation on it to understand the business model of firms it was choosing to do business with until the regulator issued guidance in October 2013 on this matter, I think having such understanding would have revealed there was a significant risk of consumer detriment associated with introductions of business from RealSIPP. In the alternative RealSIPP would have been unwilling to answer or fully answer the questions about its business model. In either event L&C should have concluded it shouldn't accept introductions from RealSIPP.

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

Anomalous features

Volume of business

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

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

L&C said during the complaint that was the subject of a published decision DRN-3587366 that 153 of its members were introduced by RealSIPP. In this case, L&C said that the number was in fact 160 and that Mr H was number sixteen of the members introduced to it by RealSIPP.

On another case from January 2018, L&C said that RealSIPP's introductions were made between February 2011 and May 2013. Further, that RealSIPP was involved with a number of investments across members' SIPPs and that: *"all of these investments would be considered Non-standard by FCA definition."* L&C provided a list of the investments concerned and confirmed that in 77 cases RealSIPP received fees but didn't advise on the SIPP.

As noted above, L&C has confirmed that the total of 160 clients were introduced by RealSIPP. And it has previously told us that following a sample of 20% of the total number of clients introduced by this introducer, 99.94% were from Occupational Pensions Schemes. L&C also said all investors invested in overseas commercial properties. And during the course of the agreement with RealSIPP, 23% of L&C's total new business came from its (RealSIPP's) introductions.

However, in the information it provided on this case L&C has said that introductions were made between the period of 12 August 2010 and 14 May 2013. It also said that it only received around 8% of new business from its overall business from RealSIPP. But it should be noted that the date of August 2010 was before the Intermediary Agreements were signed by L&C and RealSIPP/CIB. Further, the relationship between L&C and RealSIPP/CIB only ceased in 2015. So, whilst L&C may only have received 8% of new business up until May 2013, as it continued to accept introductions until 2015 from RealSIPP, I think it's more likely than not that its total business was higher than 8%. And it hasn't disputed that the number of clients introduced by the latter business was 160.

Mr H was number sixteen in the list of introductions from RealSIPP to L&C. So, it's clear that by the time it received Mr H's application L&C had already received a number of introductions from RealSIPP. And I think it's more likely than not that the trends in the pattern of business it had received from RealSIPP up to that point would have been not dissimilar to the trends in the *overall* pattern of business it received from this introducer.

Whilst sixteen was still at the relatively early stages of the relationship with L&C, I consider by this point, L&C should have been concerned that such a volume of introductions relating exclusively to consumers investing in higher-risk esoteric investments was unusual – particularly from a small IFA firm. And it should have considered how a small IFA firm such as RealSIPP, introducing this type of business, was able to meet regulatory standards.

<u>RealSIPP was introducing consumers who were all investing in high-risk non-standard assets</u>

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

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

High proportion of execution-only business

The application form L&C received from RealSIPP (which included the details of CIB as well) for Mr H made no record of whether he (Mr H) had received advice at the point of sale or not. But the available evidence shows that prior to receiving Mr H's SIPP application L&C was, or should have been, aware that not offering or giving advice was something RealSIPP was doing routinely. In addition to the possibility no advice had been given to Mr H, the available evidence also shows L&C was, or should have been, aware that not offering or giving advice was something RealSIPP, or its principal CIB, was doing routinely.

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

From the figures L&C's previously provided to us, a little under half the introductions from RealSIPP were transacted as execution-only business (i.e. with no advice being given by RealSIPP). That's a large proportion of the total business RealSIPP introduced, and I think it's likely that RealSIPP had introduced business to L&C without providing advice on a number of occasions before Mr H's introduction. So, I think that from very early on, L&C was on notice that RealSIPP, although the AR (Appointed Representative) of a regulated business that had permissions to advise on the business being introduced, wasn't a firm that was doing things in a conventional way. And I consider L&C ought to have recognised that there was a risk that RealSIPP might be choosing to introduce some consumers not only without them being given full regulated advice but also without having been offered full regulated advice.

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

The availability of advice

As noted above, the CIB suitability report said: *"Whenever possible, we would wish to carry out a complete financial review, but at your explicit request, our advice is restricted to the consideration of establishing a Self Invested Personal Pension to allow you to invest in the offshore development of your choice. Should you wish us to consider any other areas, we would be very happy to provide further advice, in accordance with the costs and charges laid out in our Client Agreement."* However, it should be noted that the Client Agreement that Mr H received appears to have been a 'RealSIPP' Client Agreement and it was made clear by RealSIPP in that agreement that it did not offer advice to clients. It did point out to clients, in other documents, that they could obtain advice from its 'partner' CIB if they wished to do so.

But as noted in the statement by CIB in its suitability report quoted above, it was still only offering clients restricted advice. A full financial review, in my understanding, is a holistic review of an individual's total financial circumstances, including incomings, outgoings, savings, investments, mortgages, pension products, protection products etc and it then analyses the individuals needs and objectives and the adviser then recommends how the consumer could best meet them. So, I don't read that Mr H, not wanting a complete financial review as equating to him not wanting full advice on the specific financial product that he (the consumer) believed he would be being advised on (i.e. their pension monies).

I think it's more likely than not that the 'complete financial review' wording was just wording RealSIPP and/or CIB was incorporating into its letters. I say this mindful of the fact that we've seen no cases that I'm aware of where it gave a full financial review (i.e. looking at all the consumers investments, savings, outgoings, protection in place etc and identifying needs and objectives etc). And I've seen similar wording used by CIB in its suitability reports and later CIB Client Agreements. In all of the cases the Financial Ombudsman has seen, RealSIPP and/or CIB was either giving no advice, or it was only giving advice on an appropriate SIPP to transfer the consumer's pension monies into (and without consideration of the suitability or otherwise of the underlying investments).

Mr H was advised to proceed with the transfer of his three personal pension plans to the SIPP. And as I've said this was without the benefit of full regulated advice. He was only advised to transfer from his personal pensions to a SIPP and L&C was chosen for this purpose. So, given the advice he received, I think it's understandable that he followed this advice. But as I've said, this advice consisted only of whether he should transfer from one pension provider to another.

Taking all of this in the round, whilst Mr H agreed with the recommendation he was given by the CIB adviser, I don't think he could have made an informed decision as to whether to transfer or not. This was a significant sum of money and, from what I understand, this was Mr H's sole source of income for his retirement. As I've said the CIB suitability letter shows that it wasn't offering clients like Mr H the option of *full* regulated advice that also incorporated advice on the suitability, or otherwise, of the proposed investments.

The possibility that there had been no regulated advice and/or no full regulated advice been given/offered particularly when concerning a pension, was a clear and obvious potential risk of consumer detriment here. It was clear from the SIPP application that Mr H was intending to transfer monies in from existing personal pension plans to invest (entirely) in two overseas property developments – a move which was highly unlikely to be suitable for the vast majority of retail clients.

The involvement of an unregulated business

I think it's more likely than not from the available evidence that an unregulated party was involved with the promotion of the TRG investments to some consumers introduced to L&C (including Mr H). Mr H said the unregulated introducers were actually members of his family who he said were 'financial advisers'.

I note L&C's comments on this issue which I've set out above. As I said in my provisional decision, I did check the FCA register. But from the checks I made it was not possible to say whether either of the family members were regulated at the time that they introduced Mr H to the TRG investments. What I said in my provisional decision, was that that one name does not appear on the register and whilst one name matching one of Mr H's family members does appear on the register it is unclear whether this is the same person Mr H is referring to as there is more than one entry with this name. But in any event, I couldn't find

any names on the regulator's register matching Mr H's family members who had worked for RealSIPP and/or CIB at any point.

As I said in my provisional decision, Mr H said it was the family members who initially introduced him to the TRG investments. But it was RealSIPP who introduced him to L&C and it CIB was who gave him the regulated advice to transfer his pension plans to the L&C SIPP.

So, in my view, I think it's more likely than not that Mr H's family members acted as unregulated introducers or promoters of the TRG investment. I think it's unlikely that consumers like Mr H were making the decision to establish a L&C SIPP, transfer their existing pension monies into a L&C SIPP and invest in the TRG investments of their own volition. And I consider L&C ought to have been alive to the risk that TRG and/or other unregulated introducers working with it or for it, were involved in promoting the TRG investments such as Dunas Beach Resort investments to be held in Mr H's SIPP.

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

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

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

Requesting information directly from RealSIPP

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

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

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

I think that L&C, before accepting further applications from RealSIPP, should have checked with it (RealSIPP) about things like: how it came into contact with potential clients; what agreements it had in place with its clients; whether all of the clients it was introducing were being offered 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 know L&C has said that it didn't need to understand RealSIPP's business model until after the October 2013 finalised guidance and to say it should have done so is with the benefit of hindsight. But I think the October 2013 guidance simply gave examples of what SIPP providers could do to meet the Principles. And that these requirements (i.e. meet with the regulatory duties under the Principles) had applied before the 2013 guidance was issued. The example questions I've set out above, would have given L&C a clearer understanding of how RealSIPP were operating.

I remain of the view that it's more likely than not that if L&C had asked RealSIPP for this *type of* information it (RealSIPP) would've provided a full response to the information sought. And that, amongst other things, L&C would have then been provided with copies of documents such as the Client Agreement, which at the time Mr H was provided with this said no advice would be given at all by RealSIPP but other documents did point to CIB as being able to offer some advice. Nonetheless, L&C could have asked for the CIB suitability report which was issued sometime later and did say advice would be given. However, it also said that this would be restricted to whether Mr H should transfer to a SIPP. I consider these were fair and reasonable steps to take in all the circumstances to meet its regulatory obligations and good industry practice.

Making independent checks

I consider, 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 and/or received to applicants like Mr H. For example, it could have asked for copies of correspondence in which applicants were being offered advice.

The 2009 review said: *"…we would expect (SIPP operators) to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way,* ***for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification.****"* (bold my emphasis).

The 2009 review also said that an example of good practice was: *"Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely."*

So, I think it would have been fair and reasonable for L&C to speak to some applicants, like Mr H, directly and to ask whether they'd been offered full regulated advice on their transactions and seek copies of the suitability reports. L&C said it couldn't comment on advice without potentially being in breach of its permissions. Again, I confirm I accept L&C couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps included addressing a potential risk of consumer detriment by speaking to applicants and/or seeking copies of some suitability reports. This could have provided L&C with further insight into

RealSIPP's business model and practices. These were fair and reasonable steps to take in reaction to the clear and obvious risks of consumer detriment I've mentioned.

As was explained in the published decision DRN-3587366 there appear to have been *some* instances where RealSIPP wasn't offering consumers *any* regulated advice on the proposed transactions. In Mr H's case, information from CIB does show he (Mr H) was provided with advice about switching to the L&C SIPP but that he refused an opportunity to complete a financial review. However, I've set out above why it was more likely than not that Mr H wasn't offered full regulated advice. As per my earlier comments on this point, I don't read a consumer not wanting a complete financial review (of their total financial circumstances) as equating to a consumer not wanting full advice on the specific financial product that they're meeting with/talking to advisers about (i.e. their pension monies).

I accept there's a possibility that Mr H might only have been interested in advice about his pension provisions rather than a complete financial review of his overall financial circumstances. But I don't think it's more likely than not that Mr H was offered full regulated advice on the transactions this complaint concerns by RealSIPP and/or its principal CIB (or any other regulated advisory firm). And that he then declined that offer. I think, as evidenced from the content of its CIB suitability report along with L&C's records of the pattern of business it was receiving from RealSIPP/CIB, these firms weren't offering full regulated advice on the overall proposition to those SIPP clients it was introducing to L&C.

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 H's application:

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

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

Had L&C carried out the due diligence I've mentioned above, I think it should have identified that consumers introduced by RealSIPP hadn't received full regulated advice from RealSIPP on their transactions. In cases like Mr H's, RealSIPP wasn't discussing the specific risks associated with the actual investment he was proposing to purchase which was the TRG investments and/or advising on the suitability of the overall proposition for the consumer (i.e. including the intended TRG investments). This raises significant questions about the motivations and competency of RealSIPP. I think that if L&C had made enquiries with some applicants introduced by RealSIPP at the time their responses would have been consistent with what RealSIPP (and, where relevant, CIB) had disclosed to them in the contemporaneous documentation in relation to the extent of its role.

Therefore, I consider L&C ought to have concluded Mr H – and applicants before him – didn't have full regulated advice made available to him by RealSIPP/CIB. And have viewed

this as a significant point of concern. Retail consumers, like Mr H, were transferring their existing pension monies to L&C to invest entirely in higher-risk esoteric investments, including unregulated overseas property developments such as Dunas Beach, without the benefit of having been offered full regulated advice. And it seems that RealSIPP was actively avoiding any responsibility to give advice. I also think L&C should have concluded, had it spoke to some applicants and/or obtained copies of some suitability reports, that some consumers introduced by RealSIPP who were investing in TRG investments were likely being 'sold' on its investments by an unregulated business.

With the above in mind, I think L&C should have concluded – certainly by the time of Mr H's application and sometime before it – that it wasn't in accordance with its obligations, or its own policy requirements, to accept introductions from RealSIPP. I, therefore, remain of the view that it's fair and reasonable in the circumstances to say that L&C shouldn't have accepted Mr H's application from RealSIPP in the first place. In my view, L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr H fairly by accepting his application from RealSIPP. So, to my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant time and allowed Mr H to be put at significant risk of detriment as a result.

Due diligence on the underlying investments

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

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

I'm satisfied that L&C wasn't treating Mr H fairly or reasonably when it accepted his introduction from RealSIPP. So, I've not gone on to consider the due diligence it may have carried out on the TRG investment and whether this was sufficient to meet its regulatory obligations. And I make no findings about this issue. I should note that this doesn't mean, as L&C has said, that I accept the investment performed as 'advertised'. It simply means that I don't think it should have accepted the investment in the first place.

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

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

In my view it's fair and reasonable to say that just having Mr H sign indemnity declarations signed as part of the application process, wasn't an effective way for L&C to meet its regulatory obligations to treat him fairly, given the concerns L&C ought to have had about his introduction. L&C knew that Mr H had signed forms intended to indemnify it against losses that arose from acting on his instructions.

In my opinion, relying on such indemnities when L&C knew, or ought to have known, Mr H's dealings with RealSIPP/CIB were putting him at significant risk wasn't the fair and

reasonable thing to do. Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse to accept Mr H's application. The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr H signed meant L&C could ignore its duty to treat him fairly.

To be clear, I'm satisfied that the indemnities contained within the contractual documents don't absolve, nor do they attempt to absolve, L&C of its regulatory obligations to treat customers fairly when deciding whether to accept or reject business. This is the same in terms of the contractual arrangements (Intermediary Agreements) between RealSIPP/CIB and L&C. I don't consider the latter firm could absolve itself from liability simply by having an agreement about the firm with which it was accepting business. I'm satisfied that Mr H's SIPP shouldn't have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity, shouldn't have arisen at all. And I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for L&C to proceed with Mr H's application.

COBS 11.2.19R

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

An argument about having to execute the transaction as a result of COBS 11.2.19R (then 11.2.1R) 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, given the explanation by Jacobs J in the BBSA case, 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 H's business from RealSIPP.

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

L&C has contended it's RealSIPP and/or CIB that's really responsible for Mr H's losses. CIB would be the respondent for complaints about activities RealSIPP undertook as the latter firm was an Appointed Representative of CIB. And the Financial Ombudsman won't look at complaints against CIB, as it's been dissolved and no longer exists as a regulated business. We also can't look at complaints about TRG.

The DISP rules set out when an Ombudsman's determination includes a money award, then that money award may be such amount as the Ombudsman considers to be fair compensation for financial loss, whether or not a Court would award compensation (DISP 3.7.2R). In my view, for the reasons set out above, it's fair and reasonable in the circumstances of this case to hold L&C accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mr H fairly. Given this, the starting point is that it would be fair to require L&C to pay Mr H compensation for the loss he's suffered as a result of its failings.

I've carefully considered if there's any reason why it wouldn't be fair to ask L&C to compensate Mr H for his loss, including whether it would be fair to hold another party liable in full or in part. And, for the following reasons, I consider it appropriate and fair in the circumstances for L&C to compensate Mr H to the full extent of the financial losses he's suffered due to L&C's failings.

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

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

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

Mr H taking responsibility for his own investment decisions

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

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

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

I've carefully considered what L&C's said about Mr H being aware of the risks. The suitability report and other documents provided by CIB/RealSIPP gave him no specific advice on the actual risks of investing in the TRG investments and/or using the full amount of his pension provisions in such investments. It simply gave him some general information about risks of investing in property investments but it didn't advise him on the merits and/or risks of investing in the TRG investments and/or the risks he would be taking with his pensions monies by investing in such investments. I wouldn't consider it fair or reasonable for L&C to have concluded that Mr H *had* received an explanation of the risks involved with the overall proposition from RealSIPP and/or CIB given what L&C knew, or ought to have known, about RealSIPP's business model by the time it received Mr H's application.

Prior to this, Mr H had very little investment experience. And he and his wife were experiencing financial difficulties due to their business being in Administration when they were first approached about the idea of investing in the TRG investments. Mr H was told that one of his pensions he held was performing badly. So this was the reason he decided to swich pensions. CIB was a regulated firm who used an AR as part of its process, so both had the necessary permissions to advise on the transactions this complaint concerns. Mr H then used the services of a regulated personal pension provider, L&C. So, overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair to say L&C should compensate Mr H for the losses he's suffered. I don't think it would be fair to say in the circumstances that Mr H should suffer the loss because he ultimately instructed the transactions to be carried out.

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

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

Further, if Mr H 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 to Mr H would have been not to establish a SIPP and not to transfer his pension monies to invest in the TRG investments. And I think it's more likely than not that Mr H would have listened to that advice as he did so when he was advised to transfer to the L&C SIPP by the CIB adviser. Alternatively, if L&C hadn't accepted his business from RealSIPP, Mr H might have simply decided not to seek pensions advice elsewhere from a different adviser and still then retained his existing pension plans.

So, overall, I think it's far more likely than not that if Mr H had approached another regulated advisory firm he'd have been told in no uncertain terms he should leave his pensions where they were. And I consider it is most likely that Mr H would have listened to this advice.

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

All in all, I do think it's fair and reasonable to direct L&C to pay Mr H compensation in the circumstances. While I accept that TRG, RealSIPP and CIB might have some responsibility for initiating the course of action which led to Mr H's loss, I consider that L&C failed to comply with its own regulatory obligations and didn't put a stop to the transactions proceeding by declining Mr H's application when it had the opportunity to do so. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against L&C that requires it to compensate Mr H for the full measure of his loss. RealSIPP was reliant on L&C to facilitate access to Mr H's pension. *But for* L&C's failings, I'm satisfied Mr H's pension transfer wouldn't have occurred in the first place.

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

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

For all the reasons set out above, I'm upholding the complaint.

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 H 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 *most likely* that Mr H would've remained a member of the pension plans he transferred into the SIPP.

In light of the above, L&C should:

- Obtain the notional transfer value of Mr H's previous pension plans.
- Obtain the actual transfer value of Mr H'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 H'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 impact of charges.
- If the SIPP needs to be kept open only because of the illiquid investments and is used only or substantially to hold one or more of those assets, then any future SIPP fees should be waived until the SIPP can be closed.
- If Mr H has paid any fees or charges from funds outside of his pension arrangements, L&C should also refund these to Mr H. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Pay to Mr H an amount of £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 H would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investments may prove difficult, as there is no market for it. For calculating compensation, L&C should establish an amount it's willing to accept for the investments as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investments.

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

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

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

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

L&C should first contact the provider of the plans which were transferred into the SIPP and ask them to provide a notional value for the policies 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 H has made 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.

I take on board what L&C has said about possible difficulties in obtaining a notional value from Mr H's previous pension providers. And the delays these may cause. But as I said in my provisional decision, which now forms part of my final decision, if there are any difficulties in obtaining the notional valuation from a previous provider, then L&C should instead arrive at a notional valuation for that provider by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return index). That is a reasonable proxy for the

type of return that could have been achieved over the period in question. And, again, there should be a notional allowance in this calculation for any additional sums Mr H has contributed to, or withdrawn from, his SIPP since its inception.

In its response to my provisional decision, L&C doesn't think it's fair or reasonable for Mr H to retain the FSCS payment, whilst at the same time receive compensation from L&C. But as I said in my provisional decision, I acknowledge that Mr H has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. But the terms of Mr H's Reassignment of Rights, which is dated 20 August 2022, require him to return compensation paid by the FSCS in the event this complaint is successful. Further, I understand that the FSCS will ordinarily enforce the terms of the assignment if required. So, I remain of the view that I think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the compensation Mr H received from the FSCS.

It will be for Mr H to make the arrangements to make any repayments he needs to make to the FSCS. However, as I also said in my provisional decision, which remains my view in my final decision, I do think it's fair and reasonable to allow for a *temporary* notional deduction equivalent to the payment(s) Mr H actually received from the FSCS for a period of the calculation, so that the payment(s) ceases to accrue any return in the calculation during that period.

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

To do this, L&C should calculate the proportion of the total FSCS' payment(s) that it's reasonable to apportion to each transfer into the SIPP, this should be proportionate to the actual sums transferred in. And L&C should then ask the operators of Mr H's previous pension plans to allow for the relevant notional withdrawals 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 H 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 H's previous pension plans.

Where there are any difficulties in obtaining notional valuations from the previous operators, 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 H'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 H's loss.

Pay an amount into Mr H'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 H'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 H as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this. L&C has said that Mr H should be put to proof about being a basic rate taxpayer. But looking at Mr H's financial situation, I've not seen any persuasive evidence that Mr H will be anything but a basic rate taxpayer in retirement.

SIPP fees

If the investments can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mr H 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 investments and is used only or substantially to hold those assets, 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 H 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 at 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.

In terms of any interest that's been ordered in this decision, I note what L&C has said about the amount of interest it thinks should be paid. But in this case, the interest I'm recommending is to compensate Mr H for being 'deprived' of the money he would be entitled to. I can rarely say for sure what the cost is to someone of being 'deprived' of money. For many people, it might have influenced a range of decisions about spending and borrowing over a period of time. In this instance, I remain of the view that 8% simple interest per year is a fair and reasonable amount to reflect the cost to Mr H of being deprived of his money.

If L&C considers that it is legally required to deduct income tax from any interest set out in this decision, it must send a tax deduction certificate with the payment if Mr H requests one. Mr H can reclaim the tax from HMRC if appropriate. I know L&C has previously said that it does not normally send these out, but if Mr H requests a tax deduction certificate it should be able to comply with this request.

Distress & inconvenience

I remain of the view that the loss of the pension provision which is the subject of this complaint caused Mr H significant distress. And this is clear from his submissions to this service. He used all of his pension funds to try to help with the money that he lost due to his business failure. And Mr H was totally reliant on his pension provision for his income in retirement. So, I consider L&C should pay him £500 to compensate him for the distress and inconvenience it has caused to him.

I note L&C's comments in response to my provisional decision, that the distress and inconvenience payment should take into account Mr H's contribution to the losses he suffered. But I am only taking into account the distress and inconvenience L&C has caused to Mr H. And I remain of the view, for the reasons I've set out above, why I think £500 is a fair and reasonable amount to pay to Mr H.

My final decision

My final decision is that I am upholding the complaint against London & Colonial Services Limited and I am ordering it to pay Mr H the amount calculated under 'Putting things right'.

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'm upholding the complaint. Fair compensation should be calculated as set out above under 'Putting things right'. My final decision is that London & Colonial Services Limited must pay Mr H the amount produced by that calculation – up to a maximum of £160,000 and any award of interest as set out above.

Recommendation: If the amount produced by the calculation as set out under 'Putting things right', is more than £160,000, I am recommending that London & Colonial Services Limited pays Mr H the balance. This recommendation is not part of my determination or award. London & Colonial Services Limited doesn't have to do what I recommend. It's unlikely that Mr H can accept my decision and go to court to ask for the balance. Mr H may want to get independent legal advice before deciding whether to accept my final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 26 March 2024.

Yolande Mcleod
Ombudsman