DRN-4910126

Financial Ombudsman Service

The complaint

Mr M complains that London & Colonial Services Limited ('L&C') didn't carry out sufficient due diligence or act in his best interests when it accepted his application for a Self-Invested Personal Pension ('SIPP') to invest in Chateau de la Cazine ('CDC'). And that he has suffered a loss as a result.

What happened

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

Involved parties

L&C

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

ARLWM Ltd ('ARLWM')

ARLWM was authorised by the then regulator, the Financial Services Authority ('FSA') – which later became the Financial Conduct Authority ('FCA'), which I will refer to throughout for ease.

Mr D was the sole director of ARLWM. And ARLWM – later trading as Montgomery Financial Consultants – was no longer authorised from 23 July 2019 and, as I understand it, was declared in default by the Financial Services Compensation Scheme ('FSCS') in 2020.

CDC

The CDC investment took the form of a property development owned by SAS Halcyon Retreat ('SAS') – which in turn appears to have been owned and marketed by a firm made of two individuals, which I'll refer to as B&B – until completion. Investors owned a fractional share in a third-party company and once the hotel rooms/properties were completed ownership was meant to be transferred to the third-party company.

The CDC investment was marketed as offering investors guaranteed interest/cashback on their deposit for a period between 12 to 36 months. And after the intended completion date – usually promoted as July 2015 – investors were meant to receive a guaranteed rental income of around 10% for two years. The marketing material and sale agreement also set out a number of further guarantees. For example, that between years 3 and 10 after completion, investors could ask SAS to buy back their investment for sometimes up to 180% of the purchase price.

The transaction

On 31 August 2012, B&B wrote to Mr M thanking him for his SIPP reservation in CDC. And, amongst other things, it said he would receive his membership upon approval of his SIPP.

On 18 September 2012, L&C acknowledged receipt of Mr M's SIPP application, dated 7 September 2012. This form listed Mr M's financial adviser as Mr D of ARLWM. It said Mr M had been given advice at the point of sale and wanted L&C to act on his adviser's instructions. Mr M's form also said fees of £4,000 upfront plus 0.5% of his fund per year ongoing would be paid to ARLWM. And, while no initial investment instructions were detailed on the form, there was a handwritten note which said 'See attached investment purchase request form'.

On 27 September 2012, L&C confirmed acceptance of Mr M's SIPP application and said that his pension monies totalling £154,000 had been received into his SIPP from two existing personal pension schemes.

While L&C hasn't provided with us a copy of Mr M's investment purchase request form that accompanied his SIPP application form – despite me asking it to do so in response to my provisional decision – I'm aware from similar cases against L&C that around the time this form included, amongst other things, the following:

- A question about whether the investor was a certified Sophisticated Investor (and a request to provide evidence in that case).
- A question about whether advice had been provided on the proposed investment. And where it had there was a section for the adviser to complete (including a box for their FCA number(s)).
- A typed member declaration section which Mr M would have been asked to sign to confirm, amongst other things, that:
    - L&C hadn't provided advice on the investment and the customer had carried out their own due diligence into this.
    - The investment may be high risk and there may not be an established market for selling the proposed holding.
    - Responsibility for assessing the risks and merits of the investment rested with the consumer and any investment adviser they'd appointed.
    - Unregulated investments may not be protected by the FSCS.
    - The consumer indemnified L&C against any liabilities arising from the investment.

It appears Mr M's investment purchase request form detailed that he wanted to invest in CDC, given that on 17 October 2012 he invested £134,000 in total of his SIPP monies into this – neither party has disputed my understanding here, despite being given the opportunity to do so in response to my provisional decision.

Mr M would have been issued with a CDC investment agreement and likely membership certificates detailing his investments, although L&C doesn't appear to have provided us with a copy – despite me asking it to do so in response to my provisional decision.

At some point prior to February 2013, Mr M also applied for and set up an Ascentric platform account via his SIPP.

And it seems Mr M last received a return from his CDC investment in September 2018.

Mr M's complaint

After initially coming to our Service in respect of the adviser, Mr M made a claim to the FSCS about ARLWM. In April 2020, the FSCS upheld Mr M's claim, calculating his losses to be just over £111,000 and it paid him £85,000 which I understand was its compensation limit at that time. On request, the FSCS later reassigned legal rights against L&C back to Mr M.

In the meantime, on 24 January 2018, Mr M first raised queries with L&C about, for example, the level of investment due diligence it had carried out. This seemingly wasn't addressed in its response to him. And, on 23 August 2018, 3 December 2018 and 23 January 2019, Mr M wrote to L&C querying, for example, what investment due diligence the checks it had carried out and he raised that it might not have acted in his best interests.

L&C sent Mr M its final response letter in March 2019. It said, in summary, that:

- The SIPP is written under trust and it has limited power to veto investments. It is an execution-only provider and this was clearly explained to Mr M in documentation.
- L&C didn't provide advice and wasn't permitted to do so. It didn't consider the suitability of the switch and underlying investment for Mr M.
- L&C satisfied itself that the investment was suitable to be held in a UK registered pension scheme.
- L&C also ensured appropriate and relevant due diligence was undertaken into the CDC investment, that it was reputable and could properly be held in a SIPP.
- The fact our Service awarded Mr M compensation against ARLWM, the adviser, means we considered it to be fully liable and Mr M isn't entitled to have the same matter considered twice.

On 18 July 2019, unhappy with this response, Mr M referred his L&C complaint to our Service. And, over the course of his complaint Mr M has said, amongst other things, that:

- He was going to retire at age 60 and wasn't interested in changing his pension, but ARLWM suggested annuity rates were low and he didn't want to lose anything close to retirement.
- ARLWM was previously a small client of his employer. And he was told the investment had guaranteed returns and a guaranteed buy-back scheme. He was given investment brochures and told to visit the CDC website.
- He didn't receive any payment when moving to his L&C SIPP.
- When he turned 60, he took tax free cash from his SIPP and started drawing £500 per month from it a few years later until he could no longer do so due to the illiquid investment. Mr M had consultancy work though, so he wasn't relying on his SIPP pension monies when the payments stopped.
- Mr M would like to get his SIPP pension monies back, minus what he has withdrawn.

Our Investigator said that Mr M's complaint had been made in time and that it should be upheld because, in summary, L&C shouldn't have accepted his application in light of the volume of business and proportion of customers being introduced to it by ARLWM which were being invested in high-risk unregulated investments. He also said L&C's due diligence into the CDC investment didn't go far enough.

L&C responded and said, amongst other things, that:

- Mr M's complaint has been made outside our Service's time limits, both our six-month and six and three year time limits.
- Our Service already upheld Mr M's complaint against the adviser, ARLWM, in January 2019. Given ARLWM then entered liquidation, it's assumed that it didn't settle the matter. And that our Service now seeks to unjustly hold L&C responsible

for the failings of another firm, as the only regulated entity left that was involved.

- In similar cases, involving the same adviser and investment, we found in L&C's favour. We said it was fair and reasonable for it to have accepted the applications from the introducer and that it carried out appropriate investment due diligence.
- Mr M was advised and an aggressive investor who understood and took an active role in the intended strategy. Mr M made up his mind long before involvement from it. So had L&C rejected Mr M's instructions, he would have proceeded regardless.
- It's irrational to think L&C had any scope to refuse the transaction or otherwise counsel Mr M against it given its permissions and role in the transaction.
- We must consider the relevant case law and, if deviated from, set out why – R. (on the application of *Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017] EWHC 352 (Admin) and Jay J's comments at paragraph 73 were referenced.
- The relationships and facts are similar to those in *Adams v Options*, and it's unclear why we've reached a different conclusion to that.
- The ambit and application of the Principles, and such duties as may be imposed on L&C by these, fall to be construed in light of the Conduct of Business Sourcebook ('COBS') rules applicable to L&C, its regulatory permissions, contractual arrangements and the statutory objective that consumers should take responsibility for their decisions.
- It was said in *Adams* that reports, guidance and correspondence issued after the events at issue couldn't be applied to Options' conduct at the time. So, publications issued after the transactions shouldn't have a bearing on this complaint.
- Even if the 2009 Thematic Review Report had been statutory guidance made under the Financial Services and Markets Act ('FSMA') s.139A (which it wasn't), the breach of such statutory guidance wouldn't give rise to a claim for damages under FSMA s.138D.
- Regulatory publications can't alter the meaning, or the scope, of the obligations imposed by the Principles.
- *Adams* held that duties imposed by COBS can't all apply to all firms in all circumstances.
- Neither the obligations under COBS 14.2.3R and COBS 14.3 to provide clients with product information, nor the obligation under COBS 19.1.2R to provide clients with pension product information, apply to execution-only SIPP providers.
- An assessment of the investment to the degree set out by us would fall outside of the scope of L&C's duty and retainer. And L&C couldn't communicate the results of such an investigation to a consumer without putting itself in breach of its permissions.
- The customer was aware L&C acted on an execution-only basis and didn't accept responsibility for the quality of the investment business.
- Amongst other things, the judge in *Adams* held that in order to identify the extent of the regulatory duties imposed on Carey, "*one has to identify the relevant factual context" and that "the key fact ... in the context is the agreement into which the parties entered, which defined their roles in the transaction*".
- The judge also said that "*a duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed...as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed.*"
- In *Adams* the FCA agreed that the function of a firm, as determined by contract, would govern what it had to do to comply with its duties under the FCA Handbook.
- Insufficient weight has been given to contractual arrangements and the demarcation of roles and responsibilities. The documents setting out the contractual relationship between the parties make it clear that L&C was acting on an execution-only basis.
- Our position runs contrary to *Adams* by suggesting that, notwithstanding the clear contractual terms, L&C owed due diligence obligations under the Principles.

- Our Service is attempting to use the Principles to circumvent the *Adams* decision.
- We've failed to have regard to the general principle that consumers should take responsibility for their decisions, the fundamental principle of freedom of contract and to the authority of *Adams* and *Kerrigan v Elevate Credit International Ltd* [2020] C.T.L.C. 161.
- A breach of the Principles cannot, of itself, give rise to any cause of action at law, and consideration of these must be via the appropriate COBS rules applying to the transaction.
- Our Service is extending the scope of the duty owed by L&C beyond what was envisaged by the parties.
- Reference to the 2009 and 2012 Thematic Reviews contravene the decision in *Adams* on the basis these:
    - o have no bearing on the construction of the Principles as the contents of the documents cannot found a claim for compensation of itself;
    - o cannot alter the meaning of, or the scope of the obligations imposed by, the Principles;
    - o do not provide "guidance" and even if they were considered statutory guidance, any breach would not give rise to a claim for damages under FSMA s.138D.
- The FCA's Enforcement Guide says that "*Guidance is not binding on those to whom the FCA's rules apply. Nor are the variety of materials (such as case studies showing good or bad practice, FCA speeches and generic letters written by the FCA to Chief Executives in particular sectors) published to support the rules and guidance in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules.*"
- The level of due diligence imposed by the Service goes far beyond what was agreed between the parties. Our Service is holding L&C to a standard that's not provided for by statutory guidance or by the law.
- It's not fair or reasonable to determine the complaint by reference to the FCA publications and to do so only exacerbates the problem referred to by Jay J in Aviva.
- There is a real unfairness if an execution-only SIPP provider is liable for the poor investment choices of consumers.
- We've said that Mr M was a retail customer who acted in accordance with the advice given, which contradicts evidence that Mr M had a good knowledge of investments, fully understood the CDC investment and had selected this himself. The documents made him aware the investment was high risk and unregulated. So we should hold an oral hearing to address this point with Mr M.
- Mr M received an incentive payment – L&C hasn't provided any evidence of this though, despite being given the opportunity to do so in response to my provisional decision.
- The redress recommended, for example the compensation for distress and inconvenience, is disproportionate to what ARLWM was originally expected to pay.

As no agreement could be reached, Mr M's complaint has been passed to me for a decision.

I issued a provisional decision concluding that Mr M's complaint has been made in time for our Service to consider it and that it should be upheld. Mr M responded adding, in summary, that he didn't think £750 in compensation for distress and inconvenience was a lot considering the matter had been ongoing for years. And L&C didn't respond with any further comments or information.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable

in the circumstances of this complaint.

Having done so, I remain of the view that Mr M's complaint has been made in time for our Service to consider it and that his complaint should be upheld for the reasons previously set out in my provisional decision, which I've largely repeated below.

When doing so, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I think was good industry practice at the relevant time.

While I've considered the entirety of the detailed submissions the parties have provided, my decision focuses on what I consider to be the central issues. The purpose of my decision isn't to comment on every point or question made, rather it's to set out my decision and reasons for reaching it.

Preliminary point – time limits

For the avoidance of doubt, I've considered this preliminary point and the next on the basis of the applicable rules and law and not on the basis of what is fair and reasonable in all the circumstances.

L&C has said that Mr M's complaint was made outside our time limits set out in the Dispute Resolution ('DISP') Rules – found in the Financial Conduct Authority's handbook.

But L&C sent Mr M its final response letter to his complaint in or around March 2019, and he referred his complaint to our Service within six months of this, in July 2019.

Turning to our 'six and three-year rule' Mr M's January and August 2018 complaints were made within six years of the events complained of, which took place in September 2012. And, in any event, I haven't seen anything to make me think Mr M was or ought reasonably to have become aware there might be a problem which L&C may have responsibility for more than three years before he complained to it in 2018.

So I'm satisfied Mr M's complaint was referred within our time limits and I've gone on to consider the merits of the complaint.

Preliminary point – L&C's request for a hearing

L&C has said an oral hearing is necessary to explore Mr M's understanding and motivations for entering the transactions, for example.

Our Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (s.225 of FSMA). DISP 3.5.5R provides the following:

> *"If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by any means which the Ombudsman considers appropriate in the circumstances, including by telephone. No hearing will be held after the Ombudsman has determined the complaint."*

Given my statutory duty under FSMA to resolve complaints quickly and with minimum formality, I'm satisfied that it wouldn't normally be necessary for me to hold a hearing in most cases (see the Court of Appeal's decision *in R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642).

So, the key question for me to consider when deciding whether a hearing should be held is whether or not: "*…the complaint can be fairly determined without convening a hearing*".

We do not operate in the same way as the Courts. Unlike a Court, we have the power to carry out our own investigation. And the rules (DISP 3.5.8R) mean I, as the Ombudsman determining this complaint, am able to decide the issues on which evidence is required and how that evidence should be presented. I am not restricted to oral cross-examination to further explore or test points.

If I decide particular information is required to decide a complaint fairly, in most circumstances we are able to request this information from either party to the complaint, or even from a third party. In this case, L&C has had the opportunity to consider, and comment on, our Investigator's view. And we previously sought some further information from Mr M, which L&C has had the opportunity to consider and comment on in response to my provisional decision.

I have carefully considered the submissions L&C has made. However, I'm satisfied I am able to fairly determine this complaint without convening a hearing. In this case, I'm satisfied that I have sufficient information to make a fair and reasonable decision. So, I don't consider a hearing is required. The key question is whether L&C should have accepted Mr M's applications at all. Mr M's understanding of matters are secondary to this. And I am, in any event, able to test this to the extent I think necessary by asking questions of Mr M by phone or in writing where I think necessary.

As I am satisfied it is not necessary for me to hold a hearing, I will now turn to considering the merits of Mr M's complaint.

Relevant considerations

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

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

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

> "*The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirements 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 BBSAL, Berkeley Burke brought a judicial review claim challenging the decision of an Ombudsman who had upheld a consumer's complaint against it. The Ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The Ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and hadn't treated its client fairly.

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

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

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

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

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

I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Options SIPP. And HHJ Dight didn't consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither judgment says anything about how the Principles apply to an Ombudsman's consideration of a complaint. But, to be clear, I

don't say this means *Adams* isn't a relevant consideration at all. As noted above, I've taken account of both judgments when making my decision on Mr M's case.

I acknowledge that COBS 2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client*) overlaps with certain of the Principles, and that this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of 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 he 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 think there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams (summarised in paragraph 120 of the Court of Appeal judgment) and the issues in Mr M's complaint. 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 investment into its SIPP.

And in Mr M's complaint, amongst other things, I'm considering whether L&C ought to have identified that the CDC investment involved a significant risk of consumer detriment and whether it ought to have declined to accept applications from ARLWM and/or applications to invest in CDC *before* it accepted Mr M's application.

The facts of Mr Adams' and Mr M's cases are also different. And I need to construe the duties L&C owed to Mr M under COBS 2.1.1R in light of the specific facts of his case. So, I'm satisfied that COBS 2.1.1R is a relevant consideration – but that it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Mr M's case, including L&C's role in the transaction.

And it's important to emphasise that I must determine this complaint by reference to what I think is fair and reasonable in all the circumstances of the case. In doing that, I'm required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This 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.

The regulatory publications

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

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

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

The 2009 Thematic Review Report

The 2009 report included the following statement:

> "*We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its clients and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.*
>
> *It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.*
> …
> *We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate SIPPs that are unsuitable or detrimental to clients.*
>
> *Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their customers' interests in this respect, with reference to Principle 3 of the Principles for Businesses ('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 FCA stated:

> *"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*
>
> *All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension*

scheme is a ‘client’ for SIPP operators and so is a customer under Principle 6. It is a SIPP operator’s responsibility to assess its business with reference to our six TCF consumer outcomes.”

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

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

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

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

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

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

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

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

Although the members’ advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers.

Examples of good practice we have identified include:

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

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

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

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

> *"**Due diligence***
>
> *Principle 2 of the FCA's Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers as well as assessing that investments are appropriate for personal pension schemes) to help them justify their business decisions. In doing this SIPP operators should consider:*
>
> - *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*
> - *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
> - *having checks which may include, but are not limited to:*
> - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
> - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*
> - *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
> - *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*
> - *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm"*

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

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

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

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

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

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

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

As I've said, although I've referred to selected parts of the publications to illustrate the relevance, I've considered these in their entirety.

These publications provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it treats its customers fairly and produces the outcomes envisaged by the Principles.

The publications indicated that the regulatory obligations of SIPP operators include doing due diligence checks on parties who introduce clients to SIPP operators and on the investments that SIPP operators allow to be held in SIPPs.

I acknowledge that the 2009 and 2012 reports and the "*Dear CEO*" letter aren't formal guidance (whereas the 2013 finalised guidance is). However, the fact that the reports and "*Dear CEO*" letter didn't constitute formal guidance doesn't mean the importance of these should be underestimated. These 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 regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take these 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.

At its introduction the 2009 Thematic Review Report says:

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

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

So, I'm satisfied that the 2009 Report is a *reminder* that the Principles apply and it gives an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. The Report set out

the regulator's expectations of what SIPP operators should be doing and therefore indicates what I consider amounts to good industry practice at the relevant time. So I remain satisfied it's relevant and therefore appropriate to take it into account.

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

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

Like the Ombudsman in the *BBSAL* case, I don't think the fact some of the publications, post-date the events that took place in relation to Mr M's complaint, mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin these existed throughout, as did the obligation to act in accordance with the Principles.

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

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

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

I'd also add that, even I took the view – which I don't – that any publications or guidance that post-dated the events subject of this complaint don't help to clarify the type of good industry practice that existed at the relevant time (which I don't), that doesn't alter my view on what I consider to have been good industry practice at the time. That's because I find that the 2009 Report together with the Principles provide a very clear indication of what L&C could and

should have done to comply with its regulatory obligations that existed at the relevant time before accepting Mr M's applications and allowing the CDC investment into the SIPP.

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

I'm deciding 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 this decision. So taking account of the factual context of this case, I think 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 ARLWM/the business ARLWM was introducing and the CDC investment *before* deciding to accept Mr M's applications.

And the questions I need to consider include whether L&C ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by ARLWM and/or investing in CDC were being put at significant risk of detriment. And, if so, whether L&C should therefore not have accepted Mr M's applications from ARLWM and permitted Mr M's SIPP monies to be invested into CDC.

The contract between L&C and Mr M

My decision is made on the understanding that L&C acted purely as a SIPP operator. I don't say L&C should (or could) have given advice to Mr M or otherwise have ensured the suitability of the SIPP or CDC investment for him. I accept that L&C made it clear to Mr M that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investments.

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

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

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

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

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

L&C's due diligence on ARLWM

L&C had a duty to conduct due diligence and, as part of this, give thought to whether to accept introductions from ARLWM. That's consistent with the Principles and the regulators' publications as set out earlier in this decision.

Our Service previously asked L&C a series of detailed questions about the due diligence it undertook into the introducer, ARLWM. From the information provided in response, and from the information available on other similar cases where ARLWM was the introducer, I can see L&C:

- Carried out an anti-money laundering check on Mr D.
- Had the ARLWM fill out an intermediary application form in December 2011, where it asked for details of authorisation.
- Checked ARLWM's permissons on the FCA register in December 2011 when it first started accepting business from it.
- Had ARLWM fill out a new intermediary application form for L&C in January 2019 – seemingly as it remained registered with it for servicing rights – where it asked questions such as, whether the advisers or its business or principals have either now, or ever been, the subject of any disciplinary proceedings by any regulatory body or professional association.

From the information that has been provided, I'm satisfied L&C did take some steps toward meeting its regulatory obligations and good industry practice. However, I don't think the steps we've seen evidence of went far enough, or were sufficient, to meet L&C's obligations and good industry practice.

L&C said that it entered into an intermediary agreement with ARLWM, but, to date, I've not seen copies of any agreements entered into between them. And L&C hasn't provided a copy of any that are/were in effect between it and ARLWM despite me asking it to do so in response to my provisional decision.

L&C said it checked the FCA register again to ensure ARLWM was still regulated before accepting any new applications, but I haven't seen any evidence from the time to support that it did this before accepting Mr M's particular application. That's despite me asking it to provide this in response to my provisional decision.

I think L&C was aware of, or should have identified potential risks of, consumer detriment associated with business introduced by ARLWM, before it accepted Mr M's application. For example, the SIPP business introduced by ARLWM had anomalous features – it appears to have been high risk business, where monies were ending up invested in esoteric investments post-transfer.

L&C should have taken steps to address these risks (or, given these risks, simply declined to deal further with ARLWM). Such steps should have involved getting a fuller understanding of ARLWM's business model, through requesting information from ARLWM and through independent checks. A reasonable understanding of how ARLWM was operating would have

revealed there was a significant risk of consumer detriment associated with introductions of business from ARLWM.

In the alternative if ARLWM was unwilling to answer or fully answer the questions about its business model, L&C may not have been able to satisfy itself that it had a reasonable understanding of how ARLWM was operating.

In either event, L&C should have concluded it shouldn't accept introductions from ARLWM.

I've set out below some more detail on the anomalous features of the business ARLWM was introducing to L&C, and the potential risks of consumer detriment that I think L&C either knew about, or ought to have known about, before it accepted Mr M's SIPP application. These points should have been considered by L&C cumulatively.

<u>The volume and type of business ARLWM introduced</u>

It's clear that L&C had access to information about the number and nature of introductions that ARWLM made to it, as it's been able to provide us with details about this when requested. An example of good practice identified in the FCA's 2009 review was:

> *"Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable 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 has said that 29 members were introduced to it by ARLWM between December 2011 and December 2014. And L&C has previously told us that it accepted its tenth ARLWM introduction in respect of another customer in August 2012. So it seems likely to me that ARLWM's introduction of Mr M to L&C the following month – in September 2012 – was introduction number eleven or onwards.

L&C has also said that *all* investors that ARLWM introduced to it invested in overseas commercial properties. And I think L&C should've been concerned that the introductions related exclusively to consumers investing in higher-risk esoteric investments was unusual. 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 and in respect of a small proportion of their pension. And I think L&C either was aware, or ought reasonably to have been aware, that the type of business ARLWM was introducing was high risk and therefore carried a potential risk of significant consumer detriment.

While L&C has said that the total introductions to it from ARLWM only represented just over 6.5% of L&C's business at the time, a report carried out by L&C for its board – while undated this was seemingly completed sometime after December 2018 in light of the content – said that of 12 firms that were introducing customers to it to invest in CDC over 50% of this business – which I can see amounted to £1.3 million – was introduced to it by ARLWM.

I think L&C should have considered that this was unusual and a clear and obvious potential risk of consumer detriment.

The board report, which I'll come back to later, said that:

> "*Over 50% of the investments into CDC (sic), in terms of value, was made by one advisory firm, and one single advisor. Mr D (sic) of ARLWM (sic). Both of which are still active. This should offer London & Colonial some degree of comfort, and reduce the overall potential exposure. Any liability (speculative currently) of London & Colonial concerning an unsuitable pensionable asset could potentially be*…".

While report ends mid-sentence and, as I've said above, was seemingly carried out in 2018, I think it supports that L&C was already aware, or ought reasonably to have become aware, that ARLWM was referring so much business to the same high risk overseas property investment and that there was a high chance of this being unsuitable given L&C was discussing potential exposure and liability. And that it was taking comfort from the adviser still being active, as it thought that meant it wouldn't be responsible for consumer detriment because ARLWM could still be held responsible.

So I think that from very early on L&C was aware, or ought reasonably to have been aware, that ARLWM wasn't a firm that was doing things in a conventional way. The risks involved in high-risk esoteric investments are unlikely to be fully understood by most people. And I think the concerns I've highlighted ought to have been a red flag for L&C in its dealings with ARLWM and that there was a clear and obvious potential risk of consumer detriment in this case.

<u>Mr D of ARLWM</u>

It seems L&C made the decision to stop accepting new business from ARLWM around December 2014. And I've been provided with an undated internal email from the Head of Compliance at L&C, which says:

> "*No new business submitted from this source…These restrictions are as a result of previous sales made by this firm of distressed assets, and that there is a sanction on the FCA register against this form* (sic) *in one of* [its] *previous guises*".

Looking at the FCA register, I can see Mr D previously worked for a firm that received a large fine for failing to comply with Principle 3 (taking reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems*)* and for failing to ensure effective internal governance to monitor risks its customers were exposed to in a number of areas. While this was some time before Mr D started referring business to L&C through ARLWM, I do think it helps build a picture of the type of business Mr D had previously been involved in.

And when L&C referred to one of ARLWM's previous guises in the above email, I think it was likely referring to another firm, which I'll call Firm B. The FCA register shows that at the time Mr D started providing advice through ARLWM in March 2011, he was also one of four advisers at Firm B – another regulated advice firm – until November 2012, alongside Mr L who Mr M said he initially dealt with at ARLWM. The FCA issued a warning notice to Firm B on 29 August 2012 for not paying due regard to the interests of its customers or treating them fairly, in breach of Principle 6. L&C's due diligence obligations were ongoing. And this was before Mr M made his SIPP application form L&C to invest in CDC in September 2012. Firm B then had its permission revoked by the FCA soon after, in November 2012.

I think the above internal email from L&C's Head of Compliance shows it was very concerned about the sanction on the FCA register. This was seemingly one of the main reasons it ceased to accept any new business from ARLWM. The above information about Mr D was readily available at the time though. And I think that if L&C had looked this up then given the concerns I think it ought to have had about Mr D around the time it received Mr M's

CDC investment application, then at the very least it would have given L&C cause for concern about the quality of business ARLWM would be carrying out. And that this should have caused L&C to think very carefully from August 2012 before continuing to accept any introductions from ARLWM and Mr M's investment application from it, given Mr D was its only director.

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 shouldn't have continued accepting applications from ARLWM and before it received Mr M'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 try to address the potential risks of consumer detriment in the first instance.

Requesting information directly from ARLWM

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

As set out above, the 2009 Thematic Review Report explained that the regulator would expect SIPP operators to have procedures and controls, and for management information to be gathered and analysed, so as to enable the identification of, amongst other things, "*consumer detriment such as unsuitable SIPPs*". Further, that this could then be addressed in an appropriate way *"…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, and before it accepted Mr M's application from ARLWM, should have checked with ARLWM about things like: how it came into contact with potential clients, what agreements it had in place with its clients, whether all of the clients it was introducing were being offered full advice, what its arrangements with any unregulated businesses or third parties were, how much business it was intending to refer to be invested in non-mainstream assets, how and why retail clients were interested in making CDC investments, whether it was aware of anyone else providing information to clients, how it was able to meet with or speak with all its clients, and what material was being provided to clients by it.

I think obtaining this type of information from ARLWM was a fair and reasonable step for L&C to take, in the circumstances, to meet its regulatory obligations and good industry practice.

And, on balance, I think it's more likely than not that if L&C *had* checked with ARLWM and asked the type of questions I've mentioned above that ARLWM would have provided a full response to the information sought.

In the alternative, if ARLWM had been unwilling to answer such questions if they'd been put to it by L&C, I think L&C should simply then have declined to accept introductions from ARLWM.

<u>Making independent checks</u>

I think, in light of what I've said above, it would also have been fair and reasonable for L&C, to meet its regulatory obligations and good industry practice, to have taken independent steps to enhance its understanding of the introductions it was receiving from ARLWM. For example, it could have asked for copies of correspondence in which applicants were being offered advice.

The 2009 Thematic Review Report said that:

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

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

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

So I think it would have been fair and reasonable for L&C to speak to some applicants, like Mr M, directly and/or to seek copies of the suitability documents.

I accept L&C couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps included addressing a potential risk of consumer detriment by speaking to applicants and/or having sight of advice letters, as this could have provided L&C with further insight into ARLWM's business model.

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

If L&C had undertaken the type of due diligence I've mentioned above, then I think it ought to have identified before it accepted Mr M's application that ARLWM's sole director had worked for two companies which had received sanctions, one of which he continued to work for and was later sanctioned while he was also a director of ARLWM. And that there were anomalous features.

Retail consumers, like Mr M, were also transferring pension monies to L&C to invest in higher-risk esoteric investments like CDC. I think it's fair to say that such investments are highly unlikely to be suitable for the vast majority of retail clients. As I've said, these will generally only be suitable for a small proportion of the population. And I think L&C either was aware, or ought reasonably to have been aware, that the type of business ARLWM was introducing was high risk and therefore carried a potential risk of consumer detriment.

Had L&C taken appropriate steps, such as seeking clarification from Mr M, and/or requesting copies of a suitability report documents, it would have seen that ARLWM said in the suitability report that he was a balanced rather than high-risk investor. And had it spoken to Mr M it would have found out that he wasn't a high-risk investor, but a retail one. This is

supported by the risk profile document from the time, which said that Mr M didn't feel comfortable with financial uncertainty and that taking financial risks wasn't important to him, for example.

So, I think that L&C should have identified that the business it was receiving from ARLWM, raised serious questions about the motivation and competency of ARLWM. And I think L&C should have concluded, and before it accepted Mr M's business from ARLWM, that it shouldn't accept introductions from ARLWM. I therefore conclude that it's fair and reasonable in the circumstances to say that L&C shouldn't have accepted Mr M's application from ARLWM.

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

L&C's due diligence on the CDC investment

As I've set out above, I think that if L&C had carried out due diligence on ARLWM which was consistent with its regulatory obligations and the standards of good practice at the time then it ought to have concluded that it shouldn't accept applications from ARLWM before it received Mr M's application. So I don't necessarily need to consider the due diligence on the CDC investment. But I have, for completeness, considered what L&C did and ought to have done and concluded in relation to the CDC investment.

L&C had a duty to conduct due diligence and give thought to whether an investment itself is acceptable for inclusion in 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'm satisfied that, to meet its regulatory obligations when conducting its business, L&C was required to consider whether to accept or reject a particular investment (here CDC), with the Principles and any other relevant rules and regulations in mind.

I think that it's fair and reasonable to expect L&C to have looked carefully at the investments before permitting these into its SIPPs. To be clear, for L&C to accept the CDC investments without carrying out a level of due diligence that was consistent with its regulatory obligations, while asking its customer to accept warnings absolving it of the consequences, wouldn't in my view be fair and reasonable or sufficient. And if L&C didn't look at the investment in detail, and if such a detailed look would have revealed that potential investors might be being misled, or that the investment might not be secure or might be fraudulent, it wouldn't in my view be fair or reasonable to say L&C had exercised due skill, care and diligence – or treated its customer fairly – by accepting such an investment.

Taking into account the available evidence and the relevant considerations I've described, and what's fair and reasonable in the circumstances of this case my view is that L&C should, at least, have done the following:

- Identified CDC as high-risk, speculative and non-standard investment, so it should have carried out sufficient due diligence.

- Considered whether these investments were appropriate for a pension scheme.

- Ensured the investments were genuine and not a scam, or linked to fraudulent activity.

- Independently verified that CDC's assets were real and secure, and the investments operated as claimed.

- Ensured the investments could be independently valued, both at point of purchase and subsequently.

- Ensured Mr M's SIPP wouldn't become a vehicle for a high-risk and speculative investment that wasn't a secure asset and could be a scam.

Had L&C carried out sufficient due diligence checks on these points I think it would have become aware of concerns regarding the CDC investment which, in my view, indicated a significant risk of consumer detriment, for the reasons detailed below.

L&C provided us with a copy of the agreement for sale entered into between SAS and L&C as trustee for Mr M, dated 27 September 2012. The agreement noted that the company, CDC Fractional X Limited, would own a share in an apartment, along with the number and address for this. The agreement set out the obligations and terms and conditions. And said that '*legal ownership of the Property will vest in the Company…prior to Completion*', noted as 1 July 2015 at the latest. And that the '*only asset the Company has or shall have is good legal title to the Property*…'.

I've seen a page setting out who the administrator and officers involved in the CDC investment were. As well as some plans of the CDC properties and grounds and a document detailing the associates that would be working on the development and design of CDC.

I can see that in January, February and June 2013, L&C carried out an internal investment review into the CDC investment and the notes it has provided us with from this say the following:

> *21.01.2013 - Lin: Fractional Ownership…altered* [sic] *me today to problems getting certificates of title from the Fractional company that deals with the Chateau de la Cazine. 13 certificates are outstanding and we are now on the 3rd excuse as to why they have not been issued - shortage of staff, backlog etc - very similar to the way the SGG problem evolved. Consequently we have suspended all new money going out on this investment. 20.02.2013 - GM - email [Fractional's] "... LB & GM have agreed that we can lift the suspension with immediate effect. We will continue to monitor the situation and take any action if and when required." 19.06.2013 - MA - Further purchases suspended pending review - agreed at investment committee meeting (14.06.2013)*

I think SSG is likely to be a reference to the Sustainable Growth Group, which the Serious Fraud Office opened a criminal investigation into in 2011 and found that investors had been deliberately misled about the nature of the investment. In which case, by referencing what was happening with the CDC investment as being very similar to the way the SGG problem evolved, I think L&C had or was starting to have real concerns about the CDC investment. L&C lifted the suspensions though and seemingly continued to allow investments into it within its SIPPs.

In light of L&C's clear concerns, our Service previously asked it for full details as to why the suspensions occurred/were considered necessary, as well as why these were lifted each time, with evidence from the time. But I can't see that L&C has provided answers to this.

L&C's board report that I mentioned earlier, seemingly dated just after December 2018, said that it was a detailed review carried out by compliance into investments including CDC. It

said this sought to understand the current position, the risks and L&C's exposure, before analysing the options to mitigate the risks. And, amongst other things, it said that:

> "*It is clear from this that in all cases there is a clear breach of contract; completion has not been served prior to the long stop date. There have been other notable breaches on more individual cases, such as the non-repayment of interest monies; not keeping us up to date with buildings work and delays to this; and in some cases failure to complete refund upon client instruction…*
> *…*
> *It is difficult to accurately deduce the number of fractional ownerships owned due to a number of contracts not being present. It is estimated that there are 162 fractional ownerships within this number, with two clients unable to be estimated (due to no other client owning a share in the company they own).*
>
> *As of 1st December 2018, London & Colonial had taken receipt of £420,603.86 in payment from Halcyon. A combination of interest repaid in line with the contract, along with refunds paid over an agreed timeframe, as well as some funds that we have been unable to identify the reason (potentially rental income).*
>
> *An estimated £45,000.00 remains to be owed on the contractual interest payment….*
>
> *We are unable to estimate rental payments until the property is confirmed to have been built. No completion has been correctly, or incorrectly, served and therefore it is assumed that none have been completed.*
> *…*
>
> ***The development***
>
> *TBC FOLLOWING HALCYON'S RESPONSE ON 11/01/2018*
>
> *London & Colonial own fractional shares in 28 different companies, that each own one single room/suite in the Chateau De La Cazine or Halcyon Retreat complexes.*
> *…*
>
> *According to Companies House, none of these fractional ownership companies have any value. With no cash or no assets assigned to them.*
>
> *London & Colonial wrote to* [SAS] *at the beginning of December, asking for confirmation of property completion dates, or estimated date if not yet completed, and valuations for all of our assets. Their response to this is given below.*
>
> *The valuations they have provided are of the property share. A number of our clients have only paid 66% of the property share price, with the remaining amount to be covered by a 10 year developer loan. Based on this, I would recommend valuing at the amount originally invested by our clients, as this is the true valuation of what their investment is currently worth, since they are able to instruct a refund of the deposit for failure to complete the development by the long stop date. Other valuation options are below:*

BOARD DECISION 1

Option 1 (recommended)	Value at initial amount invested	This is the amount of money, according to the contract, that the client could get back at this moment in time if they were to instruct a resale
Option 2	Value at £0	The client owns a share in a company that has zero cash balance, and no assets, and therefore arguably has a share of a company worth nothing. Resulting in a valuation of £0.
Option 3	Value as per Halcyon's valuations	The valuation from Halcyon should be fair and independently verifiable. As the only valuation that has been provided, this is another potential option. However we have been unable to verify that this is an independent valuation. Moreover if the property has not been built I am unsure what, or how, a valuation has been conducted.

"

L&C doesn't seem to have provided our Service with a copy of SAS' full response to its request for information, including copies of any valuations and information provided to it by SAS alongside this.

Under a later heading "*Halcyon's financial position*" the report again said "*TBC FOLLOWING HALCYON'S RESPONSE ON 11/01/2018*". And given this section on SAS' financial position wasn't filled out in the board report, this suggests to me that SAS didn't provide L&C with this information when requested for it to comment on this.

I can see that a 43-page document called the "*Technical Due Diligence Report*" on the CDC development was prepared for L&C by a RICS surveyor. This was dated 3 March 2019 following a site visit on 25 February 2019 and, amongst other things, this said:

- The golf course had been laid out recently with it anticipated that 10 holes would be completed within the next 10 months. But this would need a significant amount of work and it was assumed there was sufficient funds to do this.

- The old chateau that's meant to be converted into a spa facility is just a shell.

- The pools and tennis court needed a lot of work.

- The main chateau is in a reasonable condition but has a number of maintenance issues.

- The restaurant had lost its Michelin star.

- There was half the amount of staff/builders on site than the surveyor would expect. He couldn't anticipate the CDC development being completed for at least 12-14 months and that's with a full complement of contractors.

- *"Overall the conclusion is that whilst the main 1880s Chateau is in reasonable condition there is still quite an amount of work needed to other parts of the property in order to get it up to a reasonable standard whereupon it would be starting to perform adequately for investors in the project.* [A local person] *said he was sure that the developers had insufficient funds in place to do further works. I am suspicious*

> *that the works being done on site were being done for my benefit, due to the visit having been announced…the representative for the developer on site, was quite evasive when questioned, and referred me back to head office.*
> *…*
> *I expect that the cost of finishing will be considerable probably another 2 - 3 million at least if not more. The old Chateau which is to be converted into a spa will, I expect, cost the best part of 1 million including the swimming pool areas.*
>
> *…I think that it would take 12 to 18 months to finish depending on cash flow. I feel that there is inadequate cash flow as there were few materials on site*."

Having carefully considered all of the information that's been made available to date, I don't think L&C's actions went far enough. As I explain in more detail below, I'm not satisfied that L&C undertook sufficient due diligence on the CDC investment *before* it decided to accept this into its SIPPs. As such, in my view, L&C didn't comply with its regulatory obligations and good practice, and it didn't act fairly and reasonably in its dealings with Mr M, by not undertaking sufficient due diligence on the CDC investment before it accepted her application to invest in this.

Further, based on what it knew or ought to have known had it undertaken sufficient due diligence, I think L&C failed to draw a reasonable conclusion on accepting the CDC investment into its SIPPs.

<u>If L&C had completed sufficient due diligence on the CDC investment, what ought it reasonably to have discovered and concluded?</u>

Importantly, and consistent with its regulatory obligations, I think that when undertaking due diligence into the proposed CDC investment L&C should have had regard to, and given careful consideration to, CDC's marketing material.

I've seen some of CDC's marketing material from the relevant period which, while undated, included prominent statements such as purchasers are offered "*not only 10% guaranteed rentals returns but also 5% cash back paid on your deposit, providing owners with **positive cash-flow** from day one."* (no emphasis added).

It also said, amongst other things, that:

> "*Purchasers at Chateau de la Cazine are offered the **security** of a 10% return which continues for two years post-completion. We will pay you this **guaranteed rental income**…on a quarterly basis….Enjoy the **high yields** of a 10% guaranteed rental return for two years post completion, followed by a 50/50 split thereafter. Based on local comparables these ongoing returns are anticipated to be high*…
> ….
>
> *"We are so confident that Chateau de la Cazine will flourish that, should you be unable to resell for significant profit in the future, we are offering to buy your property back from you after year 3 and before year 10 at the **full purchase price, guaranteed**. This is a solid guarantee which will be written into your contract for complete peace of mind."* (no emphasis added).

And, for some of the properties/suites which only required a deposit, with the remainder payable on completion, it said:

*“We are currently offering the option of guarantee **non-status finance** for your final payment, relieving any concerns that you may have about raising funds upon completion”* (no emphasis added).

I can see that marketing material available online at the end of August 2011, which I think was easily discoverable on B&B’s website just a few months before L&C started accepting introductions from ARLWM for customers to invest in CDC, also set out in a table the rental return per annum. It said this would be 8% at year two and 5% at year nine. For fractional ownership with a purchase price from £31,500 it said the guaranteed rental return would respectively be £2,520 and £1,575 in that case. And, for some of the CDC properties, it said:

“…should you choose to sell your property back to us a few years after completion, we promise to buy it back from you at 180% of the amount that you initially paid for it - no strings attached!”

While the information online offered a table that it said included local village property comparables I think this gave very sparse information, as follows:

Village Properties Comparables

Resort	Bedrooms	Sq m.	Rental Guarantee	Free Use	Golf	Spa	Buy-back	Price
Château de la Cazine	2	120	5% (9yrs) or 8% (2yrs)	4 weeks	Yes	Yes	Yes	£220,000
Domaine de Lavagnac	2	76	7%	4 weeks	Yes	Yes	No	£317,340
Château de Vigiers	2	80	3.5%	None	Yes	Yes	No	£495,000

B&B’s website also said that some properties had already been sold. But I can’t see that L&C asked for information about how many had been sold, at what price compared with the original purchase price and for what rental income these had generated.

In my view, the marketing material does not:

- Contain any type of risk warning.
- Provide sufficient explanation about the local comparables that the anticipated high return was held out as being based on. The basis largely seems to be B&B’s own confidence in its business model and the marketplace.
- Provide any explanation of the guarantees offered. For example, it doesn’t:
    - Explain how SAS was planning on funding the guaranteed 5% cash back/interest on deposits. While I’ve seen evidence that some customers, including Mr M, received this, L&C’s board report shows that not all customers did. And I haven’t seen any evidence which explains how this was actually being funded.
    - Say how SAS was planning to fund the guaranteed 10% rental income for two years post completion, particularly given I can’t see that this was dependent on occupancy – in other literature I’ve instead seen that it was specifically noted as being guaranteed whilst occupancy was building.
    - Give any information on the guaranteed non-status finance, including how this was guaranteed and likely to be funded.
    - Provide any information as to how SAS intended to carry out and fund the buy-back guarantee.
    - Set out management costs once built, and neither does this appear to be set out in the contract other than referring to this as being deducted from rental

income. While I can see that the annual management cost of £180 is set out in the additional documentation provided following the sale, this says that insurance and local annual taxes aren't included seemingly without any information as to how much those are likely to be.

I've seen a CDC investment leaflet that was sent to customers after they'd secured their investment in this. One of the headings '*Important information regarding the guarantees on your investment'* reiterated the guarantees mentioned above in similar terms, with a buyback guarantee at 150% of the purchase price. But it also went on to say under a heading '*How robust is your guarantee?*' that:

> *"**All** the guarantees are written into your contract and are **ultimately underwritten** by* [B&B] *Worldwide (BBW) based in the UK*." (emphasis added).

And that BBW had, for example, "*a very successful track record of over 2,500 completed properties over the last 9 years*.". It also said, amongst other things, that:

> *"The strength of the guarantees lies in the financial strength of the Chateau de la Cazine resort. **Again, for added security, the assets of the Chateau have been ring fenced from any other development within the company and set up under a separate French Company called SAS Halcyon Retreat.***
>
> ***Halcyon Retreat own the Chateau, the outbuildings and over 220 acres of land. It is currently worth €8m to €9m with absolutely zero bank debt.** As the resort continues to develop and the facilities are added, then the valuation of the assets will rise considerably.*
>
> *Given the financial strength of the project and it's* (sic) *protection with the ring fenced company - the project is robust as any investment we've seen.*
>
> *The main Chateau has already been completely transformed and redeveloped. Paying guests are staying there and it's already producing 10% guaranteed returns for the early investors.*
>
> *We have also invested our own personal monies into Chateau de la Cazine."* (no emphasis added).

I can't see that L&C sought to verify this information about the CDC resort, its worth and the returns it was already said to be generating by, for example, requesting evidence to support the above statements or by seeking a valuation of the CDC investment that could be independently verified before accepting it into SIPPs.

L&C seems to have had concerns about all the valuation options put forward in its board report, as set out above. And I think L&C's concerns about the investment would likely have been the same if it had sought valuation information at the outset, given that according to Companies House the fractional ownership companies never had any assets and that L&C has said it couldn't verify if SAS' valuation was independent.

Turning to the guarantees given by SAS – that BBW was said to be underwriting – L&C also said in the board report that customers had failed to receive cashback/interest on their deposits and refunds upon instruction for failure to complete by the given long stop completion dates. So the guarantees set out in the sales agreements weren't being honoured. The information provided also shows that the customers introduced to L&C by ARLWM alone invested under 1.3 million in total in CDC. And that all customers who were introduced to L&C, including by other firms, invested just over £3.3 million in total in CDC. So

SAS and BBW were providing guarantees in respect of a significant amount of business. And it's unclear how it was anticipated that these guarantees could be met. According to Companies House, as of May 2012, BBW – which I understand was a limited company which B&B were directors of – it owed more in total to its creditors and in liabilities than what it was owed by its debtors. And its tangible assets and cash in the bank were also around £150,000.

So, had L&C sought to verify the strength of the guarantees before accepting the CDC investment into its SIPPs, I think it ought to have had cause for concern that there was a risk of customer detriment. And, had L&C carried out some further basic checks into B&B and BBW in light of this then I think it would have found out that B&B had previously been involved in marketing other property developments, such as Bulgarian Dreams. B&B marketed this investment on its website via a company called Overseas Dreams – which I note is a previous name for BBW. Bulgarian Dreams featured on Watchdog in 2009. It ceased trading shortly after and properties that were supposed to have been built seemingly weren't. Prior to this, in July 2006, a large newspaper reported that the investment hadn't lived up to promises made, with some investors saying they'd been given false promises about the rental income that they'd been told was guaranteed. And, in respect of B&B, the article said that:

> "[B&B]*, which has released what it calls a "self-certification, off-plan, true, buy-to-let mortgage in Bulgaria", suggests on its website that borrowing 70% of the purchase price could raise a buyer's profits from 50% to 479%. "This is how property investors make so much money in property deals— they use the bank's money," it explains.*
> …
> *managing director of* [B&B]*, admitted there had been problems with Laguna in Sofia and no longer recommends the firm in the capital. He said, too, that he would look into his website's promotion of mortgages. A warning has since been added: "Rental returns are not guaranteed in Bulgaria or any country and clients should only borrow money that they can afford to pay back via other means if necessary.".*

While B&B was said to have added a risk warning to its marketing literature for the Bulgarian Dreams investments, as I've mentioned above I can't see that it did this when later marketing the CDC investment. And given B&B had recently been involved in marketing another property development investment that had, on the face of it, offered similar rental income guarantees – which had seemingly failed – to the CDC investment, I think this ought to have given L&C further cause for concern in accepting this into SIPPs.

L&C might say that an assessment by it of the information that I've mentioned relating to Bulgarian Dreams would fall outside of the scope of its duty in respect of the CDC investment. But the publications explain that the due diligence necessary may vary depending on the circumstances. The examples given in these aren't exhaustive. And in light of the concerns I think L&C ought to have had, I think it's reasonable to consider that it ought to have taken a closer look to satisfy itself at the outset as to whether or not the CDC investment was secure and that the investment could be valued or realised.

I do think the concerns L&C identified in 2013 and in its 2018 board report, which it asked questions about, was good practice and also later instructing a survey. But I also think that questions like the ones I've mentioned were relevant to establishing an understanding of the nature of the CDC investment and trying to ensure this was genuine at the outset. Such that L&C should also have obtained answers to questions akin to these before it allowed CDC investments to be held in any of its SIPPs.

And I think that's especially true in circumstances like these where I think that L&C should have identified, and before permitting the CDC investments to be held in its SIPPs, that there

was a significant risk that potential investors were being misled by CDC's marketing material.

To be clear, if parties involved in the CDC investment were unwilling or unable to fully answer L&C's questions and to provide information sought then I think, consistent with its regulatory obligations and good practice L&C should simply have concluded it wouldn't permit the CDC investment to be held within its SIPPs.

SAS and B&B presented the investment as one that would provide high returns underwritten by guarantees and which offered a strong prospect of a capital return – despite the fact that there was no real likelihood of investor protection associated with the investment.

I haven't seen anything to suggest SAS had a proven track record for investors, so L&C couldn't be certain that the CDC investment operated as claimed. L&C should also have been very concerned about the guarantees offered by it, given it seems this was a new business with no track record (and which was promoted by and the guarantees underwritten by a business with a questionable one).

I think, in light of this, L&C should have been concerned that consumers may have been misled or didn't properly understand the investment they intended to make. Consumers could easily have been given the impression, from the marketing material, that they were assured of high returns with little or no risk and would easily be able to sell their investment at or after particular milestones. Such an impression was clearly misleading as, for the reasons given above, this depended on the liquidity of SAS and BBW.

From the evidence I've seen I think the information being published about the CDC investment before Mr M's L&C monies were invested with it, including marketing material available online, gave rise to a significant risk that potential investors were being misled. And I think that L&C ought to have identified this *before* permitting the CDC investment into its SIPPs. This is a clear point of concern, which I think L&C ought reasonably to have identified before it accepted Mr M's application to invest in CDC.

In my opinion, the issues I've identified above should have, when considered objectively, put L&C on notice that there was a significant risk of consumer detriment. And, without more evidence to ensure the investment was an appropriate one to permit within its SIPPs, I'm satisfied that L&C shouldn't have accepted the CDC investment.

CDC investment summary

In my opinion it's fair and reasonable to say that L&C ought to have concluded there was an obvious risk of consumer detriment here. All in all, I am satisfied that L&C ought to have had significant concerns about the CDC investment from the beginning. And I think such concerns ought to have been a red flag for L&C when it was considering whether to accept this investment into its SIPPs. Such concerns emphasise the importance of sufficient due diligence being undertaken before investments are accepted and before SIPP investors monies are invested.

Had L&C done what it should have, and drawn reasonable conclusions from what it knew or ought to have known, I think that it ought to have concluded there was a significant risk of consumer detriment if it accepted the CDC investment into its SIPPs and that this wasn't acceptable for its SIPPs.

As such, and based on the available evidence, I don't think L&C undertook appropriate steps or drew reasonable conclusions from the information that I'm satisfied would have been available to it, had it undertaken adequate due diligence into the CDC investment before it

accepted this into its SIPPs. I don't think L&C met its regulatory obligations and, in accepting Mr M's application to invest in CDC, it allowed his funds to be put at significant risk.

To be clear, I'm not saying L&C should necessarily have identified *all* the issues set out or to have foreseen those which later came to light with the CDC investment. I'm only saying that, based on the information available to L&C at the relevant time, it should have drawn a similar overall conclusion – that there was a significant risk that potential investors were being misled. I'm satisfied, on a fair and reasonable basis, that a significant risk of consumer detriment ought to have been apparent from the information available to L&C at the time. And I do think that appropriate checks would have revealed issues which were, in and of themselves, sufficient basis for L&C to have declined to accept the CDC investment in its SIPPs before Mr M invested in it. And it's the failure of L&C's due diligence that's resulted in Mr M being treated unfairly and unreasonably.

There's a difference between accepting or rejecting a particular investment for a SIPP and advising on its suitability for the individual investor. I accept that L&C wasn't expected to, nor was it able to, give advice to Mr M on the suitability of the SIPP and/or the CDC investment for him personally. To be clear, I'm not making a finding that L&C should have assessed the suitability of the CDC investments for Mr M. I accept L&C had no obligation to give him advice, or to otherwise ensure the suitability of an investment for him.

And I'm also not saying that L&C shouldn't have allowed the CDC investment into its SIPPs because it was high risk. My finding isn't that L&C should have concluded that Mr M wasn't a candidate for high-risk investments or that an investment in CDC was unsuitable for Mr M. Instead, it's my fair and reasonable decision that there were things L&C knew or ought to have known about the CDC investment and how this was being marketed, which ought to have led L&C to conclude it wouldn't be consistent with its regulatory obligations or good practice to allow this investment into its SIPPs. And that L&C failed to act with due skill, organise and control its affairs responsibly, or treat Mr M fairly by accepting the CDC investment into his SIPP.

I think the fair and reasonable conclusion based on the evidence available is that L&C shouldn't have accepted Mr M's application to invest in CDC. I think it ought to have concluded that it would not be consistent with its obligations to do so. To my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant time, and allowed Mr M to be put at significant risk of detriment as a result.

Acting fairly and reasonably to investors (including Mr M), L&C should have concluded that it wouldn't permit the CDC investment to be held in its SIPPs at all. And I'm satisfied that it's likely Mr M's pension monies were only switched to L&C to effect the CDC investment. So, I think it's more likely than not that if L&C hadn't permitted the CDC investments to be held in its SIPPs at all that Mr M's pension monies wouldn't have been switched to L&C. Further, that Mr M wouldn't then have suffered the losses he has as a result of doing so.

While I've concluded both that L&C shouldn't have accepted Mr M's business from ARLWM and also that it shouldn't have accepted his application to invest in CDC, had I only reached the conclusions I've set out above on one of those aspects and not also gone on to reach findings on the other aspect for completeness, I'd still consider it fair and reasonable in all the circumstances to uphold this complaint. That's because L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr M fairly by accepting his business from ARLWM. And because, separately, L&C also didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr M fairly, by accepting the CDC investments into his SIPP. And to my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant times, and allowed Mr M to be put at significant risk of detriment as a result.

I've taken into account that in L&C's response on another due diligence complaint against it with our Service, L&C referenced a previous complaint that we didn't uphold which it said also involved ARLWM and the CDC investment. I think it's important to clarify though that I'm considering the individual circumstances of Mr M's complaint. There are notable differences between this and the previous complaint L&C has referenced. And the complaint wasn't referred for an Ombudsman's decision on the matter.

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

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

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

The indemnity

L&C knew Mr M had signed forms intended to acknowledge, amongst other things, his awareness of some of the risks involved with investing and to indemnify L&C against losses that arose from acting on his instructions. And, in my opinion, having Mr M sign declarations and relying on the contents of such forms when L&C knew, or ought to have known, that both the type of business it was receiving from ARLWM and allowing the CDC investment to be held within its SIPP would put investors 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 for L&C to do would have been to decline to accept Mr M's business.

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

So, I'm satisfied that Mr M's L&C SIPP shouldn't have been established and/or his L&C monies shouldn't have been invested in the CDC investment. And that the opportunity for L&C to execute investment instructions to invest Mr M's monies in CDC or proceed in reliance on an indemnity and/or risk disclaimers shouldn't have arisen at all. I firmly think that it wasn't fair and reasonable in all the circumstances for L&C to accept Mr M's business from ARLWM or for it to accept his application to invest in CDC in that case.

COBS 11.2.19R

L&C might say that COBS 11.2.19R obliged it to execute investment instructions. And that once the SIPP has been established, it is required to execute the specific instructions of its client.

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

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

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

So I don’t think that L&C’s argument on this point is relevant to its obligations under the Principles to decide whether to accept Mr M’s application to open a SIPP in the first place. I remain satisfied that Mr M’s SIPP shouldn’t have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity shouldn’t have arisen at all. And I’m firmly of the view that it wasn’t fair and reasonable in all the circumstances for L&C to proceed with Mr M’s application.

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

The involvement of other parties

In this decision I’m considering Mr M’s complaint about L&C. However, I accept that other parties were involved in the transactions complained about, including ARLWM. And that the FSCS calculated Mr M’s losses to be in excess of £85,000 and paid him £85,000 compensation in respect of a claim about ARLWM. Following this the FSCS provided Mr M with a reassignment of rights.

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

In my opinion it’s fair and reasonable in the circumstances of this case to hold L&C accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mr M fairly. The starting point therefore, is that it would be fair to require L&C to pay Mr M compensation for the loss he’s suffered as a result of its failings. And, having carefully considered if there’s any reason why it wouldn’t be fair to ask L&C to compensate Mr M for his loss, I don’t think there is. In the circumstances, I consider it appropriate and fair for L&C to compensate Mr M to the full extent of the financial losses he’s suffered due to L&C’s failings.

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

Having taken everything L&C has said into consideration, I think that it’s appropriate and fair in the circumstances for L&C to compensate Mr M to the full extent of the financial losses

he's suffered due to L&C's failings. And, having carefully considered everything, I don't think that it would be appropriate or fair in the circumstances to reduce the compensation amount that L&C is liable to pay to Mr M.

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

Mr M taking responsibility for his own investment decisions

In reaching my conclusions I've thought about section 5(2)(d) of the FSMA (now section 1C). This section requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions.

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

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

ARLWM was a regulated firm seemingly with the necessary permissions to advise on the transactions this complaint concerns. I'm satisfied that in Mr M's dealings with it, he trusted ARLWM to act in his best interests. Mr M also then used the services of a regulated personal pension provider in L&C. And, as mentioned, if L&C had acted in accordance with its regulatory obligations and good industry practice I'm satisfied the arrangement for Mr M wouldn't have come about in the first place.

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

Would Mr M's application have gone ahead elsewhere if L&C had declined it?

I'm not persuaded that Mr M's application to invest in CDC via ARLWM would have gone ahead elsewhere with another SIPP provider if L&C had declined it. And, in any case, I don't think it's fair and reasonable to say that L&C shouldn't compensate Mr M for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found L&C did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr M's business from ARLWM.

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had

refused to accept Mr M's SIPP and CDC application from ARLWM, the transactions wouldn't still have gone ahead and Mr M would have retained his monies in his existing pension scheme.

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

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

I recognise Mr M signed a declaration confirming he understood the investment may be high risk. But Mr M was a retail customer and this was a significant amount of Mr M's overall pension provision and pension monies with the SIPP. And, in any case, I've not seen any evidence to show Mr M was paid a cash incentive – Mr M has told us that he didn't receive a payment. It therefore cannot be said he was "*incentivised*" to enter into the transaction. And, on balance, I remain satisfied that Mr M, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself.

So, in my opinion, this case is very different from that of Mr Adams. And I'm not satisfied that Mr M proceeded knowing that the investments he was making were high risk and speculative and that he was determined to move forward with the transactions in order to take advantage of a cash incentive.

Overall, I do think it's fair and reasonable to direct L&C to pay Mr M compensation in the circumstances. While other parties might have some responsibility for initiating the course of action that's led to Mr M's loss, I consider that L&C failed to comply with its own obligations and didn't put a stop to the transactions proceeding by declining to accept Mr M's applications when it had the opportunity to do so. And I'm satisfied that Mr M wouldn't have established the L&C SIPP, switched monies in from existing pension scheme or, ultimately, invested in CDC if it hadn't been for L&C's failings.

Having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mr M's SIPP and CDC investment application from ARLWM, the transactions this complaint concerns wouldn't still have gone ahead.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr M. But, as mentioned above, in considering what fair compensation looks like in this case, I think it's reasonable to make an award against L&C that requires it to compensate Mr M for the full measure of his loss. L&C accepted Mr M's business from ARLWM. And, but for L&C's failings, I'm satisfied that Mr M's pension monies wouldn't have been transferred to L&C and later invested in CDC.

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

What would have happened if Mr M's pension monies hadn't been transferred to L&C so as to effect the CDC investment?

As I've mentioned above, I'm satisfied that Mr M's existing pension monies were only switched to L&C so as to effect the CDC investment. And I'm also satisfied that L&C should have decided not to accept business from ARLWM to invest in CDC. Further, that I think it's fair to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr M's business from ARLWM or permitted the CDC investment into its SIPPs.

If Mr M's pension monies hadn't been switched to L&C to effect the CDC investment then he might have decided to leave these where they were or, alternatively, sought to switch to take TFC and pension income periodically thereafter as and when he wanted to. Mr M was 58 years old when he switched to L&C in 2012, he took TFC a few years later in mid-2014 and then he started to take pension income payments in 2016. So I think there's a possibility Mr M might still have decided to switch to a SIPP to take TFC and then income payments thereafter as and when he wanted and/or needed to.

Overall, I think Mr M might well still have decided to switch his pension plans to do so. I can't state definitively though which provider would have been used, or into what holdings, and in what proportions, the monies not taken as tax-free cash/pension income would have been invested. Or the regularity with which Mr M might have taken any income payments in that case (by which I mean payments above and beyond those he actually received from his L&C SIPP).

Having carefully considered this issue, and given the lack of certainty on this (including about the specific provider, holdings, and the specific proportions, monies would have been invested in post-switch had switches elsewhere still been effected), for the purposes of quantifying redress in this case I think the fair and reasonable approach is to assume that the monies in question would have achieved a return equivalent to the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return index). I'm satisfied that's a fair and reasonable proxy for the type of return that could have been achieved over the period in question. And to assume that Mr M would have taken the same level of benefits as those he actually received and on the same dates.

Conclusion

Taking all of the above into consideration, I think that in the circumstances of this case it's fair and reasonable for me to conclude that L&C should have decided not to accept business from ARLWM and not to permit its SIPP members to invest in CDC *before* it received Mr M's business. And I also think it's fair and reasonable for me to conclude that if L&C hadn't accepted Mr M's introduction from ARLWM and/or hadn't permitted its SIPP members to invest in CDC in its SIPPs that he wouldn't have established and switched monies into an L&C SIPP, or invested in CDC.

So, for the reasons I've set out, I think it's fair and reasonable to direct L&C to compensate Mr M for the loss he's suffered as a result of L&C accepting his business from ARLWM and permitting him to invest his L&C SIPP monies in CDC.

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

Putting things right

My aim is to return Mr M to the position he'd now be in but for what I consider to be L&C's failure to carry out adequate initial and ongoing due diligence checks before accepting Mr M's applications.

As I've explained above, but for L&C's failings, I think it's fair and reasonable to conclude that Mr M's monies wouldn't have been switched to L&C and invested in CDC. But I accept Mr M might still have decided to switch away from his existing plans and to take tax-free cash and then income payments periodically thereafter. As such, for the purposes of quantifying redress in this case, I think the fair and reasonable approach is to assume that the monies in question would have achieved a return equivalent to the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return index). I'm satisfied that's a fair and reasonable proxy for the type of return that could have been achieved over the period in question. And to assume that Mr M would have taken the same level of benefits as those he actually received and on the same dates.

What must L&C do

In light of the above, L&C must calculate fair compensation by comparing Mr M's current position to the position I think Mr M would otherwise have likely been in. In summary, L&C must:

1) Calculate a current notional value, as at the date of my final decision, of the monies that were switched into the L&C SIPP if they hadn't been switched into the L&C SIPP.

2) Obtain the actual current value of the monies that were switched into Mr M's L&C SIPP, as at the date of my final decision, less any outstanding charges.

3) Deduct the sum arrived at in step 2) from the sum arrived at in step 1).

4) Pay a commercial value to buy any illiquid investments in the SIPP that cannot currently be redeemed (or treat them as having a zero value).

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

6) Pay Mr M £750 for the distress and inconvenience the problems with his pension have caused him.

I've explained how L&C should carry out the calculation, set out in steps 1 - 6 above, in further detail below:

1) Calculate a current notional value, as at the date of my final decision, of the monies that were switched into the L&C SIPP if they hadn't been switched into the L&C SIPP.

L&C should calculate what the monies transferred into the L&C SIPP would now be worth had they instead achieved a return equivalent to the FTSE UK Private Investors Income Total Return Index from the date they were first transferred into the L&C SIPP through until the date of my final decision.

I'm satisfied that's a reasonable proxy for the type of return that could have been achieved over the period in question.

L&C must also make a notional allowance in this calculation for any additional sums Mr M has contributed to, or withdrawn from, his L&C SIPP since outset. To be clear this doesn't include SIPP charges or fees paid to third parties like an adviser. But it does include any pension commencement lump sums or pension income Mr M actually took after his pension monies were transferred to L&C.

Any notional contributions or notional withdrawals to be allowed for in the calculation should be deemed to have occurred on the date on which monies were actually credited to, or withdrawn from, the L&C SIPP by Mr M.

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

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

2) *Obtain the actual current value of the monies that were switched into Mr M's L&C SIPP, as at the date of my final decision, less any outstanding charges.*

   This should be the current value of these monies as at the date of this decision.

3) *Deduct the sum arrived at in step 2) from the sum arrived at in step 1).*

   The total sum calculated in step 1) minus the sum arrived at in step 2), is the loss to Mr M's pension.

4) *Pay a commercial value to buy any illiquid investments in the SIPP that cannot currently be redeemed (or treat them as having a zero value).*

   But for any illiquid CDC holdings that remain within Mr M's L&C SIPP, Mr M's monies could be switched away from L&C. In order to ensure the SIPP could be closed and further L&C SIPP fees could be prevented, any remaining illiquid holdings need to be removed from the SIPP.

   To do this L&C should reach an amount it's willing to accept as a commercial value for any illiquid CDC holdings that remain within Mr M's L&C SIPP, and pay this sum into the SIPP and take ownership of the relevant investments.

If L&C is unwilling or unable to purchase any illiquid CDC holdings that remain within Mr M's L&C SIPP, then the actual value of any such investments it doesn't purchase should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include their being given a nil value for the purposes of ascertaining the current value of such investments in step 2).

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 M 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 M may receive from the investments after the date of my decision, and any eventual sums he would be able to access from the SIPP in respect of the investments. 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 M 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 M 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 M may receive from the investments from that point, and any eventual sums he would be able to access from the SIPP in respect of the investments. L&C will need to meet any costs in drawing up the undertaking.

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

The amount paid should allow for the effect of charges and any available tax relief. Compensation shouldn't be paid into a pension plan if it would conflict with any existing protections or allowances.

If L&C is unable to pay the compensation into a pension arrangement for Mr M, or if doing so would give rise to protection or allowance issues, it should instead pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The notional allowance should be calculated using Mr M's expected marginal rate of tax in retirement at his selected retirement age.

It's reasonable to assume that Mr M is likely to be a basic rate taxpayer at his selected retirement age, so the reduction on the compensation would equal 20%. However, this reduction shouldn't be assumed to apply to the whole compensation amount just because Mr M received a previous tax free lump sum payment. If less than 25% of the fund value was liquid at the date Mr M took the tax free lump sum for example, then Mr M might have otherwise been able to take a further tax free payment. L&C should take this into account when calculating the amount of the compensation which needs to be reduced by 20%.

Neither L&C nor Mr M have disputed that the above is a reasonable assumption. That's despite me giving them the opportunity to do so in response to my provisional decision and letting them know that it won't be possible for us to amend this assumption once any final decision has been issued on the complaint.

6) Pay Mr M £750 for the distress and inconvenience the problems with his pension have caused him.

   In addition to the financial loss that Mr M has suffered as a result of the problems with his pension, I think that the loss suffered to Mr M's pension provision has caused him distress and during a difficult time when he was unwell. And I think that it's fair for L&C to compensate him for this as well.

SIPP fees

If the investment/s can't be removed from the SIPP, and because of this it can't be closed once compensation has been paid, then it wouldn't be fair for Mr M to have 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.

My final decision

For the reasons given, I uphold Mr M's complaint and London & Colonial Services Limited must pay fair redress as set out above.

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

determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that London & Colonial Services Limited should pay the amount produced by that calculation up to the maximum of £160,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

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

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 13 August 2024.

Holly Jackson
Ombudsman