DRN-3875522

The complaint

Mr S complains that London & Colonial Services Limited ('L&C') didn't undertake sufficient due diligence on White Sands investments he made through his L&C Self-Invested Personal Pension ('SIPP') and that, as a result of this, he's suffered significant losses.

What happened

I've outlined the key parties involved in Mr 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.

Talk Financial Solutions Limited ('TFSL')

At the time of the events in this complaint, TFSL was an independent financial adviser ('IFA') authorised by the then regulator – the Financial Services Authority ('FSA'), which later became the Financial Conduct Authority ('FCA'). TFSL was authorised from 13 April 2011 to 8 June 2016. TFSL was dissolved in October 2019.

Green Planet Investment Limited ('GPIL')

GPIL was incorporated in Gibraltar. GPIL marketed a property investment scheme in Brazil to investors. GPIL wasn't regulated by the financial services regulator. This case involves investments in GPIL's White Sands Country Club ('White Sands').

As I understand it, GPIL granted a mandate to Capital Alternatives Sales And Marketing Limited to sell, on GPIL's behalf, land owned by GPIL's Brazilian subsidiary.

Capital Alternatives Sales And Marketing Limited ('CASML')

CASML was incorporated in April 2009 in the name Brett UK Limited by a Mr Brett Jolly. In January 2010 the company changed its name to GPIL as well, then in April 2012 it changed its name to CASML.

By September 2012 (when L&C received Mr S' application to invest in White Sands), Mr Jolly had been appointed director of over 70 companies named "*White Sands Country Club* [a number] *Limited*". This included being director of three companies "*White Sands Country Club* [WS1909,1910 and 1911] *Limited*" (all incorporated in August 2012) that Mr S' pension monies would be invested in.

Both GPIL and CASML were ordered into liquidation on grounds of public interest on 20 November 2013, this followed an investigation by the Insolvency Service.

What happened?

I've briefly summarised what's happened below.

Mr S has said to us that:

- He was advised by a Mr B to move to L&C to invest in products that included the White Sands investment.
- He'd understood Mr B to be an employee or director of TFSL.
- Mr B had explained the White Sands proposal to him and he was guided by Mr B.
- He was following Mr B's advice on the GPIL investment. He was told that the investment would be secure and that it would offer a preferential return to the other investments on offer.

L&C received a completed application form for Mr S to open a new SIPP. The IFA details section of the application form records the introducing adviser's name (Mr G) and the firm he's acting for (Talk Financial Solutions), along with TFSL's FSA authorisation number. A box is ticked to confirm that Mr S was advised at the point of sale and it's recorded that initial remuneration of £1,995 would be paid to the IFA. It's also stated in the form that around £215,000 would be transferred in from Zurich but no initial post-transfer investments are recorded. Mr S signed the form on 1 June 2012.

L&C provided a copy of the suitability report that TFSL sent to Mr S on 1 June 2012. Amongst other things, this says that:

- Mr S' pension portfolio hadn't done much for the previous 6/7 years and he wanted to take a more aggressive stance with a portion of his portfolio.
- Mr S would like a portion of his pension portfolio to be invested in overseas property and carbon credits holdings. He'd read through brochures/marketing material and visited the offices of Green Planet.
- Mr S had confirmed his understanding and acceptance of the risks associated with investing in unregulated collective investment schemes ('UCIS'). Mr S was aware that such investments weren't covered by the FSA or the Financial Services Compensation Scheme ('FSCS').
- Investment specific risks had been discussed with Mr S.
- Mr S had around £215,000 in his Zurich pension plan. He'd asked Zurich if he could access the intended investments through Zurich's SIPP and been told he couldn't.
- With a high risk investor, like Mr S, TFSL would normally recommend a spread of investments and with some low/medium risk investments included. But Mr S didn't want to do this as it might dilute the potential returns.
- It recommended that Mr S transfer his monies to L&C. L&C was the only SIPP provider facilitating both Green Planet Property and Carbon Credits investments.
- 20% of the transferred monies would be invested into the Green Planet Overseas Property Fund, 20% would be invested into the Green Planet Carbon Credit Fund and the residual 60% would be invested with a discretionary fund manager ('DFM').

Mr S signed a form attached to the suitability report on 1 June 2012, this typed form said that:

> *"I can confirm that I have disclosed all relevant information to enable you to assess my suitability for investing in Unregulated Collective Investments. I have not sought your advice on the specific Unregulated Investment as I already knew the product I wanted to invest in. I fully understood the risks associated with Unregulated*

Investments and I also fully understand the Green Planet product into which I am choosing to invest.

I appreciate the time you have taken talking about risk and I acknowledge your recommendation to split my investments. I am going to split my investment but I intend to have 40% in unregulated Alternative Investments and 60% in regulated collectives via a Discretionary Manager. You recommended a slightly lower percentage into Unregulated investments, however, I do not want to dilute my potential investment returns and to that end I will ignore your advice and make an investment of 40% into Green Planet.

I take full responsibility for the investment funds I choose to Self Invest into."

White Sands SIPP instruction forms were later sent to L&C, these were signed by Mr S on 24 September 2012. It was noted that £27,500 was to be invested in plot WS19-09 and a further £1,206 was payable in legal and administrative costs bringing the total to £28,706. And identical sums were to be paid for investments in plot WS19-10 and WS19-11. There were three options available to the SIPP holder *"36 month capped"*, *"60 month capped"* or *"uncapped, 100% of capital growth"*. Mr S selected the last of these in the forms.

A White Sands Country Club Green Planet disclaimer was also signed for the investments by Mr S on 24 September 2012, it's noted amongst other things in the disclaimer that:

- The Zoning/Planning certificate supplied was genuine, up to date and legally valid for the development purchased.
- The property was legally and financially unencumbered.
- Green Planet were the vendors of the property and no financial advice had been provided by Green Planet.
- If required, the investor had obtained all and any financial services advice from their own IFA.
- The investor's relationship with Green Planet was just that they'd purchased a property from it after receiving financial advice from a third party to do so.
- The investor hadn't been coerced or bribed into entering into the agreement.

Mr S also completed L&C Investment Request forms on 24 September 2012, this was to acquire 100% of the issued share Capital in *"White Sands Country Club WS1909"* and also in *"White Sands Country Club WS1910"* and *"White Sands Country Club WS1911"*. It was explained in the forms that:

- L&C wasn't authorised to, and hadn't given investment advice.
- L&C had obtained legal advice in its capacity as trustee, so as to assess the risks of ownership of the company, and its title to the underlying plots and so as to ensure the acquisition of the appropriate title.
- The advice L&C had obtained didn't cover the investment merits, marketability, or value of the plot(s).
- *"The Company"* – which in Mr S' case was the companies White Sands Country Club (WS1909 - WS1911) Limited – would hold the plot(s) identified in the corresponding White Sands SIPP instruction forms Mr S had signed and the Trustee, here L&C, would acquire 100% of the shares in the Company, subject to the Share Purchase Agreement.
- The plot(s) would not be held directly by L&C but would be held indirectly via *"the Company"*.
- The investor had reviewed information supplied by Green Planet, the Share Purchase Agreement and the Management Agreement.

- The investor understood the speculative nature of the investment and had obtained any advice they required.
- Investing in unquoted shares is high risk and there's no established market for selling unquoted shares. Unquoted shares are unregulated investments and the protection of the FSCS wouldn't apply.
- The investor would indemnify L&C in respect of liabilities that arose in relation to the investment.

A L&C form that Mr S also completed on 24 September 2012 detailed White Sands as the investment, confirmed the name and details for his contact at Green Planet Investment and recorded an investment amount of £27,500. There was a declaration at the end of the form, amongst other things, this included a description of some generic risks and an indemnity for L&C against any liabilities arising from the investments. The form also recorded that Mr S wasn't a certified or self-certified sophisticated investor and that he'd received no advice on the merits of the proposed investment and the investment decision was solely his responsibility.

We've not been provided with a copy of the sale and purchase share agreement in this case by Mr S or L&C. However, L&C has provided us with a sale and purchase share agreement on a different case in which a SIPP investor also invested in White Sands. I'm satisfied it's more likely than not that, subject to a few exceptions such as reference to the individual SIPP member and the specific White Sands company/plot number, the agreement in that other case would have been largely identical to the agreements in Mr S' case.

It was noted, amongst other things, in the sale and purchase share agreement on the other case that the agreement was between GPIL (the 'Seller'), Green Planet Investimentos Imobiliarios Ltda (the 'Guarantor') and L&C ('the 'Buyer').

Clause 4 of the agreement reads as follows:

> *"4. **Completion***
>
> *4.1 Completion shall take place at the offices of the Buyer's Solicitors…or at such other place as the parties may agree immediately after the signing and exchange of this Agreement when all (but not part only unless the Buyer shall so agree) of the business referred to in Schedule 3 shall be transacted."*

Schedule 3 of the agreement is titled ***"Completion arrangements"*** and it says:

> "*On Completion* ("Completion" is defined in the document as completion of the sale and purchase of the Sale Share by the performance by the parties of their respective obligations under clause 4 and Schedule 3):
>
> *1. The Seller shall deliver to the Buyer:*
>
> *1.1 executed transfer in respect of the Sale Share in favour of the Buyer, together with the share certificate for the Sale Share;*
>
> *1.2 certified copies of the minutes recording the resolution of the board of directors of the Seller authorising the sale of the Sale Share and the execution of the transfers in respect of them;*
>
> *1.3 such other documents as may be required to give a good title to the Sale Share and to enable the Buyer to become the registered holders of it;*

1.4 (as agents for the Company all its statutory and minute books and registers (written up to the business day immediately preceding the date of this Agreement), its common seal (if any), certificate of incorporation, any certificate or certificates of incorporation on change of name, details of all user names, passwords and codes used by the Company ("Company" is defined in the document as White Sands Country Club WS (a number) Limited (details of which are set out in Schedule 1)) *for online filing of corporate documents, all books of account and other documents and records including copies of its memorandum and articles of association of the Company;*

1.5 ***the deeds and documents of title to the Property*** **(**Property is defined in the document as Plot WS (a number) White Sands Country Club, Murive, Natal, Rio Grande do Norte, Brazil, details of which are set out in Schedule 2) and all ancillary documents) (bold my emphasis).

2. When the Sellers have complied with the provisions of paragraph 1, the Buyer shall pay the Purchase Price by electronic funds transfer to the Nominated Account and payment of the Purchase Price into such account shall constitute a good discharge to the Buyer in respect of it."

Schedule 4 of the agreement is titled ***"****General Warranties"*. And, amongst other things, it's explained that:

"

7. Title

7.1 The Company, is solely legally and beneficially entitled, and has a good and marketable title, to the Property.

8. Encumbrances

8.1 The Property (and the proceeds of sale from it) are free from:

8.1.1 any mortgage, debenture, charge (whether legal or equitable and whether fixed or floating), rent charge, lien or other right in the nature of security; and

8.1.2 any agreement for sale, estate contract, option, right of pre-emption or right of first refusal,

and there is no agreement or commitment to give or create any of them.

9. Condition

9.1 The Property is in a good condition free from any contamination or pollution.

9.2 There are no development works, remediation works or fitting-out works outstanding in respect of the Property.

9.3 The Company has not received any adverse report from any engineer, surveyor or other professional relating to the Property and it is not aware of any predecessor in title having done so.

10. Ownership of assets

10.1 Apart from the Property, the Company has no, and has never had, any other asset of whatever nature."

The agreement then has a section to be signed and dated by all of L&C, GPIL and Green Planet Investimentos Imobiliarios Ltda (Mr Jolly signed for both Green Planet firms in the agreement we've seen on the other case).

L&C wrote to Mr S in January 2014. It provided him with an update on GPIL, highlighting it had recently been placed into liquidation. L&C said that the investment Mr S had made in White Sands was to purchase 100% of the shares in a special purpose vehicle ('SPV') company. And that the SPV was formed for the sole purpose of holding title to the plot of land specified in the application form. L&C said it understands that the purpose of the investment was to acquire a plot of land on White Sands Country Club development. And that the plots would be held for 3 years, 5 years or an unspecified period before then being sold back to GPIL, or to a third party.

The liquidator for GPIL wrote to L&C about the White Sands investment in October 2015. Amongst other things, it said that:

- It's also the liquidator of CASML, which was the sole selling agent for the plots in the UK.
- GPIL was incorporated in Gibraltar and operated as part of a wider group of companies which were involved in the sale of plots of land in Brazil to investors. The current and sole director of the company is Michelle Jolly (the wife of the former managing director Brett Jolly).
- The land is owned by a Brazilian company (Terras de Extremoz Investimentos Imobiliarios Ltds (Brazil) – ('Terras Brazil')), that holds 99% of the shares in Brazil. The Company granted CASML the right to be the sole selling agent of the land in Brazil.
- The liquidator visited Brazil in February 2015 to conduct further investigations into the land.
- The land is over 10km from the beach and there's no sign of any infrastructure having been put in place.
- Following enquiries with the local land registry and agents in the area, the liquidator understands that the planning permission obtained wasn't appropriate for the proposed development and has since lapsed.
- Title to all of the individual plots of land is still held in the name of Terras Brazil and a number of local creditors had taken, or were taking, steps to register their liabilities against the land.
- The liquidator had met with various local and international agents when visiting the land, none of the agents had been willing to provide a formal valuation of the land. However, they'd advised that the land was in an undesirable location and that it's probably worth no more than approximately £200,000. This is far less than both the price paid for the land and also the cumulative amount the investors paid for their plots of land.
- Investors paid funds to GPIL and to CASML in exchange for plots at the White Sands Country Club. These funds were subsequently transferred to Mr Jolly before being paid to Terras Brazil in order to finance the purchase of the land.
- As the land was purchased by Terras Brazil the proceeds of any sale would be payable to that company. And the funds paid to Terras Brazil for the purchase of the land are recorded in the books of Terras Brazil as a director's loan due to Mr Jolly.
- It had been in contact with L&C to obtain information about investments that had been made through SIPPs, which it had been told L&C facilitated.

Details of monies invested in the SIPP and monies paid to Mr S

We've been provided with a transaction history for Mr S' SIPP. This records that a little under £217,000 was transferred in from Zurich towards the start of September 2012. There was then a further transfer in of about £75 from Zurich in December 2012. A transfer in of a little under £3,900 was effected from Transact in September 2013 and Transact transferred another £120 in April 2015.

TFSL was paid an IFA fee of a little under £2,000 in September 2012.

A total of £126,000, split equally been two different discretionary fund managers, was invested in September 2012. And, as I understand it, three investments of £28,706 were made in White Sands investments. With the first two of these being effected in November 2012 and the final investment occurring in December 2012.

Mr S took a tax-free cash sum of a little under £60,000 from his SIPP in June 2015. And Mr S has taken income from his pension fund on a number of occasions from October 2015 onwards.

Mr S has provided us with a bank statement showing payments he received after he'd made the White Sands investments. There's a transfer in of £10,475 on 29 November 2012 and a further £5,470 on 18 December 2012. We've seen evidence that £5,640 of these monies were transferred into an ISA on 27 December 2012.

Mr S has explained that £10,000 was then transferred out of his bank account to fund an investment with St James's Place. We've seen a statement showing the £10,000 leaving the account on 26 July 2013. And we've also seen St James's Place correspondence in which St James's Place is recommending Mr S use the £10,000 held on deposit to fund investments in a St James's Place ISA (£5,760) and a St James's Place Unit Trust feeder account (£4,240).

What's happened with this complaint so far?

In response to Mr S' complaint L&C said, amongst other things, that:

- TFSL was Mr S' regulated financial adviser when he applied for the L&C SIPP. TFSL was regulated and authorised by the FCA to provide pension transfer and investment advice.
- L&C's the sole trustee and administrator of Mr S' SIPP.
- Under the rules of the trust, it's the member who has the power to choose investments, following investment advice from their financial adviser. L&C has only limited powers of veto of any investment.
- L&C doesn't provide investment advice and doesn't comment on the merits of any investment. It's not responsible for investigating the financial standing, integrity or expertise of parties running the investments.
- The suitability of the investment is the responsibility of the financial adviser.
- L&C's role is to satisfy itself that the investment is allowed within the trust rules and that it doesn't breach HM Revenue & Customs ('HMRC') regulations. It also establishes the liabilities and responsibilities it would have to take on as the owner of the asset.
- The acquisition of the White Sands investment was by way of the formation of a company in the UK with the sole purpose of holding the relevant plot of land. The asset of the SIPP was therefore the purchase of 100% shares in the company. L&C's

solicitors monitored the formation of the company and checked that the title to the plots could be acquired by the company.
- It didn't provide, and it's not responsible for, the pension advice Mr S received.
- It didn't have any agreements in place with the Green Planet Group.
- It doesn't know whether the White Sands application form was sent directly by Mr S or via a third party but it does have a copy of the suitability report from the adviser recommending that Mr S invest in White Sands.
- Mr S signed a typed disclaimer on 1 June 2012 in the TFSL suitability report.

Mr S has said to us that:

- He was told this was a secure, good investment, with a return that was better than other investments on offer and which was in line with his risk profile – but this has proven not to be the case.
- The recommended White Sands investment was too risky for him, wasn't liquid and had poor corporate governance.
- The only previous investments he'd made outside of his pension were in TESSAs and a cash ISA.
- The White Sands presentation was face to face with hand drawn sketches including several references to *"green products".* Before signing he queried some of the forms with Mr B as he was unsure of their meaning and implication. And was told that it was just a necessary step to process the investment.
- Mr B's previous advice had been beneficial and he'd asked Mr B about the 1 June 2012 disclaimer form. Mr B had assured him it was ok to sign, so Mr S had signed the form.
- He'd not been offered any payment until after he'd signed all the paperwork. He was then told that there would be a cashback payment made to him as well. He received £15,000 in total split over two payments.

Mr S also raised a complaint against TFSL with us. TFSL later ceased to be a going concern and Mr S pursued a complaint against TFSL with the FSCS. The FSCS upheld Mr S' complaint, it calculated Mr S' losses to be in excess of £200,000 and it paid him £50,000 compensation. Following this the FSCS provided Mr S with a reassignment of rights.

One of our investigators reviewed Mr S' complaint and concluded it should be upheld. The investigator highlighted that he'd asked L&C to provide evidence of the due diligence it had undertaken into the White Sands investment and that L&C had been unable to provide us with any information in response to this request. The investigator explained that, because of this, he was going to assess the complaint based on the information we had on file. Further that, based on the evidence we'd received, if L&C had undertaken appropriate checks into the White Sands investment it would have concluded that the White Sands investment wasn't an investment that it should have accepted within Mr S' SIPP. And that, by failing to do this, L&C hadn't treated Mr S fairly and it should redress him for the losses he'd suffered.

Solicitors for L&C have said, amongst other things, that:

- This complaint has similar facts to the *Adams v Options SIPP UK LLP (formerly Carey Pensions UK LLP)* [2020] EWHC 1229 (Ch) case, but the investigator's view doesn't explain why we've reached a different conclusion to that arrived at in *Adams*.
- The Financial Ombudsman Service is attempting to use the Principles to circumvent the *Adams* decision.
- Consideration of the Principles must be via the appropriate Conduct of Business Sourcebook ('COBS') rules applying to the transaction.
- The investigator's view seeks to impose a duty on L&C that it doesn't owe and which

goes beyond the scope of any duty envisaged by the parties.

- The investigator in the view accepts that L&C couldn't give investment advice but suggests that the business should have been rejected as the investment was commercially unattractive.
- Information contained in the liquidator's report and in news articles that the investigator referred to wouldn't have been available at the time of the investment.
- L&C only offered an execution-only service.
- Insufficient weight has been given to contractual arrangements and the demarcation of roles and responsibilities.
- A breach of the Principles cannot, of itself, give rise to any cause of action at law.
- The Principles fall to be construed in light of the COBS rules applicable to L&C, L&C's regulatory permissions, L&C's contractual arrangements and the statutory objective that consumers should take responsibility for their decisions.
- Publications issued after the transactions shouldn't have a bearing on this complaint.
- Regulatory publications can't alter the meaning, or the scope, of the obligations imposed by the Principles.
- Many of the matters which the 2009 Thematic Review Report invites firms to consider are directed at firms providing advisory services.
- 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 the FSMA.
- The relationships in this case are similar to those in *Adams*, the distinguishing factor is that Mr S took advice from a regulated financial advice firm.
- At the time of the transaction complained of there was no obligation on a customer to take advice on the transfer of a pension, let alone a pension switch.
- The investigator should have concluded that L&C's duties to Mr S extended no further than those owed to the claimant in *Adams* and, accordingly, that it's neither reasonable nor fair for L&C to pay compensation in this case.
- The investigator's view fails to have regard to the general principle that consumers should take responsibility for their decisions, the fundamental principle of freedom of contract and to the authority of *Adams* and *Kerrigan v Elevate Credit International Ltd* [2020] C.T.L.C. 161.
- We're enabling recovery of losses flowing from non-contractual obligations, which were inconsistent with express obligations in the parties' contractual arrangements.
- Mr S signed disclaimers to confirm that he knew that the investment was high risk, illiquid and may be difficult to sell.
- In *Adams* the Store First investment being high-risk didn't make it manifestly unsuitable and the same's true of the White Sands investment.
- It isn't fair or reasonable to hold that an execution-only SIPP provider should investigate an investment with the same level of scrutiny as an accountant completing a forensic report after the investment had failed.
- It isn't reasonable to conclude that L&C should have completed due diligence on the commercial viability of the investment, or how returns would be generated.
- It's also not fair to hold L&C responsible for not having identified that the planning permission obtained wasn't appropriate.
- L&C wasn't under an obligation to commission a report into the value of the land.
- Determining the suitability of the investment would have required a full assessment of the investment and the investor's circumstances. And L&C couldn't have communicated the results of any assessment without putting itself in breach of its permissions.
- Mr S made the investment in full knowledge of the risks, including that it was illiquid and may be difficult to sell. Mr S was also willing to act against advice.

- If L&C had declined to accept the investment it's more likely than not that the transaction would have been effected with another SIPP provider.
- L&C's conduct wasn't causative of any loss and no redress should be payable as a consequence.

As agreement couldn't be reached the complaint was passed to me for review. As part of that process, L&C was provided with a copy of any information it might not previously have seen that was being relied on and it was invited to let us have any further submissions it wished to make on that information. And L&C did make further submissions which I have considered carefully in full.

Following this I issued a provisional decision on this complaint and I concluded Mr S' complaint should be upheld. In brief, I concluded that:

- L&C should have been conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.
- On the basis of the available evidence, L&C didn't undertake sufficient due diligence into the White Sands investments before it accepted White Sands investments into its SIPPs, and before it accepted Mr S' applications to invest in White Sands. Its failure to do so was unfair to Mr S.
- L&C didn't take appropriate steps or draw reasonable conclusions from information that would have been available to it if it had undertaken sufficient due diligence.
- If L&C had undertaken adequate due diligence, it should reasonably have concluded that:
    - The investment in White Sands would allow its SIPPs to become a vehicle for a high-risk and speculative investment that wasn't a secure asset. Building work hadn't started, title to properties wasn't, in fact, being transferred to investors and appropriate planning permission hadn't, in fact, been secured.
    - GPIL and/or CASML were making misleading and/or unfounded statements – investors were being misled and there was a risk the investment might be fraudulent.
    - It was very difficult to get independent valuations for the plots. And being able to independently value the property the Company was meant to hold was critical to being able to independently value the investment.
- L&C ought to have concluded there was a significant risk of consumer detriment if it accepted the White Sands investment into its SIPPs and that the White Sands investment wasn't acceptable for its SIPPs.
- L&C didn't undertake appropriate steps, or draw reasonable conclusions, from information that would have been available to it had it undertaken adequate due diligence into the White Sands investment *before* it accepted that investment into its SIPPs.
- L&C didn't meet its regulatory obligations and, in accepting Mr S' applications to invest in White Sands, it allowed Mr S' funds to be put at significant risk.
- In the circumstances, it was fair and reasonable for L&C to compensate Mr S to the full extent of the financial losses he's suffered due to L&C's failings.

In response to my provisional decision, Mr S highlighted that:

- If a final decision was issued in his favour, he'd need to pay £50,000 plus interest to the FSCS.
- If redress is paid into his SIPP, to access the £50,000 he'd need to take pension income that would be taxable.

- Alternatively, if redress is paid to him directly, he'd be repaying the £50,000 from redress monies that have been subject to a notional deduction for tax.
- The first £50,000 of the redress should be paid with no deduction for tax and the residual should be paid less tax.

Mr S also queried whether L&C could be asked to pay £50,000 plus the FSCS interest directly to the FSCS.

L&C didn't accept my provisional decision and solicitors for L&C provided a detailed response. I've set out below a summary of what I consider to be the main points made in the response. However, the list isn't exhaustive and before making this decision I carefully considered the response in full:

- Mr S received advice and support for investment decisions from TFSL. Mr S brought a successful FSCS claim against TFSL, this shows that TFSL provided advice.
- Mr S was an aggressive investor who understood the intended strategy and took an active role in it.
- There's no rational reason for holding a SIPP provider responsible where a complainant was fully advised. The advice of TFSL was causative of the decision to invest, if this wasn't down to Mr S' own decision.
- L&C's actions had the least causative impact, to hold it fully responsible is unjust.
- TFSL is responsible for any losses associated with the investment being unsuitable.
- TFSL had primary responsibility for completing due diligence on the investment.
- L&C knew that a financial adviser was involved and that the adviser would have the responsibility to advise on the merits of the investment. L&C could take comfort under COBS from the involvement of a regulated third party.
- Amongst other things, TFSL's 1 June 2012 letter said that:
  - Mr S was willing to take a high degree of investment risk.
  - Mr S had a very good working knowledge of investments, wanted to take a more aggressive stance and wanted to invest in alternative investments.
  - Mr S wanted to invest in the Green Planet Property Fund, he'd looked into the fund and had knowledge of how it worked. Further, he understood and accepted the potential risks of investing some of his monies in unregulated collective investments.
  - TFSL had discussed risks associated with Mr S' chosen Green Planet investment and he'd confirmed he accepted and understood the risks – the letter discussed liquidity, political, event and currency risks.
- An addendum to the letter said that Mr S understood the product he wanted to invest in and understood the risks associated with unregulated investments.
- L&C is being targeted as it's the only regulated entity left standing.
- The provisional decision cherry picks from case law and statute. And holds L&C to a standard that's not provided for by statutory guidance or by the law.
- No regard is paid to the respective duties of the parties under the contract.
- The provisional decision extends the scope of the duty owed by L&C beyond what was agreed by the parties.
- Cases discussed in the provisional decision (along with the discussion of the Principles) appear to have been deployed with a view to circumventing *Adams*.
- Nothing in *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) provides a precedent for COBS to be ignored in preference to the Principles.
- *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878 pre-dates *Adams* and concerned a judicial review on the lawfulness of an ombudsman's decision. It didn't concern the duties of a SIPP provider at law.

- This Service dismisses the rationale of *Adams* on the basis that the alleged breaches in *Adams* took place after the contract was entered into, this is a false distinction.
- It's unfair to use an alleged distinction that makes no practical differences to the operation of the precedent and to completely ignore a further difference that has a significant bearing on the scope of duty.
- The Principles aren't being used by this service to inform or interpret the obligations imposed by COBS and at law, they're being used to avoid having to base any decision on those rules.
- Declarations in investment purchase requests for White Sands that Mr S signed said:
    - L&C hadn't provided any financial or investment advice.
    - The investor had carried out their own due diligence on the investment.
    - The investment may be high risk and there may not be an established market for its sale. There may be a delay in selling it if a purchaser couldn't be found.
    - Unregulated investments may not be protected by the FSCS and compensation might not be available in the event of a loss.
    - The investor indemnified L&C against all liability arising from the investment.
    - L&C wasn't responsible for the assessment of the merits of the investment or the integrity and capability of the persons involved in promoting or administering it.
    - Responsibility for the decision to purchase the investment and monitor it lay solely with the investor and any adviser they'd appointed.
- L&C was entitled to rely on the declarations and disclaimers.
- It would be unfair if the SIPP provider wasn't able to rely on express representations made by the consumer when signing the contractual documentation.
- The provisional decision lays responsibility for the investment decisions with L&C.
- Mr S was aware that L&C would act on an execution-only basis and would accept no responsibility for the quality of the investment business.
- Duties imposed by the COBS can't all apply to all firms in all circumstances.
- The COBS rules contain some provisions and obligations that don't apply to execution-only SIPP providers.
- 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.
- In *Adams* it was said that any reports, guidance and correspondence issued after the events at issue could not be applied to Carey's conduct at the time. And publications issued after the transaction here should have no bearing on the complaint.
- The provisional decision refers to a 2013 Insolvency Service press release and an October 2015 letter from GPIL's liquidator, but doesn't say how information in them could have been obtained at the time, or the level of due diligence needed to do so.
- L&C had no specialism in assessing the prospects of an investment's success.
- L&C couldn't have determined that statements on GPIL's website were misleading. It wasn't until 2013 that there was information in the public domain that indicated that the information contained on the website might be misleading.
- GPIL's track record (and corporate structure) might indicate that the investment was speculative, but this was known and accepted before the investment was made.
- The Investment Request forms explained that plots might be difficult to value.

- There was no obligation for L&C to obtain independent valuations of the plots of land.
- This service's view is that L&C should have completed adviser level due diligence. But this wasn't requested or offered and is at odds with L&C's permissions.
- The complaint must be looked at in the context of the retainer.
- The purpose of the declarations was to set out the limits of the retainer and the division of responsibilities. In extending the duties beyond what was accepted by each party this service is imposing a duty on L&C that wasn't requested or accepted.
- This service's conclusions are that L&C owed a duty that extended far beyond what was agreed in the retainer documents, in contradiction to the rationale of *Adams*.
- We've accepted that Mr S was unaware of the risks, despite disclaimers he signed.
- Mr S' assertion that he was an unsophisticated investor who acted in accordance with the advice given contradicts the contents of the suitability report. An oral hearing should be held to test Mr S' evidence on this point. If a hearing isn't held, the documentary evidence should take precedence.
- *Gestmin SGPS S.A. v Credit Suisse [2013]* EWCA 3560 (Comm) states that little weight should be given to recollections due to their inherent unreliability and that factual findings should be based on documentary evidence.
- Mr S' involvement went beyond instructing the transactions, he selected the investment and decided on the percentage of his fund to be invested.
- If Mr S was reliant on advice from TFSL, it follows that he would still have sought to act on its advice if L&C hadn't accepted the investment.
- Mr S had decided to invest in Green Planet before he received advice and confirmed he was willing to accept a high degree of risk. He acted against advice in relation to the percentage holding.
- If L&C had refused the investment, the most likely outcome is that Mr S would have sought another SIPP provider to facilitate this.
- Mr S was offered (and received) a cash incentive. This service has accepted Mr S' submission that he wasn't aware of this until *after* he'd signed the paperwork. An oral hearing should be held to determine how accurate this is.
- A cashback payment on an investment is usually a marketing tool designed to encourage investment. It makes no sense to offer such an incentive but to keep this hidden from the investor until after they have committed.
- We've artificially distinguished *Adams* on the question of causation, despite a cash incentive having been offered.
- Facts are being interpreted in order to reach a pre-determined conclusion.

I considered the request for an oral hearing and explained to both parties why I was satisfied that I'm able to fairly determine this complaint without convening a hearing. L&C didn't agree with what I said about this and solicitors responded on L&C's behalf. I set out below a summary of what I consider to be the main points made in that response. However, the list isn't exhaustive and before making this decision I carefully considered the response in full:

- Mr S' position is different to that set out in the documents.
- The documents say that Mr S had a good knowledge of investments, fully understood the investment and that he'd selected it. Mr S didn't challenge this.
- It would be fair to hold an oral hearing to determine what previous investment experience Mr S had, what he knew about the investment and why he'd selected it.
- Information could be obtained at the hearing with a view to testing the credibility of Mr S' position.
- A hearing is also required to obtain further evidence on the payment Mr S received, what part this played and what he'd have done in the alternative.
- This service is accepting Mr S' recollections in preference to the documentary

evidence, despite case law establishing that the former should take precedence.
- *R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service [2017] EWHC 352)* says that this service must take account of the relevant law and, if deviating from it, explain why.
- If an oral hearing isn't agreed to, the complaint should be dismissed without consideration of the merits under DISP 3.3.4(10) on the basis that the subject matter would be more suitable for determination by the Court.
- Mr S' submissions are so at odds with the evidence that testing this via witness statement and cross examination is required in order to fairly deal with the complaint.

What I've decided - oral hearing request

The DISP rules on hearings

As a preliminary point, the Financial Ombudsman Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (see section 225 of the Financial Services and Markets Act 2000 ('FSMA')). And, the Dispute Resolution rules found in the FCA Handbook under which we operate ('the DISP rules') provide the following in relation to the resolution of complaints by the ombudsman and hearings:

DISP 3.5.5R

> *"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."*

DISP 3.5.6R

> *"A party who wishes to request a hearing must do so in writing, setting out:*
>
> *(1) the issues he wishes to raise; and*
> *(2) (if appropriate) any reasons why he considers the hearing should be in private;*
>
> *so that the Ombudsman may consider whether:*
>
> *(3) the issues are material;*
> *(4) a hearing should take place; and*
> *(5) any hearing should be held in public or private."*

DISP 3.5.7G

> *"In deciding whether there should be a hearing and, if so, whether it should be in public or private, the Ombudsman will have regard to the provisions of the European Convention on Human Rights."*

Given my statutory duty under FSMA to resolve complaints quickly and with minimum formality, I'm satisfied that it would normally not 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).

My consideration of the hearing request

In accordance with my duties under FSMA and the relevant DISP provisions as set out above, I've carefully reconsidered the request for a hearing on this complaint. And, I remain satisfied that a hearing would only be required in this case if I thought the complaint couldn't be fairly determined without convening one.

As L&C will be aware, we don't operate in the same way as the courts. Unlike a court, we have the power to carry out our own investigation. And, if particular information is required to decide a complaint fairly, in most circumstances we're able to request this information from either party to the complaint, or even from a third party.

DISP 3.5.8R provides:

> *"The Ombudsman may give directions as to:*
>
> *(1) the issues on which evidence is required;*
> *(2) the extent to which evidence should be oral or written; and*
> *(3) the way in which evidence should be presented."*

This means 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. And I'm not restricted to oral cross-examination to further explore points or to test the veracity of information that's been provided to me.

There are a number of issues that are in dispute in this complaint, but it's not uncommon for us to deal with complaints where the parties involved disagree as to what has happened and/or with the findings we've reached. But this doesn't necessarily mean that a hearing is required to fairly determine the complaint.

We generally decide complaints on the basis of the paperwork and submissions made either in writing or over the phone. We've received written responses and documentary evidence from both parties during our investigation of this complaint, and I'm able to consider that evidence fully. A number of written submissions have been made over the course of this complaint and I don't consider a hearing will necessarily make a difference or cause Mr S' recollections of events that occurred many years ago to change.

I also want to emphasise that a hearing is only an opportunity for me to ask the parties to provide oral evidence. A hearing wouldn't normally provide L&C with the opportunity to cross-examine evidence or testimony provided. Our hearings don't follow the same format as a court. We're inquisitorial in nature and not adversarial. The purpose of any hearing would be solely for me to obtain any further information from the parties that I require in order to fairly determine the complaint. The parties wouldn't usually be allowed direct questioning or cross examination of the other party to the complaint.

If I decide particular information is required to decide a complaint fairly, in most circumstances I'm able to request this information from either party to the complaint, or even from a third party. In this case, we've put questions to Mr S about the White Sands investments including, amongst other things, about the presentation of sales documentation to him, his understanding of forms he signed and his understanding of the payments he received. And Mr S has provided answers to the questions we put to him. L&C has had the opportunity to consider, and comment, on Mr S' answers.

For example, we emailed L&C in July 2022 and provided it with the opportunity to let us have any comments it wished to make about, amongst other things, what Mr S said he'd been told by his adviser and also his comments on the payments he'd received – Mr S' submissions on these points were included within a PDF document attached to a July 2022 email we sent

L&C. And I can see that solicitors for L&C have, in fact, made further submissions on a number of points since then, both before and after I issued my provisional decision on this complaint. Further, and more broadly, L&C was invited to make submissions to us on a number of occasions during our investigation of this complaint. And if I considered further evidence was needed on any point L&C raised in its submissions, it's been open to me to ask the parties for any further evidence I required.

An investigator issued a provisional assessment on this complaint in September 2021. And I then issued a provisional decision on this complaint in September 2022. L&C has been given a number of opportunities to make representations and has made several sets of representations.

In this case, I'm satisfied I've sufficient information to make a fair and reasonable decision. So I don't consider a hearing – or any further investigation by other means – is required.

The parties to this complaint have been given ample opportunity to make submissions at every stage of the process. Each party has had the benefit of seeing the material submissions made by the other party and been afforded the opportunity to respond. And bearing that in mind and having taken all of L&C's evidence and arguments into account, I'm satisfied that I'm able to fairly determine Mr S' complaint without convening a hearing.

Also relevant to the assessment as to whether a hearing is held is my findings (which I acknowledge L&C disputes) that L&C shouldn't have accepted the White Sands investment in its SIPPs *at all,* that I don't think any other SIPP provider would have accepted the White Sands investment and, further, that it wouldn't be fair and reasonable to say that another SIPP operator would have made the same mistakes as L&C did by accepting Mr S' applications to invest in White Sands.

If L&C had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted White Sands investments into its SIPPs *at all.* That should have been the end of the matter – if that had happened Mr S' intentions or understanding wouldn't have affected his applications to invest in White Sands – and I'm satisfied the arrangement for Mr S wouldn't have come about in the first place. And Mr S' comments about acting in accordance with the advice he was receiving, his recollections of what he was told by his adviser and his recollection that there was no mention of any payment until *after* paperwork had been completed are secondary to this.

DISP 3.5.4R provides:

> *"If the Ombudsman decides that an investigation is necessary, he will then:*
>
> *(1) ensure both parties have been given an opportunity of making representations;*
> *(2) send both parties a provisional assessment, setting out his reasons and a time limit within which either party must respond; and*
> *(3) if either party indicates disagreement with the provisional assessment within that time limit, proceed to determination"*

I'm satisfied this procedure has been followed in this case, and that the appropriate next step is for me to proceed to determination. And, whilst considering my determination, if I considered further evidence was needed on any point, it's been open to me to ask the parties for any further evidence I required.

Having taken all of the evidence and arguments into account, I'm satisfied that I'm able to fairly determine this complaint without convening a hearing. In deciding this, I have had regard to the parties' rights under the European Convention on Human Rights.

What I've decided – dismissal

Amongst other things, L&C has made submissions about why it believes this complaint might be better suited to be considered by a court. It's appropriate to address this issue before I set out my findings on the merits of this complaint.

Having carefully considered L&C's submissions on this point, I'm satisfied that Mr S' complaint is one we can and should consider.

We've a statutory duty to resolve complaints referred to us which are within our jurisdiction, subject to certain discretions which are set out in our rules.

L&C's representative has submitted that the complaint should be dismissed without consideration of the merits under DISP 3.3.4(10) on the basis that the subject matter would be more suitable for determination by the court. To be clear, this complaint was referred to us after 9 July 2015.

I've carefully considered whether this complaint should be dismissed. DISP 3.3.4 A R says that I may dismiss the complaint, not that I must. So I've discretion to decide what I'll do in the circumstances. I'm satisfied that I don't need to exercise my discretion to dismiss this complaint under DISP 3.3.4 A R on the basis it would significantly impair our effective operation, on the basis that it would be more suitable to be dealt with by a court or a comparable ADR entity. I'm also satisfied that I don't need to exercise my discretion to dismiss this complaint under DISP 3.3.4 A R for any other reason.

This complaint requires consideration to be given to, amongst other things, the rules and principles set down by the FCA. In my view, these are matters which the Financial Ombudsman Service is particularly well placed to deal with. I'm also satisfied we possess the necessary knowledge and expertise to fairly determine the complaint. Our investigation is also well advanced.

I'm satisfied this complaint is well suited to the work of the Financial Ombudsman Service. We have significant experience of dealing with complaints of this type, including complaints where parties disagree about what occurred, or where there are contradictions in submissions or evidence – and we're well-placed to consider them.

Considering Mr S' complaint wouldn't in my view seriously impair our effective operation. So, overall, I'm not required to dismiss this complaint, and for the reasons I've given, I'm not exercising my discretion to dismiss it. As such, I've gone on to set out my findings on the merits of this complaint below.

What I've decided – and why - merits

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

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

As a preliminary point, the purpose of this final decision is to set out my findings on what's fair and reasonable, and explain my reasons for reaching those findings, not to offer a point by point response to every submission made by the parties to the complaint. And so whilst

I've carefully considered all the submissions made by both parties, I've focussed here on the points I believe to be key to my final decision on what's fair and reasonable in the circumstances.

Relevant considerations

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

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

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

In *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878 ('BBSAL'), Berkeley Burke brought a judicial review claim challenging the decision of an ombudsman who'd upheld a consumer's complaint against it. The

ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and hadn't treated its client fairly.

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

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

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

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

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

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

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

I note that in *Adams v Options SIPP*, HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at paragraph 148:

> *"In my judgment in order to identify the extent of the duty imposed by Rule 2.1.1 one has to identify the relevant factual context, because it is apparent from the submissions of each of the parties that the context has an impact on the ascertainment of the extent of the duty. The key fact, perhaps composite fact, in the context is the agreement into which the parties entered, which defined their roles and functions in the transaction."*

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

And in Mr S' complaint, amongst other things, I'm considering whether L&C ought to have identified that the White Sands investment involved a significant risk of consumer detriment and, if so, whether it ought to have declined to accept applications to invest in White Sands *before* it accepted Mr S' applications.

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

So I've considered COBS 2.1.1R – alongside the remainder of the relevant considerations, and within the factual context of Mr S' case, including L&C's role in the transaction.

However, I think it's important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I'm required to take into account relevant considerations which include: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in *Adams v Options SIPP*. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

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

Overall, I'm still 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 S' case.

The regulatory publications

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

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

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

The 2009 Thematic Review Report

The 2009 Report included the following statement:

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

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

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

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

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

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

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

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

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

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

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

The later publications

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*"**Due diligence***

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

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*

- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*

- *having checks which may include, but are not limited to:*

    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*

    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*

- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*

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

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

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

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

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

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

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

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

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

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

It's relevant that when deciding what amounted to have been good industry practice in the BBSAL case, the ombudsman found that *"the regulator's reports, guidance and letter go a*

long way to clarify what should be regarded as good practice and what should not." And the judge in BBSAL endorsed the lawfulness of the approach taken by the ombudsman.

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.

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 therefore remain satisfied it's appropriate to take them into account too.

I've carefully considered what L&C has said about publications published after Mr S' SIPP was set up. But I remain of the view stated in my provisional decisional that, like the ombudsman in the BBSAL case, I don't think the fact that some of the publications post-date the events that took place in relation to Mr S' complaint, mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

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

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

That doesn't mean that in considering what's fair and reasonable, I'll only consider L&C's actions with these documents in mind. The reports, *"Dear CEO"* letter and guidance gave non-exhaustive examples of good practice. They didn't say the suggestions given were the

limit of what a SIPP operator should do. As the annex to the *"Dear CEO"* letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

To be clear, I don't say the Principles or the publications obliged L&C to ensure the transactions were suitable for Mr S. It's accepted L&C wasn't required to give advice to Mr S, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But they're evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles. And so it's fair and reasonable for me to take them into account when deciding this complaint.

I'd also add that, even if I took the view 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 and before it accepted Mr S' application.

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

In determining this complaint, I need to consider whether, in accepting Mr S' applications to establish a SIPP and to invest in White Sands, 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.

And, taking account of the factual context of this case, it remains my view that in order for L&C to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence checks on TFSL/the business TFSL was introducing and the White Sands investment before deciding to accept Mr S' applications.

In deciding what's fair and reasonable in the circumstances, what I'll be looking at here is whether L&C took reasonable care, acted with due diligence and treated Mr S fairly, in accordance with his best interests. And what I think's fair and reasonable in light of that. And I think the key issues in Mr S' complaint are whether it was fair and reasonable for L&C to have accepted Mr S' SIPP application and White Sands investment applications in the first place. So, I need to consider whether L&C carried out appropriate due diligence checks on TFSL and the White Sands investment before deciding to accept Mr 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 TFSL and/or investing in White Sands were being put at significant risk of detriment. And, if so, whether L&C should therefore not have accepted Mr S' application for the L&C SIPP and/or White Sands investments.

The contract between L&C and Mr S

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

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

I've not overlooked or discounted the basis on which L&C was appointed. And my decision on what's fair and reasonable in the circumstances of Mr 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 S on the suitability of the SIPP or White Sands investment.

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

In this case, the business L&C was conducting was its operation of SIPPs. And I remain satisfied that, to meet its regulatory obligations, when conducting its operation of SIPPs business, L&C had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind. To be clear, I don't agree that it couldn't have rejected introductions or applications without contravening its regulatory permissions by giving investment advice.

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

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 S) 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, and well before the time of Mr S' application, I think that L&C ought to have understood that its obligations meant that it had a responsibility to carry out appropriate checks on TFSL to ensure the quality of the business it was introducing. And I think L&C also ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments, like the White Sands holding, before accepting them into 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 White Sands), with the Principles in mind.

Amongst other things, L&C has said that its role was to satisfy itself that the investment was allowed within the trust rules and that it didn't breach HMRC regulations. Further, that it also established the liabilities and responsibilities it would have to take on as the owner of the asset.

To be clear, it's my view that L&C was obliged to carry out due diligence on the White Sands investment – due diligence that went further than simply checking that the investment was 'SIPP-able' under HMRC rules. I say that after taking into account the regulatory publications

I've referenced earlier in this decision, amongst other matters, in considering whether L&C acted fairly and reasonably in this case.

And I think that it's fair and reasonable to expect L&C to have looked carefully at the White Sands investment it was allowing Mr S' pension fund to be invested in. To be clear, for L&C to accept the White Sands investment 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 an investment in detail, and if such a detailed look would have revealed that the investment might not be secure, might be fraudulent, or might not exist, 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.

L&C's due diligence on White Sands

Mr S complains that L&C didn't undertake sufficient due diligence on the White Sands investments. I can't see that he's expressed dissatisfaction about any other investments that L&C accepted after his SIPP was established. As such, in this final decision, I've not considered the adequacy, or otherwise, of the due diligence L&C undertook into any investments that weren't the White Sands investments.

L&C has said that the acquisition of the White Sands Country Club investment was by way of the formation of a company in the UK with the sole purpose of holding the relevant plot of land. And that the asset of the SIPP was the purchase of 100% shares in that company.

L&C has said that its solicitors monitored the formation of the company and checked that the title to the plots could be acquired by the company. We've asked L&C for evidence to show exactly what its solicitors did but L&C hasn't provided the information requested.

We've also asked L&C a series of questions about the due diligence it undertook on the White Sands investment/GPIL and for a copy of any product literature it had obtained. Some of the questions asked included: what its conclusions about the investment were, whether it conducted an independent report into the investment and how it had satisfied itself the valuation was fair and reasonable.

Having asked L&C for this information, we subsequently chased it for a reply but, again, we've received no substantive response to our enquiries from L&C.

Under DISP 3.5.9 (3) R I may *"reach a decision on the basis of what has been supplied and take account of the failure by a party to provide information requested."*

So, L&C has provided us with very little information about any due diligence it undertook into White Sands or GPIL.

Based on the information that's been made available to us, I'm not satisfied that L&C undertook sufficient due diligence on the White Sands investment before it decided to accept it into its SIPPs, and where such due diligence ought to have led it to conclude the White Sands investment shouldn't be accepted into its SIPPs. And based on the evidence we've been provided, my current view is that L&C didn't meet its regulatory obligations and didn't act fairly and reasonably in its dealings with Mr S by not performing sufficient due diligence on the White Sands investment before deciding to accept it into its SIPPs and before accepting Mr S' applications to invest in White Sands.

What should L&C have done?

Taking into account all the available evidence and the relevant considerations I've referenced above, and what's fair and reasonable in the circumstances of this case – in relation to the White Sands investment – my view is that L&C should have:

- Identified White Sands as a high-risk, speculative and non-standard investment and carried out sufficient due diligence into it.
- Considered whether to permit White Sands investments to be held in its SIPPs.
- Taken reasonable steps to check that the investment was genuine and not a scam, or linked to fraudulent activity.
- Independently verified that the assets were real and secure, and the White Sands investment operated as claimed.
- Ensured that the investment could be independently valued, both at point of purchase and subsequently.
- Taken reasonable steps to ensure that title to property was being acquired by the SIPP/by the company that the SIPP was acquiring 100% of the issued share capital in.
- Taken reasonable steps to check that the Seller was doing what was expected under the sale and purchase share agreement, such as delivering to the buyer the deeds and documents of title to the property *before* the purchase price was paid by the Buyer.
- Taken reasonable steps to ensure its SIPPs wouldn't become a vehicle for a high-risk and speculative investment that wasn't a secure asset, and could be a scam.

L&C hasn't provided us with sufficient evidence to demonstrate that it did any of these things, or to show how what it did represented fair and reasonable treatment of Mr S in this case.

So, on the basis of the available evidence, I find that L&C didn't undertake sufficient due diligence into the White Sands investments before it accepted White Sands investments into its SIPPs, and before accepting Mr S' applications to invest in White Sands, and I find its failure to do so was unfair to Mr S.

If L&C had completed sufficient due diligence, what ought it reasonably to have discovered?

As I've explained previously, L&C has provided us with very little information about any due diligence it undertook into White Sands. So, I've carefully considered information about the White Sands investment from documents available elsewhere, such as archived pages from GPIL's website, an Insolvency Service press release from November 2013 and GPIL's liquidator's letter to L&C in October 2015.

A number of these documents were published *after* L&C accepted Mr S' applications and, as such, weren't available to L&C prior to the events that took place in relation to Mr S' complaint. However, I'm satisfied that some of the information referenced in the documents, such as information relating to details about the structure of CASML/GPIL and the White Sands investment, would have been discoverable by L&C prior to the events Mr S has complained about, had it undertaken sufficient due diligence.

Amongst other things the following statements appeared on GPIL's website prior to L&C receiving Mr S' application:

- *"We* (Green Planet Investment)*…are now internationally recognised as one of the leading Property Consultants in the field."*

- "*Intensive and meticulous research utilising satellite, cadastral demographic and available census data – in conjunction with municipal and domestic Spatial Development Plans – enables Green Planet to predict future investment trends into international emerging and green-field development markets. This, in conjunction with the Board of Directors' wealth of specialist knowledge and experience in the arena, leads to excellent property investment opportunities whilst retaining solid rationale. In short: Minimum Risk, Maximum Return."*

Regarding the White Sands Country Club, it was stated amongst other things on GPIL's website in 2011 that:

> *"White Sands Country Club is located in Natal on the booming north-east coast of Brazil. The club enjoys the sea breeze of the sandy white dunes of Genipabu's pristine coastline and not only offers a prime piece of land with the potential to build a beautiful home, but also provides investors with a fantastic investment opportunity.*
>
> *The exclusive boutique Country Club has 244 residential homes and is located in one of the most up and coming residential suburbs of Natal. The Country Club offers sports facilities that include football, tennis, mini-golf and a state of the art equestrian centre. Guests can also unwind and relax in the club's boutique spa facilities, pool complex, jacuzzis and saunas.*
>
> *Important Facts:*
> *Number of Plots = 244*
> *Plot Size = 360-515m2*
> *Planning Permission Status = Full planning permission granted*
> *Nearest Airport = Natal (Approx 15 miles)*
> *Estimated Annual Appreciation = 15-25%"*

By May 2012 the information about White Sands on the website had been updated, including that:

> *"The exclusive boutique Country Club has over 600 residential homes located in one of the most up-and-coming residential suburbs of Natal. With its proximity to the beach and the history of Brazil's leisure and recreational activities the opportunities to take part in sporting pursuits both low and high intensity will be numerous.*
> *…*
> *White Sands Country has been divided into three separate phases. Phase One of White Sands Country Club has now completely sold out. We have now moved on to Phase Two of the project, with the minimum investment for a 360m2 plot being £17,495.*
>
> *As with Phase One, Phase Two has been very popular and we are now nearing 95% of sales completed in Phase Two. The launch of Phase Three is imminent in the coming weeks and at that point, the land will be re-valued and we expect that prices for 360m2 plots in Phase Three will start from between £19,495 and £22,495.*
>
> *The plots come with full planning permission and ALL relevant due diligence reports."*

The Insolvency Service published a press release in November 2013 titled *"Green Planet 'investment' companies wound up following Insolvency Service investigation into a land scheme in Brazil."* It was noted, amongst other things in this release that:

- A UK and a Gibraltar company, both called GPIL – which had marketed a property investment scheme, in Brazil taking £14 million from investors, have been ordered into liquidation in the High Court in London in the public interest.

- GPIL representatives persuaded investors they were dealing with a large UK registered bank. And salesmen used high pressure sales techniques and made exaggerated promises of 20-30% returns on investment to persuade investors to buy plots of land and off-plan apartments at three sites in Natal, Brazil.

- Websites used by GPIL, which included www.gpirewards.com, www.greenplanetinvestment.com and www.gpigroup.eu, claimed or implied that GPIL was an expert in the international property market and had undertaken significant due diligence in relation to the sites.

- Investors were told that White Sands Country Club would be completed and open by March 2013.

- The site is said to be owned by a Brazilian registered company, Green Planet Investimentos Imiliarios Ltda which is a subsidiary of GPIL in Gibraltar and is described as part of the Green Planet Group.

- The grounds for winding up CASML were lack of commercial probity by making misleading and unfounded statements when marketing the sites to the public, lack of transparency and insolvency.

- The grounds for winding up GPIL were lack of commercial probity in allowing its agent CASML to make misleading and unfounded statements when marketing the sites to the public and lack of transparency.

- GPIL director, Mr Jolly, had told investigators that no building work was ever started.

- CASML's company's share capital was initially 1,000 ordinary shares of £1 each. All shares were originally held by Mr Jolly who subsequently transferred 670 shares to GPIL in Gibraltar and 330 shares to a Mr Thompson. Those 330 shares were subsequently cancelled and GPIL's 670 shares were subsequently transferred to Green Planet Investment International Holdings plc, part of a corporate group known as the Green Planet Group of which Mr Jolly was the ultimate owner.

The press release quoted a company investigations supervisor at the Insolvency Service:

> *"Green Planet Investment was a slick land investment scheme designed to make money only for those with the company and not the 300 investors who were persuaded by false and misleading statements to invest over £14 million into an investment black hole".*

It was also recorded in the press release that, in ordering both companies into liquidation on grounds of public interest on 20 November 2013, Registrar Nicholls said:

"...The ground for winding up as produced in the evidence, which is not opposed, is this: That Capital made misleading and/or unfounded statements in respect of the land marketed for sale; that members of the public dealing with Capital were misled and/or confused as to which legal entity they were dealing with and that Capital appears or is insolvent… Green Planet granted a mandate to Capital to sell on its behalf the land which it itself owned by its Brazilian subsidiary. There is a clear link from the evidence. Green Planet knew or should have known of the misleading and/or unfounded statement being made by Capital or its staff and that members of the public were misled and/or confused as to which legal entity they were dealing with. The conclusion of the Secretary of State, with which this Court concurs, is that Capital displayed a lack of commercial probity by making misleading and/or unfounded statements.

Those statements made were in respect of the investment opportunity, Capital's experience, due diligence carried out, that planning permission had been obtained at the White Sands County Club site, which was stated to be full planning permission, increases in the value of plots and the progress, or lack of progress, in respect of the development of the sites… In respect of Capital, the evidence set out, which is unopposed, enables the Court to conclude that it must be and is in the public interest to make a winding up order in respect of Capital... In circumstances where it is appropriate to make an order to wind up Capital the conclusion is that a winding up order should also be made in respect of Green Planet for the reasons set out."

I think it's more likely than not that L&C had received, and acted on, applications to invest in White Sands from different consumers (whether introduced by TFSL or a different introducer) *before* it received Mr S' SIPP application. I think that's consistent with what TFSL said about L&C in its June 2012 suitability report.

I think L&C ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments before accepting them into its SIPPs.

I think it's important I emphasise here that I'm not saying that L&C should necessarily have discovered *everything* that later became known had it undertaken sufficient due diligence *before* accepting the White Sands investments into its SIPP. But I do think that appropriate checks would have revealed some fundamental issues which were, in and of themselves, sufficient basis for L&C to have declined to accept the White Sands investments in its SIPPs.

And, before it had received Mr S' applications to invest in White Sands, I think that L&C ought to have identified that:

- The White Sands investment purported to offer a very high return and there appears to be minimal evidence to support such a projection. I don't expect L&C to have been able to say the investment would be successful. But such a high projected return without any apparent basis should have given L&C cause to question its credibility. There was a risk here that consumers might be misled about the potential returns, or at least did not have sufficient information to assess their viability.

- GPIL doesn't appear to have had a track record with similar developments and was making statements on its website which appear to be misleading and/or unfounded. Had sufficient due diligence been undertaken, I think L&C ought to have questioned the credibility of some of the things GPIL was saying. For example, it being internationally recognised as one of the leading property consultants in the field. Or its ability to predict future investment trends, in conjunction with its directors' specialist knowledge and experience, resulting in a *"Minimum Risk, Maximum Return"* investment opportunity.

- The way the White Sands investment was structured was unusual and might reasonably be described as a sophisticated and/or complex investment; it could suffer significant losses, the nature of which would be difficult to predict or estimate at the outset. The holding exposed investors to significant risks such as: opaque corporate structures; illiquidity; and risks inherent in unregulated investments.

- The investment was based overseas and would be subject to the domestic laws and regulations that apply to the ownership of land and matters governing investments.

  This created additional risk and we've been provided with no evidence that L&C asked for an opinion about the potential impact of this from, for example, an independent law firm based in that country. Or that it sought independent verification that the plots being purchased were as described, real and secure, or that the investment operated as claimed.

- Investors were purchasing 100% of the shares in recently incorporated companies - White Sands Country Club WS(a number), which had Mr Jolly as the sole director.

- Land was being acquired in Brazil by a Brazilian subsidiary of GPIL (Gibraltar). And investors were entering into a sale and purchase share agreement, whereby they were paying funds to GPIL in exchange for 100% of the shares in a company that would have good title to a plot at White Sands Country Club.

- The plots could be difficult to independently value, both at point of purchase and subsequently (as proved to be the case when the liquidator attempted to obtain valuations albeit after the events complained about here). Apart from the property, the Company that investors were acquiring 100% of the shares in had no other assets. Being able to independently value the property the Company held was, therefore, critical to being able to independently value the investment.

  We've been provided with no evidence that that L&C took steps to ensure that the plots could be independently valued *prior* to accepting the investment into its SIPPs. Had it done so, I think it's more likely than not that it would have been identified that it was difficult to get independent valuations for the plots. Alternatively, in the instance L&C had been able to ensure an independent valuation prior to accepting the White Sands investment into its SIPPs, I think it's more likely than not that it would have been identified that the land was worth far less than the amounts investors were paying for the plots. And this was information that called into question the viability of the proposed business model (particularly in light of the very high projected returns).

- Under the sale and purchase share agreement, following the signing and exchange of the agreement, and before the purchase price was paid, the Seller was meant to deliver to the Buyer the deeds and documents of title to the property.

- Title to the development plots wasn't, in fact, being transferred. This was at odds with L&C forms that stated the companies that SIPPs were acquiring 100% of the shares in (in Mr S' case, this was White Sands Country Club WS 1909, 1910 and 1911) would **own and hold** the plots identified in the respective White Sands Country Club SIPP instruction forms (bold my emphasis).

- There appears to have been significant discrepancies between what was stated in the sale and purchase agreement and the actual position. Including that:

    - There were no development works, remediation works or fitting-out works outstanding in respect of the Property.
    - Following the signing and exchange of the sale and purchase share agreement, and before the purchase price was paid, the Seller was meant to deliver to the Buyer the deeds and documents of title to the property.
    - The Company, White Sands Country Club WS (a number) Limited), was solely legally and beneficially entitled, and had a good and marketable title, to the Property.

- In May 2011, GPIL had described the White Sands Country Club as having 244 residential homes and by May 2012 this had increased to over 600 residential homes. That's a substantial increase in the number of residential homes GPIL was claiming existed and in a relatively short period of time. I think that level of expansion over that period of time ought to have reinforced the importance of L&C independently verifying that assets linked to the White Sands investment were real and secure.

- Investors were being given the impression that the land acquired was proximate to the beach, that the necessary full planning permission had been granted and that the site was progressing. In fact, the land was kilometres from the beach, there were no signs of any infrastructure having been put in place and/or building work having started and the planning permission obtained wasn't appropriate.

- The investment wasn't subject to regulation in the same way as regulated funds. And investors potentially didn't have recourse to the FSCS or this service.

If L&C had completed sufficient due diligence, what ought it reasonably to have concluded?

If L&C had undertaken adequate due diligence, I think it should reasonably have concluded the White Sands investment wasn't acceptable for its SIPPs. That's because:

- Title to properties wasn't, in fact, being transferred to investors.

- The investment in White Sands would allow its SIPPs to become a vehicle for a high-risk and speculative investment that wasn't a secure asset. Building work hadn't started and appropriate planning permission hadn't, in fact, been secured.

- GPIL and/or CASML were making misleading and/or unfounded statements – investors were being misled and there was a risk the investment might be fraudulent.

- It was very difficult to get independent valuations for the plots. And being able to independently value the property the Company was meant to hold was critical to being able to independently value the investment. Further, if L&C had been able to obtain an independent valuation, I think it would have been identified that the land was worth far less than investors were paying.

Each of these in isolation was very serious, I think these points ought to have been red flags for L&C when it was considering whether to accept the White Sands investments into its SIPPs. They emphasise the importance of sufficient due diligence being undertaken *before* investments are accepted and *before* SIPP investors monies are invested.

I think that these points of concern, which I think ought reasonably to have been identified by L&C *before* it accepted Mr S' applications, ought to have led L&C to conclude there was a

significant risk of consumer detriment if it accepted the White Sands investment into its SIPPs and that the White Sands investment wasn't acceptable for its SIPPs.

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 White Sands investment *before* it accepted that investment into its SIPPs. I don't think L&C met its regulatory obligations and, in accepting Mr S' applications to invest in White Sands, it allowed Mr S' funds to be put at significant risk.

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 S on the suitability of the SIPP and/or White Sands investment for him personally. To be clear, I'm not making a finding that L&C should have assessed the suitability of the White Sands investment for Mr S. I accept L&C had no obligation to give advice to Mr S, or to ensure otherwise the suitability of an investment for him.

So, my finding isn't that L&C should have concluded that Mr S wasn't a candidate for high-risk investments. It's that L&C should have concluded the White Sands investment wasn't acceptable for its SIPPs and it thereby failed to treat Mr S fairly or act with due skill, care and diligence when accepting the White Sands investments into his SIPP.

I think it's important I emphasise here that I'm not saying that L&C should necessarily have discovered *everything* that later became known had it undertaken sufficient due diligence *before* accepting the White Sands investments into its SIPP. But I do think that appropriate checks would have revealed some fundamental issues which were, in and of themselves, sufficient basis for L&C to have declined to accept the White Sands investments in its SIPPs.

So I'm satisfied L&C should have identified a number of the concerns I've mentioned, and ought to have drawn the conclusion I've set out, based on what was known at the time. I don't say that L&C should have known White Sands was a fraudulent investment at the time – only that it ought to have identified significant points of concern, which ought to have led it to conclude it shouldn't accept the White Sands investment. It ought to have identified that there was a high risk of consumer detriment here. And it's the failure of L&C's due diligence that's resulted in Mr S being treated unfairly and unreasonably.

In my opinion L&C didn't meet its regulatory obligations or good industry practice at the relevant time. So, I think it's fair and reasonable to conclude that L&C didn't act with due skill, care and diligence, and it didn't treat Mr S fairly, by accepting the White Sands investments in his SIPP.

L&C's due diligence on TFSL

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

As part of our investigation, L&C was asked a series of detailed questions about the due diligence it undertook into the introducer (which was TFSL for the SIPP). Having asked L&C for this information, we subsequently chased it for a reply but we've not received a substantive response to our enquiries.

Under DISP 3.5.9 (3) R I may *"reach a decision on the basis of what has been supplied and take account of the failure by a party to provide information requested."*

So, L&C has provided us with very little information about its relationship with TFSL.

I accept that TFSL was authorised by the FSA when it introduced Mr S to L&C. But this doesn't necessarily mean that L&C did all the checks it needed to do.

However, given what I've said about L&C's due diligence on the White Sands investment and my conclusion that it failed to comply with its regulatory obligations and good industry practice at the relevant time, I don't think it's necessary for me to also consider L&C's due diligence on TFSL. I'm satisfied that L&C wasn't treating Mr S fairly or reasonably when it accepted the White Sands investment into its SIPPs, so I've not gone on to consider the due diligence it should have carried out on TFSL before accepting Mr S' business from it and whether this was sufficient to meet its regulatory obligations. And I make no findings about this issue.

Was it fair and reasonable in all the circumstances for L&C to proceed with Mr S' applications?

For the reasons previously given above, I think L&C should have refused to accept the White Sands investment in its SIPPs. So things shouldn't have got beyond that.

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

L&C knew that Mr S had signed forms intended to acknowledge, amongst other things, his awareness of some of the risks involved with the White Sands investment and to indemnify L&C against losses that arose from acting on his instructions. And, in my opinion, relying on the contents of such forms when L&C knew, or ought to have known, allowing the White Sands investment to be held within its SIPPs would put investors at significant risk wasn't the fair and reasonable thing to do. Having identified some of the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse to accept the White Sands investment in its SIPPs.

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

To be clear, my finding is that, acting fairly and reasonably to investors, L&C should have concluded that it wouldn't permit the White Sands investment to be held in its SIPPs *at all.* And I'm satisfied that Mr S' pension monies were only transferred to L&C because it was allowing GPIL investments – I think it's quite clear from TFSL's report that's why L&C was the recommended SIPP provider. And I think it's more likely than not that if L&C hadn't permitted the White Sands investment to be held in its SIPP that Mr S' pension monies wouldn't have been transferred to L&C or invested in White Sands. Further, that Mr S wouldn't then have suffered the losses he's suffered as a result of transferring to L&C and investing in White Sands.

So, I'm satisfied that Mr S' L&C SIPP shouldn't have been established and his monies shouldn't have been invested in the White Sands holdings. And that the opportunity for L&C to execute investment instructions to invest Mr S' monies in White Sands or proceed in reliance on an indemnity and/or risk disclaimers shouldn't have arisen at all. I'm firmly of the

view that it wasn't fair and reasonable in all the circumstances for L&C to proceed with Mr S' applications to invest in White Sands.

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

The involvement of other parties

In this decision I'm considering Mr S' complaint about L&C. However, I accept that another regulated party was involved in the transaction complained about – TFSL. Mr S also raised a complaint against TFSL with us. We concluded that complaint should be upheld, but TFSL ceased to be a going concern before redress was paid to Mr S. And Mr S then pursued his complaint against TFSL with the FSCS. The FSCS upheld Mr S' complaint, it calculated Mr S' losses to be in excess of £200,000 and it paid him £50,000 compensation. Following this the FSCS provided Mr S 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 S fairly.

The starting point therefore, is that it would be fair to require L&C to pay Mr S compensation for the loss he's suffered as a result of its failings. I've carefully considered if there's any reason why it wouldn't be fair to ask L&C to compensate Mr S for his loss.

And, for the following reasons, I consider it appropriate and fair in the circumstances for L&C to compensate Mr S to the full extent of the financial losses he's suffered due to its failings.

I accept that TFSL and/or GPIL/CASML might have some responsibility for initiating the course of action that led to Mr 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 S wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

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

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

In reaching my conclusions in this case 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 point carefully and I'm satisfied that it wouldn't be fair or reasonable to say Mr 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 White Sands investments into its SIPPs *at all*. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr S wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

As I've made clear, L&C needed to carry out appropriate due diligence on the White Sands investment and reach the right conclusions. I think it failed to do this. And just having Mr S 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.

TFSL was a regulated firm with the necessary permissions to advise on the transactions this complaint concerns. I'm satisfied that in his dealings with it, Mr S trusted TFSL to act in his best interests. Mr S also then used the services of a regulated personal pension provider in L&C.

I've carefully considered what L&C has said about Mr S being aware of the risks. Mr S was made aware of some of the risks associated with unregulated investments and the White Sands investment. But, on balance, I also think that Mr S acted with reliance on the adviser he was dealing with. And I think that Mr S' testimony of being reassured by that adviser that the investments being arranged for him were good investments is credible. In any eventuality, this is a secondary point because, as mentioned above, if L&C had acted in accordance with its regulatory obligations and good industry practice I'm satisfied that it shouldn't have accepted White Sands investments into its SIPPs *at all*. That should have been the end of the matter – and if that had happened, I'm satisfied the arrangement for Mr S 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 to say L&C should compensate Mr S for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr S should suffer the loss because he ultimately instructed the transactions be effected.

<u>Had L&C declined Mr S' business from TFSL, would the transactions complained about still have been effected elsewhere?</u>

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 acknowledge Mr S was made aware of some of the risks associated with unregulated investments and the White Sands investment. And I'm satisfied that Mr S was paid a cash sum in this case and that the monies he received were then invested elsewhere.

As L&C is aware from documents provided to it before I issued my provisional decision. We asked Mr S if he'd received any incentive when making his investment. Mr S replied and said that there'd been no mention of any incentive *before* the paperwork was signed.

However, Mr S also explained that he *had* received a payment after he'd signed all the paperwork – at which point it was explained that he'd receive a cashback payment. Mr S said that he'd understood the payment to be *"in lieu of any interest payments during the five year investment period."* Mr S said that he'd received two payments totalling £15,000 and that he'd find a bank statement showing the payments. When bank statements were provided these showed payments broadly similar to what Mr S had suggested, with £10,475 paid to him on 29 November 2012 and a further £5,470 paid to him on 18 December 2012. And it appears that the bulk of these monies were then transferred from the bank account and reinvested.

As I explained in my provisional decision, where a payment has been offered *after* the paperwork has been signed it cannot reasonably be said to have *"incentivised"* entry into the transaction.

L&C requested an oral hearing to, amongst other things, determine how accurate what Mr S has said about the payments is. I've already explained above that I don't consider a hearing will necessarily make a difference or cause Mr S' recollections of events that occurred many years ago to change. And why I'm satisfied that I'm able to fairly determine this complaint without convening a hearing.

In this case, Mr S has also stated that he was told by the adviser he was dealing with that the investment was a good investment, with a return that was better than other investments on offer. And, on balance, I think it's more likely than not that he was assured by what he'd been told by the adviser he was dealing with.

Overall, and having carefully considered all the submissions that have been made, I remain satisfied that Mr S, unlike Mr Adams, wasn't eager to complete the transactions this complaint concerns for reasons other than securing the best pension for himself.

I'm also satisfied that it wouldn't be fair to say Mr S' actions mean he should bear the loss arising as a result of L&C's failings. Had L&C acted in accordance with its regulatory obligations and best practice, it shouldn't have accepted Mr S' applications to invest in White Sands *at all*. That should have been the end of the matter. And had this occurred I'm satisfied the November 2012 and December 2012 payments wouldn't have been made to Mr S.

From the correspondence I've seen, I think that the only reason Mr S' pension monies were transferred to L&C was because TFSL understood it to be amongst the only, if not the only, SIPP provider accepting White Sands investments into its SIPP. That position seems to be supported by the contents of GPIL's liquidator's October 2015 letter, in which the only provider it mentions as facilitating White Sands investments through SIPPs is L&C. So, based on the available evidence, I'm not satisfied any other SIPP provider would have accepted the White Sands investment in its SIPPs. The corollary of this is that I'm satisfied that, but for L&C accepting the White Sands investments in its SIPPs, the transactions complained about here wouldn't still have been effected elsewhere.

For completeness, even if I'm wrong about this and even if there was another SIPP provider prepared to accept the White Sands investment in its SIPPs, I wouldn't think it's fair and reasonable to say that L&C shouldn't compensate Mr S 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 the White Sands investment into its SIPPs.

I appreciate that the White Sands investment wasn't the only investment Mr S effected in his L&C SIPP post-transfer, but I'm satisfied from the contemporaneous documentation that the reason Mr S' pension monies were transferred to L&C was so as to effect the White Sands investments.

So, I think it's more likely than not that but for L&C's failings in accepting the White Sands investment in its SIPPs, Mr S wouldn't have transferred his monies into a L&C SIPP so as to effect the investments this complaint concerns or have received the payments he received.

In my opinion, this case is very different from that of Mr Adams. And having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept White Sands in its SIPPs, the transactions this complaint concerns wouldn't still have gone ahead.

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

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr S – including TFSL. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against L&C that requires it to compensate Mr S for the full measure of his loss. L&C accepted the White Sands investments into its SIPPs and but for L&C's failings, I'm satisfied that Mr S' pension monies wouldn't have been invested in White Sands holdings.

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 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 S 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 S 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.

I acknowledge that Mr S has received a sum of compensation from the FSCS. However, the terms of his reassignment of rights require him to return any compensation paid by the FSCS in the event this complaint is successful. So I will make no allowance for what he's been paid by the FSCS. It will be for Mr S to make the arrangements to make any repayments he needs to make to the FSCS.

I've considered what Mr S said in response to my provisional decision about the monies he'll need to repay to the FSCS. The monies he received from the FSCS were paid to him directly and I'm satisfied that what I've set out further below is fair redress in this complaint.

In conclusion

Taking all of the above into consideration, I think that in the circumstances of this case it's fair and reasonable for me to conclude that L&C should have decided not to accept the White Sands investment to be held in its SIPPs before it had received Mr S' application from TFSL. And I conclude that if L&C hadn't accepted the White Sands investment in its SIPPs, Mr S wouldn't have established a L&C SIPP, transferred his pension provisions into it and made the White Sands investments he then made. For the reasons I've set out, I also think

it's fair to ask L&C to compensate Mr S for the loss he's suffered as a result of L&C accepting the White Sands investment in its SIPPs.

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 S to the position he'd now be in but for what I consider to be L&C's failure to carry out adequate due diligence checks before accepting Mr S' applications.

Mr S' has complained about the monies that were invested in the White Sands investments and I think that L&C should calculate fair compensation by comparing the current position of the monies that were invested in the White Sands investments to the position those monies would have been in had the investments in White Sands not been effected. I can't be certain of what funds, and in what proportions, those monies would have been invested in from late 2012 onwards if they hadn't been transferred into the L&C SIPP and invested in White Sands. It's possible they might have been retained in Mr S' existing policies, but it's also possible they might still have been transferred elsewhere and invested in other holdings.

Given the lack of certainty on this point, and having carefully considered this issue, 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 experienced a return from the date they were transferred into the L&C SIPP 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 reasonable proxy for the type of return that could have been achieved over the period in question.

What must L&C do?

In light of the above, L&C should calculate fair compensation by comparing Mr S' current position to the position Mr S would be in if he hadn't invested in White Sands. In summary, L&C must:

1) Calculate a current notional value, as at the date of this decision, of the monies that were invested in the White Sands investments if they'd not been transferred to the L&C SIPP.

2) Obtain the actual current value of the monies that were invested in the White Sands investments in Mr S' L&C SIPP, as at the date of this decision, less any outstanding charges. This value might be £0.

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

4) Pay a commercial value to buy Mr S' share in any residual White Sands holdings in his SIPP that cannot currently be redeemed.

5) Pay an amount into Mr S' SIPP, so that the transfer value of the SIPP 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 S £500 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 this decision, of the monies that were invested in the White Sands investments if they'd not been transferred to the L&C SIPP.*

   L&C should calculate what the monies that were invested in the White Sands investments would now be worth, as at the date of this decision, had they not been invested in White Sands and had instead achieved a return from the date of transfer into the L&C SIPP equivalent to the FTSE UK Private Investors Income Total Return Index.

   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 can make a notional allowance in its calculation, in the form of a notional withdrawal, for any monies that have been realised from Mr S' White Sands investments since outset. Any notional withdrawals to be allowed for should be deemed to have occurred on the date on which monies were actually realised from the White Sands investments and paid to Mr S/his SIPP, so that they cease to accrue any return in the calculation from that point on. To be clear, there should be no notional allowance in the calculation for any monies Mr S was paid by the FSCS.

   L&C must make a notional allowance in its calculation to allow for the monies Mr S received as *"cashback"*, that's the payments of £10,475 on 29 November 2012 and £5,470 on 18 December 2012. These are monies that Mr S wouldn't have received if he hadn't transferred his pension monies to L&C to invest in White Sands and, as such, I'm satisfied it's fair and reasonable for L&C to make an allowance for a notional deduction of these monies in this redress calculation. The notional withdrawals to be allowed for should be deemed to have occurred on the date these monies were actually paid to Mr S, so that they cease to accrue any return in the calculation from that point on.

2) *Obtain the actual current value of the monies that were invested in the White Sands investments in Mr S' L&C SIPP, as at the date of this decision, less any outstanding charges. This value might be £0.*

   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 S' pension, as a result of the White Sands investments.

4) *Pay a commercial value to buy Mr S' share in any residual White Sands holdings in his SIPP that cannot currently be redeemed.*

   But for any illiquid White Sands holdings that remain within Mr S' L&C SIPP, Mr S' monies could be transferred away from L&C. In order to ensure the SIPP could be closed and further SIPP fees could be prevented, any remaining illiquid White Sands 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 White Sands holdings that remain within Mr 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 White Sands holdings that remain within Mr 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, it may ask Mr S to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Mr S may receive from the White Sands investments after the date of my decision, and any eventual sums he would be able to access from the SIPP. L&C will need to meet any costs in drawing up the undertaking.

5) *Pay an amount into Mr S' SIPP, so that the transfer value of the SIPP 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 Mr S' SIPP, 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 S' expected marginal rate of tax in retirement at his selected retirement age.

It's reasonable to assume that Mr S is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr S would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

6) Pay Mr S £500 for the distress and inconvenience the problems with his pension have caused him.

In addition to the financial loss that Mr S has suffered as a result of the problems with his pension, I think that the loss suffered to this portion of his pension provision has caused Mr S distress. And I think that it's fair for L&C to compensate him for this as well.

SIPP fees

If any illiquid White Sands holdings that remain within Mr S' L&C SIPP can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mr S to have to continue to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of any illiquid White Sands investments that remain within it, and if the SIPP is used only or substantially to hold those

illiquid investments, then L&C should pay an amount into Mr S' SIPP equivalent to five years' worth of the fees that will be payable on the SIPP (based on the most recent year's fees). Five years should allow enough time for the issues with any illiquid White Sands holdings that remain within the SIPP to be dealt with, and for them to be removed from the SIPP. As an alternative to this L&C can agree to waive any future fees which might be payable by Mr S until the SIPP can be closed.

Interest

The compensation resulting from this loss assessment must be paid to Mr S or into his SIPP within 28 days of the date L&C receives notification of Mr S' acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation isn't paid within 28 days.

L&C must also provide the details of its redress calculation to Mr S in a clear, simple format.

My final decision

For the reasons given, it's my final decision that Mr S' complaint is upheld and that 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 £150,000, 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 £150,000, 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 final decision is that London & Colonial Services Limited should pay the amount produced by that calculation up to the maximum of £150,000 (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 £150,000, I recommend that London & Colonial Services Limited pay Mr S 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 S could accept a decision and go to court to ask for the balance and Mr S 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 S to accept or reject my decision before 26 January 2023.

Alex Mann
Ombudsman