

## **The complaint**

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

## **What happened**

Both parties to this complaint have, at times, made submissions through a representative and, for simplicity, I refer to Mr H and/or L&C throughout this decision even where the submissions I'm referring to were, in fact, made on their behalf by one of their representatives.

I've outlined the key parties involved in Mr H'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.

#### **Smith Osborne Associates Ltd ('SOA')**

At the time of the events in this complaint, SOA was an appointed representative ('AR') of the On-Line Partnership. It was authorised by the then regulator – the Financial Services Authority ('FSA'), which later became the Financial Conduct Authority ('FCA'). SOA was an AR of the On-Line Partnership Limited from 29 December 2008 to 23 December 2014.

#### **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.

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 J. In January 2010 the company changed its name to GPIL as well. Later, in April 2012 it changed its name to CASML.

By May 2012 (when Mr H signed paperwork to invest in White Sands), Mr J had been appointed director of over 70 companies named "*White Sands Country Club* [a number]

*Limited*". This included being director of the company, *White Sands Country Club WS0615 Limited*, (incorporated in November 2011) that Mr H'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 H says that he had a friend who had pensions knowledge, that friend told him pensions in general weren't very good and that Mr H should invest into something more profitable. Mr H says that after he spoke to his friend he met with SOA.

On 2 May 2012, Mr H signed a typed form on SOA headed paper titled "*Investment information*". The form set out a number of the risks associated with Carbon Credit investments. The risks included that Carbon Credits were highly speculative, there was no recognised market for them and they were only considered suitable for experienced/sophisticated investors – with no more than 20% of investable assets to be held within them at any one time.

The form also said that Mr H was happy to proceed with the transfer of his existing pensions on a non-advised basis and highlighted that by doing so he may lose all or part of the protection offered by the ('FSA'), Financial Ombudsman Service and Financial Service Compensation Scheme ('FSCS'). Further, that the investor (here Mr H) could not receive a financial incentive through his pension for making investments of this type and that any financial incentive would be deemed a conflict of interest and impact on suitability.

We've been provided with a copy of the suitability report that SOA sent to Mr H on 10 May 2012. Amongst other things, this says that:

- Mr H had been introduced to SOA by an individual at Green Planet Corporate Solutions ('GPCS').
- Mr H had met with the individual at GPCS to discuss the option of using pension monies to invest in White Sands.
- The White Sands investment couldn't be made via Mr H's existing pension arrangement and he was looking to transfer his pension monies to a provider that would allow the investment.
- Mr H wanted to invest in White Sands following his conversation with GPCS because the investment offered the potential for very high returns.
- Mr H had made the decision to invest in White Sands by the time he was introduced to SOA.
- To facilitate the investment, SOA explained that monies would need to be transferred into a SIPP.
- Moving Mr H's entire pension fund from a multi asset fund with Scottish Life into an unregulated alternative investment in a SIPP would be highly speculative and would be exposing Mr H's capital to risk which could lead to a total loss of the pension fund.
- Mr H had said he was comfortable with this and that the potential risks were worth taking due to the potential return available.
- SOA didn't think investing 100% of Mr H's pension fund would be suitable. Such investments were only deemed suitable for 20% of a client's overall investment assets and SOA understood that Mr H's Scottish Life plan represented a larger percentage than this.
- Making such an investment in a high risk asset, of which Mr H has had no

experience, would be highly speculative. SOA wouldn't recommend the transaction or the transfer to the SIPP.

- If Mr H proceeded with the transfer then he would lose contributions being made by his employer to his existing scheme and SOA recommended against doing this. Mr H was unconcerned by this as he would be auto-enrolled into a new scheme in the near future and thought it likely he would only miss out on a small amount of employer contributions.
- Mr H accepted that SOA didn't recommend the transfer but still wanted to transfer to invest in White Sands, so the transfer would proceed on a non-advised information only basis.
- Mr H had no experience of investing in overseas land or property or unregulated investments and had been provided with details of the White Sands investment by GPCS.
- A number of risks associated with the White Sands investment were set out. SOA noted that Mr H had confirmed that he'd had the risks of investing in White Sands explained to him (the name of the person who provided the explanation is redacted in the letter I've seen) and that he'd also conducted his own research and due diligence. SOA said it was unable to offer any specific advice about White Sands.
- Investing the entire pension fund in White Sands would be considered speculative/extremely high-risk and Mr H could lose his entire fund.

Subsequently, on 16 May 2012, L&C received a completed application form for Mr H to open a new SIPP. The Independent Financial Adviser ('IFA') details section of the application form records the introducing firm as SOA, and SOA's FSA authorisation number was recorded. A box is ticked to confirm that Mr H was given advice at the point of sale and it's recorded that initial remuneration of £1,500, and ongoing remuneration of £350, would be paid to the IFA. It's also stated in the form that Mr H would manage the fund himself and that a little over £33,000 would be transferred in from Scottish Life. In respect of initial investments "*Carbon Credits \*TBC\**" is stated. Mr H signed the form on 2 May 2012.

L&C wrote to SOA on 17 May 2012 confirming receipt of the SIPP application. It explained that it had forwarded transfer paperwork on to Scottish Life and that it had not yet received any investment instructions for Mr H's SIPP. L&C asked for details of these once the basis for investing the fund had been agreed.

On 25 May 2012, L&C wrote to Mr H and confirmed that his SIPP was in force and that a little under £32,000 had been received from Scottish Life.

A White Sands SIPP instruction form was later sent to L&C, this was signed by Mr H on 31 May 2012. It was noted that £27,500 was to be invested in plot WS 06-15 and a further £1,206 was payable in legal and administrative costs bringing the total to £28,706. There were three options available to the SIPP holder "*36 month capped*", "*60 month capped*" or "*uncapped, 100% of capital growth*", Mr H selected the last of these.

A White Sands Country Club Green Planet disclaimer was also signed for the investments by Mr H on 31 May 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 H also completed L&C Investment Request forms on 31 May 2012, this was to acquire 100% of the issued share capital in "*White Sands Country Club WS 0615 Ltd*". 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 H's case was the company White Sands Country Club WS 0615 Limited – would hold the plot(s) identified in the corresponding White Sands SIPP instruction forms Mr H 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 H also completed on 31 May 2012 detailed White Sands as the investment, confirmed the details for Mr H's contact and recorded an investment amount of £28,706. 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 investment. The form also recorded that Mr H wasn't a certified or self-certified sophisticated investor, that he'd received no advice on the merits of the proposed investment and that the investment decision was solely his responsibility.

We've not been provided with a copy of the *full* sale and purchase share agreement in this case by Mr H or L&C (we've seen a partial copy in this case but some sections are missing, for example, Schedule 3 and 4 of the agreement). However, L&C has previously provided us with a full copy of a sale and purchase share agreement on a different case in which a SIPP investor also invested in White Sands (that case was the subject of a previous final decision). I'm satisfied it's more likely than not that, subject to a few exceptions such as reference to the individual SIPP member and/or the specific White Sands company/plot number, the agreement in that other case would have been largely identical to the agreement in Mr H's case.

It was noted, amongst other things, in the sale and purchase share agreement in Mr H's 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."*

The full copy of the sale and purchase share agreement that, as I've mentioned above, L&C previously provided to us on the other case, included a copy of Schedule 3 and Schedule 4. And Schedule 3 of the agreement (titled "*Completion arrangements*") said that:

*"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."*

And in the other case Schedule 4 of the agreement (titled "*General Warranties*") said, amongst other things, 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 Invetimentos Imobiliarios Ltda (Mr J signed for both Green Planet firms in the agreement we've seen on the other case).

We've been provided with a transaction history for Mr H's SIPP. This records that a little under £32,000 was transferred in from Scottish Life on 25 May 2012. SOA was paid an IFA fee of £1,500 in June 2012. And £28,076 was then invested in the White Sands Investment on 21 June 2012.

On 9 January 2014, L&C wrote to Mr H and said that, as Mr H might have seen in the financial press, GPIL had been placed into liquidation. L&C also explained that:

- L&C was sole trustee of Mr H's SIPP and was the legal owner of the assets in the SIPP. It carries out investment instructions given to it by Mr H's financial adviser subject to the investment being allowable under the rules of the SIPP. At Mr H's request it invested into the White Sands investment.
- The investment was made by the purchase of 100% of the unquoted shares of a special purpose vehicle ('SPV') company. The SPV was formed for the sole purpose of holding title to the plot of land specified in Mr H's application form.
- L&C understands that the purpose of the investment was to acquire a plot/plots of land on White Sands Country Club development. The plots would be held for three years, five years or an unspecified period and then sold back to Green Planet or to a third party.

- It didn't have any further information about the circumstances of the insolvency or Green Planet. But as owner of the asset it would notify its interest to the liquidator when asked to do so and pass on any updates it received.
- As the funds Mr H had invested were from a pension fund any recovery or compensation that was achieved would be payable to the pension fund.

On 9 July 2014, L&C wrote to Mr H and said it was enclosing a valuation and a Statutory Money Purchase Illustration ('SMPI'). Both the valuation and SMPI gave the value of Mr H's SIPP as being a little over £27,500 as at 9 July 2014.

On 14 May 2015, L&C wrote to Mr H and said it was enclosing a valuation and a SMPI. It was explained in the letter that there was only a small cash balance remaining and that the White Sands investment was (then) currently illiquid. And that, as a result of this, there wasn't sufficient cash liquidity to pay any pension income if wanted, or to pay fees or charges. The letter also said that:

*"Whilst we sympathise with the problems encountered with the particular investment within your arrangement, we have never been involved with, nor are we in any way responsible for the choice of the investment or the difficulties arising in connection with it. We have nevertheless carried out the work required to operate the SIPP arrangement itself and will continue to do so as long as the arrangement continues – in this connection the fees for this work therefore continue to be incurred."*

L&C also noted that it would continue to accrue any fees due and would only deduct them from the fund when sufficient liquidity became available in the SIPP to do so, noting that the balance of fees owing was £804. Both the valuation and SMPI gave the value of Mr H's SIPP as being a little over £27,500 as at 14 May 2015.

The liquidator for GPIL wrote to L&C about the White Sands investment on 12 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 the wife of the former managing director Mr J.
- The land is owned by a Brazilian company (Terras de Extremoz Investimentos Imobiliarios Ltda (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 J 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 J.
- 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.

L&C sent a copy of the letter from the liquidator on to Mr H on 23 October 2015.

On 19 May 2016, L&C wrote to Mr H and said it was enclosing a valuation and an SMPI. It was explained, amongst other things, in the letter that L&C had valued the White Sands investment as £0. It was explained that this represented a value that L&C considered it appropriate to attribute to the asset bearing in mind that there was no readily available market on which the asset was traded and no immediate means of determining a sale value. And L&C explained that:

*“Whilst we sympathise with the problems encountered with the particular investment within your pension, we have never been involved with, nor are we in any way responsible for the choice of the investment or the difficulties arising in connection with it. We have nevertheless carried out the work required to operate the pension itself and will continue to do so as long as the pension continues – in this connection the charges for this work therefore continue to be incurred.”*

L&C also noted that it would continue to accrue any fees due and would only deduct them from the fund when sufficient liquidity became available in the SIPP to do so. Both the valuation and SMPI gave the value of Mr H's SIPP as being a little over £75 as at 19 May 2016.

On 30 June 2016, L&C wrote to Mr H and said, amongst other things, that:

- The investment Mr H chose to make in White Sands had encountered serious trading difficulties. In the absence of any recognised market there appeared to be no reference from which to establish a value, or any market or means to achieve a sale.
- The investment in White Sands has to be regarded as having no current value and there appears to be no realistic prospects for a sale in the foreseeable future.
- Due to this, and the fact that Mr H held no other investments in his SIPP, his SIPP couldn't be regarded as having any value apart from a small amount held in cash.
- In the circumstances it would regard Mr H's SIPP arrangement as terminated and write off its outstanding fees that accrued.
- If Mr H advised it within 30 days that he wanted to make further contributions in order to make other investments it would be happy to reinstate his arrangement.
- While the White Sands investment was considered to have no value and no realistic prospect of recovery, if Mr H wanted then L&C would transfer ownership of the investment to him so that he would benefit in the event of there being a recovery of some value.

### ***What's happened with this complaint so far?***

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

- Mr H's SIPP application form confirmed that he intended to transfer his previous pension plans into a L&C SIPP following the receipt of regulated financial advice from SOA.
- SOA, a regulated financial adviser, held the appropriate permissions to advise on pension transfers and investments.
- L&C provides execution-only SIPP administration services, as explained in the SIPP application form, the Member Declaration, the Terms and Conditions and the Key Features Document, all of which were provided to Mr H.
- L&C complied with the requirement under COBS 11.2.19 by executing Mr H's specific instructions. L&C would have been in breach of COBS if it hadn't executed Mr H's investment instructions.
- L&C doesn't (and isn't permitted to) provide advice to any clients in relation to the establishment of a SIPP, transfers of any previously held arrangements into the SIPP or the underlying investments.
- L&C acts as the trustee and administrator of Mr H's SIPP.
- The suitability of the investment is the responsibility of the financial adviser.
- L&C conducted due diligence on the White Sands investment and found no reason at the time to refuse the investment.
- It is a SIPP provider's responsibility to ensure that the investments it accepts are genuine and that good title can be obtained. A SIPP provider will also ensure that, in accepting an investment, the customer will not fall foul of HM Revenue & Customs ('HMRC') rules.
- L&C determined that the investment comprised shares in a land development company. The company shares could be independently valued by a qualified accountant, by way of the provision of their opinion on share price after reviewing their accounts. In addition, any land assets owned by the company could be valued by a qualified surveyor.
- L&C reviewed the investment information and conducted searches to determine as far as possible that it was legitimate, that it was suitable to be held in a UK pension scheme and that there were no sanctions against the company or the individuals involved.
- Risks highlighted by L&C in a Member Declaration that Mr H signed included that investing in unquoted shares is a high risk investment, there was no established market for selling unquoted shares, unquoted shares are unregulated investments and the protection of the FSCS won't apply.
- The Member Declaration also stated that:

*"Neither the Trustee nor its Administrator is authorised to give me financial or investment advice and that no information given to me by you is intended to be and will not be taken as advice to me of any kind nor as any kind of recommendation of this investment*

...

*I understand the speculative nature of the Investment and I have obtained whatever information, reports, legal, financial, taxation and other advice I require regarding the investment including its potential value and the associated costs and expenses including any taxes and other costs and expenses that may fall to be paid out of my Open Pension arrangement."*

- Mr H was aware of the risks involved, as demonstrated by the different investment forms he provided to L&C.
- The complaint wasn't made in time, either because more than six months passed between its final response letter and the complaint being referred to us. Or else,

because it's more than six years from the events complained about and more than three years since Mr H was aware that he had cause for complaint.

- It's likely Mr H would have a valid claim through the FSCS.

Mr H has said to us that:

- During a meeting with SOA the White Sands investment was introduced. This was the first time he'd heard about White Sands and he was told investing in it would lead to his pension pot growing.
- He was interested in White Sands because he was told investing in it would lead to his pension pot growing and that he would have more money for retirement.
- He had to sign documentation and then his pension was transferred. He was told to sign a number of forms, so he signed all of them.
- He doesn't have knowledge of pensions and investments and signed and returned everything as he trusted the advice he was getting.
- He never thought there were risks, he thought White Sands was a legitimate investment and was given assurances that there was little or no risk.
- If L&C hadn't permitted the White Sands investment he would have sought the advice of his friend on what to do as he had no knowledge of investments.
- He received no payment after transferring into the SIPP and making the investment in White Sands.
- He signed the forms but didn't have a full understanding of things.
- He signed the documents that were brought to him.
- He wasn't advised it was high risk.
- He trusted SOA to do what was right on his behalf and he didn't understand the whole thing.
- The sole purpose of establishing a SIPP was to enable Mr H to invest in the White Sands investment.
- In addition to compensation for the losses he's suffered, Mr H has also asked us to consider the upset caused by L&C's conduct and to make an award for his legal costs (which I've taken to mean any sum he's had to pay, or will have to pay, his professional representative in this complaint – a firm of solicitors).
- Mr H has made no complaint to SOA or The On-Line Partnership.
- In 2019, Mr H ran into a friend who had experience with pensions and investments. During their conversation Mr H's SIPP was mentioned and the friend had subsequently recommended that Mr H seek further advice on the status of his pension and investments. After carrying out some research, Mr H had contacted his current representative to make an enquiry about his pension transfer. Mr H has little knowledge of pensions and investments and it wasn't until he'd run into the friend that he started to have cause for concern that L&C hadn't carried out sufficient due diligence.
- In the years following his pension transfer Mr H was travelling to and from Africa a great deal and didn't have access to his mail or pension statements.

One of our investigators reviewed Mr H's complaint and concluded that the complaint had been made to us in time and that it was one that should be upheld. The investigator said that L&C shouldn't have accepted the White Sands investment into Mr H's SIPP. And that, by doing so, L&C hadn't treated Mr H fairly and it should redress him for the losses he'd suffered.

L&C didn't agree and said, amongst other things, that:

- The complaint is time barred. Mr H's complaint was first made more than six years after all of the SIPP being established, monies being transferred into the SIPP and

monies being invested into the White Sands holding. Further, Mr H ought to have been aware he had cause for complaint more than three years before he complained.

- GPIL was wound up in December 2013. By this point, it would have been obvious that a total loss had been suffered and any issue regarding the investment's suitability, or alleged failure to complete adequate due diligence, would have been apparent.
- By November 2013, the national press was running articles discussing the high pressure sales tactics used by GPIL and highlighting concerns that the investment was a scam.
- L&C wrote to Mr H on 9 January 2014 stating that GPIL had been placed into liquidation.
- L&C sent Mr H a copy of a report from the liquidator, dated 12 October 2015, on 23 October 2015.
- L&C sent a letter to Mr H on 19 May 2016, this stated that the White Sands investment was valued at £0 and that the overall SIPP value was a little over £75 with a projected value, as at age 65, of £0.
- L&C sent a letter to Mr H on 30 June 2016, this stated that there was no reference with which to establish a market for the White Sands investment or any means to achieve a sale. Further, that White Sands was regarded as having no current value and no prospects for sale in the foreseeable future. And that the SIPP fund couldn't be considered to have any value and the SIPP contract would be terminated.
- The original SIPP application form stated that Mr H intended to invest in Carbon Credits. It seems that Mr H had a desire to invest in high risk, unregulated products in the hopes of achieving a high return. And it seems highly likely that, had L&C refused to accept the White Sands investment that Mr H would still have proceeded.
- It's clear that the decision to transfer wasn't made as a consequence of the White Sands marketing information specifically, but was made with a general intention to make high risk investments.
- 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 in the view 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.
- At all times, Mr H was aware that L&C would act on an execution-only basis and would accept no responsibility for the quality of the investment business.
- 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.
- 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.

- The relationships in this case are similar to those in *Adams*, the distinguishing factor is that Mr H took advice from a regulated financial advice firm.
- Mr H 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.
- 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.
- It carried out due diligence on SOA; it would have checked the register to make sure SOA had the requisite permissions but, due to system issues, it's been unable to retrieve evidence of any searches carried out.
- The first introduction it received from SOA was in June 2011.
- A terms of business agreement would have been put in place with SOA in June 2011 but, due to system issues, it's been unable to retrieve evidence of this.
- Following the introduction and acceptance of new business, it's process would have been to carry out regular checks to ensure that the introducer remained authorised.
- It didn't request copies of suitability letters from SOA.
- The agreement with SOA came to an end in January 2015, when SOA ceased to be authorised to give financial advice.
- 124 clients were introduced by SOA and 100% of these were for consumers who were to invest monies in non-mainstream investments.
- Mr H was number 59 of the clients introduced by SOA.
- 1.61% of the introductions involved occupational pension schemes.
- The business introduced by SOA made up a little over 7% of L&C's total new business during the period in which SOA was introducing business.
- It carried out due diligence on the White Sands investment but, due to system issues, it's unable to provide any records of this. It didn't rely on any third party's due diligence review,
- The usual searches carried out before an investment is accepted would include a search of Companies House, including the directors and majority shareholders, complete internet searches of the Company, the Directors and majority shareholders, and a search of the regulator's website to check whether there are any adverse publications.
- It satisfied itself that the property was able to be fairly valued as the investment was a development of commercial property in the form of a Country Club/Hotel Rooms/Apartments. As such, a qualified surveyor is able to be appointed to provide their opinion on market value. However, due to system issues, it's unable to provide us with any records of any searches it carried out.

L&C wasn't able to prove records/documents to demonstrate any initial steps it took to understand SOA's business model or client process; in particular, how the introductions were made, whether advice was being given by the introducer on the pension transfer and/or the underlying investments and on the level of business it was expecting to receive from SOA each month. L&C wasn't able to provide records of any (at the time) ongoing discussions with SOA about its client process and the business it was introducing.

Notwithstanding what's stated above, L&C has been able to provide us with a due diligence report dated 16 March 2012, titled "*Regarding the acquisition of real estate from Green Planet Investimentos Imobiliarios Ltda*" both L&C's name and the name of Peixoto & Cury ('P&C'), who appear to be a firm of solicitors, appears on the report. It's noted, amongst other things, in the report that:

- P&C had been retained by L&C to assist in the acquisition of residential plots within a residential condominium named Terras de Extremoz I to be entered into with Green Planet Investimentos Imobiliarios Ltda, a Brazilian limited liability company in the real estate business.
- The scope of P&C's work was two-fold – due diligence and legal advice for closing the transaction with the transfer of title of the residential plots from Green Planet Investimentos Imobiliarios Ltda to L&C, or else to entities designated by L&C.
- The due diligence report was based on information P&C had obtained from Green Planet Investimentos Imobiliarios Ltda's counsel. P&C hadn't checked any original documentation or visited the area where the plots are located.
- As such, "*for great part of the conclusions drawn herein, we had to rely solely on information whose accuracy we have been unable to confirm.*"
- P&C had managed to obtain some documentation from public records and its report was also based on this information.
- The due diligence report was based solely on P&C's analysis of Brazilian law and shouldn't be considered to be an opinion on Green Planet Investimentos Imobiliarios Ltda.
- P&C relied on information made available by third-parties, or available public records, and part of this information may have to be later confirmed by means of independent review.
- Documents suggested a public deed of purchase and sale had been executed between Green Planet Investimentos Imobiliarios Ltda and Glade Empreendimentos Imobiliários Ltda. ('Glade'), further that a chattel mortgage had been entered into in favour of Glade which would be released once all payment obligations had been fulfilled by Green Planet Investimentos Imobiliarios Ltda.
- A certificate issued by a real estate registry office recorded Green Planet Investimentos Imobiliarios Ltda as the registered owner of the land subdivision Terras de Extremox, this consisted of in excess of 700 plots of land. It had been agreed that 158 plots of land would be excluded from the chattel mortgage.
- P&C recommended that L&C (or the entities indicated by L&C) purchase plots that weren't pledged by the chattel mortgage, or else that were already released from the chattel mortgage.
- P&C recommended that, prior to the acquisition, each and every plot to be acquired by L&C, or by entities indicated by L&C, is dismembered from the whole real estate, so that each plot to be acquired has its own enrolment with the real estate registry office. This was so that each plot can be individualised for purposes of having a single registered owner following acquisition.
- P&C didn't know whether a project for providing the land subdivision with infrastructure was on schedule but had received an affidavit from Green Planet Investimentos Imobiliarios Ltda about this.

- Some payments from Green Planet Invetimentos Imobiliarios Ltda to Glade had been made in arrears.
- GPIL held a 99% equity interest in Green Planet Invetimentos Imobiliarios Ltda, Mr J held the other 1%.

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

- The complaint had been referred in time and was one we could consider.
- 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 H's application to invest in White Sands. Its failure to do so was unfair to Mr H.
- 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 H's application to invest in White Sands, it allowed his funds to be put at significant risk.
- In the circumstances, it was fair and reasonable for L&C to compensate Mr H to the full extent of the financial losses he's suffered due to its failings.

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

- The ombudsman is creating new due diligence obligations in a way that's contrary to the FCA's own publications at the time.
- L&C invites the Financial Ombudsman Service to dismiss the complaint.
- This complaint is time-barred. The event complained about occurred more than six years before Mr H complained to L&C. And Mr H was aware, or ought reasonably to have become aware, that he had cause for complaint more than three years before his complaint was made.

- The White Sands development was due to be completed and opened by March 2013. While it's not unusual for building work to be delayed, Mr H should have noticed that the building work was not proceeding according to plan.
- In 2013 there was growing concern about the White Sands investment, this was publicised in the mainstream media (links to two articles were provided). Any reasonably prudent investor would have been aware of the media coverage and this, combined with the delayed building work, ought to have been a concern.
- In November 2013, White Sands was put into liquidation which resulted in increased press attention and publications from the Insolvency Service.
- L&C wrote to Mr H in May 2016 stating that the White Sands investment was valued at £0, this should have put Mr H on a train of enquiry to start investigating the matter.
- In *Jacobs v Sesame* [2014] EWCA Civ 1410, the Court of Appeal found that a decrease in the value of an investment allowed a claimant to acquire constructive knowledge for the purposes of s.14A of the Limitation Act 1980 where a claimant had understood that their capital was guaranteed.
- Mr H would have been aware that his investment was valued at £0 in May 2016. So, he was aware, or ought to have been aware, he had cause for complaint at that time.
- In a recent final decision (the reference was provided to us) the Financial Ombudsman Service stated that the writing down of a consumer's investment meant that the consumer was aware, or ought reasonably to have been aware, that they had cause for complaint more than three years before they complained.
- Mr H was sent a letter on 30 June 2016 which explained that there was no viable market for the White Sands investment and his SIPP contract would be terminated.
- By October 2016, Mr H ought to have known that there was cause for complaint against L&C.
- By October 2016 all of the FCA documents referred to in the provisional decision had been published. And it's reasonable to assume that a SIPP investor with an investment written down to zero would, or should, have taken an interest in the regulatory requirements and obligations placed on a SIPP provider.
- To use the FCA publications to uphold the complaint on merits whilst simultaneously holding that a reasonably prudent investor shouldn't have been aware of their contents is absurd.
- Mr H was aware that L&C would *"be the custodian of the asset under the SIPP and therefore when faced with the knowledge that the asset was worthless, amidst allegations of fraud"* Mr H ought to have reasonably considered that L&C bore some responsibility for this.
- All of the justifications for upholding the complaint were apparent from the liquidator's report that was provided to Mr H in 2015.
- The definition of 'complaint' under DISP includes reference to *"...an activity of that respondent, or any other respondent with whom that respondent has some connection in marketing or providing financial services or products... which comes under the jurisdiction of the Financial Ombudsman Service..."* This section requires that a complaint must relate to the activity of the respondent or any other respondent who has some connection with the financial service complained of. 'Respondent' is a defined term and, for the purposes of this section would include an authorised professional firm.
- As such, Mr H would have had awareness of his complaint when he had:
  - Awareness of a problem
  - Awareness that the problem may have caused him loss, and
  - Awareness that the problem was caused by L&C or another regulated entity.
- SOA was involved with the transaction, and it provided advice. By the time Mr H had received the liquidator's report he would have been aware, and certainly ought to have been aware, that he had a cause for complaint in respect of the actions of any party who assisted with the transaction.

- As such, the three-year limb would have started to run from the point at which Mr H received the liquidator's report at the latest, as this gave him all of the information on which he now bases his complaint.
- The fact that a SIPP was worthless with an asset that was subsequently wound up amidst fraud allegations would give any reasonable investor cause to investigate the liability of all parties to the transaction, and an internet search would have revealed the publications issued by the regulator regarding the duties of a SIPP provider.
- The case of *Haward v Fawcett* [2006] UKHL 9 is applicable to the interpretation of the three-year timeframe in DISP, as this is the leading case on the interpretation of the secondary three year timeframe in s.14A of the Limitation Act. The case held that the three year period begins to run when a claimant has sufficient knowledge to start investigating their claim.
- Receipt of the liquidator's report gave Mr H sufficient grounds to investigate his complaint and, in following the *Official Receiver* case, this should be sufficient to start time running under DISP and the complaint should be rejected as a consequence.
- The Ombudsman placed insufficient weight on the documentary evidence that shows that Mr H was aware of the risks of the White Sands investment.
- Mr H was informed by SOA that investing in White Sands could expose his capital to risk which could lead to the total loss of his pension fund. SOA concluded that the transfer to the SIPP and investment in White Sands wasn't suitable. Despite this, Mr H proceeded with the transfer and investment against advice.
- Mr H confirmed that the risks of investing in White Sands had been explained to him and that he'd conducted his own research and due diligence.
- Mr H's comments that he signed the forms but didn't have a full understanding of things, and that he wasn't advised it was high risk, contradict the contemporaneous written documents.
- L&C was instructed to act on instructions on an execution-only basis and the responsibility lies with Mr H.
- Mr H previously tried to invest in Carbon Credits, another speculative, high-risk investment. Mr H was intent on taking risks with his pension funds in the hope of achieving greater returns, despite the associated risks.
- L&C can't be held accountable for investment decisions that Mr H would have made with, or without, its involvement.
- In the provisional decision, the ombudsman cherry picks from case law.
- The decision in *Adams v Options SIPP UK LLP* (formerly Carey Pensions UK LLP) [2020] EWHC 1229 (Ch) is largely ignored even though the relationships in this case between L&C, Mr H and SOA are similar to those in *Adams*. If anything Mr H was in a safer position as he had the benefit of another FCA regulated entity – SOA.
- The *Berkeley Burke* judgment was a judicial review of the Financial Ombudsman Service whereas the *Adams* case examined the responsibility of a SIPP provider offering an execution-only service, both under COBS rules and contract.
- The Financial Ombudsman Service doesn't properly address using the Principles as the basis for finding against L&C in preference to the COBS rules or established case law. And the Financial Ombudsman Service makes no attempt to apply the Principles in light of COBS as interpreted in *Adams*.
- A breach of the Principles cannot, of itself, give rise to any cause of action at law.
- The Principles, and such duties as may be imposed on L&C by these, fall to be construed in light of the COBS rules applicable to L&C, the regulatory permissions that L&C held at the time and L&C's contractual arrangements with its clients and other parties.
- The Financial Ombudsman Service doesn't explain how L&C could have completed adviser level due diligence and communicated this to the consumer without breaching its permissions.

- In *Adams* it was held that *“there was... [no] duty on [Carey]... to consider the suitability of appropriateness of a SIPP or the underlying investment. The contract between [the parties] makes that clear”*.
- The Financial Ombudsman Service applies the Principles wholly in contrast to the terms of the contract and the statutory objective previously set out at FSMA s.5(2)(d), now s.1C.
- Amongst other things, the judge in *Adams* held 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”*.
- Some points raised haven't been addressed in the provisional decision.
- The publication of any reports, guidance and correspondence issued by the FCA had no bearing on the construction of the Principles. The contents of the documents, or the Principles, cannot found a claim for compensation of itself.
- Regulatory publications can't alter the meaning, or the scope, of the obligations imposed by the Principles.
- If there was no obligation imposed on L&C by the Principles to consider and act on the suitability of the SIPP or the underlying investment, the publications referred to in the provisional decision can't impose such a duty.
- The 2009 and 2012 Thematic Reviews aren't statutory guidance under FSMA s.139A. And even if the 2009 and 2012 Thematic Review Report had been statutory guidance made under FSMA S.139A (which they weren't), the breach of such statutory guidance wouldn't give rise to a claim for damages under FSMA S.138D.
- Many of the matters which the Thematic Review invites firms to consider are directed at firms providing advisory services.
- The FCA's Enforcement Guide says that *“Guidance is not binding on those to whom the FCA's rules apply. Nor are the variety of materials (such as case studies showing good or bad practice, FCA speeches and generic letters written by the FCA to Chief Executives in particular sectors) published to support the rules and guidance in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules.”*
- It's not fair or reasonable to determine the complaint by reference to the FCA publications and to do so only exacerbates the problem referred to by Jay J in *Aviva*.
- *Adams* held that the duties imposed by COBS can't all apply to all firms in all circumstances. Neither the obligations under COBS 14.2.3R and COBS 14.3 to provide clients with product information, nor the obligation under COBS 19.1.2R to provide clients with pension product information, apply to execution-only SIPP providers.
- The provisional decision seeks to impose on L&C a duty of due diligence that it doesn't owe and which goes far beyond the scope of any duty envisaged or agreed by the parties.
- The provisional decision imposes a requirement on L&C to make a value judgment in circumstances where it wasn't qualified or able to do so.
- The provisional decision wrongly finds that L&C was under an obligation to protect against consumer detriment and ensure that Mr H understood the risk involved.
- If L&C really had the obligations of due diligence that are set out in the provisional decision it would have been required to engage in the activity of advising on investments in contravention of its regulatory permissions.
- Mr H signed the L&C SIPP application form on 2 May 2012, this was received by L&C on 16 May 2012. L&C wrote to SOA confirming receipt of the SIPP application and explained that the transfer paperwork had been forwarded on to Scottish Life, after the contract had been entered into.

- The provisional decision states that the facts in the *Adams* case are different to those in Mr H's complaint and the rationale for this relates to timing. L&C fails to see how the Ombudsman can conclude that Mr H's complaint must be determined differently on the basis that any alleged breach was made pre-contract. This is incorrect and allows the decision to proceed on a legally incorrect basis.
- This finding creates a relationship between L&C and Mr H before the contract was entered into and before any funds were received by L&C, this cannot be right.
- Insufficient weight has been given to contractual arrangements and the demarcation of roles and responsibilities. The documents setting out the contractual relationship between the parties make it clear that L&C was acting on an execution-only basis.
- The reasoning of the provisional decision runs contrary to that in *Adams* in which it was held that a SIPP provider's duties under the regulatory regime fall to be construed in light of its contractual arrangements.
- Regardless of when due diligence was completed in the respective cases, *Adams* considered the duties of a SIPP provider under COBS at length and the findings of that case should be applied.
- The Financial Ombudsman Service is deviating from established case law with no valid explanation for why it's done so.
- The provisional decision should have found that L&C's duties to Mr H extended no further than those owed to the claimant in *Adams*.
- In *Adams* the judge held that, in construing Carey's regulatory obligations, further regard should be had to FSMA s.5(2)(d): "*I also view the 'consumer protection objective' as relevant in ascertaining the duty [imposed on Carey], even though the section of FSMA which contains it is aimed at the FCA itself. The provision requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, among other things, 'the general principle that consumers should take responsibility for their decisions'. In this case those decisions, as between the claimant and the defendant, are set out in the documents which comprise the contract between them.*" And The FCA didn't disagree with this approach.
- The provisional decision 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.
- At the time of the transaction complained of there was no obligation on a customer to take advice on the transfer of a pension.
- The provisional decision enables Mr H to recover against L&C for losses flowing from non-contractual obligations which were inconsistent with, and contrary to, the express obligations in the parties' contractual arrangements.
- Assessing the suitability of any pension product, transfer of pension rights or investments was wholly the responsibility of Mr H and/or his financial adviser.
- In compliance with its obligations under COBS 11.2.19R, L&C acted on Mr H's written instructions in the setting up of the SIPP and the transfer of monies.
- To decline the application to open a SIPP and investment on the grounds that the transaction was unsuitable for Mr H would have required an assessment of suitability. And L&C didn't have investment advisory permissions.
- L&C would have ensured SOA was listed on the Financial Services Register as a regulated FCA firm and that it was authorised to provide investment management services. Due to system issues, L&C has been unable to locate evidence of this.
- It was reasonable for L&C to be afforded a significant level of comfort in relation to SOA's appointment as Mr H's investment manager.
- An FCA-authorized investment manager is required to operate under a set of regulatory obligations and to ensure they have their client's best interests in mind.
- COBS 2.4.8 states that "*It will generally be reasonable (in accordance with COBS 2.4.6R (2)) for a firm to rely on information provided to it in writing by an unconnected*

*authorised person or a professional firm, unless it is aware or ought reasonably to be aware of any fact that would give reasonable grounds to question the accuracy of that information."*

- No breach arises by virtue of Mr H investing in high-risk investments and the risk element doesn't necessarily make an investment unsuitable for a SIPP. As the judge found in *Adams*, the fact that Store First was high risk didn't make it manifestly unsuitable.
- The suitability of a high-risk investment depends on the customer's circumstances.
- The provisional decision stated that, but for L&C's alleged breach, Mr H wouldn't have invested in White Sands and wouldn't have suffered the loss to his pension. This conclusion is inconsistent with the terms of the contract between the parties, the relevant COBS Rules and the restrictions on L&C's permissions.
- There is a real unfairness if an execution-only SIPP provider is liable for the poor investment choices of consumers and the failures of other regulated entities over which it put in place contractual controls that the regulated entity breached.
- Where a consumer chooses an execution-only service, it would be unfair if the SIPP provider were not able to rely on express representations made by the consumer when signing the contractual documentation.

## What I've decided – and why

### jurisdiction

I've reconsidered all the evidence and arguments in order to decide whether we can consider Mr H's complaint.

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

### Has the complaint been brought in time?

DISP 2.8.2R sets out that:

"The *Ombudsman* cannot consider a *complaint* if the complainant refers it to the *Financial Ombudsman Service*:

(1) more than six *months* after the date on which the *respondent* sent the complainant its *final response, redress determination or summary resolution communication*;...

...  
unless:

(3) in the view of the *Ombudsman*, the failure to comply with the time limits in *DISP 2.8.2 R* or *DISP 2.8.7 R* was as a result of exceptional circumstances; or...

(5) the *respondent* has consented to the *Ombudsman* considering the *complaint* where the time limits in *DISP 2.8.2 R* or *DISP 2.8.7 R* have expired..."

The respondent in this complaint is L&C. As I understand it, L&C first issued a final response letter to Mr H on 20 November 2019. On 26 February 2020 we received a copy of Mr H's complaint form and a covering letter from his representative detailing his complaint.

As such, I'm satisfied Mr H's complaint was referred to us within six months of the date on which the respondent, here L&C, sent Mr H its final response.

DISP 2.8.2R also sets out that:

“The *Ombudsman* cannot consider a *complaint* if the complainant refers it to the *Financial Ombudsman Service*:

...

(2) more than:

- (a) six years after the event complained of; or (if later)
- (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the *complaint* to the *respondent* or to the *Ombudsman* within that period and has a written acknowledgement or some other record of the *complaint* having been received;

unless:

(3) in the view of the *Ombudsman*, the failure to comply with the time limits in *DISP 2.8.2 R* or *DISP 2.8.7 R* was as a result of exceptional circumstances; or...

(5) the *respondent* has consented to the *Ombudsman* considering the *complaint* where the time limits in *DISP 2.8.2 R* or *DISP 2.8.7 R* have expired...”

L&C says that Mr H’s complaint was raised outwith these time limits. L&C says that it first received Mr H’s complaint on 1 October 2019. As I understand it, there were various strands to Mr H’s complaint but, overall, the crux of the complaint was that L&C didn’t undertake sufficient due diligence on the White Sands investment he made through his L&C SIPP and that, as a result of this, he’s suffered losses that L&C should compensate him for. Further that, but for L&C’s failings, Mr H’s monies wouldn’t have been transferred into the L&C SIPP and the sole reason for establishing the SIPP was to effect the White Sands investment.

The SIPP was established in May 2012, monies were transferred into it from Scottish Life that same month and monies were invested in the White Sands investment in June 2012. All of which occurred more than six years before Mr H had referred his complaint to either L&C or us.

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

I accept that the secondary three-year time limit in the DISP rule is similar to the secondary limitation period for a negligence claim under the Limitation Act. They are not however the same so the case law on the Limitation Act is not of direct application. And it’s important to keep in mind that I am concerned with the DISP rule not the Limitation Act here.

In thinking about when Mr H was aware, or ought reasonably to have become aware, that he had cause for complaint, I’ve considered how ‘cause for complaint’ should be interpreted in the context of the FCA Handbook.

On interpreting the Handbook generally Singh LJ said the following in *The Official Receiver v*

Shop Direct Finance Company Limited [EWCA] Civ 367:

*“44. The FCA Handbook is similar in its drafting style to the Financial Services Authority's Client Assets Sourcebook (CASS), which was considered by this Court in Re Lehman Brothers International (Europe) (No 2) [2010] EWCA Civ 917; [2011] 2 BCLC 184...*

*...*

*46. For present purposes I derive the following propositions from the judgments in Re Lehman Brothers:*

*(1) Ultimately it is the actual wording of a provision that must govern any decision as to its effect.*

*(2) The Handbook should be read as a whole, taking an holistic and iterative approach, so that a preliminary view on one provision can be tested by reference to the rest of the relevant provisions.*

*(3) The provision should be construed in the light of its overall purpose.*

*(4) It should be construed on the basis that it is intended to produce a practical and commercially sensible result. The rules should be taken to be grounded in reality. The court should keep in proportion any drafting infelicities.”*

And in relation to DISP 2.8.2R Nugee LJ said the following:

*“155. The resemblance to the ordinary limitation periods for claims in negligence where there is also a primary period of 6 years (under s. 2 of the Limitation Act 1980 ("LA 1980")) and a secondary period of 3 years from the date of the claimant's actual or constructive knowledge (under s. 14A LA 1980) is striking. We have in fact been shown evidence that this is not a coincidence, but even without this material (which is of doubtful admissibility) it would have been a reasonable assumption that the general structure was modelled on the LA 1980 provisions and was designed to do the same thing in general terms.*

*156. What then is the purpose of having these two time-limits? The purpose of an ordinary limitation period is to prevent stale claims from being litigated, the period of 6 years being fixed as a generally reasonable period to bring a claim. This explains the primary period. But as is well-known that could and did lead to some claimants who had suffered latent injury or damage finding that they had lost their rights to sue before they even knew, or could reasonably be expected to know, that they had been injured or suffered loss. Provision was therefore made, first in ss. 11 and 14 LA 1980 (applicable to claims for personal injury) and subsequently in s. 14A LA 1980 (applicable to other claims in negligence), for the claimant to have 3 years from his date of knowledge to bring a claim. The purpose of this is obvious. It was to remedy the injustice of a claimant's claim being time-barred before they knew, or could reasonably be expected to know, that they had a claim. On the other hand the selection of a (relatively short) 3 year time period shows that another purpose was to provide that once they did, or should, have that knowledge they should get on with the claim and bring proceedings reasonably promptly. Precisely the same in my view applies to the secondary time-limit in DISP 2.8.2R(2)(b). The purpose of the rule is to prevent a complainant from losing the right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware.”*

The Handbook includes the following rule (GEN 2.2.1R):

*“Every provision in the Handbook must be interpreted in the light of its purpose.”*

And guidance in the same section says the purpose of any provision in the Handbook is to be gathered first and foremost from the text of the provision in question and its context amongst other relevant provisions (GEN 2.2.2(G)).

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

*“In the Handbook ...*

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

*(2) an expression in italics which relates to an expression defined in the Glossary must be interpreted accordingly.’*

The term ‘cause for complaint’ is not defined in the FCA’s glossary. But where DISP says the Ombudsman cannot consider a complaint if it is out of time, the word ‘complaint’ is in italics. So it is a defined term in the FCA Glossary and must be treated accordingly.

And where the Handbook says it sets out how complaints are to be dealt with by respondents, ‘complaint’ is again in italics. So again it is a defined term.

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

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

*“...any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service...which:*

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

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

And ‘respondent’ (which is italicised) means a regulated firm covered by the jurisdiction of the Financial Ombudsman Service.

So the Glossary definition of complaint requires that the act or omission complained of must relate to an activity of that respondent, or any other respondent with whom that respondent has some connection in marketing or providing financial services or products.

And so the material points required for Mr H to have awareness of a cause for complaint include:

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

It's therefore my view that it's necessary for Mr H to have had an awareness (within the meaning of the rule) that related to L&C, not just awareness of a problem that had caused a loss. Knowledge of a loss alone is not enough. It can't be assumed that upon obtaining knowledge of a loss a consumer had knowledge of its cause. And I don't accept that the three year time limit necessarily means knowledge of a loss means the consumer has three years to make enquiries to discover all parties who might be responsible, failing which they run out of time to make a complaint. As Nugee LJ said in *The Official Receiver* case '*the purpose of the rule is to prevent a complainant from losing the right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware.*'

There are a number of points that I think are relevant to this discussion:

- In order to be aware of cause for complaint the complainant should reasonably know there's a problem, that they have or may suffer loss, and that someone else is responsible for the problem – and who that someone is. So, to have knowledge of cause for complaint about L&C, Mr H needs to be aware, or should reasonably be aware, that there's a problem which has caused, or may cause, him loss and that L&C is responsible.
- Mr H transferred a little under £32,000 into his SIPP in May 2012 and a little over £28,000 was invested into the White Sands investment in June 2012.
- Mr H says he was given assurances that the investment would expose his monies to little or no risk.
- L&C wrote to Mr H on 9 January 2014 stating that GPIL had been placed into liquidation. It was explained that L&C was sole trustee of Mr H's SIPP and was legal owner of the assets held in the SIPP. Further, that L&C carries out investment instructions given to it by Mr H's adviser, subject to investments being allowable under the rules of the SIPP. And, at Mr H's request, it had made investments into White Sands. L&C said it didn't have further information about the circumstances of GPIL's insolvency but as trustee it would notify its interest to the liquidator when requested and would pass on updates from the liquidator to Mr H. It was also explained that any recovery or compensation that was achieved would be payable into Mr H's SIPP.
- A valuation sent to Mr H by L&C in July 2014 recorded the value of Mr H's investment in White Sands as £27,500.
- A covering letter from L&C, sent to Mr H alongside a May 2015 valuation (which still recorded the White Sands investment as being valued at £27,500), explained that the White Sands investment was illiquid and that "*Whilst we sympathise with the problems encountered with the particular investment within your arrangement, we have never been involved with, nor are we in any way responsible for the choice of the investment or the difficulties arising in connection with it.*"
- L&C sent a copy of the liquidator's letter of 12 October 2015 (referenced in more detail elsewhere in my decision) on to Mr H on 23 October 2015.
- On 19 May 2016, L&C wrote to Mr H and said it was enclosing a valuation and a SMPI. It was explained, amongst other things, in the letter that L&C had valued the White Sands investment as £0. It was explained that this represented a value that

L&C considered it appropriate to attribute to the asset bearing in mind that there was no readily available market on which the asset was traded and no immediate means of determining a sale value. And L&C explained that:

*“Whilst we sympathise with the problems encountered with the particular investment within your pension, we have never been involved with, nor are we in any way responsible for the choice of the investment or the difficulties arising in connection with it. We have nevertheless carried out the work required to operate the pension itself and will continue to do so as long as the pension continues – in this connection the charges for this work therefore continue to be incurred.”*

L&C also noted that it would continue to accrue any charges due and would only deduct them from the fund when sufficient liquidity became available in the SIPP to do so. Both the valuation and SMPI gave the value of Mr H's SIPP as being a little over £75 as at 19 May 2016.

- On 30 June 2016, L&C wrote to Mr H and explained that Mr H's investment in White Sands had encountered serious trading difficulties. Further, that in the absence of any recognised market there appeared to be no reference from which to establish a value, or any market or means to achieve a sale. L&C said the investment in White Sands had to be regarded as having no current value and there appeared to be no realistic prospects for a sale in the foreseeable future. Due to this, and the fact that Mr H held no other investments in his SIPP, Mr H's SIPP couldn't be regarded as having any value apart from a small amount held in cash. L&C said it would regard Mr H's SIPP arrangement as terminated and write off its outstanding fees that had accrued. L&C also explained that while the White Sands investment was considered to have no value and no realistic prospect of recovery, if Mr H wanted then L&C would transfer ownership of the investment to him so that he would benefit in the event of there being a recovery of some value.
- I'm satisfied that the contents of some of the letters I've referred to above evidence that Mr H was aware, or ought reasonably to have become aware, more than three years before he complained to L&C, that there was a problem that had caused him some loss or damage. But, I'm not satisfied that the content of the letters would have, or ought to have, caused Mr H to become aware that L&C had responsibility for the position he was in more than three years before he complained to L&C.
- While I'm satisfied it was known by Mr H that the White Sands investment was held within his L&C wrapper, there's nothing I've seen that was sent to Mr H more than three years before his complaint was referred to L&C that would have caused Mr H, or a reasonable retail investor in his position, to link L&C to the losses his pension monies had suffered. I think it's worth highlighting that Mr H wasn't advised by L&C about setting up the SIPP or the suitability of investments. And I think the obvious first thought when losses were suffered would have been that his financial advisers might have given poor advice or that the people who ran the White Sands investment might have caused the loss.
- I'm not aware of anything L&C said or did at the outset of its relationship with Mr H that would have caused him to think it might be responsible if such a problem occurred. Nor am I aware of anything L&C said or did that ought reasonably to have caused Mr H to think it was responsible once the problem had occurred. Indeed, in 2015 and in 2016, when L&C wrote to Mr H to say his investment was illiquid, L&C

expressly said it had “*never been involved with, nor are we in any way responsible for the choice of the investment or the difficulties arising in connection with it.*”

- To be clear, I don't think Mr H would need to have understood the details of L&C's obligations to have been aware (or in a position whereby he ought reasonably to have become aware) of his cause for complaint. But I think Mr H would have needed to have actual or constructive awareness that an act or omission by L&C had a causative role in the loss. And I don't think Mr H, or a reasonable investor in his position, ought reasonably to have attributed his problem to acts or omissions by L&C more than three years before he complained to L&C.
- In my view there's nothing in any correspondence we've seen, that was sent to Mr H more than three years before his complaint was referred to L&C, that would indicate to a reasonable retail investor in Mr H's position that L&C had responsibility for the position he was in – the position of having a SIPP with investments in it that were performing badly.
- I've seen no evidence that Mr H had been told by any party, and more than three years prior to his representative raising a complaint with L&C in October 2019, that L&C may have done something wrong and might be wholly or partly responsible for the position he was in.
- Mr H says that in 2019 he ran into a friend who had experience with pensions and investments. And that during their conversation Mr H's SIPP was mentioned and the friend subsequently recommended that Mr H seek further advice on the status of his pension and investments. Mr H has submitted that it wasn't until he'd spoken to his friend that he started to have cause for concern that L&C hadn't carried out sufficient due diligence into the White Sands investment. And that after carrying out some research, he then contacted his current representative. Following this, a complaint was made by Mr H's representative to L&C on his behalf later in 2019.
- I consider Mr H's submissions on this point to be plausible and not contradicted by the documentary evidence. I'm satisfied from the available evidence that, having become aware in 2019 that L&C might be responsible for his loss, Mr H proceeded to make a complaint to L&C later the same year with the help of his representative. Although Mr H's awareness of his cause for complaint about L&C took several years to emerge, he took reasonable steps after the conversation with his friend in 2019, and didn't simply choose not to pursue any action.

On balance, I think it's reasonable to accept Mr H's explanation of events, including that he became aware in 2019 that he had cause for complaint against L&C. Further, having carefully considered all of the available evidence, I don't think Mr H was aware, or ought reasonably to have become aware, that he had cause for complaint against L&C more than three years before his complaint was referred to L&C. Accordingly, I'm satisfied this complaint has been brought in time and that it's one we can consider.

*Does Haward v Fawcetts lead to a different view in this case?*

L&C has submitted that Mr H knew enough from the point he received the liquidator's report (at the latest) to start the three-year limb of the time bar clock. According to L&C *Haward v Fawcetts* makes clear that the three year period begins to run when a claimant has sufficient knowledge to start investigating their claim. Further, that receipt of the liquidator's report gave Mr H sufficient grounds to investigate his complaint and, in following the *Official*

*Receiver* case, this should be sufficient to start time running under DISP and the complaint shouldn't be considered as a consequence.

So, in effect, L&C say Mr H had sufficient awareness in the sense required in the *Haward v Fawcetts* case as he had enough knowledge to give him cause to investigate things further. As I've already mentioned, the Limitation Act case law is not of direct application. That said, L&C doesn't say I'm bound to apply that case law as such, but I think it's informative when considering the three-year time limit in DISP. I've therefore considered the *Haward v Fawcetts* case.

I note the case is about actual rather than constructive knowledge (e.g. see Lord Mance at paragraph 127 "...*the present case is concerned only with actual knowledge...*").

I also note that Lord Nicholls makes the following points in relation to the purpose of the three-year limitation period:

- Statutes of limitation seek to hold a balance between two competing interests: the interests of claimants in having maximum opportunity to pursue their legal claims, and the interests of defendants in not having to defend stale proceedings.
- Traditionally the limitation period for most claims is six years. This goes back to the Limitation Act 1623.
- However, with certain types of claims this six-year period is not reasonable.
- The starting date for the six-year limitation period is when a cause of action accrues. In claims based on negligence a cause of action accrues when real damage is suffered. This principle has been applied in limitation cases even where, at the date of accrual of the cause of action, the claimant did not know he had suffered damage.
- Section 14A was inserted into the Limitation Act 1980 Act by the Latent Damage Act 1986, to remedy the deficiencies in the law by providing for an extended period of limitation to run from a date later than the date when the cause of action accrued.
- The extended three-year limitation period starts when the claimant first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring the action.
- Parliament sought to identify the knowledge a claimant needs to possess before it is fair and reasonable that time should run against the claimant. That is the purpose of S14A. This is made explicit in section 14A by its introductory description of the requisite knowledge as 'the knowledge required for bringing an action [etc]'. "*The claimant is to have a reasonable period, set by Parliament at three years, in which to start proceedings after he has the knowledge he reasonably needs for that purpose.*"

Lord Nicholls then went on to say:

*"8. Two aspects of these 'knowledge' provisions are comparatively straightforward. They concern the degree of certainty required before knowledge can be said to exist, and the degree of detail required before a person can be said to have knowledge of a particular matter...*

...

*9. Thus, as to the degree of certainty required, Lord Donaldson of Lynton MR gave valuable guidance in *Halford v Brookes* [1991] 1 WLR 428, 443. He noted that*

*knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence: 'suspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice'.*"

Lord Nicholls then summarised the above – but remembering that he was doing so in the context of the question of the degree of certainty that was required:

*"In other words, the claimant must know enough for it to be reasonable to begin to investigate further."*

Lord Nicholls then went on:

*"10. Questions about the degree of detail required have mostly arisen in the context of the need for a claimant to know 'the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence'... Hoffmann LJ said section 14(1)(b) requires that 'one should look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had in broad terms knowledge of the facts on which that complaint is based': Broadley v Guy Clapham & Co [1993] 4 Med LR 328, 333.*

*11. A similar approach is applicable to the expression 'attributable' in s14A(8)(a). The statutory provisions do not require merely knowledge of the acts or omissions alleged to constitute negligence. They require knowledge that the damage was 'attributable' in whole or in part to those acts or omissions. ...[T]ime does not begin to run against a claimant until he knows there is a real possibility his damage was caused by the act or omission in question."*

And at paragraph 118 Lord Mance said:

*"A claimant who has received apparently sound and reliable advice may see no reason to challenge it unless and until he discovers that it has not been preceded by or based on the investigation which he instructed or expected. A claimant who has suffered financial loss in a transaction entered into in reliance on such advice may not attribute such loss to the advice unless and until he either makes the like discovery about the inadequacy of the work done, or at least discovers some respect in which the transaction was from the outset unsound giving him (as Hoffman LJ said) prima facie cause to complain. Such a scenario may well occur where there are other causes of loss which appear to him capable of explaining the whole loss."*

To pause for a moment, I don't say L&C gave advice. I am however noting Lord Mance's comment about the difficulty that may arise where there are other possible causes of loss which appear capable of explaining the whole loss.

In my view Mr H's complaint should be summarised as I have done at the beginning of this decision – Mr H complains that L&C didn't undertake sufficient due diligence on the White Sands investment he made through his L&C SIPP and that, as a result of this, he's suffered losses.

In the above complaint Mr H attributes his loss to a failure on the part of L&C. In order to make that complaint he needs to be aware that he has or is likely to suffer a loss, and that there is or is likely to have been a failure on the part of L&C which did or is likely to have caused the loss.

In Mr H's case, as I've explained above, I'm satisfied that the contents of letters sent to Mr H evidence that Mr H was aware, or ought reasonably to have become aware, more than three years before he complained to L&C, that there was a problem that had caused him some loss or damage. But I'm also satisfied from the available evidence, which I've referred to earlier in this decision and don't repeat again here, that Mr H didn't attribute that loss to any failure on the part of L&C until 2019.

In my view there was nothing to show that Mr H had even a vague and unsupported suspicion that L&C may have been at fault yet alone a reasonable belief.

Accordingly he didn't know enough for it to be reasonable to begin to investigate further a potential claim in relation to L&C.

As Mr H wasn't aware that L&C may have been at fault, he was also not aware there was a real possibility that his damage was caused by the act or omission in question in the complaint he now makes.

As Lord Mance explained the picture becomes more difficult when there are other causes of loss which appear to the claimant capable of explaining the whole loss. And in this case there were other potential causes of Mr H's loss that will have appeared more obvious causes of the loss. As I've mentioned above, I think the obvious first thought when losses were suffered would have been that his financial advisers might have given poor advice or that the people who ran the White Sands investment might have caused the loss.

But L&C wasn't Mr H's adviser nor had L&C run the White Sands investment. Indeed, in 2015 and again in 2016 L&C had proactively highlighted to Mr H that "*we have never been involved with, nor are we in any way responsible for the choice of the investment or the difficulties arising in connection with it.*" And I don't consider that Mr H ought reasonably, in the circumstances, to have considered that L&C bore some responsibility for the position he was in by 1 October 2016 (three years prior to the date on which L&C says it first received Mr H's complaint).

By 1 October 2016, the regulator had published reports on the results of two thematic reviews on SIPP operators in 2009 and 2012, issued guidance for SIPP operators in 2013 and wrote to the CEO's of SIPP operators in 2014. A common theme of those communications is that the regulator considered SIPP operators had obligations in relation to its customers even where it does not give advice, and that many SIPP operators had a poor understanding of those obligations. L&C says that it's reasonable to assume that a SIPP investor with an investment written down to zero would, or should, have taken an interest in the regulatory requirements and obligations placed on a SIPP provider and that if Mr H wasn't aware of the regulatory communications, he ought to have been.

In all the circumstances, I don't consider that Mr H would have had an understanding of the sort of obligations SIPP providers were under before October 2016, the relevant date to the three-year limb of the time limit rule in this case. And in my view the point wouldn't have been obvious to SIPP investors even by October 2016. I don't consider that it was common knowledge amongst SIPP investors at that point that a SIPP operator might have some responsibility for the investments made within their SIPPs.

On balance, I don't consider that Mr H was, or ought reasonably to have been, aware of the contents of the regulatory publications more than three years before he complained to L&C. I also don't consider these publications mean that Mr H, or a reasonable investor in his position, should have had an understanding, and more than three years before his complaint

was made to L&C in October 2019, that L&C might have responsibility for the position he was in.

In the circumstances I don't consider that Mr H had in broad terms knowledge of the facts on which his complaint is based. In particular I don't think he knew L&C ought to have carried out any checks on the investment and that, as he now alleges, it failed to carry out such checks causing him to suffer loss.

Nor do I consider that Mr H was under an obligation to seek help by 1 October 2016 from, for example lawyers or a Claims Management Company, which might have led at that time to Mr H discovering his potential complaint against L&C more than three years before he complained to L&C.

So in all the circumstances I don't accept that Mr H had actual awareness of cause for complaint against L&C more than three years before he referred his complaint to L&C. And I don't consider that a reasonable SIPP investor in Mr H's position would have had any greater awareness of cause for complaint against L&C than Mr H did.

And, as mentioned previously, I also don't think Mr H, or a reasonable investor in his position, ought reasonably to have attributed his problem to acts or omissions by L&C more than three years before Mr H complained to L&C.

#### *Previous Ombudsman's decision on a different complaint*

L&C has also highlighted that in a previous decision, involving a different SIPP provider and a different investment, that a different ombudsman concluded that complaint wasn't made in time. I've carefully reviewed what was said in that decision.

The circumstances and facts of the other complaint are different and the consumer's testimony referenced in that decision is very different to that in Mr H's case.

We consider each complaint on its own circumstances, and the question I have to address here is whether, in all of the circumstances of this specific complaint, Mr H was aware, or ought reasonably to have become aware, he had cause for complaint about L&C more than three years before he referred his complaint. And, for the reasons I've already given at length above, I'm satisfied Mr H wasn't aware, and ought not reasonably to have become aware, he had cause for complaint about L&C more than three years before he referred his complaint.

In all the circumstances I don't therefore consider that Mr H ought reasonably to have become aware he had cause for complaint against L&C more than three years before he did, in fact, complain to L&C. And I'm still satisfied this complaint was referred in time and is one we can consider.

#### **Dismissal**

In response to my provisional decision L&C has said, amongst other things "*We invite FOS to revisit the Provisional Decision and dismiss the complaint.*"

L&C didn't provide detailed submissions about why it believes I should dismiss this complaint. But, having carefully considered all of the submissions that have been made, I'm satisfied that I don't need to exercise my discretion to dismiss the complaint under DISP 3.3.4A R on the basis it would significantly impair our effective operation, as it is more suitable to be dealt with by a Court or a comparable ADR entity. I'm satisfied the complaint is well suited to the work of the Financial Ombudsman Service. We have

significant experience of dealing with complaints of this type and are well-placed to consider them. Considering Mr H's complaint would not in my view seriously impair our effective operation. And I'm also satisfied that I don't need to exercise my discretion to dismiss the complaint under DISP 3.3.4A R for any other reason.

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 consider the merits of this complaint below.

### **merits**

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

In considering 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 decision on what's fair and reasonable in the circumstances.

### **Relevant considerations**

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

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

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

*"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*

*Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.*

*Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."*

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

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

And at paragraph 77 of *BBA* Ouseley J said:

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

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

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

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

The *BBSAL* judgment also considers section 228 of 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 satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

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

I've considered whether *Adams* means that the Principles shouldn't be taken into account in deciding this case. And, I'm 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 the *Adams* judgments when making this decision on Mr H's case.

I acknowledge that COBS 2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client*) overlaps with certain of the Principles, and that this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of 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 H's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened *after* the contract was entered into. And he wasn't asked to consider the question of due diligence *before* Options SIPP agreed to accept the store pods investment into its SIPP.

And in Mr H'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 H's application.

The facts of Mr Adams' and Mr H's cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Mr H's case. And I need to construe the duties L&C owed to Mr H under COBS 2.1.1R in light of the specific facts of Mr H's case.

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

However, 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 H 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 H on the merits of the investment and/or the SIPP.

Overall, I'm satisfied that COBS 2.1.1R is a relevant consideration – but that it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Mr H'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 Businesses ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').*

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

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

## **The later publications**

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

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

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

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

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

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

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

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

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm’s procedures and are not being used to launder money*
- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*

- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from 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'm satisfied it's relevant and therefore appropriate to take it into account.

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

L&C has also said that many of the matters which the Report invites firms to consider are

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

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

I've carefully considered what L&C has said about publications published after Mr H's SIPP was set up. But I am of the view that, like the ombudsman in the *BBSAL* case, I don't think the fact that some of the publications, (other than the 2009 Thematic Review Report), post-date the events that took place in relation to Mr H'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 H. It's accepted L&C wasn't required to give advice to Mr H, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But, as I've said above, 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 H'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 H'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.

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

And, taking account of the factual context of this case, it's my view that in order for L&C to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence checks on SOA/the business SOA was introducing and the White Sands investment before deciding to accept Mr H'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 H fairly, in accordance with his best interests. And what I think's fair and reasonable in light of that. I think the key issues in Mr H's complaint are whether it was fair and reasonable for L&C to have accepted Mr H's SIPP and White Sands investment applications in the first place. So, I need to consider whether L&C carried out appropriate due diligence checks before deciding to accept Mr H's applications.

And 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 SOA 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 H's application for the L&C SIPP and/or White Sands investments.

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

In this case, the business L&C was conducting was its operation of SIPPs. And I'm satisfied that, to meet its regulatory obligations, when conducting its operation of SIPPs business, L&C had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind. 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 H) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

Prior to receiving Mr H's applications, I think that L&C ought to have understood that its obligations meant that it had a responsibility to carry out appropriate checks on SOA 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.

So, 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.

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.

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 H'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**

We've asked L&C a series of questions about the due diligence it undertook on the White Sands investment and for a copy of any product literature it had obtained. L&C has submitted that due to system issues it's not able to provide records to evidence a number of the points we asked it about.

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.*”

L&C has provided evidence that solicitors for it did undertake *some* due diligence into the property and firms that were behind the White Sands investment, it's provided a report that was compiled by P&C in March 2012. Earlier in this decision, I've referenced some of the points noted in that report. And, as previously mentioned, P&C explained in the report that it had managed to obtain some documentation from public records and that its due diligence report was premised on information P&C had obtained from Green Planet Investimentos Imobiliarios Ltda's counsel. Further that it hadn't checked any original documentation or visited the area where plots are located and that "*for great part of the conclusions drawn herein, we had to rely solely on information whose accuracy we have been unable to confirm*". P&C also explained that part of the information it had relied upon may have to be later confirmed by means of independent review. We've been provided with no evidence any of the points mentioned in P&C's report were later confirmed by way of independent review.

Overall, based on the evidence that's been made available to us, I'm satisfied L&C undertook *some* due diligence into the White Sands investment, but 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 – I've said more about this below. My view is that L&C didn't meet its regulatory obligations, and didn't act fairly and reasonably in its dealings with Mr H, by not performing sufficient due diligence on the White Sands investment before deciding to accept it into its SIPPs and before accepting Mr H's application 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 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 a number of these things, or to show how what it did represented fair and reasonable treatment of Mr H 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 H's applications to invest in White Sands, and I find its failure to do so was unfair to Mr H.

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

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

As I've mentioned previously, L&C has provided us with some limited information about the due diligence it undertook into White Sands. And I've carefully considered that information, along with 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 H's applications and, as such, weren't available to L&C prior to the events that took place in relation to Mr H'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 H 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 H'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 = 360-515m<sup>2</sup>*

*Planning Permission Status = Full planning permission granted*

*Nearest Airport = Natal (Approx 15 miles)*

*Estimated Annual Appreciation = 15-25%*"

By March 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 360m<sup>2</sup> 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 360m<sup>2</sup> 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](http://www.gpirewards.com), [www.greenplanetinvestment.com](http://www.greenplanetinvestment.com) and [www.gpigroup.eu](http://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 J, 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 J who subsequently transferred 670 shares to GPIL in Gibraltar and 330 shares to a Mr T. 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 J 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.”*

Mindful of the number of introductions L&C says it had received from SOA before Mr H's business was introduced to it, and mindful of the fact that L&C was also receiving business from other introducers, 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 *before* it received Mr H's SIPP application. In my provisional decision I said that if L&C disagreed with this, and if it was L&C's contention that Mr H's application was the first application it approved from *any* consumer to invest in White Sands, that it should provide me with confirmation of this alongside any response it sent to my provisional decision. L&C didn't submit that it disagreed with my provisional finding that it had received, and acted on, applications to invest in White Sands from different consumers *before* it received Mr H's SIPP application. And I'm still of the view that it's more likely than not that L&C had received, and acted on, applications to invest in White Sands from different consumers *before* it received Mr H's SIPP application.

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. And, before it accepted Mr H's application 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.
- Investors were purchasing 100% of the shares in recently incorporated companies – White Sands Country Club WS (a number), which had Mr J 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 obtain 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 H's case, this was White Sands Country Club WS 0615) 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 March 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 the Financial Ombudsman Service.

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

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

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 H'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 H's application to invest in White Sands, it allowed Mr H'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 H 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 H. I accept L&C had no obligation to give advice to Mr H, or to ensure otherwise the suitability of an investment for him.

So, my finding isn't that L&C should have concluded that Mr H 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 H 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 SIPPs. 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 H 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 H fairly, by accepting the White Sands investment in his SIPP.

### **L&C's due diligence on SOA**

L&C had a duty to conduct due diligence and give thought to whether to accept introductions from SOA. 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 SOA for the SIPP). L&C has submitted that due to system issues it's not able to provide records to evidence a number of the points we asked it about.

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 SOA.

I accept that, as an AR of the On-Line Partnership, SOA was authorised by the FSA when it introduced Mr H 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 SOA. I'm satisfied that L&C wasn't treating Mr H fairly or reasonably when it accepted the White Sands investment into his SIPP, so I've not gone on to consider the due diligence it carried out on SOA before accepting Mr H'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 H's applications?**

For the reasons previously given above, I think L&C should have declined to accept Mr H's application to invest in White Sands. So things shouldn't have got beyond that.

In my view it's fair and reasonable to say that just having Mr H 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 H had signed forms intended, amongst other things, to indemnify it 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 H 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 applications.

In its response to Mr H's complaint L&C has referenced COBS 11.2.19R and said that it would have been in breach of COBS if it hadn't effected Mr H's investment instructions. Before considering this point in more detail below, I think it's important to reiterate 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*.

I'm also satisfied that Mr H's pension monies were transferred into the SIPP so as to effect the White Sands investment; I think it's clear from SOA's suitability report of 10 May 2012 that's why the transfer was being effected. And, as I mention later in this decision, I think it's more likely than not that the reason L&C was selected as the SIPP provider for Mr H's pension monies was because it accepted the White Sands investment in its SIPP. I also 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 H's pension monies wouldn't have been transferred to L&C. Further, that the opportunity for L&C to execute Mr H's investment instructions to invest in White Sands wouldn't have arisen.

So, I'm satisfied that but for L&C's failings, Mr H's monies wouldn't have been transferred into an L&C SIPP to effect the White Sands investment and that the opportunity for L&C to execute investment instructions to invest Mr H's monies in White Sands or proceed in reliance on an indemnity and/or risk disclaimers shouldn't have arisen at all. And I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for L&C to proceed with Mr H's application to invest in White Sands.

### **COBS 11.2.19R**

In its response to Mr H's complaint L&C has referenced COBS 11.2.19R and said that it would have been in breach of COBS if it hadn't effected Mr H's investment instructions.

However, in the circumstances it's my view that the crux of the issue in this complaint is whether L&C should have accepted the White Sands investment in the first place.

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

*"The heading to COBS 11.2.1R shows that it is concerned with the manner in which orders are to be executed: i.e. on terms most favourable to the client. This is*

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

And I don’t think that L&C’s argument on this point is relevant to its obligations under the Principles to decide whether to allow Mr H’s SIPP monies to be invested into the White Sands investment.

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

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

#### The involvement of other parties

In this decision I’m considering Mr H’s complaint about L&C. However, I accept that other parties were involved in the transactions complained about, including SOA.

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 the regulatory obligations, good industry practice and to treat Mr H fairly.

The starting point therefore, is that it would be fair to require L&C to pay Mr H compensation for the loss he’s suffered as a result of its failings. I’ve carefully considered if there’s any reason why it wouldn’t be fair to ask L&C to compensate Mr H for his loss, including whether it would be fair to hold another party liable in full or in part. And, on balance, I consider it appropriate and fair in the circumstances for L&C to compensate Mr H to the full extent of the financial losses he’s suffered due to L&C’s failings.

I accept that it may be the case that SOA might have some responsibility for initiating the course of action that led to Mr H’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 H wouldn’t have come about in the first place, and the loss he’s suffered could have been avoided.

I want to make clear that I’ve carefully taken everything L&C has said into consideration. And it’s my view that it’s appropriate and fair in the circumstances for L&C to compensate Mr H to the full extent of the financial losses he’s suffered due to 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 H.

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 H. I accept that L&C wasn't obligated to give advice to Mr H, or otherwise to ensure the suitability of the pension wrapper or investments for him. Rather, I'm looking at L&C's separate role and responsibilities – and for the reasons I've explained, I think it failed in meeting those responsibilities.

#### Mr H taking responsibility for his own investment decisions

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 H's actions mean he should bear the loss arising as a result of L&C's failings.

SOA was a regulated firm with the necessary permissions to advise on the transactions this complaint concerns. Mr H also then used the services of a regulated personal pension provider in L&C. Mr H says he trusted SOA to do what was right on his behalf, that he didn't understand the whole thing, that he doesn't have knowledge of pensions and investments and that he signed and returned what he was given. Having carefully considered all of the evidence, I think that Mr H was made aware of some of the risks associated with the White Sands investment *before* his monies were invested in that arrangement.

However, 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 H wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

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

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

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

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."*

As I've explained above, having carefully considered all of the evidence, I think that Mr H was made aware of some of the risks associated with the White Sands investment *before* his

monies were invested in that arrangement. But I've not seen any evidence that suggests Mr H was paid a cash incentive. It therefore cannot be said he was *incentivised* to enter into the transaction.

Overall, and having carefully considered all the submissions that have been made, I'm satisfied that Mr H, 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 H'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 H's application to invest in White Sands *at all*. That should have been the end of the matter.

Mr H's representatives have contended that the monies were transferred to the SIPP solely to make the White Sands investment and, as I've explained above, that appears to be supported by the contents of SOA's May 2012 suitability report.

I've noted the reference to Carbon Credits in the SIPP application form and in the SOA Investment Information form, both of which Mr H signed on 2 May 2012. However, it seems that following on from this a decision had been made not to invest in Carbon Credits and that by 10 May 2012 discussions had moved along. I say that because the only investment discussed in SOA's 10 May 2012 suitability report was White Sands.

Following on from SOA's suitability report being issued, L&C received Mr H's SIPP application form on 16 May 2012. It's not made clear from that portion of the suitability report we've seen why it was that L&C was selected as the SIPP provider. But it seems more likely than not that SOA still selected L&C as the SIPP provider because it was aware that L&C was accepting White Sands investments into its SIPP.

I've noted 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. If L&C was the only SIPP provider accepting White Sands investments, and we've been provided with no evidence that would support a contention that other SIPP providers not named in GPIL's liquidator's October 2015 letter were also facilitating White Sands investments, then but for L&C accepting the White Sands investment in its SIPPs it's more likely than not that the transactions complained about here wouldn't still have been effected elsewhere.

For completeness, even if there was another SIPP provider that might have been 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 H 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.

So, my finding is that but for L&C's failings in accepting the White Sands investment in its SIPPs, Mr H's pension monies wouldn't have been invested in White Sands.

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 the White Sands investment in its SIPPs, the transactions this complaint concerns wouldn't still have gone ahead.

Overall, it's my opinion that it's fair and reasonable to direct L&C to pay Mr H 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 H's loss, I consider that L&C failed to comply with its own regulatory obligations and didn't put a stop to the White Sands investment proceeding by declining to accept the White Sands investments in Mr H'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 H – including SOA. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against L&C that requires it to compensate Mr H for the full measure of his loss. L&C accepted the White Sands investments into its SIPPs and but for L&C's failings, I'm satisfied that Mr H's pension monies wouldn't have been transferred to L&C or invested in White Sands.

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 H'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 H 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 H to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by other firms involved in the transactions.

*What would have happened in the alternative if Mr H's pension monies hadn't been transferred so as to effect the White Sands investment?*

If Mr H's pension monies hadn't been transferred to effect the White Sands investment, Mr H might have decided to leave his monies where they were or, alternatively, he might still have sought to transfer away from his existing pension plan.

Mr H says that if L&C hadn't permitted the White Sands investment he'd have sought the advice of his friend on what to do as he had no knowledge of investments. After speaking to his friend previously Mr H had met with SOA, and this appears to have been for the purpose of obtaining professional advice on his pension monies. So, I think it is more likely than not that if Mr H had reverted back to his friend again, following a discussion, Mr H would then have sought professional advice again.

It seems not unlikely that a professional adviser would have recommended Mr H retain his pension monies where they were. Mr H might then have agreed to that advice or he might have asked to transfer notwithstanding that advice. On his own evidence, Mr H appears to have placed weight on his understanding from discussions with his friend that his pension monies might be able to achieve a better return elsewhere.

So, in the alternative, Mr H's monies might have been retained in the Scottish Life plan or they might have been transferred and invested in other (non-White Sands) holdings.

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

**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 H's application from SOA. And I conclude that if L&C hadn't accepted the White Sands investment in its SIPPs, Mr H wouldn't have transferred monies to L&C so as to effect the White Sands investment. For the reasons I've set out, I also think it's fair to ask L&C to compensate Mr H 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 H to the position he would likely now be in but for what I consider to be L&C's failure to carry out adequate due diligence checks on White Sands before accepting Mr H's application.

As I've explained above, but for L&C's failings, I think it's fair and reasonable to conclude that that Mr H's monies would either have been retained in his Scottish Life plan, or else they might have been transferred and invested in other (non-White Sands) holdings. Further, that 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 achieved a return equivalent to the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return index). I'm satisfied that's a fair and reasonable proxy for the type of return that could have been achieved over the period in question.

### **What must L&C do?**

In light of the above, L&C must calculate fair compensation by comparing Mr H's current position to the position Mr H would be in if his pension monies hadn't been transferred to the L&C SIPP and invested into White Sands. In summary, L&C must:

- 1) Calculate a current notional value, as at the date of my final decision, of the monies that were transferred into the L&C SIPP if they hadn't been transferred into the L&C SIPP.
- 2) Obtain the actual current value of the monies that were transferred into Mr H's L&C SIPP, as at the date of my final 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 H's share in any residual White Sands holdings in his SIPP that cannot currently be redeemed.
- 5) Pay an amount into a pension arrangement for Mr H, so that the transfer value of that pension arrangement is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.
- 6) Pay Mr H £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 my final decision, of the monies that were transferred into the L&C SIPP if they hadn't been transferred into the L&C SIPP.*

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

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

L&C must also make a notional allowance in this calculation for any additional sums Mr H has contributed to, or withdrawn from, his L&C SIPP since outset. To be clear this doesn't include SIPP charges or fees paid to third parties like an adviser.

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

- 2) *Obtain the actual current value of the monies that were transferred into Mr H's L&C SIPP, as at the date of my final decision, less any outstanding charges. This value might be £0.*

This should be the current value of these monies as at the date of my final 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 H's pension.

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

L&C has submitted that Mr H was informed on 30 June 2016 that there was no reference with which to establish a market for the White Sands investment or any means to achieve a sale. Further, that the White Sands investment was regarded as having no current value and no prospects for sale in the foreseeable future. And that the SIPP fund couldn't be considered to have any value and the SIPP contract would be terminated.

It's also not clear to me whether the SIPP was, in fact, closed down without value following this letter. If it was and the White Sands investment is no longer held within Mr H's SIPP then there's nothing for L&C to do under step 4) and it can proceed on to step 5).

Alternatively, if Mr H's L&C SIPP is still in effect, and if the White Sands investment is still held within it, then but for any illiquid White Sands holdings that remain within Mr H's L&C SIPP, Mr H'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 H'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 H'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 H 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 H 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 a pension arrangement for Mr H, so that the transfer value of that pension arrangement is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.*

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

If L&C is unable to pay the compensation into a pension arrangement for Mr H, 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 H's expected marginal rate of tax in retirement at his selected retirement age.

It's reasonable to assume that Mr H is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr H 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 H £500 for the distress and inconvenience the problems with his pension have caused him.

In addition to the financial loss that Mr H 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 H distress. And I think that it's fair for L&C to compensate him for this as well.

### *SIPP fees*

If Mr H's L&C SIPP is still in effect, and if there remain illiquid White Sands investments that can't be removed from the SIPP, and it hence cannot be closed after compensation has

been paid, then it wouldn't be fair for Mr H to have to continue to pay L&C annual SIPP fees to keep the SIPP open. As such, if the L&C SIPP needs to be kept open only because of an illiquid White Sands investment, and is used only or substantially to hold the illiquid White Sands investment, then any future L&C annual SIPP fees must be waived by L&C until the SIPP can be closed.

### *Interest*

The compensation resulting from this loss assessment must be paid to Mr H or into a pension arrangement for Mr H within 28 days of the date L&C receives notification of Mr H'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 H in a clear, simple format.

### *Legal costs*

I can see that Mr H's representative has submitted that an award should be made for Mr H's legal costs. I've read this as relating to the sums Mr H has paid, or will pay, to his representative for having been represented by it in this matter.

We are a service that is free at point of access to consumers. It's not usually necessary to have professional representation in bringing a complaint although an award for such costs may be made where it's considered fair and reasonable to do so.

Mr H has highlighted that it wasn't until he'd run into a friend in 2019 that he started to have cause for concern that L&C hadn't carried out sufficient due diligence. I appreciate that, after speaking to his friend in 2019, Mr H might only have had a basic understanding that L&C might have some responsibility for the loss his pension fund had suffered, but once he knew that, even if only in general terms, Mr H could have made a complaint to L&C and, if he was unhappy with its reply, to us.

We are informal and we have an inquisitorial remit, so it's not necessary for a consumer to set out all aspects of the complaint – such as might be necessary in bringing legal action. I accept that some of the issues I've addressed in this decision are complex. But the process for raising a complaint with a firm in general terms and the process for referring a complaint on to us if dissatisfied with a firm's response isn't complex. And once with us, if Mr H had queries about our findings, or the proposed redress (or any other aspect of the matter), we could have dealt with those directly – that's a service we routinely provide where consumers have brought complaints to us without representation and where clarification is sought on some aspect of our investigation or assessment of their complaint. So, while many of the complaints we deal with are technical and complex, that doesn't automatically mean that an award for the costs of professional representation should be made.

Here, I'm satisfied that it was Mr H's choice to use his representative's services in bringing the complaint. I don't doubt that Mr H valued the assistance of his representative in this matter. But I don't think an award for fees is justified here.

### **My final decision**

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or

reject my decision before 28 October 2024.

Alex Mann  
**Ombudsman**