DRN-5438543

The complaint

London & Colonial Services Limited ('L&C') recently changed its name to Pathlines Pensions UK Limited but for ease of reference I'll simply be referring to 'L&C' throughout this decision.

Mrs T complains that Pathlines Pensions UK Limited ('L&C') didn't act with due diligence in accepting a White Sands Country Club ('White Sands') investment she made through her L&C Self-Invested Personal Pension ('SIPP') and that, as a result of this, she's suffered losses.

What happened

Both parties to this complaint have, at times, made submissions through a representative and, for simplicity, I refer to Mrs T 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 Mrs T'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.

Liberty SIPP Ltd ('Liberty')

Liberty was also a regulated pension provider and administrator. Liberty was placed into administration on 27 April 2020.

Sorensen Financial Services ('Sorensen')

Sorensen was authorised by the regulator – the Financial Services Authority ('FSA'), which later became the Financial Conduct Authority ('FCA') – to advise on products and services including giving investment advice and arranging deals in investments. The Financial Services Compensation Scheme's ('FSCS') website records that Sorensen failed on 1 September 2017 and the FCA Register shows that it ceased to be authorised from 27 November 2018.

A representative of Sorensen signed an L&C Intermediary application form on 22 September 2011. This confirmed, amongst other things, that Sorensen had read and agreed to be bound by the terms of the Intermediary Agreement for Non-Insured Contracts and the Intermediary Agreement for Insured Contracts. While I can't see that it's been provided to us in this complaint, in complaints involving a different introducer I've previously seen a copy of an L&C Intermediary Agreement for Non-Insured Contracts.

Henderson Carter Associates Limited ('HCA')

As I understand it, at the time of the transactions Mrs T has complained about, HCA was authorised by the regulator and its permissions included advising on investments (excluding Pension Transfers) and arranging (bringing about) deals in investments. The FSCS website records that HCA failed on 22 March 2017 and the FCA Register shows that it ceased to be authorised from 15 June 2023.

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 2013 (when Mrs T signed paperwork to invest in White Sands), Mr J had been appointed director of over 60 companies named "*White Sands Country Club* [a number] *Limited*". This included being director of the company, White Sands Country Club WS4505 Limited, (incorporated in May 2013) that Mrs T'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.

Mrs T says she was cold called and that, following discussions, a Mr F of Sorensen in conjunction with a Mr H advised transferring her pension monies from the Teachers' Pension Scheme into a Liberty SIPP. Further, that shortly after her monies were transferred to Liberty, she was told that her monies were to be transferred from Liberty to L&C so as to effect a White Sands investment.

A transaction history for Mrs T's Liberty SIPP records that £107,505.85 was transferred into the Liberty SIPP in October 2012 and that £104,671.92 was then transferred out of the Liberty SIPP in May 2013.

We've been provided with a copy of a report dated 13 March 2013 in Mr F's name that is recorded as having been prepared for Mrs T. Amongst other things, this says that:

- The report was being compiled at the request of Mr H of HCA.
- The report dealt solely with the viability of transferring Mrs T's existing pension benefits to a new personal arrangement in order to fulfil her retirement objectives, and HCA was responsible for advising Mrs T on any other areas of need and the correct investment strategy.

- Mrs T had discussed her existing pension provision with Mr H of HCA and wanted to explore the feasibility of transferring monies from her Liberty SIPP into a pension arrangement that would allow her to invest into White Sands (the White Sands investment hadn't been approved by Liberty).
- Mrs T's Liberty SIPP was a relatively new plan and monies had been transferred into it so as to invest in Carbon Credits. As Liberty had decided not to continue to permit Carbon Credits investments, Mrs T now wanted to invest part of her pension fund into White Sands.
- The report was based on the information provided by HCA and Liberty.
- No specific tax or investment advice was inferred or intended in the information within the report and tax/investment advice should be sought from Mrs T's professional adviser.
- Mr F of Sorensen's role in the process was to clarify the feasibility of a transfer from the existing plan and outline the potential advantages and risks.
- If a transfer took place the funds would be invested initially in cash awaiting investment by HCA in line with Mrs T's agreed objectives and attitude to risk.
- Mrs T had completed a risk assessment questionnaire with HCA which indicated that her individual appetite for risk was a score of 5 on a scale of 1 to 10, suggesting a balanced risk approach to investment.
- L&C is a SIPP administrator who has a flexible approach and will generally allow any investment that is an acceptable investment under pension legislation.
- HCA had stated that *"they"* (which I've read as referring to L&C) *"carried out due diligence on the White Sands Development and Green Planet Investments and have approved it for investment"*.
- Mrs T's balanced approach to investment doesn't match the high risk of the White Sands development opportunity. Any investor should aim for a diversified asset allocation split, with any high risk investment of this kind forming only a small proportion of the total fund.
- Mr F wouldn't recommend a transfer to another SIPP as Mrs T would incur additional fees and there were no guarantees about the returns provided by the White Sands investment, which didn't match with Mrs T's appetite for risk.
- The report also included a summary of nine bullet points setting out some risks that were specific to GPIL investments like White Sands. This included that the investment was very high risk, not suitable for a normal unsophisticated investor, illiquid and that investors might get back less than they had invested.

We've been provided with a copy of the L&C SIPP application form Mrs T signed on 28 March 2013. The Independent Financial Adviser ('IFA') details section of the application form records the introducing firm as Sorensen, and Sorensen's FSA authorisation number was recorded. A box is ticked to confirm that Mrs T was given advice at the point of sale and it's recorded that initial remuneration of 3% of the value of the payments initially received into the SIPP, and ongoing remuneration of 1% of the SIPP fund value at the time, would be paid to the IFA.

L&C wrote to Sorensen on 8 April 2013 confirming receipt of the SIPP application. It explained that it had forwarded transfer paperwork on to Liberty and that it had not yet received any investment instructions for Mrs T's SIPP. L&C asked for details of these once the basis for investing the fund had been agreed.

We've been provided with a copy of a handwritten letter in Mrs T's name dated 18 April 2013. It's noted, amongst other things, in the letter that, *"I wish to waive my right to the 30 day cancellation period offered in letter dated 8 April 2013 and proceed with the contract as planned."*

On 7 May 2013, L&C wrote to Sorensen and confirmed that Mrs T's SIPP had *"been established as of 07 May 2013."* And a letter to Mrs T of the same date confirmed the commencement date for her SIPP as being 7 May 2013 and that £104,678.37 had been transferred in from Liberty.

We've been provided with an L&C Investment Purchase Request form that Mrs T signed on 12 May 2013. It was noted, amongst other things, in this form that:

- The White Sands investment and investment amount was given, along with details of both a contact at GPIL and Mr M at Sorensen.
- A box had been ticked to confirm that *"I have received financial advice from the firm detailed overleaf* (here Sorensen) *in relation to the suitability of the type of investment, and the investment is **NOT** being made in accordance with the advice, but nevertheless I wish to proceed with the investment."*
- Mrs T signed the typed member declaration section towards the end of the form to confirm, amongst other things, that L&C hadn't provided advice on the investment, that the consumer had carried out their own due diligence into the investment and that the investment **may** be high risk and that there **may** not be an established market for selling the proposed holding. It was also stated that unregulated investments may not be protected by the FSCS and that the consumer indemnified L&C against any liabilities arising from the investment (bold my emphasis).

A White Sands SIPP instruction form that Mrs T signed on 12 May 2013 noted that £27,500 was to be invested in plot WS 45-05 and a further £2,400 was payable in legal and administrative costs bringing the total to £29,900. There were three options available to the SIPP holder *"36 month capped"*, *"60 month capped"* or *"uncapped, 100% of capital growth"*, Mrs T selected the last of these.

A White Sands Country Club Green Planet disclaimer was also signed for the investments by Mrs T on 12 May 2013, 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.

Mrs T also signed a L&C Property Related Investment form, this was to acquire 100% of the issued share capital in *"White Sands Country Club WS4505 Limited"*. It was explained in the form 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 Mrs T's case was the company White Sands Country Club WS4505 Limited – would hold the plot(s) identified in the corresponding White Sands

SIPP instruction forms Mrs T 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.

We've also been provided with similar forms to those I've mentioned above, that Mrs T signed on 12 May 2013 for two other White Sands holdings – White Sands Country Club WS4609 Limited and White Sands Country Club WS4805 Limited. And the total monies being invested into each of these two holdings was again given as £29,900 per holding.

We've been provided with a copy of the sale and purchase share agreements for Mrs T's White Sands investments. It was noted, amongst other things, that the agreements were between GPIL (the 'Seller'), Green Planet Investimentos Imobiliarios Ltda (the 'Guarantor') and L&C ('the 'Buyer').

Clause 4 of the agreements read 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."*

And Schedule 3 of the agreements (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 Schedule 4 of the agreements (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 agreements then have a section to be signed and dated by all of L&C, GPIL and Green Planet Investimentos Imobiliarios Ltda (Mr J signed for both Green Planet firms in the agreements).

L&C emailed Mr M of Sorensen on 9 July 2013, we've been provided with a redacted copy of that email containing only Mrs T's details. It appears that the email originally concerned four consumers and L&C stated that:

> *"Thank you very much for the copy of your suitability letter in respect of (Redacted),* (Mrs T), *(Redacted) and (redacted).*
>
> *It is clearly not for us to give any advice ourselves and it is not our intention to question the advice you have provided, but we are conscious of the FCA's agenda for placing responsibility for suitability on SIPP Providers in addition to financial advisers and we are particularly keen to understand the circumstances in more detail in cases where a client is insisting on proceeding with an investment against advice, as with these individuals."*

And in respect of Mrs T, L&C continued to note that:

> *"We note your assessment of this client as Medium Risk attitude to risk…are you satisfied that the investment forms a suitable part of the client's wider financial portfolio?*
>
> *Can you also confirm whether the client is aware that there are on-going SIPP fees associated with making this investment via a SIPP product."*

Mr M replied to L&C on the same date and in his redacted email (which appears to relate only to Mrs T and one other consumer), it's explained that both consumers had decided not to follow the suggested constraints regarding the amounts to invest into White Sands and both were aware that holding investments within a SIPP would involve ongoing fees.

L&C replied later the same day and asked Mr M what his opinion was about the effect on these two consumers financially were they to lose the funds invested in their L&C SIPPs. And Mr M confirmed it would have an impact on their financial circumstances as they would lose an income stream. L&C then explained that its question was about the extent to which the consumers could withstand the loss and asked whether it would be catastrophic to their financial circumstances or whether it would be more of an inconvenience. Mr M replied and stated that:

> *"I would say somewhere in the middle as the funds are relatively large, but who knows what levels of income the annuity rates in 15 to 20 years time will provide. Both clients are aware of this risk and have still decided to proceed."*

We've been provided with a statement that L&C sent to Mrs T on 8 July 2014. This records, amongst other things, that:

- The SIPP had an opening balance of £0 on 8 April 2013.
- £104,678.37 was transferred into the SIPP from Liberty on 7 May 2013.
- A little under £90,000 in total was invested into White Sands on 11 July 2013
- The value of the SIPP as at 8 July 2014 was £92,274.02.

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 Ltds (Brazil) – ('Terras Brazil')), that holds 99% of the shares in Brazil. The Company granted CASML the right to be the sole selling agent of the land in Brazil.
- The liquidator visited Brazil in February 2015 to conduct further investigations into the land.
- The land is over 10km from the beach and there's no sign of any infrastructure having been put in place.
- Following enquiries with the local land registry and agents in the area, the liquidator understands that the planning permission obtained wasn't appropriate for the proposed development and has since lapsed.
- Title to all of the individual plots of land is still held in the name of Terras Brazil and a number of local creditors had taken, or were taking, steps to register their liabilities against the land.
- The liquidator had met with various local and international agents when visiting the land, none of the agents had been willing to provide a formal valuation of the land. However, they'd advised that the land was in an undesirable location and that it's probably worth no more than approximately £200,000. This is far less than both the price paid for the land and also the cumulative amount the investors paid for their plots of land.
- Investors paid funds to GPIL and to CASML in exchange for plots at the White Sands Country Club. These funds were subsequently transferred to Mr 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 Mrs T on 22 October 2015.

On 11 May 2016, L&C wrote to Mrs T and said it was enclosing a valuation. It was explained, amongst other things, in the letter that L&C had valued the White Sands investment at £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. It was noted in the valuation that, as at 11 May 2016 the value of Mrs T's SIPP was £6,897.38; this was made up of £6,897.38 in cash and £0 in three White Sands investments.

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

- Mrs T's White Sands investment 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 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, L&C was able to offer one of two options. It could arrange to transfer the White Sands investment into Mrs T's name and make changes to her SIPP so that it would have lower charges going forward. Or, Mrs T could continue with the arrangement as it was but this would involve additional charges.

On 23 August 2016 L&C wrote to Mrs T and said, amongst other things, that:

> *"I am writing further to our previous correspondence regarding the investment that you chose to make in White Sands which has unfortunately encountered serious trading difficulties. In the absence of any recognised market there appears to be no reference from which to establish a value, or even any market or means to achieve a sale.*
>
> *For this reason, the investment in White Sands has to be regarded for the purposes of your SIPP as having no current value and there appear to be no realistic prospects for a sale in the foreseeable future.*
>
> *With this in mind, we feel it would be appropriate to write off the asset, which means your SIPP will no longer incur additional charges for holding the asset. However, we are able to transfer the ownership of the asset to you for your benefit, in case any value should eventually materialise.*
>
> *The SIPP arrangement itself will still exist and, as long as it continues to do so, we are required by HMRC and also the regulator (the Financial Conduct Authority) to continue to carry out certain administration work including making regular returns to them. Consequently, our normal annual fees for this work continue to apply."*

Mrs T subsequently made a claim to the FSCS about Sorensen. The FSCS wrote to Mrs T on 2 November 2017 and said that it had calculated Mrs T's losses at £89,700 and that it would pay her £50,000, this was the maximum sum it could pay Mrs T under its limits. The FSCS later gave Mrs T a reassignment of rights in which, amongst other things, the FSCS explained it was transferring back to Mrs T any legal rights it held against L&C.

What's happened with this complaint so far?

In response to Mrs T's complaint L&C has said, amongst other things, that:

- It had first received correspondence relating to Mrs T's complaint on 12 September 2018.
- L&C is the sole trustee and administrator of the SIPP, which is written under trust.
- Under the rules of the trust, it's only the member or their nominated representative who, following advice from their regulated financial adviser, has the power to select the investments to be held within the SIPP.
- L&C doesn't provide any advice and it isn't regulated to do so.
- L&C doesn't comment on the merits of any proposed investment, nor does it comment on any recommendation by the adviser to open a SIPP. These issues are the responsibility of the financial adviser.
- In connection with an investment L&C's role is to satisfy itself, in its capacity as trustee and hence potential owner of the investment, that it's allowed within the trust rules and doesn't breach HM Revenue & Customs ('HMRC') regulations.
- L&C's records indicate that Mr F and Mr M of Sorensen were Mrs T's regulated financial advisers at the time she applied for her L&C SIPP on 8 April 2013.

- At the time Sorensen was authorised and regulated by the FCA to provide pension transfer and investment advice.
- L&C is a little confused, as it has evidence that indicates that another regulated adviser, Mr H of HCA, was also advising Mrs T.
- Whilst there are some occasions where clients obtain advice from more than one financial adviser, this could lead to a conflict of interest.
- During the period that Mrs T was being advised by both firms, HCA was also authorised and regulated by the FCA.
- L&C had no involvement in the transfer of Mrs T's monies from a defined benefit scheme ('DB') into the Liberty SIPP.
- The risk profiling of a client and their ability to understand the complexities, or otherwise, of a particular investment is a matter of agreement between the client and their regulated adviser.
- L&C understands that the only reason for the pension switch was that Liberty would no longer accept Carbon Credits, which L&C believes was Mrs T's first investment preference.
- Given that White Sands was Mrs T's second complex investment application, it would be reasonable to assume that she was looking to make such an investment. And the submitted application forms from Mrs T's adviser, Mr M of Sorensen, support this in that they indicate that Sorensen had *"advised* (Mrs T) *as appropriate, but never the less* (she) *wished to proceed."*
- L&C also believes that Liberty was reviewing its involvement in the overseas hotel development arena, whereas at the time L&C allowed such investments.
- The White Sands investment wasn't an unregulated collective investment scheme ('UCIS') and it had received legal advice on this point.
- L&C only accepts retail clients and would refuse to accept any client that wasn't a retail client.
- It had queried Mrs T's attitude to risk, which had been assessed as 'medium' by Sorensen. L&C asked if Sorensen was satisfied that the proposed investment, which L&C regarded as high risk, formed a suitable part of Mrs T's wider financial portfolio.
- L&C was keen to understand the rationale of Mrs T proceeding with an investment against advice and to check that Mrs T was fully aware of the fees associated with a SIPP.
- The response L&C received from Mr M was that "(Mrs T) *has* [also] *decided not to follow the suggested constraints regarding the amount of investment into White Sands and she* [too] *is aware of the ongoing SIPP fees".*
- L&C had also asked Sorensen what the effect would be on Mrs T financially if the funds invested in the SIPP were lost. As the initial response received wasn't clear, L&C had then asked Sorensen to what extent Mrs T could withstand the loss and whether it would be catastrophic or more of an inconvenience. The response from Mr M was that:

  > *"I would say somewhere in the middle as the funds are relatively large, but who knows what levels of income the annuity rates in 15 to 20 years' time will provide.* [Both] *clients are aware of this risk and have still decided to proceed".*

- From this information, L&C concluded that appropriate financial advice had been given and warnings provided. Further, it had obtained assurances that Mrs T understood and appeared to be able to tolerate the risks associated with the investment.
- Where an application is received, L&C checks that the introducing firm's details correspond with the details listed on Companies House.
- With regards to investment propositions, L&C establishes the entity exists and where

practical it obtains a legal opinion, and as far as is possible verifies the investment claims.
- L&C won't proceed unless a client's adviser is authorised by the appropriate regulator.
- L&C has adhered to its obligations.
- L&C has controls in place to monitor the business being introduced and all such business is under constant review.
- L&C doesn't manage Mrs T's SIPP or the assets within it.
- Forms Mrs T signed indicate that Mrs T understood that L&C wasn't authorised to provide her with financial advice and that no inference of advice could be taken from any information provided. Further, that Mrs T had taken investment advice and still wished to proceed and that she agreed to be bound by the SIPP rules.
- The SIPP application form clearly details the relationship between L&C and Mrs T and the Open Pension Brochure details L&C's duties. The duties imposed by the retainer didn't extend to L&C assessing the suitability of the investment decisions Mrs T made, or completing financial adviser level due diligence.
- L&C's duty was limited to making investments as instructed by the member, and ensuring that any such investments were compatible with HMRC rules.

Mrs T has told us, amongst other things, that:

- She had a Teachers' Pension Scheme that was dealt with by Sorensen. It was transferred to Liberty and, shortly after this, it was transferred again to L&C and the monies in the L&C policy were invested into the White Sands investment.
- Initial contact had been made by Mr H of HCA who had telephoned her out of the blue. Mr H wasn't known to her before this and he told her that, having left the teaching profession, she would be better off moving her pension elsewhere until she reached retirement age at which point her pension was to be used to pay off her mortgage balance.
- Prior to this, she hadn't thought about moving the monies in her Teachers' Pension Scheme and hadn't previously been in contact with any financial advisers.
- All further contact she had with Mr H was by telephone. And over the course of further telephone calls, she was introduced to Sorensen. Mr F from Sorensen in conjunction with Mr H advised a 100% fund transfer into a Liberty SIPP.
- The White Sands investment was liquidated in 2015.
- She had already received some compensation for Sorensen's mismanagement following a claim that was made to the FSCS.
- She doesn't feel that L&C acted with due diligence *"in accepting something that was so unsound"*. L&C had accepted something that was high risk and she had subsequently lost everything she had in her pension.
- L&C still holds an account with approximately £5,000 in her name for *"maintenance"*, she hasn't been allowed to close this account or claim the money back.
- The money that was lost from her SIPP was to be used to pay off her mortgage when due. Because she was a sole trader, she couldn't raise the monies any other way and when the mortgage became due, despite her best efforts, she couldn't pay the remaining amount.
- Her house failed to sell within the time given by her mortgage company, and it was subsequently repossessed just before the pandemic hit. The loss of her home meant the loss of her employment as she ran a business at her home.
- She doesn't have a copy of Sorensen's suitability report.

We put some questions to Mrs T's representative and, following this, Mrs T and her representative had a recorded phone conversation and we were provided with a copy of the recording of that call. During the call, amongst other things, Mrs T noted that:

- The first contact she had received was by way of a cold call from someone at Sorensen. She was told that because she was no longer teaching it was pointless to keep her monies in the Teachers' Pension Scheme, she was advised to transfer her pension and was told it was a simple process.
- Initially her pension monies were moved to Liberty, she was then contacted by Sorensen to say that this was temporary, that Sorensen was going to move the monies from Liberty to L&C and that L&C was a better place for the monies.
- She was told L&C dealt with the kind of investments that the adviser was looking at and that there would be a better return.
- She didn't really have a choice about investments, Sorensen just said the pension would be moved to L&C and the monies would be invested into the White Sands investment.
- She believed that the White Sands investment was a hotel style complex that was in the process of being built and that shares would be secured with her pension monies. Further, that as the investment got going over a number of years it would increase in value gradually.
- She went on the advice of her financial adviser and didn't think there was any risk. She realises that investments go up and down but didn't realise she could lose everything.
- She hadn't received a payment when moving her monies into the SIPP or when investing in White Sands.
- If L&C hadn't permitted the White Sands investment, she thinks that her monies would have been left where they were.
- She can't remember everything she signed, but her financial adviser had said that they would deal with all of the paperwork and that if she sent paperwork to them they would sort it. Accordingly, if she received paperwork she would have sent it on to Sorensen.
- She doesn't remember receiving a suitability report, what she was told by Sorensen was that it had worked with L&C previously and she should sign and return what Sorensen sent to her. And she was also told that there would be no problem and that if L&C didn't like anything then L&C would refuse it.
- No one from L&C had a conversation with her at the time.
- She didn't recognise, and was upset about, the suggestion that her adviser had advised her not to transfer to a SIPP.
- The box ticked in the Investment Purchase Request forms isn't true, she trusted the advice she received from her adviser and she followed it.
- No FSCS claim has been made about Liberty.
- She doesn't have a wider portfolio of investments, her pension was everything that she had.

One of our investigators reviewed Mrs T'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 Mrs T's SIPP and that L&C should redress her for the losses she's suffered.

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

- Mrs T applied to open an L&C SIPP on 28 March 2013. The SIPP application form recorded her adviser as being Mr F of Sorensen and confirmed that advice had been received at the point of sale.
- The application form also confirmed that Mrs T intended to transfer in monies worth a little under £105,000 from Liberty.
- £104,678.37 was transferred into the SIPP on 7 May 2013 from Liberty.

- Mrs T subsequently signed three Investment Purchase Requests on 12 May 2013 for the White Sands investments – the total sum to be invested was £89,700.
- Mrs T ticked a box to confirm that she had received financial advice (from Sorensen) but that she was not making the investments in accordance with that advice.
- A Suitability Letter refers to decision making in conjunction with Mrs T's *"professional adviser,* (Mr H) *of Henderson Carter Associates Ltd".*
- There was a series of declarations contained in the Investment Purchase Request forms and Mrs T confirmed that the declarations were agreed and understood when signing the forms on 12 May 2013.
- If L&C had refused to accept the investment, Mrs T would have sought to proceed regardless of this. As such, L&C's conduct wasn't causative of any loss and no redress should be payable as a consequence.
- The Financial Ombudsman Service must take into account the relevant case law and, if this is deviated from, it must explain why.
- The Financial Ombudsman Service has ignored the decision in *Adams v Options SIPP UK LLP (formerly Carey Pensions UK LLP) [*2020] EWHC 1229 (Ch) and we haven't explained why we've reached a completely different conclusion to the one reached by the High Court in *Adams*.
- The Financial Ombudsman Service is attempting to use the Principles to circumvent the *Adams* decision.
- Consideration of the Principles must be via the appropriate Conduct of Business Sourcebook ('COBS') rules applying to the transaction.
- At all times, Mrs T was aware that L&C would act on an execution-only basis and would accept no responsibility for the quality of the investment business.
- Amongst other things, the judge in *Adams* held that in order to identify the extent of the regulatory duties imposed on Carey, "*one has to identify the relevant factual context"* and that *"the key fact ... in the context is the agreement into which the parties entered, which defined their roles in the transaction".*
- 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 Mrs T took advice from two regulated financial advice firms.
- It's not fair or reasonable to use the Principles to artificially impose a duty that goes beyond that accepted and agreed by the parties.
- Mrs T signed disclaimers to confirm that she 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 is 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.

- L&C took the added step of obtaining a copy of the suitability letter provided to Mrs T by Mr M and also asked for more detail on why Mrs T was proceeding against investment advice before making the application for investment. L&C specifically asked for confirmation that the investment formed a suitable part of Mrs T's wider portfolio. This goes beyond what was required of a SIPP provider at the time.
- The suitability letter provided by Sorensen dated 13 March 2013 specifically advised Mrs T against transferring to another SIPP as she "*would only incur additional fees and there are no guarantees as to the returns provided by this investment* [White Sands] *which does not match with your appetite for risk."*
- The suitability letter also provided an extensive list of warnings in respect of the White Sands investment, including that:

    - The investment was high risk and not suitable for a normal unsophisticated investor.
    - Green Planet wasn't regulated by the FCA and the investment itself was based on planning permission being granted, and such permission could be held up or refused.
    - There was no track record of such investments being sold at a profit and any return was dependent on the development being completed to the requisite standard by the developer.
    - There was no guarantee that the purchase price of the land reflected its actual value.
    - Unforeseen developments could impact on the investment, and the asset itself would be difficult to monitor as it was based overseas.

- Mrs T made the investment in full knowledge of the risks.
- A number of SIPP providers at the time were accepting such investments (and doing so on a wholly legitimate basis).
- 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.
- 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, L&C's contractual arrangements with its clients and other parties and the general principle that consumers should take responsibility for their decisions.
- Whilst the 2009 Thematic Review could be applicable, it has no bearing on the construction of the Principles as the contents of this document cannot found a claim for compensation of itself.
- Publications issued after the transactions in this complaint, should have no bearing on the complaint.
- 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 Financial Ombudsman Service's assessment of the complaint can't impose such a duty.
- The 2009 Thematic Review isn't statutory guidance under FSMA s.139A. And even if the 2009 Thematic Review Report had been statutory guidance made under FSMA S.139A (which it wasn't), the breach of such statutory guidance wouldn't give rise to a claim for damages under FSMA S.138D.

- 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 investigator's assessment 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 investigator's assessment seeks to override COBS' careful allocation of duties between different types of firm conducting different types of business, and to impose duties on L&C in addition to those provided for under COBS, by means of a generalised appeal to the Principles.
- The Principles must be applied within the context of the specific duties imposed by the Rules not the other way around.
- If L&C really had the obligations of due diligence that are set out in the investigator's assessment it would have been required to engage in the activity of advising on investments in contravention of its regulatory permissions.
- The investigator's assessment effectively concludes that the business should have been rejected on the basis that the investment was commercially unattractive and references information that wasn't available at the time of the investment.
- 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 investigator's assessment 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.
- The investigator's assessment should have found that L&C's duties to Mrs T 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 investigator's assessment 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 investigator's assessment enables Mrs T 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.

- Sorensen first proposed to become an introducer of SIPP business to L&C in September 2011.
- It carried out due diligence on Sorensen; it checked the FCA Register to make sure Sorensen had the requisite permissions.
- L&C's expectation was that Sorensen would provide clients with advice in relation to the transactions they intended to make.
- Sorensen would submit any applications and instructions to L&C, endorsing the clients' decisions following Sorensen's advice to them.
- Following the introduction and acceptance of business from Sorensen, L&C's process was to carry out regular checks against the FCA database to ensure that Sorensen remained duly authorised and instructions could be accepted.
- Adviser charges were paid in accordance with the fee agreement signed by Mrs T and Sorensen.
- L&C has no permissions or experience to advise or comment on the suitability of the transaction.
- The agreement with Sorensen was terminated in December 2014.
- 70 clients were introduced by Sorensen and Mrs T was number 14 of these.
- Based on a sample of 10% of the consumers introduced by Sorensen 28.57% of the introductions involved occupational pension schemes. From this same sample, 28.57% invested into non-mainstream investments.
- Following the investigator's assessment, we asked L&C to provide us with figures that were premised on an analysis of *all* of the consumers introduced by Sorensen rather than just a sample. And L&C confirmed that 76% of the clients introduced by Sorensen changed the adviser on their L&C SIPP from Sorensen to HCA shortly after (within six months) monies were first transferred into their SIPP. Further, that from the total clients introduced by Sorensen, 76% invested into non-mainstream investments.
- The business introduced by Sorensen made up 13.40% of L&C's total new business during the period in which Sorensen 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, a search of the regulator's website to check whether there are any adverse publications and a check of the Company's website if applicable.
- 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 could 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 also provided 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, appear 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 Investimentos Imobiliarios Ltda to Glade had been made in arrears.
- GPIL held a 99% equity interest in Green Planet Investimentos Imobiliarios Ltda, Mr J held the other 1%.

I issued a provisional decision on this complaint, and I concluded Mrs T'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 investment before it accepted White Sands investments into its SIPPs, and before it accepted Mrs T's application to invest in White Sands. Its failure to do so was unfair to Mrs T.
- 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 Mrs T's application to invest in White Sands, it allowed her funds to be put at significant risk.
- In the circumstances, it was fair and reasonable for L&C to compensate Mrs T to the full extent of the financial losses she's suffered due to its failings.

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

- It was found in the provisional decision that, but for L&C's alleged failings, Mrs T's SIPP application from Sorensen would have been rejected and Mrs T wouldn't have invested in White Sands or subsequently suffered the loss of her pension. This conclusion is entirely inconsistent with the terms of the contract between the parties, the relevant COBS rules and the restrictions on L&C's permissions.
- No fair or reasonable reading of the Principles could require L&C to conduct due diligence of the nature suggested in the provisional decision.
- There are a number of points set out in previous submissions that haven't been addressed or given sufficient weight.
- The Ombudsman has failed to take account of the law.
- The Ombudsman has departed from legal precedent setting out (a) the importance of the contract between the SIPP provider and the customer; and (b) the scope of an execution-only SIPP provider's due diligence obligations.
- The Ombudsman is creating new due diligence obligations in a way that is contrary to the FCA's publications at the time.
- The Ombudsman's reliance on various FCA publications is misplaced and, if anything, supports L&C's position.
- From the perspective of the execution-only SIPP provider, there is a real unfairness if it's liable for the poor investment choices of consumers and the failures of other regulated entities.
- Where a consumer chooses an execution-only service, it would be unfair if the SIPP provider wasn't able to rely on express representations made by the consumer when signing the contractual documentation.

What I've decided – and why

Has the complaint been brought in time?

I've reconsidered all the evidence and arguments in order to decide whether we can consider Mrs T'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.

DISP 2.8.2R at the relevant date provided 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…or*
>
> *(2*) more than:
>
> (a) six years after the event complained of; or (if later)
>
> (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;
>
> unless the complainant referred the *complaint* to the *respondent* or to the *Ombudsman* within that period and has a written acknowledgement or some other record of the *complaint* having been received;
>
> unless:
>
> (3) in the view of the *Ombudsman*, the failure to comply with the time limits in *DISP 2.8.2 R* or *DISP 2.8.7 R* was as a result of exceptional circumstances; or…
>
> (5) the *respondent* has consented to the *Ombudsman* considering the *complaint* where the time limits in *DISP 2.8.2 R* or *DISP 2.8.7 R* have expired*…"*

The transactions complained about occurred in 2013 and Mrs T's complaint was made within six years of this in 2018.

L&C issued a reply to Mrs T's complaint on 12 February 2019 and I'm satisfied that letter wasn't a final response within the meaning given to that term in DISP 1.6.2R.

The term final response has the meaning given in DISP 1.6.2R. And in February 2019 DISP 1.6.2R said:

> *"…the respondent must, by the end of eight weeks after its receipt of the complaint, send the complainant:*
>
> *(1) a 'final response', being a written response from the respondent which:*
>
> *(a) accepts the complaint and, where appropriate, offers redress or remedial action; or*
> *(b) offers redress or remedial action without accepting the complaint; or*

(c) rejects the complaint and gives reasons for doing so;

and which:

(d) encloses a copy of the Financial Ombudsman Service's standard explanatory leaflet;
(da) provides the website address of the Financial Ombudsman Service;
(e) informs the complainant that if he remains dissatisfied with the respondent's response, he may now refer his complaint to the Financial Ombudsman Service; and
(f) indicates whether or not the respondent consents to waive the relevant time limits in DISP 2.8.2 R or DISP 2.8.7 R (Was the complaint referred to the Financial Ombudsman Service in time?) by including the appropriate wording set out in DISP 1Annex 3R; …"

The requirement to include our website address hasn't always been part of the definition of a final response letter. It was added on 9 July 2015. This suggests that if sending the leaflet was sufficient to meet the requirement to include our website address, then DISP 1.6.2R(1)(da) wouldn't have been added as a requirement for a final response as a separate criterion – particularly as including the leaflet (which includes the website address) had been a part of the definition for many years before the rule was added to in July 2015.

The above is consistent with the FCA's guidance at DISP 1.6.6A, which was also updated on 9 July 2015 and again later in January 2018:

> *"The information regarding the Financial Ombudsman Service, required to be provided in responses sent under the complaints time limit rules (DISP 1.6.2 R, DISP 1.6.2AR and DISP 1.6.4 R) should be set out clearly, comprehensibly, in an easily accessible way and prominently within the text of those responses."*

Accordingly, I'm satisfied that the letter of 12 February 2019 didn't meet the requirements for a final response letter.

Further, I can also see that following the 12 February 2019 letter, Mrs T's representatives and Mrs T *were* then in contact with us again about her complaint on 1 August 2019 and 5 August 2019.

As such, I'm satisfied Mrs T's complaint was referred to us within the time limits and is one we can consider.

dismissal

In response to my provisional decision L&C has said, amongst other things, that *"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 Mrs T'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.

The parties to this complaint have provided detailed submissions to support their position and I'm grateful to them for doing so. I've considered these submissions in their entirety. However, I trust that they won't take the fact that my final decision focuses on what I consider to be the central issues as a discourtesy. To be clear, the purpose of this decision isn't to comment on every individual point or question the parties have made, rather it's to set out my findings and reasons for reaching them.

Relevant considerations

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

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 Mrs T'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 Mrs T'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 Mrs T'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 Mrs T'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 Mrs T's application.

The facts of Mr Adams' and Mrs T's cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Mrs T's case. And I need to construe the duties L&C owed to Mrs T under COBS 2.1.1R in light of the specific facts of Mrs T's case.

So I've considered COBS 2.1.1R – alongside the remainder of the relevant considerations, and within the factual context of Mrs T'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 Mrs T 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 Mrs T 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 Mrs T'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 un-authorised business warnings.*

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

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

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

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

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

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

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

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

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

*"**Due diligence***

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

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

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

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

    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

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

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

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

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

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

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

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

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

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

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

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

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

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

At its introduction the 2009 Thematic Review Report says:

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

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

So, I'm satisfied that the 2009 Report is a reminder that the Principles apply and it gives an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. The Report set out the regulator's expectations of what SIPP operators should be doing and therefore indicates what I consider amounts to good industry practice at the relevant time. So I'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 previously 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 Mrs T's SIPP was set up. But, like the Ombudsman in the *BBSAL* case, I don't think the fact that the publications (other than the 2009 and 2012 Thematic Review Reports), post-date the events that took place in relation to Mrs T'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 Mrs T. It's accepted L&C wasn't required to give advice to Mrs T, 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 agreed with L&C that any publications or guidance that post-dated the events in this complaint don't help to clarify the type of good industry practice that existed at the relevant time (which I don't), that doesn't alter my view on what I consider to have been good industry practice at the time. That's because I find that the 2009 Report together with the Principles provide a very clear indication of what L&C could and should

have done to comply with its regulatory obligations that existed at the relevant time before accepting Mrs T's applications.

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

And, in determining this complaint, I need to consider whether, in accepting Mrs T'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 Sorensen/the business Sorensen was introducing and the White Sands investment before deciding to accept Mrs T'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 Mrs T fairly, in accordance with her best interests. And what I think's fair and reasonable in light of that. I think the key issues in Mrs T's complaint are whether it was fair and reasonable for L&C to have accepted Mrs T'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 Mrs T'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 Sorensen 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 Mrs T's application for the L&C SIPP and/or White Sands investments.

The contract between L&C and Mrs T

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

I've not overlooked or discounted the basis on which L&C was appointed. And my decision on what's fair and reasonable in the circumstances of Mrs T's case is made with all of this in

mind. So, I've proceeded on the understanding that L&C wasn't obliged – and wasn't able – to give advice to Mrs T on the suitability of the SIPP or White Sands investment.

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

In this case, the business L&C was conducting was its operation of SIPPs. And I'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 Mrs T) 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 Mrs T'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 Sorensen 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 Mrs T'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 Mrs T, by not performing sufficient due diligence on the White Sands investment before deciding to accept it into its SIPPs and before accepting Mrs T'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 Mrs T 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 Mrs T's applications to invest in White Sands, and I find its failure to do so was unfair to Mrs T.

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 Mrs T's applications and, as such, weren't available to L&C prior to the events that took place in relation to Mrs T'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 Mrs T 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 Mrs T's application:

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

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

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

> *"White Sands Country Club is located in Natal on the booming north-east coast of Brazil. The club enjoys the sea breeze of the sandy white dunes of Genipabu's pristine coastline and not only offers a prime piece of land with the potential to build a beautiful home, but also provides investors with a fantastic investment opportunity.*
>
> *The exclusive boutique Country Club has 244 residential homes and is located in one of the most up and coming residential suburbs of Natal. The Country Club offers sports facilities that include football, tennis, mini-golf and a state of the art equestrian centre. Guests can also unwind and relax in the club's boutique spa facilities, pool complex, jacuzzis and saunas.*
>
> *Important Facts:*

Number of Plots = 244
Plot Size = 360-515m2
Planning Permission Status = Full planning permission granted
Nearest Airport = Natal (Approx 15 miles)
Estimated Annual Appreciation = 15-25%"

By 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 360m2 plot being £17,495.*
>
> *As with Phase One, Phase Two has been very popular and we are now nearing 95% of sales completed in Phase Two. The launch of Phase Three is imminent in the coming weeks and at that point, the land will be re-valued and we expect that prices for 360m2 plots in Phase Three will start from between £19,495 and £22,495.*
>
> *The plots come with full planning permission and ALL relevant due diligence reports."*

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

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

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

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

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

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

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

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

- GPIL director, Mr 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 V. 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 Sorensen before Mrs T'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 Mrs T's SIPP application.

In my provisional decision I said that if *"L&C disagrees with this, I'm requesting that L&C provides me with confirmation of the earliest date on which it received an application from a*

consumer to invest in White Sands alongside the response it sends to my provisional decision, and by the deadline that's been set for responding to this provisional decision". No response was forthcoming from L&C on this point in its response to my provisional decision and, on balance, I remain satisfied 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 Mrs T'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 Mrs T's SIPP application, I think 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.

  From the evidence provided, I'm not satisfied that L&C took reasonable 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 Mrs T's case, this was White Sands Country Club WS4505, WS4609 and WS4805) 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 Mrs T'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 Mrs T's application to invest in White Sands, it allowed Mrs T'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 Mrs T on the suitability of the SIPP and/or White Sands investment for her personally. To be clear, I'm not making a finding that L&C should have assessed the suitability of the White Sands investment for Mrs T. I accept L&C had no obligation to give advice to Mrs T, or to ensure otherwise the suitability of an investment for her.

So, my finding isn't that L&C should have concluded that Mrs T 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 Mrs T fairly or act with due skill, care and diligence when accepting the White Sands investments into her 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 Mrs T 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 Mrs T fairly, by accepting the White Sands investments in her SIPP.

L&C's due diligence on Sorensen

L&C had a duty to conduct due diligence and give thought to whether to accept introductions from Sorensen. 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 Sorensen for the SIPP). And L&C has provided us with some limited information about its relationship with Sorensen.

I accept that Sorensen was authorised by the regulator when it introduced Mrs T 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 Sorensen. I'm satisfied that L&C wasn't treating Mrs T fairly or reasonably when it accepted the White Sands investment into her SIPP, so I've not gone on to consider the due diligence it carried out on Sorensen before accepting Mrs T'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 Mrs T's applications?

For the reasons previously given above, I think L&C should have declined to accept Mrs T'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 Mrs T sign declarations, wasn't an effective way for L&C to meet its regulatory obligations to treat her fairly, given the concerns L&C ought to have had about the White Sands investment.

L&C knew that Mrs T had signed forms intended, amongst other things, to indemnify it against losses that arose from acting on her 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 Mrs T signed meant that L&C could ignore its duty to treat her 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 some previous complaints L&C has referenced COBS 11.2.19R and said that it would have been in breach of COBS if it hadn't effected a consumer'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 Mrs T's pension monies were transferred to L&C specifically so as to effect the White Sands investment; I think it's clear from Sorensen's March 2013 report that's why the transfer to L&C 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 was because it accepted the White Sands investment in its SIPPs. 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 SIPPs that Mrs T's pension monies wouldn't have been transferred to L&C. Further, that the opportunity for L&C to execute Mrs T's investment instructions to invest in White Sands wouldn't have arisen.

So, I'm satisfied that but for L&C's failings, Mrs T'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 Mrs T'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 Mrs T's application to invest in White Sands.

COBS 11.2.19R

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."*

So, I'm satisfied that COBS 11.2.19R doesn't negate L&C's obligations under the Principles to decide whether to allow Mrs T's SIPP monies to be invested into the White Sands investment.

Is it fair to ask L&C to pay Mrs T 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 Mrs T's complaint about L&C. However, I accept that other parties were involved in the transactions complained about, including Sorensen and HCA.

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

In my opinion it's fair and reasonable in the circumstances of this case to hold L&C accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mrs T fairly.

The starting point therefore, is that it would be fair to require L&C to pay Mrs T compensation for the loss she'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 Mrs T for her 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 Mrs T to the full extent of the financial losses she's suffered due to L&C's failings.

I accept that it may be the case that Sorensen and/or HCA might have some responsibility for initiating the course of action that led to Mrs T'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 Mrs T wouldn't have come about in the first place, and the loss she'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 Mrs T to the full extent of the financial losses she'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 Mrs T.

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 Mrs T. I accept that L&C wasn't obligated to give advice to Mrs T, or otherwise to ensure the suitability of the pension wrapper or investments for her. 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.

Mrs T taking responsibility for her 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 Mrs T's actions mean she should bear the loss arising as a result of L&C's failings.

Sorensen/HCA were regulated firms who appear to have undertaken to advise Mrs T (and with some overlap) on differing elements of the transactions this complaint concerns. Mrs T submits that she proceeded based on what she was told by her adviser(s), she doesn't remember receiving a suitability report or being advised not to transfer, and that her adviser(s) had dealt with all of the paperwork. On balance, I think Mrs T trusted her adviser(s) to do what was right on her behalf. And Mrs T also then used the services of a regulated personal pension provider in L&C.

Having carefully considered all of the evidence, I think that Mrs T was made aware of some of the risks associated with the White Sands investment *before* her 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 Mrs T wouldn't have come about in the first place, and the loss she'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 Mrs T 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 Mrs T for the loss she's suffered. I don't think it would be fair to say in the circumstances that Mrs T should suffer the loss because she ultimately instructed the transactions be effected.

Had L&C declined to accept the White Sands investments in its SIPPs *before* it first accepted Mrs T's business, 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 Mrs T was made aware of some of the risks associated with the White Sands investment *before* her monies were invested in that arrangement. But I've not seen any evidence that suggests Mrs T was paid a cash incentive. It therefore cannot be said she was *incentivised* to enter into the transaction.

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

I'm also satisfied that it wouldn't be fair to say Mrs T's actions mean she should bear the loss arising as a result of L&C's failings. Had L&C acted in accordance with its regulatory

obligations and good industry practice, it shouldn't have accepted Mrs T's application to invest in White Sands *at all*. That should have been the end of the matter.

Mrs T says that if L&C hadn't permitted the White Sands investment, she thinks that her monies would have been left where they were. And that seems consistent with Sorensen's March 2013 report which suggests that the monies were being transferred to L&C specifically so as to make the White Sands investment.

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 Mrs T for her 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, Mrs T'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 Mrs T compensation in the circumstances. While I accept that other parties might have some responsibility for initiating the course of action that's led to Mrs T'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 Mrs T'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 Mrs T – including Sorensen and HCA. 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 Mrs T for the full measure of her loss. L&C accepted the White Sands investments into its SIPPs and but for L&C's failings, I'm satisfied that Mrs T'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 Mrs T's right to fair compensation from L&C for the full amount of her loss. The key point here is that but for L&C's failings, Mrs T wouldn't have suffered the loss she's suffered. As such, I'm of the opinion that it's appropriate and fair in the circumstances for L&C to compensate Mrs T to the full extent of the financial losses she'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 Mrs T's pension monies hadn't been transferred to L&C so as to effect the White Sands investment?

Prior to being transferred to L&C, Mrs T's monies were in a Liberty SIPP. I'm satisfied that Mrs T's pension monies were only transferred to L&C so as to effect the White Sands investment, I'm satisfied that's consistent with what's stated in Sorensen's March 2013 report and with Mrs T's testimony. If Mrs T's pension monies hadn't been transferred to L&C to effect the White Sands investment, I think it's fair and reasonable to conclude that those monies would either have been retained and invested in her Liberty SIPP, or else they might have been transferred elsewhere 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), 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 Mrs T's SIPP application from Sorensen. And that if L&C hadn't accepted the White Sands investment in its SIPPs, Mrs T 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 Mrs T for the loss she'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 Mrs T to the position she 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 Mrs T's applications.

As I've explained above, but for L&C's failings, I think it's fair and reasonable to conclude that Mrs T's monies would either have been retained in her Liberty SIPP, or else they might have been transferred elsewhere 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 Mrs T's current position to the position Mrs T would be in if her 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 Mrs T'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 Mrs T's share in any residual White Sands holdings in her SIPP that cannot currently be redeemed.

5) Pay an amount into a pension arrangement for Mrs T, 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 Mrs T £800 for the distress and inconvenience the problems with her pension have caused her.

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 Mrs T has contributed to, or withdrawn from, her 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 Mrs T.

I acknowledge that Mrs T has received a sum of compensation from the FSCS, and that she has had the use of the monies received from the FSCS. The terms of Mrs T's reassignment of rights require her to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required. So, I think it's fair and reasonable

to make no permanent deduction in the redress calculation for the compensation Mrs T received from the FSCS. And it will be for Mrs T to make the arrangements to make any repayments she needs to make to the FSCS. However, I do think it's fair and reasonable to allow for a temporary notional deduction equivalent to the payment(s) Mrs T actually received from the FSCS for a period of the calculation, so that the payment(s) ceases to accrue any return in the calculation during that period.

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

2) *Obtain the actual current value of the monies that were transferred into Mrs T'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 Mrs T's pension.

4) *Pay a commercial value to buy Mrs T's share in any residual White Sands holdings in her SIPP that cannot currently be redeemed.*

But for any illiquid White Sands holdings that remain within Mrs T's L&C SIPP, Mrs T's monies could be transferred away from L&C. In order to ensure the SIPP could be closed and further L&C SIPP fees could be prevented, any remaining illiquid 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 Mrs T'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 Mrs T's L&C SIPP, then the actual value of any such investments it doesn't purchase should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include their being given a nil value for the purposes of ascertaining the current value of such investments in step 2).

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

If L&C doesn't purchase the investments, and if the total calculated redress in this complaint is greater than £160,000 and L&C doesn't pay the *recommended* amount, Mrs T should retain the rights to any future return from the investments until such time as any future benefit that she receives from the investments together with the

compensation paid by L&C (excluding any interest) equates to the total calculated redress amount in this complaint. L&C may ask Mrs T to provide an undertaking to account to it for the net amount of any further payment the SIPP may receive from these investments thereafter. That undertaking should allow for the effect of any tax and charges on the amount Mrs T may receive from the investments from that point, and any eventual sums she would be able to access from the SIPP in respect of the investments. L&C will need to meet any costs in drawing up the undertaking.

5) *Pay an amount into a pension arrangement for Mrs T, 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 Mrs T, or if doing so would give rise to protection or allowance issues, it should instead pay that amount direct to her. 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 Mrs T's expected marginal rate of tax in retirement at her selected retirement age.

   It's reasonable to assume that Mrs T is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mrs T would have been able to take a tax-free lump sum, or *further* tax-free lump sum if she's already taken some tax-free cash from her L&C SIPP, the reduction should only be applied to that portion of the compensation that couldn't have been taken as a tax-free lump sum. For example, if Mrs T would have been able to take a tax-free lump sum of 25%, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

6) Pay Mrs T £800 for the distress and inconvenience the problems with her pension have caused her.

   In addition to the financial loss that Mrs T has suffered as a result of the problems with her pension, I'm satisfied from Mrs T's testimony that the loss suffered to this portion of her pension provision, and how this impacted her plans and her business, has caused Mrs T significant distress and inconvenience. And I think that it's fair for L&C to compensate her for this as well.

SIPP fees

If Mrs T'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 Mrs T 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 Mrs T or into her SIPP within 28 days of the date L&C receives notification of Mrs T'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 Mrs T in a clear, simple format.

My final decision

For the reasons given above, I find this complaint is one we can consider and it's my final decision that Mrs T's complaint is upheld and that Pathlines Pensions UK Limited must calculate and pay fair redress as set out above.

Where I uphold a complaint, I can make an award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend that Pathlines Pensions UK Limited pays the balance.

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

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Pathlines Pensions UK Limited pay Mrs T the balance plus any interest on the balance as set out above.

The recommendation isn't part of my determination or award Pathlines Pensions UK Limited doesn't have to do what I recommend. It's unlikely that Mrs T could accept a final decision and go to court to ask for the balance and Mrs T may want to get independent legal advice before deciding whether to accept this final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs T to accept or reject my decision before 25 April 2025.

Alex Mann
Ombudsman