DRN-5644544

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.

Mr M complains that L&C didn't meet its regulatory obligations and failed to undertake sufficient due diligence on the firm that introduced his business and on a White Sands Country Club ('White Sands') investment he made through his L&C Self-Invested Personal Pension ('SIPP'). Further, that as a result of L&C's failings he has suffered losses.

What happened

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

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

Involved parties

L&C

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

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 after 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.

Henderson Carter Associates Limited ('HCA')

HCA was a different advisory firm that was authorised by the regulator. In 2017 HCA went into liquidation and is now dissolved.

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 January 2013 (when Mr M signed paperwork to invest in White Sands), Mr J had been appointed director of over 70 companies named "*White Sands Country Club* [a number] *Limited*". This included being director of the company, White Sands Country Club WS3709 Limited, (incorporated in January 2013) that Mr M'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.

Carbon Neutral Investments Limited ('CNI')

Based in the UK, CNI provided clearing and settlement for transactions involving VER Spot Carbon Credits.

CNI is a previous name of Opus Capital Limited (currently showing as in liquidation on Companies House), Mr S has been a director of that company since November 2010.

The FCA issued a Final Notice to Mr S that's dated 14 January 2022 and it's noted, amongst other things, in this document that:

> *"…the Authority has decided to make an order, pursuant to section 56 of the Act, prohibiting* [Mr S] *from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm. The prohibition order takes effect from the date of this Notice.*
> *…*
> *On 12 May 2021, at Southwark Crown Court,* [Mr S] *was tried and convicted of one count of fraudulent trading and four counts of converting criminal property.*
> *…*
> *Between 2011 and 2014,* [Mr S] *used OCL (trading as Carbon Neutral Investments Ltd) as a vehicle to create and operate a fraudulent clearing business. This enabled a system in which carbon credits were sourced and supplied to* [Mr S] *and OCL which were ultimately sold to investors by third party brokers.*
>
> *The judge who passed sentence on* [Mr S] *stated that investors who gave money to* [Mr S'] *clearing business were reliant on information which* [Mr S] *knew to be untrue and misleading. The carbon credits were worthless and did not offer investors any prospect of making a profit or recovering their investment.* [Mr S'] *business cleared approximately £36 million of investor monies, of which over £600,000 comprised expenses put through the business, a large part of which was of benefit to* [Mr S]. [Mr S] *also sent £3.2 million of investor monies to unknown overseas accounts and has failed to disclose the beneficiaries of those accounts.*

The sentencing judge stated that the total amount involved in the overall fraud was approximately £36 million. The investors included elderly people who suffered a negative impact on their health and retirement, and others had to re-mortgage or sell their homes."

What happened

I've briefly summarised what's happened below.

Mr M says that he was cold called and offered a free pension review. Mr M says he then spoke to an individual (Mr R) who explained that lots of people were using pensions to finance investments and it was a great way of getting pensions to work harder. Mr M says he was shown a brochure that promised great returns and was told that frozen pensions weren't performing well and what was being proposed would be better for him. Further, Mr R had explained he wasn't able to give advice on the suitability of using Mr M's pensions for proposed transactions, but he could refer Mr M to an adviser. Mr M says that he only ever spoke with Mr R. As I understand it, following the discussions Mr M has referred to, Sorensen became involved with transferring monies from Mr M's existing pension arrangements into a newly established L&C SIPP.

We've been provided with a copy of a report dated 10 March 2012 in Mr C's name (Mr C was a Sorensen adviser), about Mr M's defined benefit ('DB') scheme, that's recorded as having been prepared for Mr M. The report appears to have been signed by Mr M on 24 May 2012. Amongst other things, the report says that:

- The top of the front page states *"Please sign and return."*
- The report was being compiled at the request of Mr H of HCA.
- The report dealt solely with benefits held under Mr M's DB arrangement and HCA was responsible for advising Mr M on any other areas of need and any ongoing investment strategy.
- Mr M had discussed his existing pension provision with HCA and the fact that he would like to use part of his pension monies to invest into Carbon Credits.
- In order to have input into the investment strategy, and if he wished to invest into alternative investments like Carbon Credits, Mr M would need to transfer away from his DB scheme.
- By transferring away from the DB scheme Mr M would have access to a wide range of funds however he would lose any guarantees which the DB scheme provided.
- If a transfer was to proceed the transferred monies would initially be invested into cash. Sorensen would be responsible for advising on the pension transfer and it would then be the responsibility of HCA to advise Mr M to invest his money in line with his risk profile and personal objectives.
- The critical yield needed to be achieved by a personal pension to mirror the benefits being offered by Mr M's DB scheme was 9.2% a year.
- The critical yield may only be achieved at that level if an aggressive investment approach was taken with the pension monies.
- HCA had confirmed that Mr M's appetite for risk was scored at eight out of ten, suggesting a high-risk approach to investment and there was a 27-year term for investment.
- There was no guarantee of future growth if the monies were transferred, and it was possible that Mr M's eventual pension may be reduced.
- It was likely that the type of investments that would suit Mr M's attitude to risk would not consistently achieve a return of 9.2% a year and, as such, the benefits from a personal pension were likely to be less than those the existing scheme would provide.

- The pension commencement lump sum the DB scheme would provide was also likely to be better.
- The size of fund available to Mr M was small and, because of this, it wouldn't be suitable for investment into a SIPP or high-risk investments like Carbon Credits due to the charges involved.
- The potential death benefits prior to retirement were more suitable under a personal pension arrangement than they were under the DB scheme due to Mr M's marital status.
- Overall, it would recommend against the transfer at that time.
- The report also included a brief bullet-pointed summary of some risks that were specific to Carbon Credits investments.

We've been provided with a letter addressed to Mr C of Sorensen which Mr M has signed and dated on 24 May 2012. It's noted in this typed letter that:

> *"Following consideration of the information detailed within the Pension Transfer Report provided by you on 10th May 2012, I can confirm that I wish to proceed against the advice provided and transfer my* [name of DB scheme]*.*
>
> *Please accept this letter as my authority and approval to proceed with the transfer of the* [name of pension scheme] *to a London & Colonial Self Invested Personal Pension (SIPP) so that I can fulfil my investment objective of investing into Carbon Credits. I am aware and understand all the risks associated with the transfer as have been detailed within the report of 10th May, but still wish to proceed against the advice you have given me.*
>
> *Please submit the L&C Application Form as soon as possible."*

Around 19 June 2012, Sorensen sent L&C a completed application form for Mr M to open a new SIPP. 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 Mr M was given advice at the point of sale and it's recorded that initial remuneration of 3% (of the funds initially received), and ongoing remuneration of 1% (of the fund value at the time of each annual anniversary), would be paid to the IFA. It's also stated in the form that Mr M didn't want to manage the fund himself and didn't want to appoint a financial adviser but was happy for L&C to act on instructions received from his IFA. The form was signed by Mr M on 24 May 2012 and it was noted that a little over £25,000 was to be transferred in from an existing pension arrangement.

A White Sands SIPP instruction form was later sent to L&C, this was signed by Mr M on 24 January 2013. It was noted that £27,500 was to be invested in plot WS 37-09 and a further £2,400 was payable in various 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"*, Mr M selected the last of these.

A White Sands Country Club Green Planet disclaimer was also signed for the investments by Mr M on 24 January 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 had 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.

We've been provided with an L&C Investment Purchase Request form that Mr M signed on 24 January 2013. It was noted, amongst other things, in this form that:

- The investment was White Sands Country Club WS37-09.
- The investment amount was £29,900.
- A box had been ticked to confirm that Mr M had received advice from HCA on the suitability of the investment and that the investment *wasn't* being made in accordance with the advice but, nevertheless, Mr M wanted to proceed with the investment.
- Mr M 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 L&C wasn't responsible for assessing the risks and merits of the investment and that the consumer indemnified L&C against any liabilities arising from the investment (bold my emphasis).

Mr M also completed L&C Investment Request forms on 24 January 2013, this was to acquire 100% of the issued share capital in *"White Sands Country Club WS3709 Limited"*. It was explained in the forms that:

- L&C wasn't authorised to, and hadn't, given investment advice.
- L&C had obtained legal advice in its capacity as trustee, so as to assess the risks of ownership of the company, and its title to the underlying plots and so as to ensure the acquisition of the appropriate title.
- The advice L&C had obtained didn't cover the investment merits, marketability, or value of the plot(s).
- *"The Company"* – which in Mr M's case was the company White Sands Country Club WS3709 Limited – would hold the plot(s) identified in the corresponding White Sands SIPP instruction forms Mr M 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 not been provided with a full copy of the White Sands sale and purchase share agreement in this case by Mr M or L&C. However, L&C has previously provided us with a full copy of a sale and purchase share agreement on a different case in which a SIPP investor also invested in White Sands (that case was the subject of a previous final decision). I'm

satisfied it's more likely than not that, subject to a few exceptions such as reference to the individual SIPP member and/or the specific White Sands company/plot number, the agreement in that other case would have been largely identical to the agreement in Mr M's case.

It was noted, amongst other things, in the copy of a White Sands sale and purchase share agreement that was previously provided to us on an earlier complaint that the agreement was between GPIL (the 'Seller'), Green Planet Investimentos Imobiliarios Ltda (the 'Guarantor') and L&C ('the 'Buyer').

Clause 4 of the agreement reads as follows:

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

And Schedule 3 of the agreement (titled ***"Completion arrangements")*** said that:

> "*On Completion* ("Completion" is defined in the document as completion of the sale and purchase of the Sale Share by the performance by the parties of their respective obligations under clause 4 and Schedule 3):
>
> 1. *The Seller shall deliver to the Buyer:*
>
> *1.1 executed transfer in respect of the Sale Share in favour of the Buyer, together with the share certificate for the Sale Share;*
>
> *1.2 certified copies of the minutes recording the resolution of the board of directors of the Seller authorising the sale of the Sale Share and the execution of the transfers in respect of them;*
>
> *1.3 such other documents as may be required to give a good title to the Sale Share and to enable the Buyer to become the registered holders of it;*
>
> *1.4 (as agents for the Company all its statutory and minute books and registers (written up to the business day immediately preceding the date of this Agreement), its common seal (if any), certificate of incorporation, any certificate or certificates of incorporation on change of name, details of all user names, passwords and codes used by the Company* ("Company" is defined in the document as White Sands Country Club WS (a number) Limited (details of which are set out in Schedule 1)) *for online filing of corporate documents, all books of account and other documents and records including copies of its memorandum and articles of association of the Company;*
>
> *1.5* ***the deeds and documents of title to the Property*** **(**Property is defined in the document as Plot WS (a number) White Sands Country Club, Murive, Natal, Rio Grande do Norte, Brazil, details of which are set out in Schedule 2) and all ancillary documents) (bold my emphasis).
>
> 2. *When the Sellers have complied with the provisions of paragraph 1, the Buyer shall pay the Purchase Price by electronic funds transfer to the Nominated*

Account and payment of the Purchase Price into such account shall constitute a good discharge to the Buyer in respect of it."

And in the other case Schedule 4 of the agreement (titled ***"General Warranties"***) said, amongst other things, that:

"

7. Title

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

8. Encumbrances

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

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

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

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

9. Condition

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

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

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

10. Ownership of assets

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

The agreement then also had 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 agreement we've seen on the other case).

I'm aware from other complaints we've received involving L&C and White Sands investments that 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 had 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.

While I've not seen evidence of L&C having sent a copy of the letter from the liquidator on to Mr M. I'm aware from a number of other complaints we've received involving L&C and White Sands that, typically, L&C was writing out to consumers invested in White Sands to provide them with a copy of the liquidator's letter. In my provisional decision I stated that if L&C did provide a copy of this letter to Mr M, it should provide me with evidence of this alongside its response to my provisional decision. We weren't sent evidence of L&C having provided a copy of this letter to Mr M alongside L&C's response to my provisional decision.

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

- The investment Mr M chose to make in White Sands had encountered serious trading difficulties. In the absence of any recognised market there appeared to be no reference from which to establish a value, or any market or means to achieve a sale.
- The investment in White Sands has to be regarded as having no current value and there appears to be no realistic prospects for a sale in the foreseeable future.
- Due to this, L&C considered that it would be appropriate to write off the asset and this would mean that Mr M's SIPP would no longer incur additional charges for holding the asset.
- L&C could transfer ownership of the White Sands investment to Mr M so that he would benefit *"in case any value should eventually materialize"*.

We've been provided with a transaction history for Mr M's L&C SIPP. This records, amongst other things, that:

- There was a transfer in of £27,908.35 on 3 July 2012.

- There was a transfer in of £8,348.41 on 2 October 2012.
- £29,900 was invested into White Sands on 5 April 2013.

As I understand it, in or around November 2017, Mr M submitted a claim to the FSCS about Sorensen. In the claim form to the FSCS Mr M noted, amongst other things, that:

- The advice he had received from Sorensen was unsuitable for his circumstances, attitude to risk and capacity for loss.
- Sorensen had accepted the business from its introducer without any regard for him.
- Sorensen had accepted information from a third party without verifying with him that the information was accurate and a true reflection of his circumstances and needs.
- He hadn't been informed of the high-risk nature of the investment that was made. And said that had *"I been told about the high risk nature of the investment I would never have got involved."*
- As the pension arrangements he had at the time were his only financial asset for retirement then he would not have put them at risk.
- *"If I had not proceeded with the investment I would not have needed to transfer my pensions to the SIPP. I would happily have left them where they were if that meant security."*
- He had no concerns about leaving his pensions as they were and was told that by transferring and investing his pensions that his pensions would be working much harder.
- His only reason for transferring was the advice he had been given.
- The name of the individual at the firm who had given advice was Mr C of Sorensen.
- Elsewhere in the form the name of the firm who had given the advice is recorded as HCA.
- A little under £30,000 had been invested into White Sands.
- He had also received advice from another firm in respect of the pension product and/or investment(s) that his claim concerned, and the other firm was Sovereign Caledonia.
- He had first spoken to an individual at Sovereign Caledonia (Mr R) who had introduced the idea of the investment. As he didn't have any money, he didn't see how making the investment was possible. Sovereign Caledonia had explained that lots of people were using pensions to finance investments and that it was a great way of getting pensions to work harder.
- Mr R had explained that he wasn't able to give advice on the suitability of using Mr M's pensions for the endeavour, but that he was able to refer Mr M to an IFA for review and advice.
- He has no idea who everything was referred to as he never met or spoke with anyone (other than Sovereign Caledonia) about the matter.
- He remembers receiving forms for signature and that all the paperwork was completed and marked where he had to sign.
- His attitude to risk at the time had been low risk.
- He had transferred his pension monies based on the information given to him and the advice he had received from those involved.
- He wasn't offered any incentives.
- He had realised he had a claim against Sorensen in November 2016.

The FSCS investigated Mr M's claim and it wrote to Mr M on 12 March 2018 stating that it agreed he had a valid claim and explaining that it had calculated Mr M's total losses as a little over £114,600. The FSCS said that it would pay Mr M £50,000 compensation and that this was the maximum sum it was able to pay under its compensation limits.

As I understand it, in or around December 2017, Mr M also submitted a claim to the FSCS about HCA. In the claim form to the FSCS Mr M noted, amongst other things, that:

- The claim was linked to a separate claim he had submitted to the FSCS about Sorensen. This part of the claim was because HCA had facilitated the transfer of an existing personal pension plan into the L&C SIPP. Mr H of HCA had given the advice and HCA hadn't paid regard to Mr M's best interests.
- His attitude to risk at the time had been low risk.
- He had realised he had a claim against HCA in November 2016.

The FSCS did investigate a claim against HCA in respect of the transfer of Mr M's personal pension to L&C and the investment into White Sands. And the FSCS wrote to Mr M on 5 February 2018 concluding that he had a valid claim against HCA, that it had calculated his losses in respect of that claim as being a little over £35,000 and that it would pay him that sum.

The FSCS subsequently gave Mr M a reassignment of rights pursuant to both of his claims in which, amongst other things, the FSCS explained it was transferring back to Mr M any legal rights it held against L&C.

What's happened with this complaint so far?

On 17 July 2018, Mr M wrote to L&C and said, amongst other things, that:

- L&C had failed in its statutory requirements.
- L&C failed to meet its obligations to him as a retail client, it permitted a transfer to an unsuitable pension which facilitated the purchase of an unsuitable, high-risk and illiquid investment.
- He wasn't a sophisticated investor and had a low risk profile with little or no investment experience.
- L&C had played a fundamental role in him suffering the financial loss of his pension. Had L&C complied with the mandatory requirements laid down by the regulator then it should have declined the business. Had L&C declined the business then his pension transfer couldn't have gone ahead and the subsequent investment of monies into an unregulated investment couldn't have proceeded.

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

- L&C is the sole trustee and administrator of the SIPP, which is written under trust. Under the rules of the trust, it is only the member or their nominated representative who, following advice from their adviser, has the power to select the investments to be held within the SIPP.
- L&C doesn't (and isn't permitted to) provide advice to any clients in relation to the establishment of a SIPP or the transfer of any previously held arrangements into the SIPP.
- The suitability of the SIPP and/or investment are the responsibility of the financial adviser.
- L&C satisfies itself that investments are allowed within the trust rules and that investments don't breach HM Revenue & Customs ('HMRC') regulations.
- Mr C of Sorensen was Mr M's regulated adviser at the time he applied for an L&C SIPP.
- Following the transfer of monies into Mr M's SIPP from one pension arrangement, L&C received a signed and dated authorisation document from Mr M changing his adviser from Sorensen to Mr H of HCA.

- Following this, at HCA's recommendation, L&C received a request to arrange the transfer of pension monies from a second pension arrangement into the SIPP. And, further to this, L&C received £8,348.41 into the SIPP on 2 October 2012.
- Both Sorensen and HCA were authorised and regulated by the regulator at the relevant dates.
- L&C has always been aware of, and adhered to, its obligations.
- L&C only accepts retail clients.
- On 7 January 2013, Mr M emailed L&C indicating that he had been trying without success to invest his SIPP monies into a Malgretoute development in Freedom Bay, St Lucia. Mr M had been keen to get to the bottom of the delay and wouldn't have been happy if a higher price was charged. L&C responded to Mr M on 9 January 2013 and indicated that it couldn't, at that time, allow that particular investment.
- L&C declining to permit the Malgretoute development investment had been prompted by its due diligence concerns.
- L&C assumes that, following discussions with HCA, Mr M decided to cancel his application to invest in the Malgretoute development and instead submitted an application for investment in the White Sands Country Club.
- Given that the White Sands investment was Mr M's *"second investment application of the same type of hotel complex development and that* [he] *had been recently pressing for progress on the Malgretoute development"* it would be reasonable to assume that Mr M was confident of the risks involved.
- L&C has controls in place to monitor business being introduced, including in respect of the source and the volume of that business. All such business is under constant review.
- The Open Pension Brochure explained the duties L&C was to perform. The duties imposed by the retainer didn't extend to L&C assessing the suitability of the investment decisions made by a SIPP member, or to L&C completing financial adviser level due diligence.
- L&C's duty was limited to making investments as instructed by the member, and ensuring that investments were compatible with HMRC rules.
- Forms Mr M had signed confirmed that he had taken investment advice, but he still wanted to proceed and agreed to be bound by the SIPP rules.

Mr M has said to us, amongst other things, that:

- The conversation with Mr R had come about following a cold call he had received offering a free pension review.
- The brochure he was given had looked very professional and it had promised great returns. He doesn't have the brochure as nothing was left with him. He can't remember the returns promised, he just remembers that he was told it would be better than what he had.
- He was told frozen pensions weren't really performing well and that what was being proposed would be better for him.
- There is reference in the documentation to investing in Carbon Credits and he vaguely recalls this, his recollection is that Mr R said Carbon Credits weren't for him and that the White Sands investment was better for him.
- Mr R facilitated everything that was done.
- He was assured that the investment, while different, was safe.
- He didn't change adviser, rather there was clearly an arrangement set up between HCA and Sorensen, none of which was communicated to him.
- He had very little paperwork and he only recalls dealing with Mr R.

- Paperwork was usually brought for signing and wasn't left for reading or checking. He therefore wasn't aware that some of the paperwork being signed was advising him not to proceed.
- The paperwork, which had been obtained so as to evidence the firms involved, was obtained by Mr M's professional representative through data subject access requests.
- He went by what he was told by Mr R and as he had no financial services experience then he didn't know that the process adopted by all concerned was wrong. He trusted that those advising him were there to look after his best interests.
- Sorensen's recommendation not to proceed was never highlighted to him.
- A form he signed on 24 May 2012 was highlighted where he had to sign and date.
- There is an insistent client letter but this was penned by Sorensen. To be a true insistent client letter, this should be penned by the client after the recommendation has been made and shouldn't be signed on the same date on which the client is signing a pension report to confirm receipt of the document.
- The SIPP application was also signed on 24 May 2012 and, again, it's apparent that parts he had to sign or complete in the form were highlighted.
- The documents were presented for signature only and he can't remember if the SIPP application form was pre-completed or not. But he can remember that Mr R brought the paperwork for him to sign at a meeting at a restaurant and that paperwork wasn't left with him. Signatures were gathered and then the paperwork was taken away, nothing was left for reading and checking.
- He isn't a risk taker, had anyone said that he shouldn't go ahead, or that it was a high-risk investment strategy, he wouldn't have proceeded. He would never have put his pension monies at risk.
- Neither Sorensen nor HCA had followed a proper regulated sales process, and both relied on paperwork completed by a non-regulated introducer – Mr R.
- Had L&C spoken to him, it would have established that a *"proper regulated sales process had not been conducted"* by the adviser.
- He had no meeting or financial discussion directly with the adviser and everything was done through an introducer. It was the introducer who he had met with and completed paperwork with not the adviser, and the introducer wasn't authorised by the FCA at the time.
- L&C has failed to meet its obligations under the Conduct of Business Sourcebook ('COBS').
- L&C failed to carry out satisfactory due diligence checks on the investment and failed to protect him.
- L&C failed to complete due diligence checks on the introducer and failed to verify the integrity of the firm it was accepting business from.
- The risks of the investment weren't explained to him.
- He wasn't a sophisticated investor and he had no experience of investing in high-risk illiquid assets.
- He had first appointed his professional representative in November 2016.
- The exact events only became clear to him once his professional representative had received files from HCA/Sorensen and explained the events to him.
- Before he submitted a complaint to L&C, he had a claim against his adviser with the FSCS. The FSCS didn't reach its decision on the claim until 23 March 2018, and it was only at this date he knew what his overall losses were and that not all of his losses were covered by the FSCS claim.
- The complaint against L&C was made in July 2018 once it was clear that not all of his financial losses had been redressed.

- Before a complaint could be pursued against L&C, he had to get a reassignment of rights from the FSCS, which he received on 23 May 2018. And, following this, he had prepared his complaint against L&C, which was issued on the 17 July 2018.
- Had his financial loss been below the FSCS award limit then no complaint about L&C would have been necessary.
- Also, he was unable to pursue a claim for the same losses with the FSCS and the Financial Ombudsman Service at the same time.

One of our investigators reviewed Mr M's complaint and concluded that the complaint should be upheld. The investigator said that L&C shouldn't have accepted the White Sands investment into Mr M's SIPP. And that L&C should redress Mr M for the losses he had suffered as a result of its failings.

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

- The application for the SIPP was made in June 2012 and monies were transferred into the SIPP in July 2012. The original complaint was received by L&C on 17 July 2018, this is more than six years after the SIPP application was received.
- The six year time limit has expired. Mr M also ought to have been aware of cause for complaint prior to July 2015. By that time Green Planet had been wound up (in December 2013) and it would have been obvious that a total loss had been suffered. Such that any issues regarding the suitability of the transactions entered into, or any alleged failure to complete adequate due diligence, would have been apparent.
- By November 2013, the national press was running articles discussing the high pressure sales tactics used by Green Planet and highlighting concerns that the investment was a scam. This information would have been easily ascertainable by an investor.
- By the end of 2013 at the latest, Mr M would have been aware that the total sum invested had been lost. And he also ought to have been aware of concerns with the investment, which would have given him cause to assess the suitability of the SIPP and the merits of having transferred pension monies into it.
- The investigator's assessment on the complaint doesn't consider what would have happened if L&C had rejected Mr M's application to invest into White Sands.
- Mr M had been trying, without success, to invest in the Malgretoute development and despite being told that L&C wouldn't accept that investment he remained keen to invest in an overseas hotel complex, leading to the investment in White Sands.
- The application for the White Sands investment indicates that Mr M may have made the investment against the advice of HCA.
- Mr M had a clear intention to make an investment like White Sands and was willing to do so against advice, even after a similar investment had been rejected by L&C.
- Had L&C rejected the investment then Mr M would have proceeded regardless. And L&C's conduct wasn't causative of any loss that had been suffered, no redress should be payable as a result.
- The facts in this complaint are broadly similar to those in the *Adams v Options* case, but the investigator's view doesn't explain why we've reached a different conclusion to that arrived at in *Adams.*
- The investigator's view imposes a duty on L&C to decide whether to accept or reject business brought to it by a customer requesting an execution-only service.
- The investigator's view extends the scope of the duty owed by L&C beyond what was envisaged by the parties.
- A breach of the Principles cannot, of itself, give rise to any cause of action at law.
- The ambit and application of the Principles, and such duties as may be imposed on L&C by these, fall to be construed in light of the COBS rules applicable to L&C, L&C's regulatory permissions, L&C's contractual arrangements and the statutory

objective that consumers should take responsibility for their decisions.

- It was said in *Adams* that reports, guidance and correspondence issued after the events at issue couldn't be applied to Options' conduct at the time. So, publications issued after the transactions in this case shouldn't have a bearing on the complaint.
- 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."*
- Regulatory publications can't alter the meaning, or the scope, of the obligations imposed by the Principles.
- *Adams* held that duties imposed by COBS can't all apply to all firms in all circumstances.
- Neither the obligations under COBS 14.2.3R and COBS 14.3 to provide clients with product information, nor the obligation under COBS 19.1.2R to provide clients with pension product information, apply to execution-only SIPP providers.
- Mr M was aware that L&C would act on an execution-only basis and wouldn't accept responsibility for the quality of the investment business.
- If L&C really had the obligations of due diligence set out in the investigator's view and had acted in accordance with them then it would have been required to advise on investments, which was contrary to its regulatory permissions.
- The relationships in this case are similar to those in *Adams*, the distinguishing factor is that Mr M took advice from two separate regulated advisers.
- With an execution-only service, it would be unfair if the SIPP provider couldn't rely on representations made by the consumer when signing the contractual documentation.
- 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 *"there is a very plain inconsistency between the contract which was entered into between it and the claimant and the duties [under COBS 2.1.1R] which the claimant now suggests that the defendant owed to him."*
- And that *"there was… [no] duty on [Carey]… to consider the suitability or appropriateness of a SIPP or the underlying investment. The contract between [the parties] makes that clear."*
- Further, that *"a duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed...as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed."*
- In *Adams* the FCA agreed that the function of a firm, as determined by contract, would govern what it had to do to comply with its duties under the FCA Handbook.
- Insufficient weight has been given to contractual arrangements and the demarcation of roles and responsibilities. The documents setting out the contractual relationship between the parties make it clear that L&C was acting on an execution-only basis.
- The investigator's view runs contrary to *Adams* by suggesting that, notwithstanding the clear contractual terms, L&C owed due diligence obligations under the Principles.
- The Financial Ombudsman Service is attempting to use the Principles to circumvent the *Adams* decision.
- The Financial Ombudsman Service must take into account the relevant case law

and, if this is deviated from, must set out why – *R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017] EWHC 352 (Admin) and Jay J's comments at paragraph 73 of that judgment were referenced.

- Had proper regard been given to the contractual arrangements between the parties then the investigator's view should have found that L&C's duties to Mr M extended no further than those owed to the claimant in *Adams.*
- 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*.
- At the time of the transaction complained of there was no obligation on a customer to take advice on the transfer of a pension.
- It's not fair or reasonable to use the Principles to impose a duty that goes beyond that accepted and agreed by the parties.
- The Principles can't give rise to a cause of action if breached, and consideration of the Principles must be via the appropriate COBS rules applying to the transaction.
- The investigator's view fails to have regard to the general principle that consumers should take responsibility for their decisions, the fundamental principle of freedom of contract and to the authority of *Adams* and *Kerrigan v Elevate Credit International Ltd* [2020] C.T.L.C. 161.
- The investigator's view enables Mr M 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.
- Mr M signed disclaimers confirming that he knew of the high-risk nature of the investment and that it was illiquid and may be difficult to sell. He was also aware that L&C would take no responsibility for his decision to purchase the investment.
- In *Adams* the Store First investment being high-risk didn't make it manifestly unsuitable.
- The level of due diligence imposed by the Financial Ombudsman Service goes far beyond what was agreed between the parties.
- The suitability of a high-risk investment depends on the particular financial circumstances of the particular customer and their attitude to risk.
- It's not 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. And it's not reasonable to conclude that L&C should have completed due diligence in respect of the commercial viability of the investment or how returns would be generated – that was a role for Mr M's adviser.
- It's also not fair to hold L&C responsible for not having identified that the planning permission obtained was not appropriate. And L&C was under no obligation to commission a report into the value of the land.
- A number of other SIPP providers at the time were accepting such investments and it's most likely that if L&C had rejected the application the transaction would still have been effected with a different provider.
- Mr M transferred into a SIPP in order to invest in an overseas hotel complex well before the application for investment in White Sands was actually made. Mr M's clear stated intention was that he wished to invest his funds speculatively.
- It can't comment on the advice Mr M received but this would presumably have been a causative factor in his decision to invest (borne out by the fact the FSCS has made a payment in respect of the advice given by Sorensen – from which L&C assumes that Sorensen advised Mr M to make the investment and that he acted on that advice).
- If L&C had refused the investment it couldn't have explained why, as this would have constituted investment advice.
- Regarding the FSCS decision on the claim against HCA; Mr M received £35,088.59 in respect of the advice given to him by HCA. In similar cases, the Financial

Ombudsman Service has said that if the FSCS has paid out for a full loss that doesn't exceed its limit then the Financial Ombudsman Service wouldn't expect L&C to make any further payments. Given that the full value of Mr M's White Sands investment was £29,900 it's likely that Mr M has been compensated in full.

Having subsequently been provided with a copy of Sorensen's report of 10 March 2012, L&C made some further submissions which included, amongst other things, that:

- The report further demonstrates that Mr M was seeking high returns on what was a relatively small pension; he was willing to take risks to achieve high returns and nothing L&C could have done within the confines of its permissions would have prevented this.
- Mr M was happy to take risks and in the knowledge that there was a real chance the risks would leave him worse off in retirement.
- Mr M transferring demonstrates that he was comfortable acting against advice.
- Mr M would have transferred his pension with a view to investing the monies even if the White Sands investment was rejected. And any losses flowing from the surrender of guaranteed benefits are not something that L&C can be held responsible for.
- At most, the loss should be limited to the capital sum invested and these losses are the responsibility of HCA and/or Mr M.

L&C has also previously explained to us that:

- Sorensen first became an introducer of business to it on 22 September 2011.
- An agreement was in effect between L&C and Sorensen from 22 September 2011 to 10 December 2014.
- As an execution-only SIPP provider, L&C's expectation was that Sorensen would provide a client with advice on the intended transactions. Further, that Sorensen would submit any applications and instructions to L&C, thereby endorsing the client's decisions following its advice to them.
- After the initial agreement it didn't have any further discussions with Sorensen about the client process/the business it was referring. However, it did check the FCA Register regularly to ensure that Sorensen was still authorised.
- Adviser charges were paid in accordance with the fee agreement signed by the client and their appointed adviser.
- As an execution-only SIPP provider, it has no permissions or experience to advise or comment on the suitability of the transaction.
- It didn't request copies of suitability reports/pension transfer reports from Sorensen or clients.
- Mr M appointed a FCA regulated introducer to provide holistic advice, which included the establishment of the SIPP, the pension transfers and the investment.
- Mr M also appointed a FCA regulated introducer to select and purchase underlying investments within the trading platform chosen, as is shown from his investment instructions within the application form.
- Sorensen introduced 70 clients and Mr M was number 23 of these.
- From a sample of 10% of the Sorensen-introduced clients, 28.57% of applications involved transfers in from occupational pension schemes. From the same sample 28.57% of the Sorensen-introduced clients invested into non-mainstream investments.
- From the total clients introduced by Sorensen, 76% of the clients changed the adviser on their L&C SIPP from Sorensen to HCA shortly after monies were first transferred into their SIPP.
- From the total clients introduced by Sorensen, 76% invested into non-mainstream investments.

- It carried out due diligence on White Sands. It didn't rely on any other third party's due diligence review and it conducted its own review to determine whether the investment could be held within a UK registered pension scheme. However, following a system migration and despite a substantial interrogation of its records, it's been unable to retrieve the searches carried out.
- 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. And, as such, a qualified surveyor would be able to be appointed to provide an opinion on market value.
- The usual searches carried out on an investment prior to acceptance for investment within its SIPPs 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 FCA website to check whether there are any adverse publications, and a check of the Company's website if applicable.
- Product literature is routinely requested in advance of an investment review progressing, however, following the system migration it can't locate any White Sands investment product literature that it obtained.

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

- P&C had been retained by L&C to assist in the acquisition of residential plots within a residential condominium named Terras de Extremoz I to be entered into with Green Planet Investimentos Imobiliarios Ltda, a Brazilian limited liability company in the real estate business.
- The scope of P&C's work was two-fold – due diligence and legal advice for closing the transaction with the transfer of title of the residential plots from Green Planet Investimentos Imobiliarios Ltda to L&C, or else to entities designated by L&C.
- The due diligence report was based on information P&C had obtained from Green Planet Investimentos Imobiliarios Ltda's counsel. P&C hadn't checked any original documentation or visited the area where the plots are located.
- As such, *"for great part of the conclusions drawn herein, we had to rely solely on information whose accuracy we have been unable to confirm."*
- P&C had managed to obtain some documentation from public records and its report was also based on this information.
- The due diligence report was based solely on P&C's analysis of Brazilian law and shouldn't be considered to be an opinion on Green Planet Investimentos Imobiliarios Ltda.
- P&C relied on information made available by third-parties, or available public records, and part of this information may have to be later confirmed by means of independent review.
- Documents suggested a public deed of purchase and sale had been executed between Green Planet Investimentos Imobiliarios Ltda and Glade Empreendimentos Imobiliários Ltda. ('Glade'), further that a chattel mortgage had been entered into in favour of Glade which would be released once all payment obligations had been fulfilled by Green Planet Investimentos Imobiliarios Ltda.
- A certificate issued by a real estate registry office recorded Green Planet Investimentos Imobiliarios Ltda as the registered owner of the land subdivision Terras de Extremoz, 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%.

As agreement couldn't be reached following the investigator's assessment, the complaint was passed to me for review. I issued a provisional decision on this complaint, and I concluded Mr M'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 before it accepted Mr M's business and before it accepted Mr M's application to invest in White Sands. Its failure to do so was unfair to Mr M.
- 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.
- 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 should have identified there was a significant risk of consumer detriment associated with the Carbon Credit investment(s) Sorensen-introduced consumers were making and it shouldn't have permitted the investments to be held in its SIPPs.
- If L&C had undertaken adequate initial and ongoing due diligence into Sorensen and the business being received from it, it should have concluded, and before it accepted Mr M's business from Sorensen, that it shouldn't continue to accept introductions from Sorensen.
- L&C didn't meet its regulatory obligations and it allowed Mr M's pension monies to be put at significant risk.
- It was fair and reasonable for L&C to compensate Mr M to the full extent of the financial losses he's suffered due to its failings.

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

- In the provisional decision it was found that, but for L&C's alleged breach, Mr M's application would have been rejected and he wouldn't have invested in White Sands. 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 (as is required under DISP 3.6.4) and 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's contrary to the FCA's own publications at the time.
- From the perspective of an 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 over which it put in place contractual controls that the regulated entity breached.
- Where a consumer chooses an execution-only service, it would be unfair if the SIPP provider weren't able to rely on express representations made by the consumer when signing the contractual documentation and to hold L&C responsible in circumstances where the failure is that of Sorensen.
- It invited the Financial Ombudsman Service to revisit the provisional decision and dismiss the complaint.

Mr M also replied to the provisional decision and noted, amongst other things, that:

- He expects to be a basic rate taxpayer in retirement.
- Whilst the claim to the FSCS about Sorensen wasn't made until November 2017, this wasn't the beginning of the complaint process about that firm. As Sorensen was still trading at the time, a complaint was made to Sorensen on 23 January 2017. And it was only after Sorensen cancelled its permissions that the claim then had to be made to the FSCS.

What I've decided – and why

jurisdiction

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

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

Has the complaint been brought in time?

The respondent in this complaint is L&C. As I understand it, L&C first received Mr M's complaint on 17 July 2018 and, as he hadn't received a final response letter from L&C within eight weeks of this, Mr M then referred his complaint to us in December 2018.

DISP 2.8.2R sets out that:

> "The *Ombudsman* cannot consider a *complaint* if the complainant refers it to the *Financial Ombudsman Service*:
> …
> *(2)* more than:
>
> (a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

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

unless:

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

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

L&C says that Mr M's complaint was raised outwith these time limits. As I understand it, there are various strands to Mr M's complaint but, overall, the crux of the complaint is that L&C didn't undertake sufficient due diligence on the introduction of his business and the White Sands investment he made through his L&C SIPP and that, as a result of this, he's suffered losses that L&C should compensate him for. Mr M has also said that had L&C declined the business the pension transfer wouldn't have gone ahead and the subsequent investment of monies into an unregulated investment couldn't have proceeded.

With regards to the portion of Mr M's complaint that relates to the due diligence L&C undertook into the White Sands investment and L&C permitting him to invest monies in that holding; £29,900 was invested into White Sands on 5 April 2013 and that's within six years of Mr M first raising his complaint with L&C in July 2018. As such, I'm satisfied this portion of the complaint has been referred within the time limits.

However, a portion of Mr M's complaint also relates to L&C's initial acceptance of his business and I'm satisfied that Mr M's SIPP was established on or before 3 July 2012, with £27,908.35 being transferred into the SIPP on 3 July 2012. This was more than six years before Mr M first referred his complaint to L&C. So, I'm satisfied that this portion of the complaint wasn't made within six years of L&C first accepting Mr M's business. As such, I've also gone on to consider whether Mr M referred this portion of his complaint more than three years from the date on which he either became aware, or ought reasonably to have become aware, he had cause for complaint. And when I say here cause for complaint, I mean cause to make this complaint about this respondent firm, L&C, not just knowledge of cause to complain about anyone at all.

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

On interpreting the Handbook generally Singh LJ said the following in *The Official Receiver v Shop Direct Finance Company Limited* [EWCA] Civ 367:

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

…

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

(1) Ultimately it is the actual wording of a provision that must govern any decision as to its effect.
(2) The Handbook should be read as a whole, taking an holistic and iterative approach, so that a preliminary view on one provision can be tested by reference to the rest of the relevant provisions.
(3) The provision should be construed in the light of its overall purpose.
(4) It should be construed on the basis that it is intended to produce a practical and commercially sensible result. The rules should be taken to be grounded in reality. The court should keep in proportion any drafting infelicities."

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

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

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

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

"Every provision in the Handbook must be interpreted in the light of its purpose."

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

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

"In the Handbook …

(1) an expression in italics which is defined in the Glossary has the meaning given there; and
(2) an expression in italics which relates to an expression defined in the Glossary must be interpreted accordingly.'

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

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

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

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

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

(a) Alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and
(b) Relates to an activity of that respondent, or any other respondent with whom that respondent has some connection in marketing or providing financial services or products …which comes under the jurisdiction of the Financial Ombudsman Service…"

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

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

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

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

It's therefore my view that it's necessary for Mr M to have had an awareness (within the meaning of the rule) that related to L&C, not just awareness of a problem that had caused a loss. Knowledge of a loss alone is not enough. It can't be assumed that upon obtaining knowledge of a loss a consumer had knowledge of its cause. And I don't accept that the three year time limit necessarily means knowledge of a loss means the consumer has three years to make enquiries to discover all parties who might be responsible, failing which they run out of time to make a complaint. As Nugee LJ said in The Official Receiver case '*the*

purpose of the rule is to prevent a complainant from losing the right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware.'

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

- In order to be aware of cause for complaint the complainant should reasonably know there's a problem, that they have or may suffer loss, and that someone else is responsible for the problem – and who that someone is. So, to have knowledge of cause for complaint about L&C, Mr M needs to be aware, or should reasonably be aware, that there's a problem which has caused, or may cause, him loss and that L&C might be responsible.

- There was a transfer into the SIPP of £27,908.35 on 3 July 2012 and a later transfer of £8,348.41 on 2 October 2012. Mr M said in his submissions to the FSCS that the monies he transferred to L&C were his only financial asset for retirement and he wouldn't have put them at risk.

- Mr M has said that he first appointed his professional representative in November 2016 and that he had also realised he could claim against HCA and Sorensen in November 2016. Further, that it was only after he had pursued and received compensation for the claims he made to HCA and Sorensen that he realised there were outstanding losses and he then pursued a complaint against L&C in July 2018.

- I've not been provided with a copy of any document that was sent to Mr M more than three years before he complained to L&C in July 2018 that demonstrates that Mr M was aware, or ought reasonably to have become aware, that there was a problem which had caused, or may cause him loss.

- I'm aware from some other complaints we've received involving L&C and White Sands that there were some instances where L&C wrote to consumers in 2014 stating that GPIL had been placed into liquidation. And that, as trustee, it would notify its interest to the liquidator when requested and would pass on updates from the liquidator. In addition to this I've also seen an example in at least one complaint of L&C having written to a consumer before 17 July 2015 (so more than three years before Mr M referred his complaint to L&C), to explain that the consumer's White Sands investment was illiquid. However, I've not seen evidence of such correspondence having been sent to Mr M by L&C prior to 17 July 2015 and, on balance, I'm not satisfied that such correspondence was sent to Mr M before that date.

- In addition to not being satisfied, on the basis of the evidence provided, that Mr M was aware, or ought reasonably to have become aware, more than three years before he complained to L&C, that there was a problem that had caused him some loss or damage. I'm also not satisfied from the evidence provided Mr M was aware, or ought reasonably to have become aware, that L&C might have some responsibility for the position he was in more than three years before he complained to L&C.

- By July 2015, the regulator had published reports on the results of two thematic reviews on SIPP operators in 2009 and 2012, issued guidance for SIPP operators in 2013 and had written to the CEOs of SIPP operators in 2014. A common theme of those communications is that the regulator considered SIPP operators had

obligations in relation to their customers even where they didn't give advice, and that many SIPP operators had a poor understanding of those obligations.

- On balance, I don't consider that Mr M was, or ought reasonably to have been, aware of the contents of the regulatory publications more than three years before he complained to L&C. I also don't consider these publications mean that Mr M, or a reasonable investor in his position, should have had an understanding, and more than three years before his complaint was made to L&C in July 2018, that L&C might have responsibility for the position he was in.

- I think it's worth highlighting that Mr M wasn't advised by L&C about setting up the SIPP or the suitability of investments. And I think the obvious first thought at the point in time when he became aware, or ought reasonably to have become aware, that there was a problem that had caused him some loss or damage, would have been that his financial advisers might have given poor advice or that the people who ran the White Sands investment might have caused the loss.

- I'm not aware of anything L&C said or did at the outset of its relationship with Mr M that would have caused him to think it might be responsible if such a problem occurred. Nor am I aware of anything L&C said or did that ought reasonably to have caused Mr M to think it was responsible once the problem had occurred.

- To be clear, I don't think Mr M would need to have understood the details of L&C's obligations to have been aware (or in a position whereby he ought reasonably to have become aware) of his cause for complaint. But I think Mr M would have needed to have actual or constructive awareness that an act or omission by L&C had a causative role in the loss. And I don't think Mr M, or a reasonable investor in his position, ought reasonably to have attributed his problems to acts or omissions by L&C more than three years before he complained to L&C.

- In my view there's nothing in any correspondence we've seen, that was sent to Mr M more than three years before his complaint was referred to L&C, that would indicate to a reasonable retail investor in Mr M's position that L&C had responsibility for the position he was in – the position of having a SIPP with investments in it that were performing badly.

- I've seen no evidence that Mr M had been told by any party, and more than three years prior to his representative raising a complaint with L&C in July 2018, that L&C may have done something wrong and might be wholly or partly responsible for the position he was in.

- In the circumstances I don't consider that Mr M had in broad terms knowledge of the facts on which his complaint is based. So in all the circumstances I don't accept that Mr M had actual awareness of cause for complaint against L&C more than three years before he referred his complaint to L&C.

- Based on the evidence provided to us, I also don't consider that a reasonable SIPP investor in Mr M's position would have had any greater awareness of cause for complaint against L&C than Mr M did. And I don't think Mr M, or a reasonable investor in his position, ought reasonably to have attributed the problems he has complained about to acts or omissions by L&C more than three years before Mr M complained to L&C.

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

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 Mr M's complaint would not in my view seriously impair our effective operation. And I'm also satisfied that I don't need to exercise my discretion to dismiss the complaint under DISP 3.3.4A R for any other reason.

So, overall:

- I'm not required to dismiss this complaint, and for the reasons I've given, I'm not exercising my discretion to dismiss it.

As such, I've gone on to consider the merits of this complaint below.

merits

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

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

As a preliminary point, the purpose of this final decision is to set out my findings on what's fair and reasonable, and explain my reasons for reaching those findings, not to offer a point by point response to every submission made by the parties to the complaint. And so whilst I've carefully considered all the submissions made by both parties, I've focussed here on the points I believe to be key to my decision on what's fair and reasonable in the circumstances.

Relevant considerations

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

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 still satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

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

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

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

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

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

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

I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr M's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual

relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened *after* the contract was entered into. And he wasn't asked to consider the question of due diligence *before* Options SIPP agreed to accept the store pods investment into its SIPP.

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

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

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

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

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

Overall, I'm satisfied that COBS 2.1.1R is a relevant consideration – but that it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Mr M'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 said that many of the matters which the Report invites firms to consider are directed at firms providing advisory services. It's not specified which parts of the Report it thinks are directed at such firms but, to be clear, I think the Report is also directed at firms like L&C acting purely as SIPP operators. The Report says that *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses…"* And it's noted prior to the good practice examples quoted above that *"We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs."*

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

I've carefully considered what L&C has said about publications published after Mr M's SIPP was set up. But I am of the view that, like the Ombudsman in the *BBSAL* case, the fact that some of the publications post-date the events that took place in relation to Mr M's complaint doesn't mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although some of the 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.

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

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

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

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

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

It's important to keep in mind the judge in *Adams v Options* didn't consider the regulatory publications in the context of considering what's fair and reasonable in all the circumstances

bearing in mind various matters including the Principles (as part of the regulator's rules) or good industry practice.

In determining this complaint, I need to consider whether, in accepting Mr M'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 Mr M's applications.

In deciding what's fair and reasonable in the circumstances, what I'll be looking at here is whether L&C took reasonable care, acted with due diligence and treated Mr M fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. I think the key issues in Mr M's complaint are whether it was fair and reasonable for L&C to have accepted Mr M's SIPP and White Sands investment applications in the first place. So, I need to consider whether L&C carried out appropriate due diligence checks before deciding to accept Mr M'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 Mr M's application for the L&C SIPP and/or White Sands investments.

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

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.

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

The regulators' reports and guidance provided some examples of good practice observed by the FSA and FCA during its work with SIPP operators. This included being satisfied that a particular introducer/investment is appropriate to deal with/accept. That involves conducting

checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.

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

Prior to receiving Mr M'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, amongst other things, L&C was required to consider whether to accept or reject a particular investment (here White Sands), with the Principles in mind.

It's my view that L&C was obliged to carry out due diligence on the White Sands investment – due diligence that went further than simply checking that the investment was 'SIPP-able' under HMRC rules. I say that after taking into account the regulatory publications I've referenced earlier in this decision, amongst other matters, in considering whether L&C acted fairly and reasonably in this case.

I think that it's fair and reasonable to expect L&C to have looked carefully at the White Sands investment it was allowing Mr M'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.

As I explain elsewhere in this decision, I think it's more likely than not that Mr M's L&C SIPP was established and monies were transferred into it so as to effect a Carbon Credits investment. I think that's consistent with what's stated in Sorensen's 10 March 2012 report. As such, in addition to considering the due diligence L&C undertook into the White Sands investment that Mr M ended up making, I've also considered whether L&C should have stopped permitting the type of Carbon Credits investment that some Sorensen/HCA introduced consumers appear to have been making *before* it accepted Mr M's business.

L&C's due diligence on Carbon Credits

We've only received a relatively small number of SIPP due diligence complaints from consumers who were introduced to L&C by Sorensen/HCA. And, as far as I'm aware in most, if not all, of those complaints the investments the consumers have made following the transfer of their monies into an L&C SIPP has been either Carbon Credits or White Sands.

With regards to those that have involved a Carbon Credits investment; it appears to me that these have all involved CNI and the sale and purchase of VER Spot Credits. I explained in my provisional decision that if L&C disagrees with this, and/or if L&C considers that at the time it received Mr M's SIPP application that Sorensen/HCA had also introduced consumers to it who invested in Carbon Credits investments that weren't associated with/didn't involve

CNI, that L&C should confirm as such alongside its response to my provisional decision and by the deadline that was set for responding to my provisional decision. Further, that in this instance L&C should also provide a full breakdown of the type and number of non-CNI associated Carbon Credits investments that were effected by Sorensen/HCA introduced consumers before L&C accepted Mr M's business. No further submissions or evidence was provided by L&C on this point in its response to my provisional decision.

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."*

Premised on the available evidence, I think it's more likely than not that the type of Carbon Credits investment that was anticipated at the point of Sorensen's March 2012 report was akin to the type of CNI associated/involved Carbon Credits investment that most, if not all, Sorensen/HCA introduced consumers who actually invested into Carbon Credits made. And the comments I make below are made with all of this in mind.

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

I also think L&C understood this to some extent, as L&C has previously told this Service that the Carbon Credits were a specified investment and there were no 'red flags' preventing investment in Carbon Credits going ahead. However, I've seen no evidence of the checks L&C actually undertook before accepting Carbon Credits as an investment within its SIPPs.

Previously L&C has indicated that typical checks it carried out to determine if an investment could be held in a UK registered pension scheme included:

- A search of Companies House including the directors and majority shareholders.
- Internet searches of the company, the directors and majority shareholders, including a check of the company's website if applicable.
- Checking the FCA website to see if there were any relevant adverse publications.

L&C has also previously told this Service that it routinely requested product literature before progressing its review into whether an investment could be accepted into its SIPPs.

Overall, from those submissions I'm aware of L&C having made on other complaints we've received where Sorensen-introduced consumers invested into Carbon Credits, I'm not satisfied that L&C undertook sufficient due diligence on the Carbon Credits investment before it decided to accept it into its SIPPs.

What should L&C have done?

I'm satisfied that before it accepted Mr M's business L&C should – as a minimum – have:

- Identified the Carbon Credits investment as a high-risk, speculative and non-standard investment and carried out due diligence on it.
- Correctly established and understood the nature of the investment.
- Considered whether the investment was an appropriate investment to make available via its SIPPs.
- Made sure the investment was genuine and not a scam, or linked to fraudulent activity.
- Made sure the investment worked as claimed.

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

In 2011, and before Mr M's SIPP was established, the FSA (the then regulator) had published a consumer warning on its website about the risks of investing in Carbon Credit schemes. Although it stressed not all Carbon Credit schemes are scams, it added *"experience and skill"* was needed when trading on over-the-counter markets. And, amongst other things, the information on the FSA's website in October 2011 said that:

> *"While not all carbon credit trading schemes are a scam, it is often not made clear to investors that trading on Over-The-Counter (OTC) markets requires experience and skill. You may lose money on your investment by not getting a competitive rate when trading a small volume of carbon credits or not being able to sell your credits at all.*
> *…*
> *Beware that VERs certificates are often labelled as 'certified', but this certification is voluntary involving a wide range of bodies and different quality standards that are not recognised by any UK financial compensation scheme.*
> *…*
> *Just because the salesperson mentions the Kyoto Protocol or 'government-backed' plans does not tell you anything about the type of carbon credit you are investing in.*
> *…*
> *Also keep in mind that the projects generating VERs are usually based overseas and the UK authorities have no way of controlling the quality or validity of the scheme."*

I think it's fair to say these investments were unlikely to be suitable for the majority of retail investors.

I also note that L&C has previously sent us an internal email dated 27 December 2012, so *after* Mr M's SIPP was established, which said:

> *"It is very difficult to price an asset in an illiquid market until a sale is made. Carbon Credits are very illiquid and to date we have not had any experience of selling them which is why the best we can do at the moment is to price them at cost. I have attached a recent article which mentions that Carbon Credits may only be worth £1 each.*
>
> *Please continue to price carbon credits at cost until further notice."*

A key issue with Carbon Credits is there is no price transparency – there is no independent source regarding the price being set, and nothing to confirm at what price the credits were acquired. So, there was no independent way to establish how the price was being arrived at. As such, there could be a very significant difference between the price the units were acquired at and the price these could be sold for. This is something L&C could, and should, have investigated further. And I think it more likely than not that L&C's December 2012 view of the liquidity of the market and the potential difficulty in pricing the credits as a result would have been the same before Mr M's SIPP was established if it had undertaken sufficient checks.

L&C was obliged to consider whether the investment was an appropriate investment to be held in its SIPPs at all, bearing in mind what it should have ascertained about the investment if it had carried out appropriate due diligence checks.

There also doesn't appear to be any measure of the quality of the credits in question. In other words, were the units or credits being 'generated' valid?

It doesn't appear that L&C obtained any information about the business selling the credits or the type of Carbon Credit(s) that Sorensen-introduced consumers were investing in.

I haven't seen any independent verification that the units met the Verified Carbon Standard ('VCS') standard. So, there was a risk this validation wouldn't be achieved.

I also haven't seen that it was demonstrated that there was any ready market for Carbon Credit units. It wasn't demonstrated how investors would find businesses to buy any allocation of Carbon Credit units.

And I think L&C also ought to have appreciated that there might not be a market for the Carbon Credits and that there was no guarantee that the credits could ever be sold at a profit.

Based on the evidence I've seen, I'm satisfied that, prior to accepting Mr M's business, L&C didn't carry out sufficient due diligence into the type of Carbon Credit investments which some Sorensen-introduced consumers were transferring pension monies to L&C so as to effect.

L&C may consider that carrying out the kind of assessment that would be required to establish and interrogate such factors as I've discussed, and carry out appropriate due diligence, imposes on it requirements over and above its responsibilities as a SIPP provider. But I'm satisfied these are the kind of things L&C needed to do before accepting Carbon Credit investments into its SIPPs to meet its regulatory obligations and good practice. And I don't think that this amounts to a conclusion that L&C should have assessed the suitability of the Carbon Credits investment for Sorensen-introduced consumers' individual circumstances.

So, on the basis of the available evidence, I find that L&C didn't undertake sufficient due diligence into the Carbon Credit investment(s) Sorensen-introduced consumers were making before it accepted Mr M's business.

If L&C had completed sufficient due diligence on the Carbon Credit investment(s) being effected by Sorensen-introduced consumers, what should it reasonably 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.

It could be that the investments were legitimate. I also accept that technically there was a market for Carbon Credits but, as L&C's 27 December 2012 email recognises, it often wasn't possible to sell them even though there was a market for them. So, although they technically worked as claimed, the reality was very different.

The FSA warning was published before Mr M's SIPP was set up and this made it clear that there may be issues with selling Carbon Credits. I'm satisfied this is something L&C was, or should have been, aware of at the time, and it should have considered this as a significant factor in deciding whether to permit the Carbon Credits investment in its SIPPs. The fact that investors might have struggled to realise the investment should have caused L&C significant concern – especially considering that some Sorensen-introduced consumers were effecting transfers to L&C to invest significant sums from their L&C SIPPs into Carbon Credits. It also isn't clear how investors would be able to take any benefits from their pension if the investment was difficult to value or realise.

L&C was aware, or should have been aware before it accepted Mr M's business, that some Sorensen-introduced consumers were investing significant proportions of the monies they had transferred to L&C into unregulated, esoteric and high-risk investments like Carbon Credits which would likely be difficult to sell – by way of example, the consumer in published decision DRN-5179205 ('the published decision') who had transferred monies into a L&C SIPP and invested into Carbon Credits *before* L&C accepted Mr M's business.

I acknowledge that L&C might not have been aware whether amounts being invested in Carbon Credits were the entirety of consumers' pension savings because they may have had other arrangements elsewhere. But it was an indicator of the kind of risk to which consumers were being exposed. These were 'red flags', so to speak, which should have caused L&C significant concern as to whether or not the Carbon Credits investment was appropriate to be held in its members' SIPPs.

It could be argued that not being able to independently value an investment wouldn't be indicative of its performance or legitimacy. But the investment was predicated on the Carbon Credits being sold for more than what was paid for them. And so, I think there should have been concerns if it wasn't possible to independently value them. And if an independent valuation had been possible, I think it's clear that voluntary Carbon Credits, which CNI was providing clearing and settlement transactions for, were often being sold at inflated prices, so it seems more likely than not this would then have been identified. This would effectively render the investment fundamentally unviable.

L&C should also have been aware that investors would be unlikely to benefit, in terms of the investment itself, from any regulatory protections (the investment being unregulated) such as access to the Financial Services Compensation Scheme or the Financial Ombudsman Service.

In the circumstances, I'm satisfied there were a number of concerns L&C should have identified. And, I think it's fair and reasonable to conclude that L&C should have identified there was a significant risk of consumer detriment and it shouldn't have permitted the type of Carbon Credits investments Sorensen-introduced consumers were making to be held in its SIPPs at all.

I'm satisfied L&C could have identified the concerns I've mentioned, and ought to have drawn the conclusions I've set out, based on what was known at the time. L&C ought to have identified significant concerns in relation to the investment, and it ought to have led it to conclude it shouldn't accept the type of Carbon Credits investments Sorensen-introduced consumers were making before it accepted Mr M's business. It ought to have identified that there was a high risk of consumer detriment and it's the failure of L&C's due diligence that's resulted in consumers who were effecting transfers to L&C so as to invest in Carbon Credits being treated unfairly and unreasonably.

I'm not making a finding that L&C should have assessed the suitability of the Carbon Credits investment for Mr M. I accept L&C had no obligation to give advice to Mr M, or to ensure otherwise the suitability of an investment for him.

I also accept that in Mr M's case he had:

- Received advice from a regulated adviser.
- Set out in writing that he had been advised against making the Carbon Credits investment and wanted to proceed anyway.

However, given what L&C knew and should have known about Carbon Credits, as I've set out above, I don't think the type of Carbon Credits investments Sorensen-introduced consumers were making should have been permitted as an investment through the L&C SIPPs at all. And I think it's more likely than not that Mr M's L&C SIPP was established and monies were transferred into it so as to effect such a Carbon Credits investment. I think that's consistent with what's stated in Sorensen's 10 March 2012 report and with what's known about the type of Carbon Credits investments Sorensen-introduced consumers were making.

I don't say that L&C should have known everything about the Carbon Credits investment that has subsequently come to light – only that it ought to have identified significant points of concern, which ought to have led it to conclude it shouldn't accept the type of Carbon Credits investments Sorensen-introduced consumers were making. And it's the failure of L&C's due diligence that's resulted in consumers being treated unfairly and unreasonably.

In my opinion L&C didn't meet its regulatory obligations or the standards of good practice at the time, and it allowed Mr M's pension fund to be put at significant risk as a result. 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 consumers, like Mr M, fairly by accepting the Carbon Credits investment into its SIPPs.

However, it's also apparent that Mr M's monies weren't actually invested into Carbon Credits following the transfer, and that they were invested into White Sands instead. So, it's clear something changed between Sorensen's 10 March 2012 report and Mr M's monies being invested into White Sands in April 2013. However, it's less clear whether the thing that changed occurred before or after L&C established Mr M's SIPP and monies were transferred into it.

I've thought carefully about what L&C has said about the Malgretoute development and about the January 2013 email it received from Mr M. By January 2013, the monies Mr M had transferred into the L&C SIPP had been sitting in cash for a little while. So, it seems more likely than not to me that by January 2013 it had been decided that the transferred monies wouldn't, or couldn't, be invested into Carbon Credits and different options were being explored which culminated in monies being invested into White Sands in April 2013.

Mr M's recollection is that the individual he was dealing with, Mr R, had said Carbon Credits weren't for him and that the White Sands investment was better for him. I can't be sure whether the discussion about this happened before or after Mr M's SIPP application was submitted to L&C and/or the transfers were effected. But, on balance, I think it's more likely than not that this discussion concluded *after* the transfers were effected, and I think that's consistent with the discussions which then occurred with L&C around the Malgretoute development in January 2013. In any eventuality, it's clearly the case that Mr M's transferred monies were actually invested into White Sands rather than Carbon Credits. Because of all of this, I've also gone on to reach findings on L&C's due diligence on White Sands below.

L&C's due diligence on White Sands

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.

We've asked L&C a series of questions about the due diligence it undertook on the White Sands investment and for a copy of any product literature it had obtained. L&C has

submitted that due to system issues it's not able to provide records to evidence a number of the points we asked it about.

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

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

Overall, based on the evidence that's been made available to us, I'm satisfied L&C undertook *some* due diligence into the White Sands investment, but I'm not satisfied that L&C undertook *sufficient* due diligence on the White Sands investment before it decided to accept it into its SIPPs – I've said more about this below. My view is that L&C didn't meet its regulatory obligations, and didn't act fairly and reasonably in its dealings with Mr M, by not performing sufficient due diligence on the White Sands investment before deciding to accept it into its SIPPs and before accepting Mr M'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, amongst other things, L&C should have:

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

and documents of title to the property *before* the purchase price was paid by the Buyer.

- Taken reasonable steps to ensure its SIPPs wouldn't become a vehicle for a high-risk and speculative investment that wasn't a secure asset, and could be a scam.

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

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

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

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

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

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

Amongst other things the following statements appeared on GPIL's website prior to L&C receiving Mr M'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 W. 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 Mr M's business was introduced to it, and mindful of the fact that L&C was also receiving business from other introducers, I think it's more likely than not that L&C had received, and acted on, applications to invest in White Sands from different consumers *before* it received Mr M's application. In my provisional decision I explained that if L&C disagreed with this, and if it was L&C's contention that Mr M's application was the first application it approved from *any* consumer to invest in White Sands, that I was requesting L&C provide me with confirmation of this alongside its response to my provisional decision and by the deadline that was set for responding to my provisional decision. No further submissions or evidence was provided by L&C on this point in its response to my provisional decision.

I think L&C ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments before accepting them into its SIPPs. And, before it accepted Mr M's application to invest in White Sands, I think that L&C ought to have identified that:

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

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

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

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

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

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

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

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

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

- Title to the development plots wasn't, in fact, being transferred. This was at odds with L&C forms that stated the companies that SIPPs were acquiring 100% of the shares in (in Mr M's case, this was White Sands Country Club WS3709) would **own and hold** the plots identified in the respective White Sands Country Club SIPP instruction forms (bold my emphasis).

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

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

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

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

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

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

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

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

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

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

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

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

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

I think that these points of concern, which I think ought reasonably to have been identified by L&C *before* it accepted Mr M's application to invest in White Sands, ought to have led L&C to conclude there was a significant risk of consumer detriment if it accepted the White Sands investment into its SIPPs and that the White Sands investment wasn't acceptable for its SIPPs.

Based on the available evidence, I don't think L&C undertook appropriate steps or drew reasonable conclusions from the information that I'm satisfied would have been available to it, had it undertaken adequate due diligence into the White Sands investment *before* it accepted that investment into its SIPPs. I don't think L&C met its regulatory obligations and, in accepting Mr M's application to invest in White Sands, it allowed Mr M's funds to be put at significant risk.

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

obligation to give advice to Mr M, or to ensure otherwise the suitability of an investment for him.

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

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

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

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

For the reasons I've set out at length above, acting fairly and reasonably to investors (including Mr M), L&C should have concluded – and prior to it accepting Mr M's business – that it wouldn't continue to permit the Carbon Credits or White Sands investments to be held in its SIPPs *at all*. I'm satisfied that Mr M's pension monies were only transferred to L&C so as to effect one or the other of those investments. And, I think it's more likely than not that if L&C hadn't permitted either of those investments to be held in its SIPPs before it accepted Mr M's business that Mr M's pension monies wouldn't have been transferred to L&C. Further, that Mr M wouldn't then have suffered the losses he's suffered as a result of transferring to L&C and investing in White Sands.

For the reasons given above, L&C shouldn't have accepted Mr M's application to invest in White Sands. Further, even if I thought L&C had undertaken adequate due diligence on Sorensen (which, as I explain elsewhere in this decision, I don't), I'd still consider it fair and reasonable to uphold Mr M's complaint solely on the basis that L&C should have concluded – and prior to it accepting Mr M's business – that it wouldn't continue to permit the Carbon Credits and White Sands investments to be held in its SIPPs *at all*. And that by failing to do this L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr M fairly. To my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant times, and allowed Mr M to be put at significant risk of detriment as a result.

L&C's due diligence on Sorensen

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.

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.

L&C appears to have carried out the following checks before it accepted business from Sorensen:

- It checked the Financial Services Authority ('FSA') register to ensure that Sorensen was regulated and authorised to give financial advice.
- It entered into intermediary agreements with Sorensen.

And, prior to accepting Mr M's application, it also had access to some information about the type and volume of introductions it was receiving from Sorensen.

L&C previously explained to us in the complaint that was the subject of published decision DRN-3587366 that at the date of the SIPP application in that case, which was towards the end of 2011, it wouldn't have accepted applications from a firm that wasn't authorised by the FSA.

L&C also told us in that case that its directors from the relevant period had confirmed that its policy was that applicants effecting a pension transfer, as Mr M was here, had to have had advice made available to them. And that it was then for the applicant to choose whether to take up the intermediary's offer of advice. In my provisional decision, I explained that if L&C's policy on this point wasn't the same when it received Mr M's application then I was requesting that L&C confirm as such alongside its response to my provisional decision and by the deadline that was set for responding to my provisional decision. No further submissions or evidence was provided by L&C on this point in its response to my provisional decision.

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

I think L&C was aware of, or should have identified potential risks of, consumer detriment associated with business introduced by Sorensen before it accepted Mr M's application.

As I explain below, based on the available evidence, I'm satisfied that the majority of the SIPP business introduced to L&C by Sorensen prior to it receiving Mr M's application was high-risk business where consumers' monies were ending up invested in unregulated and esoteric investments post-transfer.

I think L&C should have taken steps to address this potential risk. And I think such steps should have included getting a fuller understanding of the business that Sorensen was introducing through asking questions and through independent checks.

Further, I'm satisfied such steps would have confirmed there was a significant risk of consumer detriment associated with introductions of business from Sorensen. And I think L&C should have concluded it shouldn't continue accepting introductions from Sorensen and *before* it accepted Mr M's SIPP application.

So, based on the evidence provided to us, I'm of the view that L&C failed to conduct sufficient due diligence on Sorensen *before* accepting Mr M's business from it, or draw fair and reasonable conclusions from what it did know, or ought to have known, about the

business it was receiving from Sorensen. And that L&C ought reasonably to have concluded it should not continue to accept business from Sorensen, and have ended its relationship with it, *before* it received Mr M's application. I've set out some more detail about this below, the points I make below overlap, to a degree, and should have been considered by L&C cumulatively.

Volume of business and the type of investments being made by Sorensen-introduced consumers

L&C has told us that it has controls in place to monitor business being introduced, including in respect of the source and volume of that business. Further, that all such business is under constant review.

L&C has also previously confirmed to us that:

- Sorensen first became an introducer of business to it on 22 September 2011.
- An agreement was in effect between L&C and Sorensen from 22 September 2011 to 10 December 2014.
- Sorensen introduced 70 clients and Mr M was number 23 of these.
- From the total clients introduced by Sorensen, 76% of the clients changed the adviser on their L&C SIPP from Sorensen to HCA shortly after monies were first transferred into their SIPP.
- From the total clients introduced by Sorensen, 76% invested into non-mainstream investments.

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

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

L&C has said that 76% of the consumers introduced by Sorensen switched adviser to HCA shortly after the transfer to their L&C SIPPs and that 76% of the consumers introduced by Sorensen invested into non-mainstream investments. I think it's more likely than not that either the vast bulk, or else all, of the Sorensen-introduced consumers who switched adviser to HCA also invested into non-mainstream investments like Carbon Credits and/or White Sands. In other words, I think from the Sorensen-introduced cohort of business it was either mainly, or else exclusively, the consumers who weren't switching adviser to HCA that weren't investing into non-mainstream investments. In my provisional decision I explained that if L&C disagreed with this point that I was requesting L&C confirm as such, and also confirm what percentage of Sorensen-introduced consumers who switched adviser to HCA shortly after the transfers to their L&C SIPPs also invested into non-mainstream investments, alongside its response to my provisional decision and by the deadline that was set for responding to my provisional decision. No further submissions or evidence was provided by L&C on this point in its response to my provisional decision.

Premised on the information available to us, I'm satisfied that by the time it accepted Mr M's business, L&C had already received a number of introductions from Sorensen where

Sorensen-introduced members had switched adviser to HCA shortly after their SIPP was established and had also then invested monies into higher risk non-mainstream investments. The pattern of business being introduced by Sorensen was unusual, and I think that the pattern of consumers introduced by Sorensen switching to the same small IFA business (HCA) and investing in higher-risk esoteric investments ought to have been a cause for concern for L&C from very early on and certainly before it accepted Mr M's introduction.

L&C has said that it only accepts business from retail clients and I think it's fair to say that it's unusual for such a high proportion of introduced retail clients to switch adviser shortly after their adviser has advised upon, and arranged, the transfer of their pension monies into a new pension product. So, I think the type of introductions L&C was receiving from Sorensen was anomalous. And I think L&C ought to have taken reasonable steps to understand how this business was coming about and why it was that a large proportion of Sorensen-introduced consumers were switching adviser to HCA shortly after transfers into their SIPPs had been effected.

Clearly, it's not plausible that *most* Sorensen-introduced consumers were *independently* determining to appoint Sorensen to advise on/arrange the transfer of their monies to an L&C SIPP and then changing their adviser to HCA immediately after transfers completed and before investments were instructed. And I think that if, prior to accepting Mr M's business, L&C had undertaken appropriate due diligence it would have identified that HCA, or a third party on its behalf, was in contact with consumers about investing in holdings like Carbon Credits and/or White Sands *before* their L&C SIPPs were established and monies were transferred to L&C. Further that in most, if not all, of these cases the arrangement to switch adviser to HCA post-transfer was in place *before* consumers L&C SIPPs were established. I'm satisfied that is more likely than not what was happening and I think that's consistent both with the pattern of business L&C says it received from Sorensen and also with what Sorensen was saying in reports it was compiling for consumers (like Mr M) – where it was explained that Sorensen's report was put together at HCA's request, premised on information Sorensen had been given by HCA about the consumer (such as investment objectives for their pension monies and attitude to risk), and that HCA would be responsible for the post-transfer investment strategy.

As I've mentioned above, I think it's more likely than not that the vast bulk, if not all, of the Sorensen-introduced business where consumers switched adviser to HCA shortly after transferring monies into L&C SIPPs involved applicants who invested in high-risk non-standard esoteric holdings, such as Carbon Credits and/or White Sands. And I think it's fair to say that such investments are highly unlikely to be suitable for the vast majority of retail clients. They will generally only be suitable for a small proportion of the population – sophisticated and/or high net worth investors.

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

I'm satisfied that HCA was advising consumers to invest their pension monies in unregulated holdings like Carbon Credits and White Sands *before* they were referred on to Sorensen. And I think if L&C had undertaken adequate due diligence it ought to have been apparent to L&C from very early on that, for a large proportion of Sorensen-introduced business, L&C SIPPs were being established and transfers were being instructed so as to effect unregulated high-risk holdings that HCA was recommending and/or arranging. Further, I think L&C should have carefully considered how a small IFA business like HCA involved in this amount of higher-risk business was able to meet regulatory standards. I think this was a clear and obvious potential risk of consumer detriment.

And I think this concern ought to have been even greater in a case like Mr M's where a DB scheme was involved. At the relevant date COBS 19.1.6G stated:

> *"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interests".*

While I acknowledge this aims to define the expectation of a regulated financial adviser when determining the suitability of a pension transfer, it emphasises the regulator's concern about the potential detriment such a transaction could expose a consumer to. Given the nature of its business and regulatory status, I'd expect L&C to have been familiar with the guidance contained in the COBS – even if it didn't apply directly to it.

This was a further clear and obvious potential risk of consumer detriment.

Sorensen wasn't offering full advice to a large proportion of the clients it was introducing to L&C

If L&C had undertaken adequate due diligence, I think it would have become apparent to L&C, and from very early on, that in a large proportion of the cases Sorensen was introducing – by which I mean those where the adviser would be switched to HCA post-transfer and where HCA had already indicated to Sorensen pre-transfer that monies would be invested into unregulated holdings like Carbon Credits and/or White Sands – Sorensen was stating to consumers (like Mr M) in reports it was compiling that it was only responsible for advising on the transfer of monies from existing pension plans into a SIPP and on the basis that transferred monies would initially be invested into cash. Further, that HCA was the party responsible for other advice, including ongoing investment advice. And that it was HCA's responsibility to advise consumers (like Mr M) on investing their money in line with their risk profile and personal objectives.

On the available evidence, I'm satisfied that consumers, who were being referred to Sorensen by HCA, routinely weren't being offered the option of *full* regulated advice on the overall proposition by Sorensen (by which I mean advice on the suitability, or otherwise, of *all* of the establishment of the SIPP, the transfer of monies into SIPP and the intended unregulated investment). As Sorensen's reports make clear, it was restricting its advice to the establishment/set-up of the L&C SIPP and the transfer of monies from a consumer's existing pension plan(s) into a SIPP and on the basis that the monies would initially be invested into cash. And Sorensen wasn't undertaking to provide full advice on the suitability of the specific unregulated investment(s) that monies were being transferred into SIPPs to effect.

Accordingly, there was one advisory firm (HCA) which *didn't have* the necessary permissions to advise consumers, like Mr M, on the overall proposition (including the DB pension transfer), who was promoting and recommending unregulated investments to consumers that were to be purchased with pension monies, and *before* those same consumers had received advice on the suitability, or otherwise, of transferring their pension monies into a SIPP. And there was then a second advisory firm (Sorensen) who *did have* the requisite permissions to advise on the overall proposition but who was deciding not to do so, by which I mean Sorensen was routinely deciding not to offer consumers full advice on the suitability, or otherwise, of the specific unregulated investments that it had been informed transferred monies would be used to effect. I think this was an unusual business model that

raised significant questions about the motivations and competency of both HCA and Sorensen.

I appreciate that in Mr M's case Sorensen's report very clearly advised against the pension transfer. This was based on the critical yield required to provide equivalent benefits to those that would be forfeited on transfer, and also because the size of the pension fund meant transferring it wasn't suitable due to charges. But that wasn't the case for all of the Sorensen-introduced consumers. And I think it's more likely than not that Sorensen *had* introduced business to L&C without providing full advice on the underlying unregulated investments that monies were being transferred into SIPPs so as to effect on a number of occasions *before* Mr M's introduction, for example I'm satisfied this was the case for the consumer in the complaint that was the subject of published decision DRN-5179205.

It's unusual for regulated advice firms to be involved in transactions involving pension transfers or switches to invest in high-risk esoteric unregulated investments, like Carbon Credits and/or White Sands, where the advisory firm responsible for advising on and arranging the establishment of the SIPP/transfer of monies into the SIPP is deciding not to offer consumers advice on the suitability, or otherwise, of an unregulated investment(s) it has been told will be made with transferred monies. I think it's fair to say that most advice firms decline to be involved in such transactions and certainly don't transact this kind of business in significant volumes. I think L&C ought to have viewed this as a serious cause for concern – this was a further clear and obvious potential risk of consumer detriment.

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

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

Requesting information directly from Sorensen

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

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

The October 2013 finalised SIPP operator guidance gave an example of good practice as:

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

And I think that, before it accepted Mr M's application from Sorensen, L&C should have already checked with Sorensen about things like: how it came into contact with potential clients, what agreements it had in place with its clients, whether all of the clients it was introducing were being offered full advice by Sorensen, what its arrangements with HCA were, what its arrangements with any unregulated businesses were, how and why retail clients were interested in making esoteric investments like Carbon Credits and White Sands, whether it was aware of anyone else providing information to clients, how it was able to meet with or speak with all its clients, and what material was being provided to clients by it.

I think it's more likely than not that if L&C had asked Sorensen for this *type* of information that Sorensen would have provided a full response to the information sought. L&C might say that it didn't *have* to ask Sorensen these *types* of questions but I think this was a fair and reasonable step to take, in the circumstances, to meet its regulatory obligations and good industry practice.

Had L&C checked with Sorensen about the *type* of things I've mentioned above, I think it's more likely than not that information provided in Sorensen's response would have confirmed that consumers, like Mr M, were being introduced to Sorensen by HCA. Further, that HCA was discussing the high-risk unregulated investments, such as Carbon Credits and/or White Sands, that consumers' pension monies would be used to purchase with the consumers *before* they were referred to Sorensen. And that Sorensen was only undertaking to advise on the suitability of transferring consumers' monies from existing pension arrangements into L&C SIPPs and with transferred monies then, initially, being left in cash. Further, that it was HCA's responsibility to advise consumers on investing their monies in line with their risk profile and personal objectives. I think that's consistent with what Sorensen was saying in the examples of its reports we've seen from the time, such as the report of 3 April 2012 that's referenced in published decision DRN-5179205 and/or the report of 10 March 2012 in Mr M's case. In other words, had L&C checked at the time, I think the information Sorensen would have provided to L&C would have been broadly in line with the kind of things Sorensen was setting out in its reports.

I accept L&C might argue that Sorensen might not have given a full and honest response to questions L&C asked. Which I think only serves to highlight the importance of undertaking adequate ongoing due diligence, including *independent* checks, when receiving such an unusual pattern of predominantly high-risk business from a single introducer and I say more about this below.

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

Making independent checks

In light of what I've said above, and given the obvious potential risks of consumer detriment from the business being introduced to it by Sorensen, I think it would also have been fair and reasonable for L&C, to meet its regulatory obligations and good industry practice, to have taken *independent* steps to enhance its understanding of the introductions it was receiving. In the circumstances, I think a fair and reasonable step would have been for L&C to ask for copies of correspondence in which applicants were being offered advice and for L&C to speak to some applicants, like Mr M, directly.

As I've referenced earlier, the 2009 Thematic Review Report said that:

> *"…we would expect* (SIPP operators) *to have procedures and controls, and to be gathering and analysing management information, enabling them to identify*

> *possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way,* ***for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification****."* (bold my emphasis)

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

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

So, I think it would have been fair and reasonable for L&C to speak to some applicants, like Mr M, directly and to ask for clarification about things like how the business had come about, who they had spoken to, what they had been told, and to seek copies of some suitability reports.

As I've mentioned earlier in this decision, as far as I'm aware we've only received a small number of complaints about L&C's due diligence where the complainants are Sorensen-introduced consumers who switched adviser to HCA shortly after their L&C SIPPs were established. Published final decision DRN-5179205 involved one such complainant and, as is stated in the final decision, in that complaint the consumer (Mr G) said that they had been cold called by a representative of HCA and the representative had recommended a transfer of the consumer's DB monies to L&C to facilitate an investment in Carbon Credits. The complainant also said that he was told the investment would be safe and that it would generate guaranteed returns for his pension. The consumer in that complaint transferred monies into their L&C SIPP and invested in Carbon Credits *before* L&C had accepted Mr M's business.

A second such complaint was considered by us in the complaint that was the subject of published decision DRN-5438543. In that complaint, the consumer (Mrs T) said that HCA had contacted her out of the blue and told her that she would be better off moving her DB scheme elsewhere. Further, in respect of an investment she made in White Sands following the transfer to L&C, Mrs T explained that she went on the advice of her financial adviser and didn't think there was any risk.

Unlike Mr G, Mrs T was introduced to L&C by Sorensen *after* Mr M's L&C SIPP was established. However, I still think the record of Mrs T's testimony is of interest. And that testimony appears to be consistent on a number of key points to the testimony we've received from unconnected consumers in some other complaints about L&C that involve both HCA and Sorensen (for example Mr M's testimony in this complaint, and the record of Mr G's testimony that's detailed in published decision DRN-5179205).

I think the testimony from these separate consumers highlights certain consistent themes, and I think this further reinforces the credibility of Mr M's testimony on these specific points in this complaint. I think the consistent themes include all of: the involvement of HCA/a third party at outset, consumers being led to believe that there was a low level of risk associated with the investment(s) their monies were being transferred to L&C to effect and/or that the investment(s) was safe, and consumers understanding that by proceeding with the transactions they were acting in accordance with the advice they had actually received and/or that advice contained within Sorensen's report didn't correspond with what they were actually being advised to do at the time by the person they were dealing with.

Overall then, If L&C had spoken to some Sorensen-introduced applicants, like Mr M, I think it's more likely than not that the information provided to L&C by some applicants would have included that: they had been contacted by HCA/a third party at outset; they had been advised to use their pension monies to invest in unregulated holdings like Carbon Credits and White Sands; they believed from discussions that there was a low level of risk associated with the investment(s) their monies were being transferred to L&C to effect; and their understanding was that by proceeding with the transactions they were acting in accordance with the advice they had actually received.

L&C might say it couldn't comment on advice without potentially being in breach of its permissions. Again, I confirm that I accept L&C couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view, in the circumstances, and mindful of the unusual pattern of business being introduced by Sorensen, such steps should have included addressing a potential risk of consumer detriment by speaking to some applicants and having sight of some advice letters. As this could have provided L&C with further insight into the HCA/Sorensen business model, and helped to clarify to L&C what consumers were being told about the transactions they were entering into. This was a fair and reasonable step to take in reaction to the clear and obvious risks of consumer detriment I've mentioned.

If L&C had obtained copies of some of Sorensen's suitability reports, I think it should have been clear from the contents that consumers, like Mr M, were being introduced to Sorensen by HCA. Further, that Sorensen was aware that HCA had been discussing high-risk unregulated investments, such as Carbon Credits and/or White Sands, that those consumers' pension monies would be used to effect with consumers *before* the clients were referred to Sorensen. And that Sorensen was only undertaking to advise on the suitability of transferring consumers' monies from existing arrangements into L&C SIPPs and with the transferred monies then, initially, being left in cash.

At the end of Sorensen's reports, I've noted there were appendices and this included a page with a series of bullet points setting out some of the risks associated with Carbon Credits and/or other unregulated investments like White Sands, but this didn't amount to advising consumers on the suitability, or otherwise, of such investments for them. So, I don't think the provision of the appendices altered Sorensen's role, or what it was saying in its reports about restricting its advice to the suitability of transferring monies from existing pension schemes into L&C SIPPs and with the transferred monies then, initially, being left in cash. Or about the fact that, following this, it would then be HCA's, and not Sorensen's, responsibility to advise consumers on how to invest their monies in line with their risk profile and personal objectives.

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

As mentioned above, premised on the pattern of Sorensen-introduced business alone I think L&C could simply have concluded that, given the clear and obvious potential risks of consumer detriment, it should not continue to accept business from Sorensen. I think that would have been a fair and reasonable conclusion for L&C to have reached. But I also think it's more likely than not that if L&C had undertaken adequate checks into the business it was receiving from Sorensen that such checks would only have served to further reinforce the clear and obvious potential risks of consumer detriment associated with introductions from Sorensen. If L&C had undertaken adequate independent checks, I think it's more likely than not that it would have identified, amongst other things, that:

- HCA and/or a third party was meeting with and advising consumers (like Mr M) to use their pension monies to invest in unregulated holdings like Carbon Credits and White Sands. These consumers were relying on this advice, and the party

recommending the investments to them (by which I mean HCA and/or a third party acting on its behalf) wasn't making them aware of the considerable risks associated with the investments.

- Subsequently, certainly in cases involving DB scheme transfers, HCA was referring these consumers on to Sorensen. And I think L&C should have identified, and *before* it accepted Mr M's business, that unregulated investments were being recommended to some of these Sorensen-introduced consumers *before* the involvement of Sorensen and in circumstances where such consumers routinely weren't being offered the option of *full* regulated advice on the overall proposition by Sorensen (by which I mean that Sorensen was restricting its advice and deciding not to offer consumers full advice on the suitability, or otherwise, of specific unregulated investments that it had been informed transferred monies would be used to effect).

  The deficiencies in such a business model should have been obvious.

Each of these two bullet-points in isolation is significant and demonstrates that there was a substantial risk of consumer detriment associated with *most* of the introductions from Sorensen. I think either of these points ought to have been red flags to L&C, especially when considered alongside the pattern of business it was receiving from Sorensen. And I think the clear and obvious potential risk of consumer detriment arising from the HCA/Sorensen business model ought to have been readily apparent to L&C had it undertaken adequate due diligence and taken reasonable steps to understand how the business being introduced to it by Sorensen was coming about.

I think L&C ought to have concluded that HCA and Sorensen had a complete disregard for consumers' best interests, and weren't meeting many of their regulatory obligations. And if L&C had undertaken adequate initial and ongoing due diligence into Sorensen and the business being received from it, I think L&C should have concluded, and before it accepted Mr M's business from Sorensen, that it shouldn't continue to accept introductions from Sorensen. I therefore conclude that it's fair and reasonable in the circumstances to say that L&C shouldn't have accepted Mr M's application from Sorensen.

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

In my view, based on the information I think would have been available to L&C at the relevant time had it undertaken adequate due diligence, it ought to have been apparent that there was a significant risk of consumer detriment associated with Sorensen-introduced business. Further, it's more likely than not that the type of independent checks it would have been fair and reasonable for L&C to undertake in the circumstances would have revealed issues which were, in and of themselves, sufficient basis for L&C to have declined to continue to accept introductions from Sorensen *before* L&C accepted Mr M's business. And it's the failure of L&C's due diligence that's resulted in Mr M being treated unfairly and unreasonably.

For the reasons given above, L&C should have declined to continue to accept introductions from Sorensen *before* it accepted Mr M's SIPP business. And, even if I thought L&C had undertaken adequate due diligence on the Carbon Credits and White Sands investments (which, as I explain elsewhere in this decision, I don't), I'd still consider it fair and reasonable to uphold Mr M's complaint solely on the basis that L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr M fairly, by accepting his business from Sorensen. To my mind, L&C didn't meet its regulatory obligations or good

industry practice at the relevant times, and allowed Mr M to be put at significant risk of detriment as a result.

I make this point again here to emphasise that while I've concluded both that L&C shouldn't have accepted Mr M's business from Sorensen, and that L&C shouldn't have been permitting investors to invest in Carbon Credits and/or White Sands by the time it received Mr M's SIPP business, had I only reached the conclusions I've set out above on one of those aspects and not also gone on to reach findings on the other aspect for completeness, I'd still consider it fair and reasonable in all the circumstances to uphold this complaint.

That's because, for the reasons I've set out at length above, L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr M fairly by accepting his business from Sorensen. And because, separately, L&C also didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr M fairly, by continuing to permit its members to invest in Carbon Credits and White Sands. And, as mentioned previously, L&C didn't meet its regulatory obligations or good industry practice at the relevant times, and allowed Mr M to be put at significant risk of detriment as a result.

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

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.

I'm satisfied that Mr M's L&C's SIPP was only established, and the transfers from Mr M's previous pension schemes to the L&C SIPP only arranged, so as to effect an investment in Carbon Credits with the transferred monies. Further, for the reasons I've set out at length above, I think L&C should have declined to accept business from Sorensen and should have declined to permit the Carbon Credits and White Sands investments in its SIPPs before it accepted Mr M's business. So things shouldn't have got beyond that. Further, having accepted Mr M's business I'm also satisfied that Mr M's subsequent application to invest in White Sands should have been declined by L&C.

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

L&C knew that Mr M had signed forms intended, amongst other things, to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on the contents of such forms when L&C knew, or ought to have known, the type of business Sorensen was introducing, and/or 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 for L&C to do would have been to decline to accept business from Sorensen and to refuse to accept the Carbon Credits/White Sands investment in its SIPPs *before* it accepted Mr M's business.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr M signed meant that L&C could ignore its duty to treat him fairly. To be clear, I'm satisfied that indemnities contained within the contractual documents don't absolve, nor

do 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 consumers, like Mr M, L&C should have concluded that it wouldn't accept business from Sorensen and wouldn't permit investments to be made into the Carbon Credits/White Sands investment in its SIPPs *before* it accepted Mr M's business.

I'm satisfied that Mr M's pension monies were transferred to L&C specifically so as to effect the Carbon Credits investment; I think it's clear from Sorensen's March 2012 report that's why the transfer to L&C was being effected. I also think it's more likely than not that if L&C hadn't permitted the Carbon Credits and White Sands investments to be held in its SIPPs that Mr M's pension monies, and from both of his pension arrangements, wouldn't have been transferred to L&C. Further, that the opportunity for L&C to execute Mr M's investment instructions to invest in White Sands wouldn't have arisen.

So, I'm satisfied that but for L&C's failings Mr M's monies wouldn't have been transferred into an L&C SIPP, and that the opportunity for L&C to execute investment instructions to invest Mr M's monies in White Sands or proceed in reliance on an indemnity and/or risk disclaimers shouldn't have arisen at all. And I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for L&C to proceed with Mr M'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 Mr M's business from Sorensen and/or permitted the Carbon Credits and White Sands investments in its SIPPs 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 accept Mr M's business and/or to allow Mr M's SIPP monies to be invested into the White Sands investment.

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

The involvement of other parties

In this decision I'm considering Mr M's complaint about L&C. However, I accept that other parties were involved in the transactions complained about, including HCA/Sorensen.

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

In my opinion it's fair and reasonable in the circumstances of this case to hold L&C accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mr M fairly.

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

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

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

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

Mr M taking responsibility for his own investment decisions

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

I've considered this point carefully and I'm satisfied that it wouldn't be fair or reasonable to say Mr M's actions mean he should bear the loss arising as a result of L&C's failings.

Sorensen was a regulated firm with the necessary permissions to advise on the transactions this complaint concerns. Mr M also then used the services of a regulated personal pension

provider in L&C. And I don't think it would be fair or reasonable to say Mr M should bear some portion of the loss arising as a result of L&C's failings.

Having carefully considered all of the evidence, I think Mr M's testimony that he was *told* the investment was safe and would generate guaranteed returns for his pension is credible. But I also think it's the case that Mr M was made aware of *some* of the risks associated with the White Sands investment before his monies were invested in that arrangement, and that he was made aware of *some* of the risks associated with the Carbon Credits investment before his monies were transferred into the L&C SIPP.

However, in my view, if L&C had acted in accordance with its regulatory obligations and good industry practice by the time it received Mr M's application for a SIPP it shouldn't have been accepting business from Sorensen and/or permitting the Carbon Credits and White Sands investments into its SIPPs *at all*. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr M wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

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

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

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

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.

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

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

As I've explained above, having carefully considered all of the evidence, I think that Mr M was made aware of some of the risks associated with the White Sands investment before his monies were invested in that arrangement. And I think it's also the case that he was made aware of some of the risks associated with the Carbon Credits investment before his monies were transferred into the L&C SIPP. But I've not seen any evidence that suggests Mr M was paid a cash incentive. It therefore cannot be said he was *incentivised* to enter into the transactions.

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

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

obligations and good practice, it shouldn't have accepted Mr M's business and/or his application to invest in White Sands *at all*. That should have been the end of the matter.

With regards to accepting Mr M's business from Sorensen and permitting some Sorensen-introduced consumers to invest in the Carbon Credits investment. L&C might say that if it hadn't accepted Mr M's business from Sorensen and/or permitted the Carbon Credits investment in its SIPPs, that transfers with the intention to make that investment would still have been effected by Mr M but with a different SIPP provider. I don't think it's fair and reasonable to say that L&C shouldn't compensate Mr M for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found L&C did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr M's business from Sorensen or permitted the type of Carbon Credit(s) investments that Sorensen-introduced consumers were investing in into its SIPPs.

With regards to permitting Mr M's SIPP monies to be invested into White Sands; 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 to show that other SIPP providers not named in GPIL's liquidator's October 2015 letter were also facilitating White Sands investments, then but for L&C accepting the White Sands investment in its SIPPs it's more likely than not that the transactions complained about here wouldn't still have been effected elsewhere.

For completeness, even if there was another SIPP provider that might have been prepared to accept the White Sands investment in its SIPPs, I wouldn't think it's fair and reasonable to say that L&C shouldn't compensate Mr M for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found L&C did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted the White Sands investment into its SIPPs.

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 either declined to accept Mr M's business from Sorensen or else declined to permit the Carbon Credits and White Sands investments to be held in L&C SIPPs, the transactions this complaint concerns wouldn't still have gone ahead.

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

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr M – including HCA and Sorensen. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against L&C that requires it to compensate Mr M for the full measure of his loss. L&C accepted Mr M's business and his application to invest in White Sands, and but for L&C's failings I'm satisfied that none of Mr M's pension monies would have been transferred to L&C or invested in White Sands.

As such, I'm not asking L&C to account for loss that goes beyond the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter. However, that

fact shouldn't impact on Mr M's right to fair compensation from L&C for the full amount of his loss. The key point here is that but for L&C's failings, Mr M wouldn't have suffered the loss he's suffered. As such, I'm of the opinion that it's appropriate and fair in the circumstances for L&C to compensate Mr M to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by other firms involved in the transactions.

What would have happened in the alternative if Mr M's pension monies hadn't been transferred and invested into the White Sands investment?

Mr M says that he had no concerns about leaving his pensions as they were and was told that by transferring and investing his pensions that his pensions would be working much harder. Further, that his only reason for transferring was the advice he had been given. On balance, I think it's more likely than not that had L&C either declined to accept Mr M's business from Sorensen, or else declined to continue to permit the Carbon Credits and White Sands investments to be held in its SIPPs, *before* it received Mr M's SIPP application that the transactions Mr M complains about wouldn't have been effected and his monies would have remained invested in his existing pension arrangements.

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 business from Sorensen and not to permit the Carbon Credits and White Sands investments to be held in its SIPPs before it received Mr M's application from Sorensen. And I conclude that if L&C hadn't accepted Mr M's business from Sorensen, or hadn't permitted the Carbon Credits and White Sands investments to be held in its SIPPs, Mr M wouldn't have transferred monies to L&C or effected the White Sands investment and that his monies would have been retained in his existing pension schemes. For the reasons I've set out, I also think it's fair and reasonable for L&C to compensate Mr M for the loss he's suffered as a result of L&C's failings.

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 in awarding fair compensation is to put Mr M back into the position he would likely have been in had it not been for L&C's failings. Had L&C acted appropriately, I think it's *more likely than not* that Mr M would have remained a member of the pension arrangements he transferred into the SIPP.

I appreciate that some of the monies transferred into Mr M's L&C SIPP were from a defined benefit scheme. With regards to monies transferred in from other arrangements; Mr M hasn't said that there were any guarantees attached to the portion of the monies that were transferred into his L&C SIPP from a defined contribution pension plan(s), so I've proceeded on the basis that there weren't guarantees attached to those monies.

I think it's fair and reasonable for L&C to calculate fair compensation by comparing the current position to the position Mr M would be in if he hadn't transferred from his existing pension plans.

Mr M transferred monies from more than one different pension scheme into the SIPP, including monies from both defined contribution and defined benefit schemes. To put things right L&C will need to undertake different types of loss calculations; one in relation to monies

that originated from defined benefit scheme(s) and another in relation to monies that originated from defined contribution scheme(s). As part of doing this L&C will need to calculate the portion of Mr M's current SIPP value that's attributable to each of the respective transfers and apply them to the relevant calculations.

L&C should:

- Obtain the actual transfer value of Mr M's L&C SIPP, including any outstanding charges.
- Pay a commercial value to buy any illiquid White Sands investments (or treat them as having a zero value).
- Undertake loss calculations as set out below in respect of each of the schemes from which monies were transferred into the SIPP and pay any redress owing in line with the steps set out below.
- If the SIPP needs to be kept open only because of an illiquid White Sands investment(s) and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- Pay to Mr M £500 to compensate him for the distress and inconvenience he's been caused.

I've set out how L&C should go about calculating compensation in more detail below.

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

If L&C wishes to make such an allowance, it must first calculate the proportion of the total FSCS' payment(s) Mr M received that it's fair and reasonable to apportion to each individual transfer into the SIPP – this must be proportionate to the value of the actual sums transferred in. The total FSCS payment(s) allowed for must be no more than the total FSCS payment(s) Mr M actually received. Having done this, L&C can then make the allowance by following the steps set out in the sections below.

Treatment of the illiquid assets held within the SIPP

But for any illiquid White Sands holdings that remain within Mr M's L&C SIPP, Mr M'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 Mr M's L&C SIPP, and pay this sum into the SIPP and take ownership of the relevant investments.

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

If L&C is unable, or if there are any difficulties in buying an illiquid investment, it should give the holding a nil value for the purposes of calculating compensation. To be clear, this would include the investment being given a nil value for the purposes of ascertaining the current value of Mr M's SIPP.

If L&C doesn't purchase the investments, and if the total calculated redress in this complaint is less than £150,000, L&C may ask Mr M to provide an undertaking to account to it for the net amount of any future payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Mr M may receive from the investments after the date of my final decision, and any eventual sums he would be able to access from the SIPP in respect of the investments. L&C will need to meet any costs in drawing up the undertaking.

If L&C doesn't purchase the investments, and if the total calculated redress in this complaint is greater than £150,000 and L&C doesn't pay the *recommended* amount, Mr M should retain the rights to any future return from the investments until such time as any future benefit that he receives from the investments together with the compensation paid by L&C (excluding any interest) equates to the total calculated redress amount in this complaint. L&C may ask Mr M to provide an undertaking to account to it for the net amount of any further payment the SIPP may receive from these investments thereafter. That undertaking should allow for the effect of any tax and charges on the amount Mr M may receive from the investments from that point, and any eventual sums he would be able to access from the SIPP in respect of the investments. L&C will need to meet any costs in drawing up the undertaking.

Calculate the loss Mr M has suffered as a result of making the transfer in relation to monies originating from the defined benefit scheme(s)

L&C must undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:

https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter

As I understand it, Mr M has not yet retired, so, compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, the calculation should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr M's acceptance of my final decision.

If the redress calculation demonstrates a loss, as explained in PS22/13 and set out in DISP App 4, L&C should:

- calculate and offer Mr M redress as a cash lump sum payment,
- explain to Mr M before starting the redress calculation that:
    - redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
    - a straightforward way to invest the redress prudently is to use it to augment his current defined contribution pension
- offer to calculate how much of any redress Mr M receives could be used to augment the pension rather than receiving it all as a cash lump sum,

- if Mr M accepts L&C's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr M for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr M's end of year tax position.

For the purposes of the calculation that's being carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4, if it wishes, L&C may notionally, for the period from the point of their payment through until the valuation date (as per the DISP App 4 definition of that term), allow for that proportion of the payment(s) Mr M received from the FSCS following the claims about HCA and Sorensen, that it's fair and reasonable to apportion to monies transferred in from the defined benefit scheme(s) and in accordance with what's stated earlier in this decision, as a notional deduction (while not an income withdrawal payment, for the purposes of the calculation it may be treated as a notional income withdrawal payment). Where such an allowance is made then L&C must also, at the end of the calculation, allow for a corresponding notional addition to the overall calculated loss that's equivalent to the relevant notional deduction(s) allowed for. The effect of this notional addition will be to increase the overall loss calculated using the most recent financial assumptions in line with PS22/13 and DISP App 4, by a sum that's equivalent to the proportion of the payment(s) Mr M received from the FSCS accounted for in this part of the calculation.

Redress paid directly to Mr M as a cash lump sum in respect of a future loss includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4.3.31G(3), L&C may make a notional deduction to allow for income tax that would otherwise have been paid. Mr M's likely income tax rate in retirement is presumed to be 20%. In line with DISP App 4.3.31G(1) this notional reduction may not be applied to any element of lost tax-free cash.

Calculate the loss Mr M has suffered as a result of making the transfer in relation to monies originating from defined contribution schemes

L&C should first contact the provider(s) of the defined contribution plan(s) that was transferred into the SIPP and ask them to provide a notional value for the plan(s) as at the date of my final decision. For the purposes of the notional calculation the provider(s) should be told to assume no monies would have been transferred away from the plan, and the monies in the policy would have remained invested in an identical manner to that which existed prior to the actual transfer.

Any contributions or withdrawals Mr M has made to, or taken from, the L&C SIPP will need to be taken into account whether the notional value is established by the ceding provider(s) or calculated as set out below.

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. The same applies for any contributions made (including member contributions) – these should be added to the notional calculation from the date they were actually paid, so any growth they would have enjoyed is allowed for. To be clear withdrawals here doesn't include SIPP charges or fees paid to third parties like an adviser. But it would include any pension commencement lump sums or pension income Mr M actually took after his pension monies were transferred to L&C. It would also include any monies transferred away to a different pension provider.

If there are any difficulties in obtaining a notional valuation from an operator of Mr M's previous defined contribution plan(s), L&C should instead calculate a notional valuation by ascertaining what the monies transferred away from the plan(s) would now be worth, as at the date of my final decision, had they achieved a return from the date of transfer equivalent to the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index).

I'm satisfied that's a reasonable proxy for the type of return that could have been achieved over the period in question. And, as mentioned above, there should still be a notional allowance in this calculation for any additional sums Mr M has contributed to, or withdrawn from, his L&C SIPP since outset.

If it wishes, L&C may make an allowance in the form of a notional deduction equivalent to that proportion of the payment(s) Mr M received from the FSCS following the claims about HCA and Sorensen, that it's fair and reasonable to apportion to monies transferred in from the defined contribution scheme(s) in accordance with what's stated earlier in this decision, and on the date the payment(s) was actually paid to Mr M. Where such a deduction is made there must also be a corresponding notional addition, at the date of my final decision equivalent to the total relevant notional deduction(s) accounted for in this part of the calculation.

To do this, L&C should ask the operator(s) of Mr M's previous defined contribution pension plan(s) to allow for the relevant deduction(s) in the manner specified above. L&C must also then allow for a corresponding notional addition as at the date of my final decision equivalent to the accumulated FSCS payment(s) notionally deducted by the operator(s) of Mr M's previous defined contribution pension plan(s).

Where there are any difficulties in obtaining notional valuations from the previous operator(s), L&C can instead allow for both the notional deduction(s) and addition(s) in the notional calculation it performs, provided it does so in accordance with the approach set out above.

Pay an amount into Mr M's SIPP so that the transfer value is increased by the loss calculated above in relation to monies originating from defined contribution schemes

The total notional value(s) of Mr M's previous defined contribution plan(s) if monies hadn't been transferred to L&C (established in line with the above) less the proportion of the current value of the L&C SIPP that's attributable to monies transferred in from the same plan(s) (as at the date of my final decision) is Mr M's loss.

If the redress calculation demonstrates a loss, the compensation should, if possible, be paid into Mr M's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

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

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

It's reasonable to assume that Mr M is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr M would have been able to take a tax-free lump sum 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 Mr M 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%.

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

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

SIPP fees

If there remain illiquid White Sands holdings that can't be removed from Mr M's L&C SIPP, and it hence cannot be closed after compensation has been paid, then it wouldn't be fair for Mr M to have to continue to pay L&C SIPP fees to keep the SIPP open. As such, if the L&C SIPP needs to be kept open only because of illiquid White Sands holdings, and is used only or substantially to hold those illiquid holdings, then any future L&C annual SIPP fees must be waived by L&C until the SIPP can be closed.

Distress & inconvenience

In addition to the financial loss that Mr M has suffered as a result of the problems with his pension since the transfer into the L&C SIPP, I think the impact of L&C's failings and the loss of a significant portion of his pension provision has caused Mr M distress. I think it is fair and reasonable that L&C should pay Mr M £500 to compensate him for this.

My final decision

For the reasons given above, I find this complaint is one we can consider and it's my final decision that Mr M'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 £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, 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 £150,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Pathlines Pensions UK Limited pay Mr M the balance plus any interest on the balance as set out above.

The recommendation isn't part of my determination or award Pathlines Pensions UK Limited doesn't have to do what I recommend. It's unlikely that Mr M could accept this final decision

and go to court to ask for the balance and Mr M may want to get independent legal advice before deciding whether to accept this final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 22 July 2025.

Alex Mann
Ombudsman