The complaint

Mr B complains that Westerby Trustee Services Limited ("Westerby") should not have accepted investments into his Self-Invested Personal Pension ("SIPP") without carrying out the necessary checks.

What happened

Westerby has been represented by two law firms for periods of our investigation of this complaint, and those law firms have made submissions on behalf of Westerby at various times. For simplicity, I have referred to Westerby throughout, whether the submissions came directly from Westerby or were made on its behalf.

The SIPP and investment applications

Mr B held a personal pension scheme. Acting on the advice of a Richard Fletcher, Mr B switched the cash value of that pension into a SIPP with Westerby.

Mr B signed an application for a Westerby SIPP on 5 March 2013. On the application form, the name of the financial advisor was given as "Richard Fletcher" and the name of the firm as "*Joseph Oliver*" with no address given.

Westerby says it understood Mr Fletcher was, at the time of the application, an appointed representative of Joseph Oliver – Mediacao de Seguros LDA ("Joseph Oliver LDA"), a financial advisory firm based in Portugal. At the relevant time Joseph Oliver LDA passported into the UK under the Insurance Mediation Directive ("IMD"). This means that during those dates, Joseph Oliver LDA was an EEA authorised firm and permitted to carry out some regulated activities in the UK.

An application form for an investment platform called E-Portfolio solutions was also signed by Mr B on the same day as the SIPP application form (i.e. 5 March 2013). This recorded the financial advisor's name as "*Richard Fletcher*" and the financial advice firm as "*Joseph Oliver Marketing Limited*". Joseph Oliver Marketing Limited ("JOML") was a UK registered company, which was not authorised by the Financial Conduct Authority ("FCA").

The investment application form was signed by Westerby, as trustees of Mr B's SIPP, on

14 March 2013. The application form did not contain any details of where Mr B's money was to be invested. But statements later produced show it was invested in the Kijani Commodity Fund, which was at the time based in Mauritius (later based in the Cayman Islands), the Swiss Asset Micro Assist Income Fund ("SAMAIF"), which was based in Mauritius and the TCA Global Credit Fund – a fund which appears to have been based in the USA and has been the subject of fraud charges brought by the US authorities.

Commission of 6% - £2,463.30 - was paid directly to Richard Fletcher by Westerby. Westerby says this was in accordance with an instruction from [redacted], who was the Managing Director of Joseph Oliver LDA.

Abana Unipessoal Lda

On 17 May 2013 Joseph Oliver LDA wrote to Westerby, to say Mr Fletcher had terminated his agreement with it and, under that agreement, clients would return to Mr Fletcher. On the same day Abana Unipessoal Lda ("Abana") - another financial advisory firm based in Portugal – wrote to Westerby to say all of Mr Fletcher's clients were to be transferred to it. So Abana was the financial advice firm associated with Mr B's SIPP after this date.

Updates on the investments

On 11 November 2014 Westerby wrote to Mr B about his investments in the Kijani and SAMAIF funds. It explained that the funds would, following a Policy Statement from the FCA in August 2014, be considered to be non-standard assets. It explained that the funds might be higher risk than Mr B originally considered. Its letter also said the Mauritian Financial Services Commission had issued enforcement orders against both the Kijani and the SAMAIF funds.

Westerby "*strongly urged*" Mr B to contact his "*regulated financial advisor*", Abana, and asked him to confirm whether he wanted to continue to hold the investments or for Westerby to attempt to sell them. Westerby says it did not receive a response to this letter from Mr B.

On 23 June 2015 Westerby again wrote to Mr B about his investments in the Kijani and SAMAIF funds. This letter reminded Mr B that the funds were now considered non-standard assets. In relation to the Kijani fund the letter explained it had been announced the fund managers had taken the decision to liquidate all the fund's assets and return client money within 30-60 days, but it was not clear where the announcement had come from and some investors had made redemption requests over 90 days ago but not received any money.

This letter also explained the advisor dealing with Abana clients (by this point a Kenda Binns, not Mr Fletcher) had by that point become "*directly authorised with the FCA*" under a new firm – Abana FS Ltd. This was a UK based, FCA authorised firm.

Again Westerby "*strongly urged*" Mr B to contact his "*regulated financial advisor*", Abana (referring, I assume, to Abana FS). It did not however ask Mr B to confirm whether he wanted to continue to hold the investments on this occasion.

A further letter about the funds from Westerby to Mr B followed on 17 July 2015. This explained that the administrator of the E-Portfolio platform had had its licence suspended by the Mauritius Financial Services Commission. It further explained that efforts were underway to trace where the Kijani fund had been invested and that both that fund and the SAMAIF fund were suspended. The letter said a further update would follow. At its conclusion the letter said:

"In the meantime, we recommend that you seek financial advice from an independent financial advisor who is authorised by the Financial Conduct Authority. Please be aware that as detailed in our accompanying letter, Abana FS Limited are not deemed to be suitably independent."

The final letter (that I have seen) sent to Mr B about the funds was sent by Westerby on 23 December 2015. The letter of that date said:

"…we now have further information regarding the EPS platform, the Swiss Asset Micro Assist Income Fund (SAMAIF) and the Kijani Fund."

"We have been in correspondence with the new managers of the platform and with Asset

Management International to confirm details of your redemption (sale) request. We understand that trades in the underlying funds have been placed.

The illiquid funds within your portfolio cannot be sold at present, and will remain within the SIPP EPS account for the time being.

Based on the information that we have been provided with, the current value of the liquid and illiquid elements of the investment are as follows:

Liquid Funds: £18,582.33 (SAMAIF expected to trade again in February)

Illiquid Funds: £18,354.49 (this is not a true value - please see below)"

The letter says the following about SAMAIF:

"*We have been informed that the suspension on this fund has been lifted, however it is not yet active, pending final authority from the Mauritius Financial Services Commission.*

EPS have included the value of this fund in the liquid Funds referred to above We have been advised that this is because the underlying assets and the value of the fund has been verified, and that the fund is expected to begin trading again in February 2016."

The letter noted:

"A redemption request was submitted to EPS in respect of your SIPP portfolio on 14/04/2015 and we will confirm to you once funds are received."

This refers to an instruction given by Mr B to Westerby for an annual withdrawal of £1,880.53, commencing on 14 April 2015.

In submissions dated 3 December 2018 Westerby said:

"A redemption form had already been submitted to ePortfolio Solutions in April 2015, for a partial redemption. This was processed and £1,817.97 was received into the SIPP bank account on 19/02/2016. However [Mr B] *did not request any additional redemptions following our letter of 23/12/2015."*

And in submissions made to us on 27 January 2020 Westerby said Mr B:

"…did not make any contact with us until February 2016, and we did not receive a completed redemption form until November 2016. We forwarded the form to the investment provider, however by that time the remaining funds were also illiquid."

In its 6 June 2016 submissions to us on another complaint featuring SAMAIF Westerby said:

"The SAMAIF is also currently not trading. It is our understanding that they are currently in communication with the Mauritian regulators in order to enable redemptions from the fund, however there are no definitive timescales as yet. A copy of their latest update is enclosed."

I have also seen a copy of a 24 April 2016 update from SAMAIF, which suggests work to begin trading is still ongoing.

Mr B's recollections of events

Mr B says he was originally introduced to Richard Fletcher by a friend after he had expressed interest in consolidating several small pensions into one. He says Mr Fletcher subsequently visited him at home and packaged his existing pensions into one with Standard Life.

Mr B says Mr Fletcher contacted him again around a year later about reinvesting his pension into a more productive scheme with significantly higher interest. He recalls Mr Fletcher mentioning a return of 18%. He recalls Mr Fletcher visited him at home again, and discussed investing in the Kijani fund, and Mr Fletcher said he was also investing in this fund as it was producing very good returns.

Mr B says he signed the transfer document on the understanding Mr Fletcher would fill in the necessary details. He says the Standard Life pension had been doing well so he trusted

Mr Fletcher. He also says he was quite surprised when a few weeks later he received documentation from Westerby, as Mr Fletcher had not mentioned Westerby. Mr B says at no point did Mr Fletcher mention any risk involved in the investment.

Our investigator's view

Our investigator concluded Mr B's complaint should be upheld. She said, in summary:

- Westerby says it checked the Financial Services Register ("the Register") and verified that Joseph Oliver LDA was authorised to operate within the United Kingdom under an EEA passport.

- It says it also checked the register of Joseph Oliver LDA's home state regulator and this showed Joseph Oliver LDA was regulated by them and listed their UK passports permissions as "life" and "non-life".

- Joseph Oliver LDA did not have permission to advise on pensions in the UK at all. At the time, Westerby was a regulated SIPP provider. So it's reasonable to expect it to be fully aware of the permission requirements for the conduct of pension business, and in particular, the requirements relating to overseas firms. It's reasonable to say it ought to have had the knowledge and expertise to understand what permissions were required by Joseph Oliver LDA.

- Westerby could not reasonably have concluded, from Joseph Oliver LDA's entry on the Register that Joseph Oliver LDA had the top up permissions from the FCA which it needed to give personal pensions advice in the UK.

- If Westerby had made reasonable enquiries it would have concluded that Joseph Oliver LDA did not have the appropriate permissions to give pensions advice.

- Overall, her view was that if Westerby had acted in accordance with its obligations Mr B would have stayed in his previous pension and would not have suffered the loss he has complained about.

Previous final decision on a complaint against Westerby

We issued a final decision on another complaint involving Westerby's acceptance of a SIPP application from Abana in February 2021 ("the published decision"). That final decision has been published on our website under DRN7770418.

Although that decision relates to Abana, rather than Joseph Oliver LDA (or JOML), this complaint features the same key point – namely the permissions held and required by an incoming EEA firm dealing with personal pensions in the UK, and Westerby's knowledge of this. Westerby has made the same, or very similar, submissions on that case as it has on this case and other similar ones featuring either Abana or Joseph Oliver LDA.

After the published decision was issued Westerby was asked to take it into consideration, as an important representative decision, in accordance with the relevant FCA DISP Rules and Guidance (particularly DISP 1.4.1, 1.4.2 and 1.3.2A), which should be taken into account when assessing other similar complaints.

On this basis, Westerby was asked to review each of the outstanding complaints involving Abana and Joseph Oliver LDA – including Mr B's – and if it was not prepared to change its position after taking account of the detailed reasons set out in the published decision, to explain why that was the case.

In the provisional decision I recently issued I said Westerby had not yet reviewed Mr B's complaint. However, I note, following Westerby's response, that it had completed a review of Mr B's complaint and sent a letter detailing this to us on 13 October 2021. I confirm I have now seen this letter, and the associated attachments, and considered them in full.

Having completed its review of Mr B's complaint Westerby declined to change its position. It has made general submissions, following the published decision, which set out its reasons for disagreeing with that decision.

Westerby's submissions

I have considered all the submissions Westerby has made over the course of this complaint. However I have only included a summary of its latest submissions here.

In a letter setting out its general submissions Westerby said, in summary:

- The published decision confirms we contacted the FCA about whether top up permissions appear on the FCA Register and the "*FCA confirmed that top up permissions do appear on the Register under the "Permission" page and that the FCA understands the same information was available on the Register in 2013."*

- However there has been no disclosure of the details of the contact at the FCA with whom we communicated with, records of such communications with the FCA such as correspondence, file notes or attendance notes, details of the FCA contact's role at the FCA, whether the FCA contact was dealing with the Register in 2013 and had knowledge of it, and what the FCA contact's understanding of the Register in 2013 is based upon. An understanding of what was on the Register in 2013 is not proof of what was actually on the Register at the relevant time. We should now provide full disclosure of this information. Not to do so is procedurally unfair.

- It was reasonable for Westerby to assume from the agreement (in this case with Joseph Oliver LDA, but with Abana in the published decision case) that Joseph Oliver LDA had the necessary permissions. It does not accept that it ought to have been reasonably aware of cause to have questioned the accuracy of the statement in the agreement.

- The published decision concedes that information which was not available on the Register would not have been provided to Westerby yet says that if it had contacted the FCA directly the FCA would have been able to confirm permissions. No information has been provided about this and the FCA's position generally.

- Westerby made a Freedom of Information request to the FCA. In response to this the

FCA confirmed that in 2013, the Register would have indicated the broad permissions held under IMD by a firm which would have been either insurance mediation or reinsurance mediation and there was no requirement under the IMD to display more detailed activities. The FCA confirmed any further information not displayed on the Register would have been considered confidential information under section 348 of the Financial Services and Markets Act (FSMA) which prohibits disclosure of this information.

- In the published decision the ombudsman sought to distinguish the complaint from the situation in the *Adams* court case on the basis that Abana was offering an advisory service. It is unclear how Abana's contractually defined role impacts on the scope of duty owed by Westerby under COBS 2.1.1R. It was no part of Westerby's contractual obligations to investigate the permissions of third-party advisers.

- In the published decision the ombudsman failed to follow DISP 3.6.3G, which provides:

'*Where a complainant makes a complaint against more than one respondent in respect of connected circumstances, the Ombudsman may determine that the respondents must contribute towards the overall award in the proportion that the Ombudsman considers appropriate.'*

- The ombudsman failed to assess apportionment, as well as causation.

- Despite a related complaint about the actions of Abana, the ombudsman decided in the published decision that Westerby should compensate for the full extent of the consumer's financial losses.

- The complaints against Abana ought to have been decided first as the IFA involved in the transaction. At the very least, the complaints against Westerby and Abana ought to have been decided together. Instead we dealt with the complaint against Westerby first, which has led to the failure to address the issue of apportionment.

- We have found against Abana in a number of complaints where a different SIPP operator was used and ordered Abana to pay redress yet have not pursued, or invited the complainants to pursue, the SIPP operator.

I have also considered the outcome of Westerby's review of Mr B's complaint, following which it made some further points. I have considered all of these. I have summarised the key ones below, with the exception of those which are made again in Westerby's response to my provisional decision (which I summarise in the section below):

- It is accepted that a "permissions" page existed on the Register at the relevant time, however it is not accepted that this contained any useful information relating to Joseph Oliver LDA.

- It does not hold a copy of the "permissions" page for Joseph Oliver LDA. However, it has been able to retrieve archived copies of the page for other passported firms from the relevant time period. In every case the permission page simply shows "No matches found". It has no reason to expect that Joseph Oliver LDA's permissions page would not have shown the same, and it is likely that copies of this page were not retained as there was no useful information.

- The "Basic Details" page of Joseph Oliver LDA's Register entry included a field labelled "Undertakes Insurance Mediation". It is beyond dispute that the firm was able to carry out this activity, but the field was left blank. For UK firms it was always completed. So it was not unreasonable to conclude that the Register simply did not record Joseph Oliver LDA's permissions.

- The Register is known to have historically had significant errors, and the FCA itself recognises that there can be errors on the Register. The Legal Information section of the Register in 2012 and 2013 stated that:

"We try to ensure that the information on this site is correct, but we do not give any express or implied warranty as to its accuracy. We do not accept any liability for error or omission."

- All of Abana's clients (including those who had originally been advised by Joseph Oliver LDA, and later novated to Abana) had two opportunities to mitigate losses:

- It wrote to all clients who held investments in the Kijani fund and the SAMAIF fund in November 2014. This letter drew the clients' attention to regulatory enforcement actions against the funds.

- It wrote to all such clients again in December 2015 to inform them that there was an opportunity to redeem approximately half of their funds.

- It remains its position that the clients had a responsibility (under the general principle that consumers should take responsibility for their own decisions) to take appropriate action to safeguard their own funds.

- Mr B did not respond to its November 2014 letter. There is therefore no evidence Mr B sought advice or took any other action. So the only reasonable conclusion is Mr B chose not to take any action. It cannot be held responsible for any losses flowing from this.

- Mr B submitted a redemption request in April 2015 for a partial redemption. These funds were received in February 2016. However, Mr B did not make any further efforts to recover funds; which is surprising as he had been in contact with it in 2015 to express concern about the funds.

- Irrespective of any advice from Abana to retain the funds it was ultimately Mr B's decision as to whether follow that advice. He elected to retain funds that had been highlighted as high risk and under enforcement actions, and the principle that he should take responsibility for his decisions should be applied.

My provisional decision

In my provisional decision I concluded Mr B's complaint should be upheld.

I initially made the point that, in this case, it was not actually clear which business Westerby was accepting business from – Joseph Oliver LDA or JOML. The SIPP application simply says "*Joseph Oliver*" is the advising business – which could refer to either Joseph Oliver LDA or JOML - and the investment application says JOML is the advising business. So I had considered both possibilities – starting with Joseph Oliver LDA.

In relation to Joseph Oliver LDA I said I was satisfied that:

- Westerby ought to have identified that Joseph Oliver LDA needed "top up" permissions from the FCA to advise on personal pensions in the UK and it should have taken all steps available to it to independently verify that Joseph Oliver LDA had the required FCA permissions.

- If Westerby had taken these steps, it would have established Joseph Oliver LDA did not have the permissions it required to give personal pensions advice in the UK, or alternatively that it was unable to confirm whether Joseph Oliver LDA had the required permissions.

- In either case, it was not fair and reasonable for Westerby to accept business from Joseph Oliver LDA.

In relation to JOML, I said if the advisor was JOML it was clearly engaged in regulated activities. And so it was breaching the General Prohibition, which prohibits unauthorised business from carrying out regulated activities. So it was fair and reasonable to say Westerby should have refused to accept either the SIPP or investment application from JOML if it were the introducer of the business, rather than Joseph Oliver LDA.

I also concluded it was fair and reasonable in the circumstances of this case to conclude that none of the points Westerby had raised were factors which mitigated its decision to accept Mr B's application to open a SIPP in the first place. And I concluded it was fair and reasonable to hold Westerby to account for its failure to decline Mr B's application from Joseph Oliver LDA, and for it to be accountable for the financial loss to Mr B that flowed from this failure.

As I revisit (and, where appropriate, repeat) my provisional findings below I will not include any more than this brief summary here.

Responses to my provisional decision

Mr B's response

- I say Westerby should deduct 20% from the redress sum if paid into a pension plan to account for income tax relief. However tax relief is only granted on pension contributions but not on pension transfers. So there is no income tax relief or relief at source applicable in this case.

- In December 2017 he chose to take early retirement. The plan being to use his various small pensions to pay off his mortgage and pay monthly bills and take a part time job until his Westerby and state pensions became payable. Unfortunately he became ill and was unable to work part time, and was forced to take an equity release. Had his Westerby pension been available he would not have had to take the equity release, or would have been able to take a smaller sum.

- He is due from some of his pensions an amount of money known as COPE (contracted out pension equivalent). One of the pensions Mr Fletcher consolidated into the pension that was subsequently transferred to Westerby was a pension which had this benefit associated with it. So when he claimed his pension from Westerby it would have been increased by the COPE amount in addition to the direct contributions he paid. This is something he would like to be taken into consideration when determining the final amount of compensation.

Westerby's response

Westerby did not accept my provisional decision. I have considered Westerby's response in its entirety, however I have only summarised here the points which I consider to be key:

- It maintains it should be provided with the information it has requested relating to our request for information about the Register made to the FCA. It also considers I should clarify my position on this.

- It does not agree that Joseph Oliver LDA not holding the relevant top up permissions would be a matter of public record – the FCA was only able to confirm what was on the Register, not what was missing from it.

- It maintains it was reasonable for it to rely on what Joseph Oliver LDA told it. It is illogical to say it should have had reason to question what it was told.

- JOML was a branch of an authorised firm (it provided a link to a page on Joseph Oliver LDA's website which it says is evidence of this).The identity verification document was signed by Mr Fletcher and quoted a Financial Services Authority ("FSA") reference number, so the reasonable conclusion was Mr Fletcher was acting from an authorised firm when carrying out the regulated activity of arranging the SIPP. Also, the decision in *Adams v Options* confirmed that whilst establishing a SIPP is a regulated activity (so needs to be done via an authorised firm) advice on the underlying assets is not. So JOML providing advice is not an anomalous feature.

- It carried out extensive and thorough due diligence on Joseph Oliver LDA, which my decision seeks to downplay. No further action taken or not taken by it would have changed the outcome of Mr B's investments into a SIPP, whether provided by it or another provider.

- It acted in accordance with the regulatory publications set out in my provisional decision.

- An attempt has been made to distinguish Mr B's complaint from the decision in *Adams.* However, I have made a material error of law. In *Adams* HHJ Dight stated that the scope of the 'best interests' duty at COBS 2.1.1R was to be determined by *"the relevant factual context"* and, in particular, the parties' *"defined… roles and functions in the transaction"* as set out by the terms of their agreement. He therefore concluded that the duty argued for on Mr Adams' behalf did not arise because the defendant's role was limited to execution-only. It is unclear how Joseph Oliver LDA's contractually defined role is said to impact upon the scope of duty owed by Westerby under COBS 2.1.1R. It is wrong in principle for me to conclude that the contractual responsibilities of an unrelated third-party could somehow be used to define those owed by Westerby under COBS 2.1.1R.

- s27 of the Financial Services and Markets Act (FSMA) is designed to shift the risks of accepting business from unauthorised parties onto providers. However, s20 FSMA does the exact opposite – it explicitly shields authorised parties from the risks of accepting business from authorised parties acting outside their permissions (such as Joseph Oliver LDA).

- I have failed to assess apportionment. It notes I dealt with apportionment in another complaint where the complaint was against an EEA firm that had acted outside its permissions. The decision made an apportionment between the SIPP provider and the advisor on a 50/50 basis. It is not clear why the issue of apportionment has not been dealt with in this complaint.

- Its investigations into the financial health of Joseph Oliver LDA indicate there to be very low prospects of recovery from Joseph Oliver LDA. Any indemnity from Joseph Oliver LDA and/or assignment of rights to any action against it from Mr B is effectively worthless.

- The complaint against Joseph Oliver LDA ought to have been decided first, as it was the financial advisor involved in the transaction. At the very least, the complaints against it and Joseph Oliver LDA ought to have been decided together.

- We have upheld complaints against Abana where there was another SIPP operator involved but not pursued or invited the complainants to pursue complaints against the SIPP operator concerned regarding the due diligence it carried out on Abana.

- There have been discussions with the FCA about compensation being sought for investors who lost money as a result of dealing with Abana – this emphasises its position that Joseph Oliver LDA should not escape liability. I should consider the true gravity of the situation against Joseph Oliver LDA.

- If it had rejected Mr B's application, Joseph Oliver LDA would simply have re-applied on behalf of Mr B to another SIPP operator, which Joseph Oliver LDA was using, and that SIPP operator would have accepted the application.

- It was clear that Mr B, despite Westerby's correspondence, was content with Mr Fletcher's advice (particularly given the performance of his previous pension on advice from Mr Fletcher). If Mr B had contacted Westerby about their involvement at the outset and to have raised any concerns he may have had, this may have also put Westerby on notice of potential issues with Joseph Oliver LDA/Richard Fletcher and their business introductions, which may have led in turn to them refusing Mr B's SIPP (and to cease accepting business from them).

- The action taken by Westerby in November 2014 was in line with the FCA Principles. Westerby was acting in the best interests of the investors in keeping an eye on the investments and flagging issues with them.

- Following Westerby's letter in November 2014, raising concerns with the funds, any investor, unsophisticated or otherwise, would have sought independent financial advice, or at the very least made some reasonable lines of enquiries, regardless of whether it was suggested to him or not.

- The provisional decision provides that Westerby ought to have suggested that Mr B seek independent advice from a regulated advisor as a matter of urgency. There is no evidence that Mr B would have done so even if the suggestion had been made.

- Even if it had not referred Mr B back to Abana in November 2014 Mr B would have reverted back to Mr Fletcher regardless. And Mr Fletcher would have said that Westerby (and apparently others) were "*scaremongering*", which is what it understands Mr Fletcher told other investors.

- In finding that it was not reasonable for Mr B to take some action after Westerby's November 2014 letter, I am effectively deciding that Westerby was always liable for any subsequent losses irrespective of the duty on Mr B to mitigate his losses, and whether or not he complied with such duty.

- However, in the complaint which was the subject of the published final decision, the complainant was able to redeem his funds in May 2016. So it seems likely that Mr B could have mitigated his losses with a timely redemption request.

My findings

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

When considering what is fair and reasonable in the circumstances, 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. This goes wider than the rules and guidance that come under the remit of the FCA. Ultimately, I'm required to make a decision that I consider to be fair and reasonable in all the circumstances of the case.

As a preliminary point I note Westerby has asked me to answer specific questions and/or respond to specific points. But the purpose of this decision is to set out my findings on what is 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 I have focussed on the points I believe to be key to my decision.

I have first reconsidered what the relevant considerations are in this case. Having done so, I remain of the view that these are as set out in my provisional decision. So I have largely repeated below what I said in my provisional decision, whilst taking account of the relevant points Westerby has made in its response to my provisional decision.

Relevant considerations

I have carefully taken account of the relevant considerations to decide what is fair and reasonable in the circumstances of this complaint.

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

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

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

In *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) (“BBSAL”), Berkeley Burke brought a judicial review claim challenging the decision of an ombudsman who 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 had not treated its client fairly.

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

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

The BBSAL judgment also considers section 228 of FSMA and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the ombudsman in that complaint, which I have 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 is 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 am therefore satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

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

I note that the Principles for Businesses did not form part of Mr Adams’ pleadings in his initial case against Options SIPP. And, HHJ Dight did not 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 do not say this means Adams is not a relevant consideration *at all.* As noted above, I have taken account of both judgments when making this decision on Mr B’s case.

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

The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim on the basis 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 did not 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 the High Court judgement 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."

Westerby, too, has noted this in its response to my provisional decision. And it says I have made a "*material error*" by finding Joseph Oliver LDA's contractually defined role impacts upon the scope of duty owed by Westerby under COBS 2.1.1R.

In my provisional decision I noted that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr B's complaint. I remain of that view. The breaches alleged by Mr Adams were summarised in paragraph 120 of the Court of Appeal judgment. In particular, as HHJ Dight noted, he was not asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP.

I also noted the facts of the case were different, and that I needed to construe the duties Westerby owed to Mr B under COBS 2.1.1R in light of the specific facts of Mr B's case. I remain of that view.

As an example of the factual differences between this complaint and Adams v Options SIPP I highlighted in my provisional decision that in Adams HHJ Dight accepted that the transaction with Options SIPP proceeded without any advice from the business introducing the SIPP application. And, in contrast to that, the transaction between Mr B and Westerby proceeded on the footing that Mr B was being advised by an authorised advisor. To be clear, I made – and make - this point only to illustrate there are factual differences between this complaint and Adams v Options SIPP.

To confirm, I have considered COBS 2.1.1R - alongside the remainder of the relevant considerations, and within the factual context of Mr B's case, including Westerby's role in the transaction.

However, I think it is 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 am 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 here that I do not say that Westerby was under any obligation to advise Mr B on the SIPP and/or the underlying investments. Refusing to accept an application because it came about as a result of advice given by a firm which did not have the required permissions to be giving that advice, and had been introduced by that same firm, is not the same thing as advising Mr B on the merits of investing and/or transferring to the SIPP.

Overall, I remain 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 B's case.

The regulatory publications

The FCA (and its predecessor, the FSA) has issued a number of publications which remind 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.

The 2009 Thematic Review Report

The 2009 report included the following statement:

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

It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes."

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

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

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

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

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

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

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their advisor, 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 states:

"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 advisor, 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*

- *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 have considered them in their entirety.

I acknowledge that the 2009 and 2012 reports and the *"Dear CEO"* letter are not formal *"guidance"* (whereas the 2013 finalised guidance is). However, the fact that the reports and *"Dear CEO"* letter did not constitute formal guidance does not 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 is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect the publications, which set out the regulators expectations of what SIPP operators should be doing, also goes some way to indicate what I consider amounts to good industry practice and I am, therefore, satisfied it is appropriate to take them into account.

It is 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.

I'm also satisfied that Westerby, at the time of the events under consideration here, thought the 2009 thematic review report was relevant, and thought that it set out examples of good industry practice. Westerby *did* carry out due diligence on Joseph Oliver LDA. So, it clearly thought it was good practice to do so, at the very least.

Like the ombudsman in the BBSAL case, I do not think the fact the publications, (other than the 2009 and 2012 Thematic Review Reports), post-date the events that took place in relation to Mr B's complaint, mean that the examples of good practice they provide were not good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

It is also clear from the text of the 2009 and 2012 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 is clear the standards themselves had not changed.

That doesn't mean that in considering what is fair and reasonable, I will only consider Westerby's actions with these documents in mind. The reports, Dear CEO letter and guidance gave non-exhaustive examples of good practice. They did not 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.

In its submissions to us Westerby says (referring to the Court of Appeal decision in Adams) that s27 of the FSMA is designed to shift the risks of accepting business from unauthorised parties onto providers but s20 FSMA does the opposite – it shields authorised parties from the risks of accepting business from authorised parties acting outside their permissions (such as Joseph Oliver LDA). It says the FCA guidance mentioned in my provisional decision appears to directly contradict the intention of legislation.

s20 says that acting outside the permission given by the FCA is contravention of the requirements imposed by the FCA, but that:

(a)does not, except as provided by section 23(1A), make a person guilty of an offence,

(b)does not, except as provided by section 26A, make any transaction void or unenforceable, and

(c)does not, except as provided by subsection (3), give rise to any right of action for breach of statutory duty

However, I am not making a finding here on whether Mr B's application is void or unenforceable and it is not my role to determine whether an offence has taken place or if there is something which gives rise to a right to take legal action. I am making a decision on what is fair and reasonable in the circumstances of this case – and for all the reasons I have set out I am satisfied the regulatory publications are a relevant consideration to that decision.

In determining this complaint, I need to consider whether, in accepting Mr B's SIPP application from Joseph Oliver LDA, Westerby complied with its regulatory obligations to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regard to the interests of its customers, to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Westerby could have done to comply with its regulatory obligations and duties.

In this case, the business Westerby was conducting was its operation of SIPPs. I am satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business. 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 confirming, both initially and on an ongoing basis, that introducers that advise clients have the appropriate permissions to give the advice they are providing.

So taking account of the factual context of this case it is my view that in order for Westerby to meet its regulatory obligations (under the Principles and COBS 2.1.1R) it should have undertaken sufficient due diligence checks to ensure Joseph Oliver LDA had the required permissions to give advice on and make arrangements in relation to personal pensions in the UK before accepting Mr B's business from it.

Westerby says it did carry out due diligence on Joseph Oliver LDA before accepting business from it. And I accept that it did undertake some checks. However, the question I need to consider in this complaint is whether Westerby ought to have, in compliance with its regulatory obligations, identified that Joseph Oliver LDA did not in fact have the "top up" permissions from the FCA it required to be giving advice on and arranging personal pensions in the UK, and whether Westerby should therefore not have accepted Mr B's application from it.

At the outset I again note that, in this case, it is not actually clear which business Westerby was accepting business from – Joseph Oliver LDA or JOML. The SIPP application simply says "*Joseph Oliver*" is the advising business – which could refer to either Joseph Oliver LDA or JOML - and the investment application says JOML is the advising business.

In its response to my provisional decision Westerby says JOML was a branch of an authorised firm. I assume it means JOML was a branch of Joseph Oliver LDA. In support of this, it has provided a link to the "contact us" page of the website josepholivermsl.com. That page includes the following:

"*Registered Addresses*

Joseph Oliver Marketing Ltd

65 London Road, St Albans, Herts, AL1 1LJ, United Kingdom

Company number: 4844574

Joseph Oliver Mediaçao de Seguros Lda,

Galerias Navegador, 75, Av. 25 de Abril, 1011-C 2750-515 Cascais

Portugal Company number: 509011411"

In my view this is not sufficient evidence to show JOML is a branch of Joseph Oliver LDA. It shows JOML as a "registered address", and that information is on Joseph Oliver LDA's website. But it also confirms JOML is a separate entity from Joseph Oliver LDA, by referring to JOML's UK Companies House entry - suggesting JOML might be a subsidiary of Joseph Oliver LDA, but not a branch.

So I have again considered both possibilities i.e. that the introducing advisor was JOML or Joseph Oliver LDA – and I have again started with Joseph Oliver LDA.

If the advisor was Joseph Oliver LDA?

Having reconsidered my provisional findings on this point I remain of the view set out in my provisional decision. So I have largely repeated below what I said in my provisional decision, whilst taking account of the relevant points Westerby has made in its response to my provisional decision.

The regulatory position

Joseph Oliver LDA is based in Portugal and is authorised and regulated in Portugal by Autoridade de Supervisao de Seguros e Fundos de Pensoes ("the ASF").

Under Article 2 of the Insurance Mediation Directive 2002/92/EC, *"insurance mediation"* and

"reinsurance mediation" are defined as:

3. "Insurance mediation means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or assisting in the administration and performance of such contracts, in particular in the event of a claim.

4. Reinsurance mediation means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of reinsurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim."

In the FSA's consultation paper 201, entitled *"Implementation of the Insurance Mediation*

Directive for Long-term insurance business" it is stated (on page 7):

"We are implementing the IMD for general insurance and pure protection business…from January 2005 (when they will require authorisation).Unlike general insurance and pure protection policies, the sale of life and pensions policies is already regulated. Life and pensions intermediaries must be authorised by us and are subject to our regulation."

Chapter 12 of the FCA's Perimeter Guidance Manual ("PERG") offers guidance to persons, such as Westerby, running personal pension schemes. The guidance in place at the time the application was made for Mr B's SIPP confirms that a personal pension scheme, for the purpose of regulated activities (PERG 12.2):

"…is defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the Regulated Activities Order) as any scheme other than an occupational pension scheme (OPS) or a stakeholder pension scheme that is to provide benefits for people:

- *on retirement; or*
- *on reaching a particular age; or*
- *on termination of service in an employment".*

It goes on to say:

"This will include self-invested personal pension schemes ('SIPPs') as well as personal pensions provided to consumers by product companies such as insurers, unit trust managers or deposit takers (including free-standing voluntary contribution schemes)".

So, under the Regulated Activities Order, a SIPP is a personal pension scheme. Article 82 of the Regulated Activities Order (Part III Specified Investments) provides that rights under a personal pension scheme are a specified investment.

Westerby itself had regulatory permission to establish and operate personal pension schemes – a regulated activity under Article 52 of the Regulated Activities Order. It did not have permission to carry on the separate activity under Article 10 of effecting and carrying out insurance.

At the time of Mr B's application, SUP App 3 of the FCA Handbook set out "Guidance on passporting issues" and SUP App 3.9.7G provided the following table of permissible activities under Article 2(3) of the Insurance Mediation Directive in terms of the attendant Regulated Activities Order Article number:

Table 2B: Insurance Mediation Directive 2 **Activities** 2		**Part II RAO Activities**	**Part III RAO Investments**
1.	Introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance.	Articles 25, 53 and 64	Articles 75, 89 (see Note 1)
2.	Concluding contracts of insurance	Articles 21, 25, 53 and 64	Articles 75, 89
3.	Assisting in the administration and performance of contracts of insurance, in particular in the event of a claim.	Articles 39A, 64	Articles 75, 89

I note this shows Article 82 investments are not covered by the Insurance Mediation Directive.

The guidance in SUP 13A.1.2G of the FCA Handbook at the time of Mr B's application for the SIPP explains that an EEA firm wishing to carry on activities in the UK which are outside the scope of its EEA rights (i.e. its passporting rights) will require a "top up" permission under Part 4A of the Act (the Act being FSMA). In other words, it needs "top up" permissions from the FCA to carry on regulated activities which aren't covered by its IMD passport rights.

The relevant rules regarding "top up" permissions could be found in the FCA Handbook at SUP 13A.7. SUP 13A.7.1G stated:

If a person established in the EEA:

(1) does not have an EEA right;

(2) does not have permission as a UCITS qualifier; and

(3) does not have, or does not wish to exercise, a Treaty right (see SUP 13A.3.4 G to SUP 13A.3.11 G);

to carry on a particular regulated activity in the United Kingdom, it must seek Part IV permission from the FSA to do so (see the FSA website "How do I get authorised": http://www.fsa.gov.uk/Pages/Doing/how/index.shtml). This might arise if the activity itself is outside the scope of the Single Market Directives, or where the activity is included in the scope of a Single Market Directive but is not covered by the EEA firm's Home State authorisation. If a person also qualifies for authorisation under Schedules 3, 4 or 5 of the Act as a result of its other activities, the Part IV permission is referred to in the Handbook as a top-up permission.

In the glossary section of the FCA Handbook EEA authorisation was defined as:

(in accordance with paragraph 6 of Schedule 3 to the Act (EEA Passport Rights)):

(a) in relation to an IMD insurance intermediary or an IMD reinsurance intermediary, registration with its Home State regulator under article 3 of the Insurance Mediation Directive;

(b) in relation to any other EEA firm, authorisation granted to an EEA firm by its Home State regulator for the purpose of the relevant Single Market Directive or the auction regulation

The guidance at SUP App 3 of the FSA/FCA Handbook (which I set out above) was readily available in 2013 and clearly illustrated that EEA-authorised firms may only carry out specified regulated activities in the UK if they have the relevant EEA passport rights.

In this case the regulated activities in question did not fall under IMD passporting – they required FCA permission for Joseph Oliver LDA to conduct them in the UK. Westerby, acting in accordance with its own regulatory obligations, should have ensured it understood the relevant rules, guidance and legislation I have referred to above, (or sought advice on this, to ensure it could gain the proper understanding), when considering whether to accept business from Joseph Oliver LDA, which was an EEA firm passporting into the UK. It should therefore have known - or have checked and discovered - that a business based in Portugal that was EEA authorised needed to have top up permissions to give advice and make arrangements in relation to personal pensions in the UK. And that top up permissions had to be granted by the the UK regulator, the FCA.

In my view, it is fair and reasonable to conclude that in the circumstances of this case Westerby ought to have understood that Joseph Oliver LDA required the relevant top up permissions from the FSA/FCA in order to carry on the regulated activities it was undertaking.

Westerby's checks on Joseph Oliver LDA's permissions

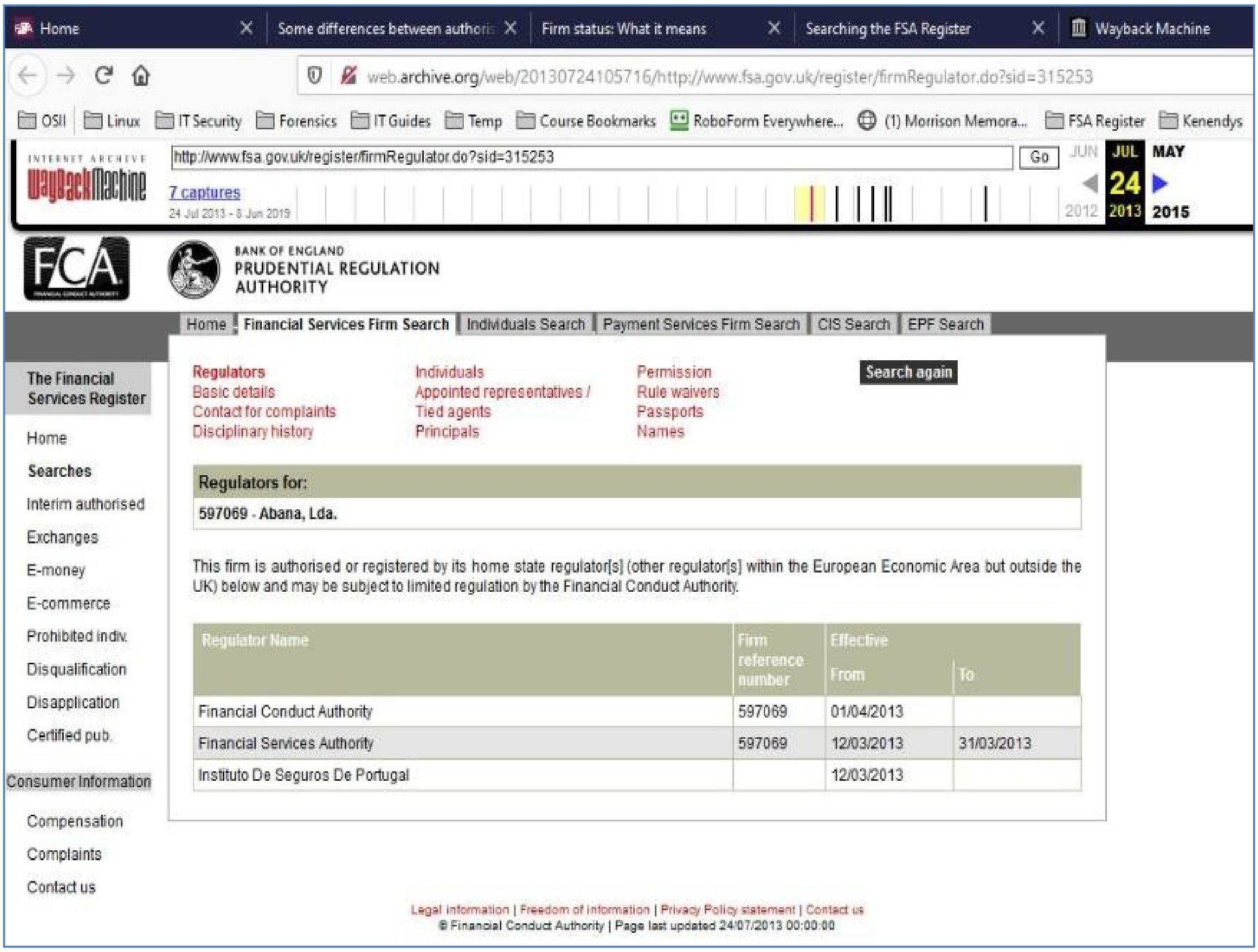
Again, I have not been persuaded to depart from my provisional decision on this point, so I have largely repeated my provisional findings below, taking account of any relevant points Westerby has made in its response to my provisional decision.

Westerby says it took appropriate steps to conduct due diligence on Joseph Oliver LDA and it could not and should not reasonably have concluded that Joseph Oliver LDA did not have the required top up permissions. I have carefully reconsidered all of Westerby's submissions on this point.

The Register

I am satisfied that, in order to meet its regulatory obligations, Westerby ought to have independently checked and verified Joseph Oliver LDA's permissions before accepting business from it. I therefore consider it is fair and reasonable to expect Westerby to have checked the Register entry for Joseph Oliver LDA in the circumstances. And, to be clear, I think it fair and reasonable to say that the checks Westerby ought to have conducted on Joseph Oliver LDA's Register entry should have included a review of all the relevant information available.

I have carefully considered the format of the Register in or around 2013 when Mr B's application was submitted by Joseph Oliver LDA. The third-party report on the Register provided by Westerby during the investigation of the complaint which was the subject of the published decision is helpful on the question of the format of the Register at the time of Mr B's SIPP application. The report includes the following screenshot of the archived Register for Abana (dated 24 July 2013):


Home | Some differences between authoris | Firm status: What it means | Searching the FSA Register | Wayback Machine

web.archive.org/web/20130724105716/http://www.fsa.gov.uk/register/firmRegulator.do?sid=315253

OSII | Linux | IT Security | Forensics | IT Guides | Temp | Course Bookmarks | RoboForm Everywhere... | (1) Morrison Memora... | FSA Register | Kenendys

INTERNET ARCHIVE WaybackMachine
http://www.fsa.gov.uk/register/firmRegulator.do?sid=315253 Go
7 captures
24 Jul 2013 - 8 Jun 2019
JUN JUL MAY
24
2012 2013 2015

FCA
BANK OF ENGLAND
PRUDENTIAL REGULATION
AUTHORITY

Home | Financial Services Firm Search | Individuals Search | Payment Services Firm Search | CIS Search | EPF Search

The Financial Services Register
Home
Searches
Interim authorised
Exchanges
E-money
E-commerce
Prohibited indiv.
Disqualification
Disapplication
Certified pub.
Consumer Information
Compensation
Complaints
Contact us

Regulators
Basic details
Contact for complaints
Disciplinary history
Individuals
Appointed representatives /
Tied agents
Principals
Permission
Rule waivers
Passports
Names
Search again

Regulators for:
597069 - Abana, Lda.

This firm is authorised or registered by its home state regulator[s] (other regulator[s] within the European Economic Area but outside the UK) below and may be subject to limited regulation by the Financial Conduct Authority.

Regulator Name	Firm reference number	Effective From	To
Financial Conduct Authority	597069	01/04/2013	
Financial Services Authority	597069	12/03/2013	31/03/2013
Instituto De Seguros De Portugal		12/03/2013	

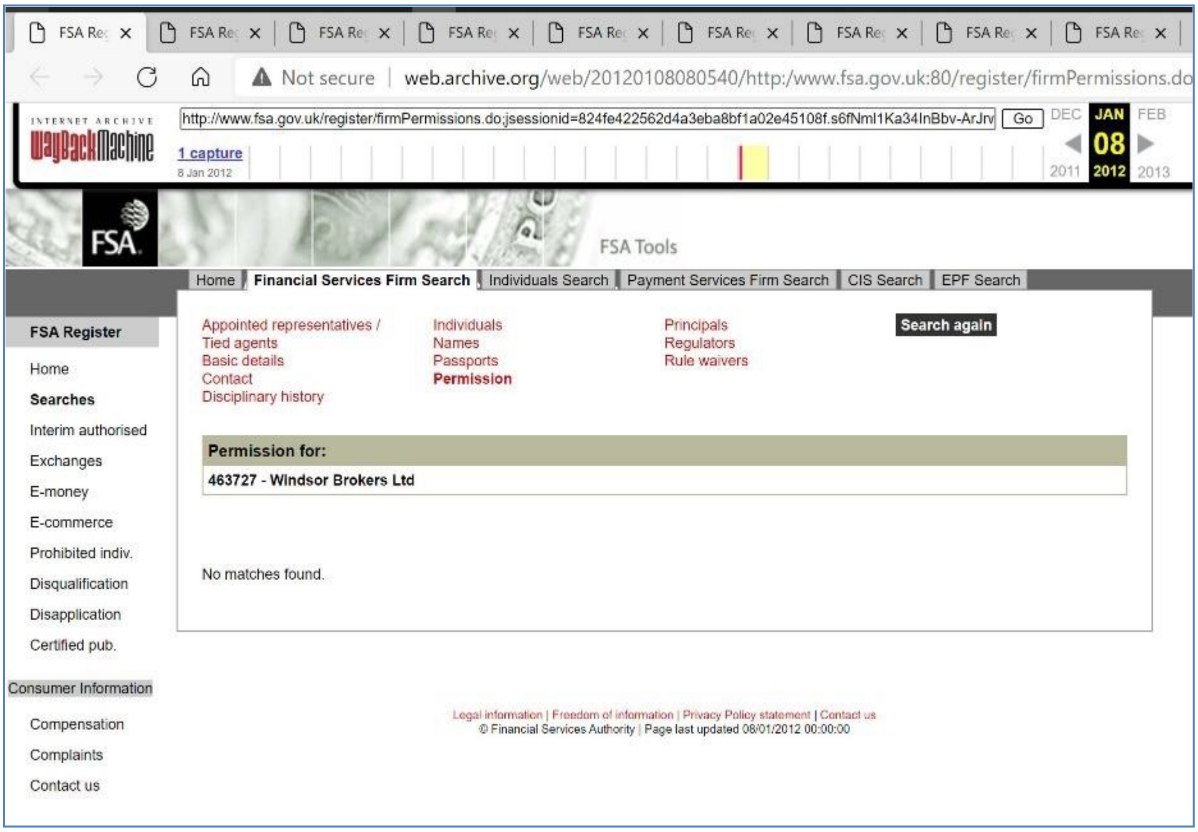
Legal information | Freedom of information | Privacy Policy statement | Contact us
© Financial Conduct Authority | Page last updated 24/07/2013 00:00:00

Each of the red titles at the top of the entry (i.e. Regulators, Basic details, Contact for complaints, etc) is a hyperlink to another page of the entry on the Register. I am satisfied the entry for Joseph Oliver LDA would have followed the same format. So, this screenshot shows that Joseph Oliver LDA's 2013 entry on the Register would have included both "Permission" and "Passports" pages (amongst other pages). It is therefore reasonable to conclude from the above screenshot that the format of the Register in or around the time Mr B's SIPP application was submitted to Westerby in 2013 included pages which provided information in relation to both a firm's passport details and in relation to a firm's permissions. And I note Westerby accepts Joseph Oliver LDA's entry would have included a permissions page at the relevant time.

Westerby's position, in short, is that the permissions page was blank and the register entry could not therefore be used to check a firm's permissions.

The report provided by Westerby on the complaint which was the subject of the published decision, helpfully, provides examples of several Permission pages for other firms which *were* archived, dating from around the time of Mr B's SIPP application or earlier. The below example, dating from 2012, and relating to a Cypriot firm which, like Joseph Oliver LDA, was an incoming EEA firm, is particularly helpful:

This shows that the Permission page for this incoming EEA firm did exist in 2012, and that it



showed “*no matches found*”. This is strong evidence that the format of the Register for EEA firms did include a page with information on a firm’s permissions, even if all it recorded is that “no matches are found”, (i.e. it had no permissions from the FCA). I note Westerby accepts that the entry for Joseph Oliver LDA likely showed “*no matches found*” in the permission page of the Register entry at the relevant time.

The third-party report also includes a screenshot of a 2013 Permission page for a UK firm which ceased to be authorised in 2008 (which also shows “*no matches found*”), and a page for a UK firm which was authorised and held FCA permissions at the relevant time, which shows the firm’s permissions set out in detail.

All of this information taken together demonstrates that, when Mr B’s application was submitted to Westerby, the format of the Register did contain a page labelled “Permission” and this page is where a firm’s permissions would be set out on the Register. And, where a firm did not have any FCA permissions at the time of the search, the Permission page on their Register entry would state “*no matches found*” (as there were no permissions to display).

This is consistent with the information we received from the FCA when we asked it to confirm whether top up permissions appear on the Register, and whether this has changed since 2013. In response to our query, FCA confirmed that “top up” permissions do appear on the Register under the “Permission” page, and that the FCA understands the same information was available on the Register in 2013.

I note Westerby has said more information should be provided about this. In is response to my provisional decision it has reiterated this request. I have not been persuaded to depart from my provisional decision on this point.

Westerby has been provided with FCA’s response to our question. That is all I have been privy to and it is sufficient to allow Westerby to consider and make submissions on this point – something which it has done, at length. I am therefore satisfied I can fairly determine this complaint now and Westerby does not need to be provided with further information on this point.

I should also make the point that my decision on this complaint would be the same even if I were to disregard the information received from the FCA – as the FCA's response to our question simply confirms what is shown by the available evidence in this case.

To summarise my conclusions so far, I remain satisfied:

- That in order to meet its regulatory obligations, Westerby ought to have independently checked and verified Joseph Oliver LDA's permissions before accepting business from it. And it is fair and reasonable to expect Westerby to have checked the *totality* of Joseph Oliver LDA's Register entry in the circumstances.

- The format of the Register in 2013 did include a "Permission" page and it follows that the entry for Joseph Oliver LDA on the Register at the time of Mr B's application would have included a "Permission" page which Westerby ought to have checked.

If Westerby did check the Permission page for Joseph Oliver LDA at the relevant time, it appears to have failed to have kept a record of this check and, unfortunately, I do not have a record of the Permission page for Joseph Oliver LDA at the relevant time. So we have no evidence of what specific information was available on this page for Joseph Oliver LDA at the relevant time. However, in light of the evidence I've set out above, I am satisfied that there would have been a permission page available on Joseph Oliver LDA's Register entry. And, if this page had erroneously failed to contain any information on whether or not Joseph Oliver LDA held the relevant permissions, (i.e. it had been left entirely blank), Westerby ought to have taken further steps to ascertain what the correct position was.

To be clear, I do not accept Westerby's submission that information about a firm's permissions was simply not available for an online user in 2013.

Westerby has, in previous submissions, referred to reports from the Complaints Commissioner both of which highlighted errors and/or weaknesses of the Register. In its latest submissions it says the Register is known to have historically had significant errors, and the FCA itself recognises that there can be errors on the Register – it refers to a disclaimer shown on the Register which says the FCA provided no warranty as to its accuracy. I have considered the submissions Westerby has made on this point.

Whilst I appreciate there have been criticisms of the Register, and it may on occasion have contained errors, I am satisfied that a regulated market participant such as Westerby, acting in accordance with its regulatory obligations, ought to have understood that Joseph Oliver LDA needed permission from the FCA to give advice on and make arrangements for personal pensions in the UK. Therefore, before accepting business from Joseph Oliver LDA, Westerby needed to confirm that Joseph Oliver LDA held the required permissions. And, for the reasons I have set out above, I am satisfied that Joseph Oliver LDA's entry on the Register at the relevant time would have included a page with information on its permissions. If this page had not set out any information (it had erroneously been left blank) Westerby, in accordance with its regulatory obligations, should not have accepted Mr B's application from Joseph Oliver LDA before carrying out further enquiries to clarify the correct position on the firm's permissions.

On this point Westerby says that the FCA will not (and nor would it have at the relevant time) confirm details about a firm that are not available on the public register. It says the published decision concedes that information which was not available on the Register would not have been provided to Westerby.

In its response to my provisional decision Westerby says it does not agree that Joseph Oliver LDA not holding the relevant top up permissions would be a matter of public record – as the FCA was only able to confirm what was on the Register, not what was missing from it. However, I remain satisfied that whether a firm holds permissions with the FCA is a matter of public record.

I accept FCA will not (and would not) confirm details about a firm that are not available on the public register. However, for all the reasons I've given above, I'm satisfied that top up permissions (or the absence of such permissions) are something which are recorded on the FCA's public register, and that this was also the case in 2013 when Westerby accepted Mr B's application from Joseph Oliver LDA. So, although we do not have evidence of exactly what did appear on Joseph Oliver LDA's "Permission" page in 2013, if it had erroneously been left blank I think it is fair and reasonable to conclude the FCA would have been able to confirm the position that Joseph Oliver LDA did not – in fact – have the required permissions, as this was information that ought to have been publicly available, on the Register. So, I remain unpersuaded by Westerby's submissions on this point and I am satisfied contacting the FCA was a sensible and proper route open to it to verify Joseph Oliver LDA's permissions before accepting business from it.

So, if Westerby had thought it necessary to contact the FCA directly to confirm Joseph Oliver LDA's permissions because the Register did not contain the relevant details, I do not think the restriction it refers to on what the FCA could confirm would have prevented it getting the information it needed. Joseph Oliver LDA did not have any top up permissions. That was a matter of public record. So, the FCA would have been able to confirm this to Westerby.

To be clear, even if there was an issue with Joseph Oliver LDA's entry on the Register I still do not think it is fair and reasonable to conclude that it was appropriate – or in accordance with its regulatory obligations - for Westerby to have proceeded with Mr B's application from Joseph Oliver LDA in those circumstances. Westerby ought to have independently checked and verified Joseph Oliver LDA's permissions before accepting business from it. If there was no information available or accessible on the Register at the relevant time to reveal the permissions position of Joseph Oliver LDA, then Westerby ought to have either found another way to verify Joseph Oliver LDA's permissions, or it ought to have declined to accept any applications from Joseph Oliver LDA until such a time as it could verify the correct position on Joseph Oliver LDA's permissions.

Furthermore, if Westerby was simply unable to independently verify Joseph Oliver LDA's permissions at all – a position I think is very unlikely given the available evidence - I think it is fair and reasonable to say that Westerby should have then concluded that it was unsafe to proceed with accepting business from Joseph Oliver LDA in those circumstances. In my opinion, it was not reasonable, and not in-line with Westerby's regulatory obligations, for it to proceed with accepting business from Joseph Oliver LDA if the position was not clear.

So, to summarise, I remain satisfied:

- It was not fair and reasonable for Westerby to proceed to accept business from Joseph Oliver LDA if, as Westerby says, it was unable to establish what permissions Joseph Oliver LDA held.

- In that case Westerby should have sought confirmation from the FCA as to whether Joseph Oliver LDA held any top up permissions. And, as I am satisfied this would have been a matter of public record, I am satisfied the FCA would have been able to confirm whether or not Joseph Oliver LDA held any permissions.

- Alternatively, if it was unable to independently verify Joseph Oliver LDA's permissions, Westerby should simply have declined to accept business from Joseph Oliver LDA.

Could Westerby have relied on what Joseph Oliver LDA told it?

In its response to my provisional decision Westerby maintains it was reasonable for it to rely on what Joseph Oliver LDA told it. I have carefully reconsidered this point, but have not been persuaded to depart from my provisional findings. So, again, I have largely repeated my provisional findings – having taken into account the relevant points Westerby has made in its response to my provisional decision.

Westerby says that it agreed Terms of Business with Joseph Oliver LDA ("the Agreement") and, in signing the Agreement, Joseph Oliver LDA confirmed it held the permissions it required.

Westerby, in previous submissions, has referred to FCA's thematic review TR16/1, and to Gen 4 Annex 1 of the FCA Handbook. These set out respectively that: firms can rely on factual information provided by other EEA-regulated firms as part of their due diligence process (TR/16/1, Para 5), and the statutory status disclosure incoming EEA firms are required to make.

COBS 2.4.6R (2) provides a general rule about reliance on others:

"(2) A firm will be taken to be in compliance with any rule in this sourcebook that requires it to obtain information to the extent it can show it was reasonable for it to rely on information provided to it in writing by another person."

And COBS 2.4.8 G says:

"It will generally be reasonable (in accordance with COBS 2.4.6R (2)) for a firm to rely on information provided to it in writing by an unconnected authorised person or a professional firm, unless it is aware or ought reasonably to be aware of any fact that would give reasonable grounds to question the accuracy of that information."

So, it would generally be reasonable for Westerby to rely on information provided to it in writing by Joseph Oliver LDA, unless Westerby was aware or ought reasonably to have been aware of any fact that would give reasonable grounds to question the accuracy of the information.

In the Agreement Joseph Oliver LDA warranted that it had the required permissions to introduce SIPPs business. However, the Agreement appears to be a generic document and not specific to Joseph Oliver LDA. It does not refer to, nor require either party to confirm or warrant, the accuracy of information supplied during a prior due diligence process.

The Agreement provides as follows:

"The Intermediary warrants that he/she is suitably authorised by the Financial Services Authority in relation to the sale of the SIPP, and advice on underlying investments where appropriate, and will maintain all authorisations, permissions, authorities, licences and skills necessary for it to carry out its activities under this contract and will in all aspects comply with all Applicable Laws".

In my view, this does not amount to a clear statement that Joseph Oliver LDA had the required top up permissions for it to advise on and arrange personal pensions in the UK that Westerby would be entitled to rely on. The activity of advising on rights under personal pension schemes is not mentioned; rather, the authorisation is said to relate to "*the sale of the SIPP*" which is an ambiguous term. And the warranty that "he/she is suitably authorised" is generic and does not refer specifically to top up FCA permissions being required and Joseph Oliver LDA warranting that it has top up permissions to conduct personal pensions business in the UK.

After carefully considering the terms of the Agreement I am not satisfied on the evidence provided that Westerby did establish what top up permissions Joseph Oliver LDA required to be arranging and giving advice on personal pensions in the UK and that it requested, and received, confirmation from Joseph Oliver LDA that it held those permissions. I am also not satisfied, for the reasons given above, that Westerby met its regulatory obligations in seeking to rely on the terms of the Agreement to conclude that Joseph Oliver LDA warranted it had the required top up permissions.

In any event, it is my view that Westerby should have done more to independently verify that Joseph Oliver LDA had the required top up permissions. If Westerby had carried out independent checks on Joseph Oliver LDA's permissions as required by its regulatory obligations, it ought to have been privy to information which did not reconcile with what Joseph Oliver LDA had told it about its permissions. So, in failing to take this step, I think it is fair and reasonable to conclude that Westerby did not do enough in order to establish whether or not Joseph Oliver LDA did have the permissions it required.

So, for all the reasons I've set out above, I do not think COBS 2.4.6R (2) applies to the Agreement the parties entered into. However, I've also given careful thought to whether it, was reasonable for Westerby to rely on it generally. I note Westerby has referred, in previous submissions, to the FCA's thematic review TR16/1 and to Gen 4 Annex 1 of the FCA Handbook, and I have considered this question with those details in mind. However, I am not satisfied there was any other basis on which it was reasonable for Westerby to rely on the meetings and Agreement, for much the same reasons as I have given above in relation to COBS 2.4.6R (2).

As the 2009 Thematic Review report makes clear, good practice, consistent with a SIPP operator's regulatory obligations under the Principles, included:

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.

The 2009 report also makes it clear that a SIPP operator should have systems and controls which adequately safeguarded their clients' interests. So, it was good practice to confirm a firm had the appropriate permissions and to do so in a way which adequately safeguarded their clients' interests. And I do not think simply asking the firm if it had the permissions or requiring it to sign something providing this confirmation was sufficient to meet this standard of good practice. This is a view Westerby itself appears to have shared at the time. It has told us it checked the Register. It has also told us its procedure was to check the Register every time a SIPP application is received from an introducer, and every time advisor fees are paid from the SIPP. It says that, in its view, this demonstrates good practice, as per the FSA's 2009 thematic review report. That is a view I share.

So Westerby should not have – and did not – rely solely on the Agreement. And, as mentioned above, for all the reasons I have given, I think Westerby's check of the Register ought to have led to the conclusion that Joseph Oliver LDA did not have the required top up permissions (i.e. if the information on Joseph Oliver LDA's Permission page had been correctly recorded), or in the alternative, that the Register did not record the information on Joseph Oliver LDA's Permission page in order for Westerby to confirm the position one way or the other (for example, if the permission page had erroneously been left blank). This means that either Westerby ought to have become aware of information which did not reconcile with what Joseph Oliver LDA had told it about its permissions in the meetings and the Agreement, or that it was still under a regulatory obligation to undertake further enquiries to independently check Joseph Oliver LDA's permissions, and by failing to do so, it did not meet the requirements it was under as a regulated SIPP operator.

If the advisor was instead JOML?

As noted at the outset, it is not actually clear which business Westerby accepted the application from here – Joseph Oliver LDA or JOML. As set out above, on the SIPP application form the name of the firm was simply given as "*Joseph Oliver*" and the E-Portfolio solutions application recorded the financial advice firm as "*Joseph Oliver Marketing Limited*".

I remain satisfied that, if the advisor was JOML, it was engaged in regulated activities. And so it was breaching the General Prohibition, which prohibits unauthorised business from carrying out regulated activities. This is a fundament of financial services regulation in the UK and, as such, I think it fair and reasonable for Westerby to have been aware of it. And I therefore think it is fair and reasonable to say Westerby should have refused to accept either the SIPP or investment application from JOML

However, I have again only briefly covered this point as there is evidence to show Mr Fletcher was representing Joseph Oliver LDA at the time and Westerby says the provider of the E-Portfolio platform has confirmed its relationship was with Joseph Oliver LDA, not JOML. So I think the likely outcome, had Westerby either assumed the application(s) were advised on by JOML and rejected it/them on that basis, or have queried on the basis the application(s) had to be advised on by an authorised business, would have been that the application(s) was/were then submitted through Joseph Oliver LDA. However, as I set out in the next section, I think the involvement of JOML should reasonably have been viewed as an anomalous feature.

Anomalous features

I remain of the view Westerby ought to have identified a risk of consumer detriment here.

Mr B was taking advice on his pension from a business based in Portugal. That advice was to transfer from a conventional pension scheme with a large life assurance business into a SIPP, and then to send the majority of the money transferred into the SIPP to investments based in Mauritius and/or the Cayman Islands. The investments involved were unusual, and specialised. And the chances of them being suitable investments for a significant portion of a retail investor's pension were very small. So, given the relevant factors, Westerby ought to have viewed the application from Mr B as carrying a significant risk of consumer detriment. And it should have been aware that the role of the advisor was likely to be a very important one in the circumstances – emphasising the need for adequate due diligence to be carried out on Joseph Oliver LDA to independently ensure it had the correct permissions to be giving advice on personal pensions in the UK.

I do not expect Westerby to have assessed the suitability of such a course of action for Mr B – and I accept it could not do that. But, in order to meet the obligations set by the Principles (and COBS 2.1.1R), I think it ought to have recognised this as an unusual proposition, which carried a significant risk of consumer detriment. So, it ought to have taken particular care in its due diligence – it had to do so to treat Mr B fairly and act in his best interests.

Another feature of concern in this case is that the investment application – which Westerby signed - does not specify what investments are to be made on the E-Portfolio platform. And, as noted above, that application refers to an unauthorised business - JOML. I note Westerby expressed the view in its response to my provisional decision that JOML was a branch of Joseph Oliver LDA but, as mentioned, I am not satisfied that was the case.

I think these should reasonably have been viewed by Westerby as further risks of consumer detriment. And are therefore further reasons why it ought to have taken particular care in its due diligence, to treat Mr B fairly and act in his best interests.

In any event, regardless of the points I have made above about anomalous features of the proposed business, I am of the view that Westerby ought to have properly checked Joseph Oliver LDA's permissions in order to comply with its regulatory obligations. I make the above point only to highlight the importance of carrying out this check.

In conclusion

I have not been persuaded to depart from the conclusion I reached in my provisional decision. To confirm, that is:

Westerby ought to have identified that Joseph Oliver LDA needed top up permissions to advise on and make arrangements for personal pensions in the UK, and taken all the steps available to it to independently verify that Joseph Oliver LDA had the required permissions.

If Westerby had taken these steps, it would have established Joseph Oliver LDA did not have the permissions it required to give advice or make arrangements for personal pensions in the UK, or that it was unable to confirm whether Joseph Oliver LDA had the required permissions.

In either event, it was not in accordance with its regulatory obligations nor good industry practice for Westerby to proceed to accept business from Joseph Oliver LDA.

Additionally, Westerby ought to have considered the anomalous features of this business I have outlined above. These were further factors relevant to Westerby's acceptance of Mr B's application which, at the very least, emphasised the need for adequate due diligence to be carried out on Joseph Oliver LDA to independently ensure it had the correct permissions to be giving advice on personal pensions in the UK.

It is fair and reasonable in the circumstances of this case to conclude that none of the points Westerby has raised are factors which mitigate its decision to accept Mr B's application from Joseph Oliver LDA.

I am therefore satisfied the fair and reasonable conclusion in this complaint is that Westerby should not have accepted Mr B's SIPP application from Joseph Oliver LDA.

Is it fair to ask Westerby to pay Mr B compensation in the circumstances?

Would the business have still gone ahead if Westerby had refused the application?

I remain satisfied that if Westerby had refused to accept Mr B's application from Joseph Oliver LDA, and explained to Mr B why it was not able to do so, Mr B would not have continued to accept or act on pensions advice provided by Joseph Oliver LDA (as he would then have been aware it did not have permission from the FCA to provide such advice). And I think it very unlikely advice from a business with the required FCA permissions would have resulted in Mr B taking the same course of action. I think it reasonable to say that business would have given suitable advice.

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."

But, in this case, I have seen no evidence to show Mr B proceeded in the knowledge that the investments he was making were high risk and speculative, and that he was determined to move forward with the transaction in order to take advantage of a cash incentive offered by Joseph Oliver LDA.

Instead, it appears Mr B understood the investment, via the SIPP, would offer a higher return than his existing pension, and he says he does not recall being told there was any risk involved.

I've also not seen any evidence to show Mr B was paid a cash incentive. It therefore cannot be said he was "incentivised" to enter into the transaction. I am satisfied that Mr B, unlike

Mr Adams, was not eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams.

In its response to my provisional decision Westerby says if it had rejected Mr B's application, Joseph Oliver LDA would simply have re-applied on behalf of Mr B to another SIPP operator, which Joseph Oliver LDA was using, and that SIPP operator would have accepted the application.

However, Mr B would still have had to be willing to do business with Joseph Oliver LDA after Westerby had rejected his application, for another application to proceed. And, for the reasons given, I am not persuaded Mr B would have continued to accept or act on pensions advice provided by Joseph Oliver LDA in those circumstances.

In the circumstances, I am satisfied it is fair and reasonable to conclude that if Westerby had refused to accept Mr B's application from Joseph Oliver LDA, the transaction would not still have gone ahead.

The involvement of Joseph Oliver LDA

In its response to my provisional decision Westerby has made points about the role of Joseph Oliver LDA. It says I have failed to properly address the contribution of Joseph Oliver LDA.

I have carefully considered these points but remain of the view it is fair to require Westerby to compensate Mr B for the full measure of his loss.

In this decision I am considering Mr B's complaint about Westerby. While it may be the case that Joseph Oliver LDA gave unsuitable advice to Mr B to switch from his personal pension to a SIPP and make unsuitable investments, Westerby had its own distinct set of obligations when considering whether to accept Mr B's application for a SIPP.

Joseph Oliver LDA had a responsibility not to conduct regulated business that went beyond the scope of its permissions. Westerby was not required to ensure Joseph Oliver LDA complied with that responsibility. But Westerby had its own *distinct* regulatory obligations under the Principles. And this included to check that firms introducing advised business to it had the regulatory permissions to be doing so. In my view, Westerby has failed to comply with these obligations in this case.

I am satisfied that if Westerby had carried out sufficient due diligence on Joseph Oliver LDA, and acted in accordance with good practice and its regulatory obligations by independently checking Joseph Oliver LDA's permissions before accepting business from it, Westerby would not have done any SIPP business with Joseph Oliver LDA in the first place.

I am also satisfied that if Mr B had been told Joseph Oliver LDA was acting outside its permissions in giving pensions advice, he would not have continued to accept or act on advice from that business. And, having taken into account all the circumstances of this case, it is my view that it is fair and reasonable to hold Westerby responsible for its failure to identify that Joseph Oliver LDA did not have the required "top up" permissions to be giving advice and making arrangements on personal pensions in the UK.

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).

As I set out above, in my opinion it is fair and reasonable in the circumstances of this case to hold Westerby accountable for its own failure to comply with the relevant regulatory obligations and to treat Mr B fairly.

The starting point therefore, is that it would be fair to require Westerby to pay Mr B compensation for the loss he has suffered as a result of Westerby's failings. I have however carefully considered if there is any reason why it would not be fair to ask Westerby to compensate Mr B for his loss, including whether it would be fair to hold another party liable in full or in part. And I consider it appropriate and fair in the circumstances for Westerby to compensate Mr B to the full extent of the financial losses he has suffered due to Westerby's failings.

I accept that it may be the case that Joseph Oliver LDA, in advising Mr B to enter into a SIPP, is responsible for initiating the course of action that led to Mr B's loss. However, it is also the case that if Westerby had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr B would not have come about in the first place, and the loss he suffered could have been avoided.

In my provisional decision I noted that the document that sets out the terms of business between Westerby and Joseph Oliver LDA includes a section where the intermediary - Joseph Oliver LDA - agreed to indemnify Westerby for any loss it may suffer as a result of the intermediary acting beyond its authority. So this gives Westerby a form of recourse if it thinks Joseph Oliver LDA has breached the terms of this agreement. And I said that, in addition, Westerby can have the option to take an assignment of any rights of action Mr B has against Joseph Oliver LDA before compensation is paid.

Westerby says its investigations into the financial health of Joseph Oliver LDA indicate there to be very low prospects of recovery from Joseph Oliver LDA. And so in its view any indemnity from Joseph Oliver LDA and/or assignment of rights to any action against it from

Mr B is effectively worthless.

I accept that may be true and the financial standing of Joseph Oliver LDA may not be healthy. However, the key point here is that but for Westerby's failings, Mr B would not have suffered the loss of his pension. As a result, the financial standing of Joseph Oliver LDA and the fact that Westerby may not be able to rely on the terms of business to seek recovery under it does not persuade me to change my overall view. On that basis, it is fair in all the circumstances to require Westerby to pay compensation for the full measure of Mr B's loss, notwithstanding any failings by Joseph Oliver LDA.

Westerby has also referred to a decision I made against an EEA based business, about SIPP advice. The circumstances of that complaint are very different. In that decision, I found that the business should compensate the consumer for half the loss they had suffered, in circumstances where the SIPP operator had already paid compensation for half the loss. That is not the case here.

As I've highlighted above, I have to decide what amounts to fair compensation and the fact that I have found that Westerby's failings has led to the entirety of Mr B's loss means that I consider it fair that Westerby should compensate Mr B to the full extent of that loss. I do not therefore think my findings here are inconsistent with the approach taken in that particular complaint, which in any event related to an entirely different set of facts and circumstances.

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

Opportunity to mitigate losses

I have carefully reconsidered this point but remain of the view that it would not be fair for any reduction to be made to fair compensation on the basis of a failure by Mr B to mitigate his loss.

In its response to my provisional decision Westerby says it was acting in the best interests of the investors in keeping an eye on the investments and flagging issues with them. In its view, following its November 2014 letter any investor would have sought independent financial advice, or at the very least made some reasonable lines of enquiries. It says there is no evidence that Mr B would have sought independent advice from a regulated advisor even if the suggestion had been made. It adds that even if it had not referred Mr B back to Abana in November 2014 Mr B would have reverted back to Mr Fletcher regardless. And Mr Fletcher would have said that Westerby (and apparently others) were "*scaremongering*", which is what it understands Mr Fletcher told other investors.

Finally, Westerby says that in the complaint which was the subject of the published final decision, the complainant was able to redeem his funds in May 2016. So it seems likely that Mr B could have mitigated his losses with a timely redemption request.

I have carefully reconsidered this point but do not think it is fair for any reduction to be made to fair compensation on the basis of a failure by Mr B to mitigate his loss.

I do not think it fair to say Mr B should have made a redemption request when Westerby wrote to him in November 2014. That letter required Mr B to seek advice, and urged him to contact his financial advisor, Abana. I note there is no evidence to show Mr B contacted

Abana. And I note Westerby's view is that it would have been reasonable for Mr B to take some action. But if Mr B had taken action, it is likely he would have taken the action Westerby "strongly urged" him to take – to seek advice from Abana. And Westerby's view – which I share – is that such a course of action would have been unlikely to lead to Mr B being advised to make any changes.

I also remain of the view that Westerby did not act in accordance with its regulatory obligations in sending this letter. I accept Westerby's point that it was acting in Mr B's interests by highlighting issues with the investments he had made. But, acting fairly and reasonably, it should by this point have concluded Abana did not have the FCA permissions required to give the advice it was urging Mr B to take. On the complaints about introductions from Abana, Westerby says its process was to check an advisory firm's permissions every time it received an application to open a SIPP, and every time an advisor's renumeration was to be paid. So, by the time Westerby wrote to Mr B in November 2014, it would have had many opportunities to discover that Joseph Oliver LDA and then Abana did not have the top up permissions they needed to give advice or make arrangements on personal pensions in the UK. For Westerby to have suggested that Mr B seek advice from Abana once problems with the funds he had invested in had come to light, is a further failing of its regulatory obligations.

By the time of the June and July 2015 letters to Mr B from Westerby, Abana FS – a UK based firm authorised by the FCA – had replaced Abana. I note Westerby concludes in the July 2015 letter that Abana FS Ltd was not sufficiently independent (I assume because of its links to Abana). And it recommends Mr B seek advice from an advisor authorised by the FCA. I think that was a fair and reasonable step to take in the circumstances, which goes some way towards correcting Westerby's earlier failure to meet its regulatory obligations by referring Mr B back to Abana.

I note Mr B does not appear to have taken any action following these letters. But I remain of the view that it is unlikely a redemption request would have been successful, in any event.

In relation to the Kijani fund, liquidators were appointed on 19 June 2015. Westerby's June 2015 letter notes that some investors had, at that time, made redemption requests over 90 days ago but not received any money. And I note that in the complaint which was the subject of the published decision Westerby summarised the situation with the Kijani fund in October 2015 as "*suspended, in liquidation. Likely to take a number of years. Unclear as to what will come back".*

So I think there is insufficient evidence to show any redemption request made in relation to the Kijani fund after issues with the fund were first highlighted in late 2014 would have been successful.

In my provisional decision I noted Westerby's December 2015 letter – which shows the SAMAIF was suspended at that time - is somewhat contradictory as it says the suspension of SAMAIF has been lifted but then says that the lift of the suspension is "not yet active" (i.e. it is still suspended).

I further note the 24 April 2016 update from SAMAIF suggests work to begin trading is still ongoing. And I also again note that in June 2016 Westerby said:

The SAMAIF is also currently not trading. It is our understanding that they are currently in communication with the Mauritian regulators in order to enable redemptions from the fund,however there are no definitive timescales as yet. A copy of their latest update is enclosed.

Which suggests SAMAIF was still suspended at this time. So I have also not seen sufficient evidence to show a redemption request made in relation to the SAMAIF would have been successful either – it seems the SAMAIF was suspended for a considerable period of time, and it is not clear if that suspension was ever lifted.

This is consistent with the published decision, which notes the amount paid to the SIPP in that case likely came from another investment rather than the Kijani or SAMAIF funds, as both appeared to have been suspended over the relevant period in that case.

Putting things right

My aim is to return Mr B to the position he would now be in but for what I consider to be Westerby's failure to verify that Joseph Oliver LDA had the correct permissions to be providing advice on pensions in the UK before accepting Mr B's SIPP application from it.

If Mr B had sought advice from a different advisor, I think it's more likely than not that the advice would have been to stay in his existing pension. I think it is unlikely that another advisor, acting properly, would have advised Mr B to transfer away from his existing pension. Alternatively, as Mr B was happy with his Standard Life pension and had only considered moving it due to contact from Mr Fletcher, he may well have simply decided not to seek further advice and keep the pension.

In light of the above, Westerby should calculate fair compensation by comparing the current position to the position Mr B would be in if he had not transferred from his existing pension. In summary, Westerby should:

1. Calculate the loss Mr B has suffered as a result of making the transfer.

2. Pay a commercial value to buy Mr B's share in any investments that cannot currently be redeemed.

3. Pay an amount into Mr B's SIPP so that the transfer value is increased to equal the loss calculated in (1). This payment should take account of any available tax relief and the effect of charges. It should also take account of interest as set out below.

Lastly, in order to be fair to Westerby, as set out above, it should have the option of payment of this redress being contingent upon Mr B assigning any claim he may have against Joseph Oliver LDA, to Westerby – but only in so far as Mr B is compensated here. The terms of the assignment should require Westerby to account to Mr B for any amount it subsequently recovers against Joseph Oliver LDA that exceeds the loss paid to Mr B.

I have explained how Westerby should carry out the calculation set out at 1-3 above in further detail below:

Calculate the loss Mr B has suffered as a result of making the transfer

To do this, Westerby should work out the likely value of Mr B's pension as at the date of this decision, had he left it where it was instead of transferring it to the SIPP.

Westerby should ask Mr B's former pension provider to calculate the current notional transfer value had he not transferred his pension. If there are any difficulties in obtaining a notional valuation then the FTSE UK Private Investors Income Total Return index should be used to calculate the value. That is likely to be a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

The calculation should take account of the value of any cash held in the SIPP currently, and any contributions or withdrawals made by Mr B. Any existing value of the investment should be covered by the next step.

Pay a commercial value to buy any investments which cannot currently be redeemed.

The SIPP only exists because of the investments made in 2013. In order for the SIPP to be closed and further SIPP fees to be prevented, any remaining investments need to be removed from the SIPP.

To do this Westerby should reach an amount it is willing to accept as a commercial value for the investments, and pay this sum into the SIPP and take ownership of the relevant investments.

If Westerby is unwilling or unable to purchase the investments the value of them should be assumed to be nil for the purposes of the loss calculation.

Westerby may ask Mr B to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the investments. That undertaking should allow for the effect of any tax and charges on the amount Mr B may receive from the investments and any eventual sums he would be able to access from the SIPP. Westerby will need to meet any costs in drawing up the undertaking.

Pay an amount into Mr B's SIPP so that the transfer value is increased to equal the loss calculated in (1).

I am not certain whether, currently, Mr B can pay the redress into a pension plan. If he can, and assuming his doing so wouldn't give rise to any allowance or protection issues, the compensation should be reduced to notionally allow for the income tax relief Mr B could claim. The notional allowance should be calculated using Mr B's marginal rate of tax. For example, if Mr B is a basic rate taxpayer, the total amount should be reduced by 20%. I note Mr B says he thinks he can pay the money into a pension, but that he won't receive tax relief. It is my understanding that a payment in of compensation will be treated as a contribution by HMRC and hence be eligible for tax relief – and this is the approach we generally take when awarding compensation in pension complaints. However, to be clear, no allowance should be made for tax relief if Mr B is able to demonstrate he is not entitled to receive tax relief.

On the other hand, Mr B may not currently be able to pay the redress into a pension plan. But had it been possible to pay the compensation into the plan, it would have provided a taxable income. Therefore, the total amount to be paid to Mr B should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr B's marginal rate of tax in retirement. For example, if Mr B is likely to be a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr B would have been able to take a tax-free lump sum, the notional allowance should be applied to 75% of the total amount.

I note Mr B refers to an amount arising from "contracting out" of part of the state pension, but any contributions Mr B made into previous schemes through contracting out should be reflected in the value of his pension – they aren't ringfenced sums or benefits that are added at retirement age – and so will form part of the compensation I set out. If Mr B feels he has lost benefits as a result of an earlier switch (i.e. before the switch to the Westerby SIPP) that is, in any event, something which is beyond the scope of his complaint against Westerby.

SIPP fees

If the investments can’t be removed from the SIPP, and it hence cannot be closed after compensation has been paid, Westerby should pay Mr B an amount equivalent to five years’ of future fees, to ensure its unlikely Mr B will have to pay further fees for holding the SIPP. Five years should allow enough time for the issues with the investments to be dealt with, and for them to be removed from the SIPP. As an alternative to this, Westerby can agree to waive any future fees which might be payable by Mr B’s SIPP.

consequential loss

I note Mr B refers to having to take an equity release, after he retired early but was unable to follow his original plans due to illness. I am sorry to hear of Mr B’s health problems, but I am not persuaded the cost of the equity release is a direct consequence of Westerby’s actions. And it seems Mr B’s original plans were based on taking his Westerby pension when he reached state pension age so if he had been able to take his Westerby pension earlier, to address the income shortfall resulting from his illness, he would then have had a shortfall later on. So either way it seems his provisions would not have been sufficient in the circumstances and he would have had to find a means of making up his income shortfall.

interest

The compensation resulting from this loss assessment must be paid to Mr B or into his SIPP within 28 days of the date Westerby receives notification of his 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 is not paid within 28 days.

My final decision

For the reasons given, my decision is that I uphold Mr B’s complaint. Westerby Trustee Services Limited should calculate and pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr B to accept or reject my decision before 4 April 2022.

John Pattinson
Ombudsman