DRN-3544621

The complaint

Mr P complains that Westerby Trustee Services Limited ("Westerby") didn't fulfil its regulatory obligations when dealing with his funds and should have done more due diligence before accepting the investments he made in his Self-Invested Personal Pension ("SIPP"). He doesn't think Westerby lived up to what he understood of the word 'trustee' in its title, and he'd like his pension funds returned to him.

Mr P told us he thought he'd "*dealt with companies that were FCA compliant*", and explained that he'd wanted low to medium risk investments, nothing high risk. He said he should be compensated for the loss of his pension.

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

Westerby's relationship with Mr P began in late 2013 when it received his application for a SIPP. Mr P's application, signed on 21 October 2013, confirmed he wished to transfer the cash value of five existing personal pension arrangements into the SIPP with an estimated transfer value of close to £94,000. At the time of the application Mr P was approaching 65 years of age and he indicated that he wanted to retire "*ASAP*".

Section 9 of the application asked, "*Do you have a financial adviser?*" This was answered "*yes*" and the details of Mr F of "*Abana*" were added. Abana Unipessoal Lda ("Abana") is a financial adviser firm based in Portugal. In December 2013, Abana passported into the UK on an Insurance Mediation Directive (IMD) services passport from 12 March 2013 to 29 December 2015 and an IMD branch passport from 8 January 2014 to 7 January 2016. This meant it was authorised to carry out some regulated activities in the UK between those dates. I will go into this in more detail in my findings below. The SIPP application also included an instruction to pay an initial commission of 3% of the total transfers to Mr F.

An application form for an investment platform called e-Portfolio Solutions (EPS), provided by a business called Asset Management International (AMI), was also completed. This recorded the financial adviser firm as being Abana. Mr F, in his capacity as a financial adviser with Abana, signed a declaration on the application on 31 October 2013. The application was signed by Mr P on the same date. Around the same time Mr P signed a form waiving his right to cancel his SIPP application during the 30-days cancellation period. His reason was "*to allow quicker investments*". The application form was signed by Westerby, as trustees of Mr P's SIPP, in December 2013 and sent on to AMI.

In January 2014 the SIPP account was established, the transfers began to come in and Mr P received a pension commencement lump sum of £15,339 from Westerby.

On 23 April 2014 a handwritten letter was sent to Westerby, purporting to be from Mr P. It stated he was fully aware of the risks involved with his chosen investments and asked it to follow his previously given instructions and invest 50% of his fund with the Kijani Commodity Fund and 50% with the Swiss Asset Micro Assist Income Fund ("SAMAIF"). The letter read:

> *"… I simply ask you to make the investments and forward the remainder of my tax free cash ASAP and I do not wish any other contact from your company regarding my investment or tax free cash requirements. Thank you*."

Mr P has no recollection of writing this letter.

Mr P's monies were invested in the Kijani Commodity Fund and in the SAMAIF. Both of these funds had initially been based in Mauritius (with one later moving to the Cayman Islands).

A further lump sum of £8,066 was paid to him by Westerby in May 2014.

Updates on the investments

On 11 November 2014 Westerby wrote to Mr P about his investments with AMI. It explained that the funds Mr P held would, following a Policy Statement from the Financial Conduct Authority (FCA) in August 2014, be classed as non-standard assets. It explained that such assets are often speculative and high risk, and that it only permitted such assets where full investment advice had been provided by a regulated financial adviser. It further explained that the investments might be higher risk than Mr P originally considered, and it was therefore imperative that Mr P discuss this with his financial adviser. It provided the contact details for Abana.

Westerby's letter also said the Mauritian Financial Services Commission had issued enforcement orders against the Kijani Fund and the SAMAIF. They said they had not established what the enforcement orders related to, but that no new investment in the funds was permitted. Westerby asked Mr P to confirm he'd sought regulated financial advice from Abana and wanted to continue to hold the investments. Mr P provided this confirmation on 12 November 2014.

Although he can't recall the date, Mr P has told us he remembers contacting his adviser "*with a problem*" but, "*he assured me it was ok, nothing to worry about. That was the last time I saw or heard from him*".

In June 2015, Westerby sent a letter to Mr P providing an update on the Kijani fund. The letter explained:

- The Kijani fund was being investigated by auditors. The fund managers had taken the decision to liquidate all assets and return client investments within 30 to 60 days.
- This information had been given to Westerby by AMI but it had not been able to ascertain who made the statement originally.
- Westerby were aware some investors in the Kijani fund were still awaiting settlement of deals that were placed more than 90 days ago.
- They strongly recommended that Mr P contact his regulated financial adviser.
- Abana customers were being referred to a new business called Abana FS Ltd, which was directly authorised by the FCA.

Later that month, Abana wrote to Mr P explaining that it wasn't authorised to provide the advice it had given him. It also explained:

> "*The letter from Westerby* [the June 2015 one I mention above] *states that we are in the process of 'novating' (moving over) all of our clients to Abana FS Ltd ("Abana FS"). I wish to clarify this matter by stating that this is not the case. We do not consider Abana FS to be suitably independent to provide advice to you about your SIPP*."

In July 2015 Westerby told Mr P the Kijani fund had been suspended (the repayment of the investment earlier mentioned did not materialise) and the business ultimately behind AMI and the EPS platform had had its licence suspended by the Mauritian Financial Services Commission. He was also told the SAMAIF had been suspended.

On 23 December 2015 Westerby wrote to Mr P again. They 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 £36,711. 08 (SAMAIF expected to trade again in February)*
>
> *Illiquid Funds £37,398. 06 (**this is not a true value - please see below**)*"

The letter also invited Mr P to let them know if he wished to redeem any or all of the liquid funds within the SIPP EPS account, and set out the redemption timescales for what were described as the "*underlying funds*". Westerby explained that the suspension on the SAMAIF had been lifted, that the fund was expected to begin trading again in February 2016 and that they'd contact Mr P again once they had further information. Once again, Westerby recommended that Mr P seek independent financial advice.

Mr P's new financial adviser contacted Westerby on 20 January 2016 and a redemption form was sent to them the same day for Mr P's signature. Westerby has told us the redemption form was never returned to it.

On 24 May 2016 Westerby sent a further update to Mr P. They said the auditor's investigations into the Kijani Fund were ongoing and it was likely the liquidation of this fund would take a number of years. About the SAMAIF, the letter said:

> "*The SAMAIF is still not trading. We understand that the managers of the fund are working with the Mauritius Financial Services Commission (MFSC) in order to gain regulatory approval for the fund to trade, however we have not been provided with a timescale for this to be completed …*
>
> *"ePortfolio Solutions had previously treated the SAMAIF as part of their "liquid" Managed Portfolio L, as it had been anticipated that the fund would begin trading*

imminently. As the fund is still not trading they are now including the SAMAIF as part of their "suspended" Managed Portfolio S for the time being."

Under the heading 'Your SIPP Value' the letter continued:

"*The current value of your SIPP is as follows:*

ePortfolio Solutions Account

EPS Managed Portfolio L	*£4,374.17*
EPS Managed Portfolio S	*£64,453.77*
GBP Cash	*£1,220.63*

Managed Portfolio L represents liquid (tradeable) funds while Managed Portfolio S represents non-tradeable funds, ie. Kijani Commodity Fund and SAMAIF. For the purposes of calculations of benefits, we will treat the funds within Managed Portfolio S as having a nil value. This is due to the uncertainty regarding the true value of these funds at this time.

Investments held outside the ePortfolio Solutions Account

SIPP Bank Account £351.42"

Finally, Westerby explained that an independent third-party compliance consultancy firm had completed their investigation of the advice provided to Mr P by Abana and "*deemed that this advice was not suitable*". Westerby said:

"*… we understand that they will be carrying out redress calculations over the course of the next month. The aim of the redress is to put your fund* [in] *a position equivalent to that you would have been in had you not invested into the funds under the ePortfolio Solutions platform*."

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 an update from SAMAIF dated 24 April 2016, which suggested work to begin trading was still ongoing at that time.

The situation with either fund has not improved, and Mr P's investments in them, made on the EPS platform, currently have no realisable value.

In July 2016 Mr P accepted an offer of redress (£85,891.17) made to him by the independent compliance consultancy firm on behalf of Abana, but he did not receive any money.

I understand Abana ceased trading in 2020.

Mr P's complaint and Westerby's response

In July 2018 Mr P complained that Westerby hadn't fulfilled its regulatory obligations when dealing with his funds. He explained that the loss of his pension funds had left him in

financial difficulty; he'd had to move to a smaller, more affordable property and sell his car and personal belongings.

Westerby responded to Mr P's complaint on 5 September 2018, rejecting it. In summary they said:

- Westerby do not hold the necessary permissions to provide financial advice.
- They'd verified that Abana were authorised by the FCA to carry out business in the UK.
- At the time of Mr P's SIPP application the Financial Services Register did not provide details of Abana's permissions – "*Our only source of reference to ensure that the firm had the required permissions was through enquiry to the firm itself.*"
- It was the responsibility of Mr F as Mr P's adviser at Abana to ensure the funds selected were appropriate for Mr P's attitude to risk and capacity for loss.
- It's reasonable to believe Mr P would have been able to recover his funds if he'd instructed Westerby to redeem them in November 2014 or soon after Westerby's letter of 23 December 2015.

Overall, Westerby did not consider itself responsible for the loss of Mr P's funds. They said they'd accepted Mr P's SIPP application in good faith, based on the information available to them at the time.

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 2021 ("the published decision"). That final decision has been published on our website under DRN7770418.

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 and its latest submissions on this case are made with reference to the published decision.

After the published decision was issued, Westerby was asked to take it into consideration, as an important representative decision, in accordance with the relevant Financial Conduct Authority (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 outstanding complaint involving Abana – including Mr P'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.

Westerby's review of Mr P's complaint and its further submissions

In October 2021 Westerby declined to change its position on Mr P's complaint and set out the details of its review. They also made further, more general, submissions. For ease of reference I've grouped the key points Westerby made under appropriate headings. In summary, Westerby said:

Information available on the Financial Services Register in 2013

- In the published decision the Ombudsman relied heavily on communications with the FCA about the Financial Services Register ("the Register") and what information was available on the Register in 2013 but had failed to disclose the details of their communications with the FCA about this.

- The Ombudsman relied on the "*understanding*" of an unnamed member of staff at the FCA, regarding the historical content of a Register which is known to have been inaccurate. He relied on speculation, rather than fact; this *understanding* of what was on the Register in 2013 is not proof of what was on the Register at the relevant time.

- It is accepted that a "*permissions*" page existed on the Register at the relevant times, however it is not accepted that this contained any useful information relating to Abana – the Register simply did not record Abana's permissions.

- The FCA confirmed to Westerby, through correspondence in August and September 2021, 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. 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. So, had Westerby contacted the FCA in 2013 it would not have been able to provide any further information; it would have been unlawful for them to do so.

The Written Agreement/Terms of Business between Westerby and Abana

- Westerby was permitted by COBS 2.4.6R and 2.4.8G to rely on written information from other authorised parties unless it was (or ought reasonably to have been) aware that it was inaccurate.

- It was reasonable for Westerby to assume from the Written Agreement/Terms of Business, signed by Abana, that it had the necessary permissions. Taken with the meetings between Westerby and Abana, there were no reasonable grounds to question the accuracy of the information provided by Abana regarding its permissions.

- The Terms of Business was established after a meeting where Westerby had already received verbal assurance that the firm (Abana) held the necessary permissions to give pension advice. It was sufficient to confirm the previous verbal assurances with a written statement in the Terms of Business; it is beyond doubt that such a statement could be relied upon in a court of law.

The Adams v Options court cases and COBS 2.1.1R (the client's best interests rule), and the Principles for Businesses

- The judge in *Adams v Options* confirmed that a SIPP provider's duties must be read in the context of the contract – although there was an advisory relationship between Mr P and Abana, he had a separate execution-only contractual arrangement with Westerby which was distinct from his contractual relationship with Abana.

- In the published decision it is wholly unclear how Abana's contractually defined role is said to impact upon 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. The Ombudsman made no attempt whatsoever to identify any factor specific to Westerby which was said to justify the duty imposed under COBS

2.1.1R.

- Whilst the judge in *Adams v Options* didn't comment on the application of the Principles to SIPP providers, COBS 2.1.1R (which was central to Adams) is reflected in Principle 6; it follows that the interpretation of COBS 2.1.1R must inform the interpretation of this Principle.

- If COBS 2.1.1R is to be read in the context of the contract, it follows that other regulatory duties (including those that flow from the Principles) must be read in the same way.

Abana's responsibilities and apportionment between Westerby and Abana

- The Ombudsman failed to assess apportionment between Westerby and Abana. The Ombudsman decided that Westerby should compensate the consumer in the published decision for the full extent of his financial losses on the basis that, amongst other things, Westerby had routes (indemnity and/or assignment of consumer's rights of action against Abana) to recover any contribution from Abana; but Abana has ceased trading and has closed.

- Abana was responsible for the losses flowing from the advice given by their representatives. Abana offered redress to the clients introduced by them; it remains responsible for this redress. It would be unfair and unreasonable for this responsibility effectively to be devolved to Westerby.

- Although sympathetic to Mr P's situation, it's not fair or reasonable for Westerby to compensate Mr P for the losses flowing from poor advice by Abana.

s.27/s.20 FSMA

- Abana was an "authorised person" under s.31 FSMA under its EEA passport. It's clearly the intention of FSMA to make authorised parties responsible for ensuring they act within their own permissions, and that another authorised party is not to be held liable for their failure to do so. s.20 FSMA states that, while an authorised person carrying out a regulated activity outside of their permissions is in contravention of a requirement imposed by FSMA, the contravention does not make agreements unenforceable, or give rise to a right of action for breach of statutory duty. Whereas, under s.27 FSMA agreements made by authorised persons as a result of a regulated activity carried out by an unauthorised party can be made unenforceable; the risks of dealing with unauthorised parties are thrown onto the authorised party.

Mitigation of losses

- All of Abana's clients had two opportunities to mitigate losses – in November 2014 and December 2015.

- Even if Westerby had not referred to Abana in its November 2014 letter it's likely Mr P would have approached Mr F or one of his other associates at Abana.

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

- Mr P didn't return the redemption form sent to him in early 2016 – as a result he lost his opportunity to recover funds. At the very least he's responsible for approximately half of his losses.

Our Investigator's view

Our Investigator concluded in March 2022 that Mr P's complaint should be upheld. She said, in summary:

- SIPP operators should have systems and controls to protect consumers from the risk of fraud or unauthorised investment advice and to identify (and prevent) instances of consumer detriment.

- Westerby as the SIPP operator had to think very carefully about the quality of the business they were accepting from Abana, and they should have declined applications where there was a risk of consumer detriment. Declining an application would not have amounted to providing advice.

- To meet its regulatory obligations Westerby should have undertaken sufficient due diligence checks to ensure Abana had the required permissions to give advice on, and make arrangements in relation to, personal pensions in the UK before accepting Mr P's business from it.

- The regulated activities undertaken by Abana in this case did not fall under IMD passporting and so required FCA permission for Abana to conduct them in the UK.

- Westerby ought to have identified that Abana 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 should not, therefore, have accepted Mr P's application from it.

- From the evidence available it's reasonable to conclude that the format of the Financial Services Register, in or around the time Mr P'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.

- She did not accept Westerby's submission that information about a firm's permissions was simply not available for an online user in 2013. But, if there was no information available or accessible on the Register at the relevant time to reveal the permissions position of Abana, then Westerby ought to have declined to accept any applications from Abana until such a time as it could, verify the correct position on Abana's permissions.

- She did not accept that Westerby could rely on what Abana told it – the Written Agreement did not amount to a clear statement that Abana had the required top-up permissions for it to advise on and arrange personal pensions in the UK. Westerby should have done more to independently verify that Abana had the required top-up permissions.

- Our Investigator concluded that as Westerby shouldn't have accepted Mr P's SIPP application from Abana, it was fair and reasonable for Westerby to compensate Mr P for his financial loss. She set out how she thought this loss should be assessed.

In a supplementary view in May 2022, our Investigator added that she didn't think it was reasonable to expect Mr P to have done anything differently in response to the investments

updates Westerby sent to him from November 2014 onwards. She concluded that even if he had responded differently, she didn't think he would have been able to successfully redeem his funds.

Westerby's response to the Investigator's view

Westerby didn't accept what the Investigator said. I've summarised the key points of their response below. However, I confirm that I have carefully considered their submissions, both general and specific to Mr P's complaint, in their entirety. Westerby said:

- The Investigator re-wrote Mr P's complaint and re-fashioned a brand new complaint for Mr P. Mr P's own complaint was about the lack of information being provided to him by Westerby, not a complaint that Westerby didn't carry out sufficient due diligence on Abana.

- The Investigator held Westerby liable for Abana, an authorised party, acting outside of their permissions but s.20 and s.27 FSMA demonstrate that Parliament's intention was that an authorised party should not be held liable for losses flowing from another authorised party's breach of their own requirements.

- Westerby acted on an execution-only basis in relation to the creation of the SIPP. It was no part of Westerby's contractual obligations and/or legal obligations as set out in s.20 FSMA to Mr P to investigate the permissions of third-party advisers. It was also not for Westerby to have offered any advice to Mr P.

- Westerby has provided the Financial Ombudsman with an expert's report, amongst other things, to support its position that information about Abana's permissions was simply not available in 2013. Yet the Financial Ombudsman has decided that the information was available on the Register in 2013, citing unsubstantiated communications with the FCA. The Financial Ombudsman has not provided any of the disclosure requested in relation to its communications with the FCA. Westerby requests "*for the disclosure of the details of the contact at the FCA with whom the FOS communicated with about the Register and the contents of it at the relevant time; records of those communications; 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*". Not to provide this would be procedurally unfair.

- It is not accepted that the FCA would have been able to provide any further information to Westerby than what was on the Register – if an approach had been made to the FCA, it would not have confirmed the position. This information was not a matter of public record, as the Investigator suggests.

- The FCA's helpdesk told Westerby that the FCA couldn't give any information that wasn't on the public register and confirmed that such information should be confirmed with the firm in question. Westerby confirmed Abana's permissions with the firm – who confirmed orally and in writing that they had the requisite permissions.

- It was reasonable for Westerby to rely on what it was told by Abana about the permissions that it held, in accordance with COBS 2.4.6R(2) and COBS 2.4.8G. More could not have been done to verify Abana's top-up permissions.

- The points raised about the generic nature of the Written Agreement/Terms of Business between Westerby and Abana, and the ambiguity of some of the wording

are erroneous and irrelevant, and don't change the undertaking Abana made. It disagrees that the Written Agreement was generic in nature. It's drafted in line with the regulator's due diligence expectations and is fit for the purpose intended.

- Westerby undertook rigorous due diligence and rejected numerous investment propositions and advisers. Abana's representatives demonstrated to Westerby that they had good technical knowledge. It was reasonable to rely on the information provided by Abana in writing, and at meetings with them and the due diligence performed. At no time did they present any reason to doubt their credibility.

- Westerby undertook due diligence in accordance with the FCA's regulatory publications. Before accepting applications Westerby:

    - checked the FCA Register and were able to confirm that the firm was authorised and regulated by both the FCA (under reference 597069) and the Portuguese regulator (Abana was authorised and regulated in Portugal by the Instituto de Seguros de Portugal under reference 412378472)

    - checked the Register's permission page to discover that it was blank (even the IMD permission section had been negligently left blank – Westerby also printed and retained copies of the continuing failure of the FCA to complete this section)

    - checked the Portuguese register which explained that Abana were authorised to advise on both "vida" ("life") and "não vida" ("non-life"), the latter Westerby understood meant investments and pensions, they being "non-life" products

    - confirmed with the firm their position about authorisation, permissions and standards

    - regularly checked the Register to confirm continuing authorisation and check for warning notices

    - maintained checks on the investment funds

    - conducted regular reviews of media publications and the regulator in Mauritius

    - confirmed Abana used other SIPP operator's products

    - checked application forms, that the applicants were genuine and that there was no money laundering involved

    - checked Companies House records and passports to verify the Directors of Abana, their addresses and signatures

    - satisfied itself that the investments were an HMRC permitted pension scheme asset

    - satisfied itself that there was no indication the investments were fraudulent, a scam, or linked to pension liberation

    - established that the funds could be easily valued and were realizable within 30 days.

- The Portuguese regulator subsequently confirmed to the independent compliance consultancy firm that Abana were authorised to advise on pension products. If Westerby had contacted the Portuguese regulator there is no reason to think they would have been told differently. There were no further checks that Westerby could have done that would have changed the outcome.

- The FCA has not to date raised any wrongdoing on Westerby's part – it's illogical that the Financial Ombudsman finds differently. The Financial Ombudsman should set out what further steps Westerby ought to have taken which would have provided Westerby with the information that Abana did not have the required permissions.

- Westerby's contract was with Abana and not Mr P – if Westerby had refused his application, Westerby would not have been in a position to contact Mr P to explain why his application had been rejected.

- If Westerby had rejected the application, Abana would simply have re-applied on behalf of Mr P to another SIPP operator, who would have accepted the application and Mr P would be in the same position as he is in now.

- In a letter dated 23 April 2014 to Westerby, Mr P confirmed that he was aware of the risks involved in his chosen investments. Nothing Westerby could have done would have prevented Mr P in making the investments. Mr P was clearly trusting of Abana and the letter shows that he was distrustful of Westerby and would not have heeded any information provided to him from Westerby without reverting firstly to Abana.

- It is not fair and reasonable for Westerby to compensate Mr P for the full extent of the financial losses he has suffered. Abana accept that they are liable for the losses suffered as a result of the advice. Notwithstanding Westerby's position that it should not be liable for any compensation to Mr P, a discount for the admission of liability from Abana or the redress offered by Abana should be factored in. Mr P should not be compensated for his losses twice.

- Abana should compensate Mr P for the full extent of his losses. Abana's actions were more serious than any alleged failures by Westerby as not only did Abana knowingly conduct advice on SIPPs outside of their permissions, but also warranted to Westerby that they had the necessary permissions to advise on SIPPs. They played the more significant, if not the only role, in causing the losses Mr P now claims.

- It is not understood why complaints against Westerby have been determined before those against Abana. The complaint against Abana should be decided first or at least at the same time as this complaint against Westerby. Abana should not escape any liability for their actions. Appropriate liability should be attributed to them for their involvement in the losses suffered by the individual complainants.

- Westerby's view is that Mr P ought to take responsibility for his own investment decisions. The Financial Ombudsman has failed to consider and/or take any account at all of Mr P's duty and failure to mitigate his losses.

- Mr P did not request redemption until 2016. Had Mr P or his adviser requested and returned the redemption form promptly after Westerby's 2014 letter, before the funds were suspended, it is highly likely that Mr P would have been able to recover 100% of his funds.

- If Mr P had acted promptly following Westerby's letter in December 2015 to mitigate his losses and request a redemption, this would likely have resulted in a significant

redemption of his funds, at least 50%. This cannot be disputed as this is what happened in relation to another investor.

- Whether or not there was a reference in Westerby's letter in November 2014 to Mr P to seeking advice from Abana is irrelevant and had no bearing on the outcome as Mr P would have reverted to his existing adviser, regardless. Westerby is not responsible for the (poor) advice from Abana and/or their representatives, nor Abana's actions to encourage the clients to stay in the funds.

Westerby also clarified the situation with the funds Mr P's money was invested in. They explained that Abana originally put him into the Kijani and SAMAIF funds directly, but later Mr F made arrangements (without Westerby's authority) for the funds to be placed into the "EPS Managed Fund" – a Special Purpose Vehicle (SPV) which acted as a "*fund of funds*", comprised of Kijani, SAMAIF and the TCA Global fund. When EPS started trading again, they split the funds into two portfolios – Managed Portfolio S containing Kijani, and Managed Portfolio L containing SAMAIF and TCA Global ("S" standing for "Suspended", and "L" for "Liquid"). SAMAIF was included in Portfolio L as it was expected to begin trading. Redemptions from this fund were made by the managers selling TCA Global – hence they were able to make redemptions initially, but TCA Global was ultimately depleted. Westerby said TCA Global was used to "*subsidise*" the early redemption requests in the expectation that SAMAIF would begin trading again. They said this was a decision Westerby had no control over.

As no agreement could be reached, the complaint has been passed to me to decide.

What I've decided – and why

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.

I acknowledge that Mr P originally complained about Abana in May 2017, and that complaint was prompted by the fact that despite his acceptance of Abana's offer of redress Mr P received no money. But Abana ultimately went out of business and wasn't in a position to satisfy any award that we might have made against it. So, that complaint was closed in July 2021, when Mr P withdrew it.

Mr P's complaint about Westerby, made in July 2018, was broad ranging. He wasn't sure exactly what Westerby's regulatory obligations were, but: he felt something had gone wrong which had caused him to suffer the loss of his pension (his "*lifeline to old age*"); told us he felt Westerby had just fobbed him off without giving him any information about where his pension had gone; and asked us to look into things.

In deciding what is fair and reasonable in the circumstances, it's appropriate to take an inquisitorial approach. And, ultimately, what I'll be looking at here is whether Westerby took reasonable care, acted with due diligence and treated Mr P fairly, in accordance with his best interests. And what I think is fair and reasonable in the light of that. So, I am going to focus on what I think is key – which, for the reasons I'll explain, I consider to be the checks

Westerby carried out on Abana before accepting business from it.

As a preliminary point I should also say 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, whilst I have considered all the submissions made by both parties, I have focussed here on the points I believe to be key to my decision about what is fair and reasonable in the circumstances.

I have first set out what I consider the relevant considerations are in this case. To confirm, when doing this, I have considered all the submissions Westerby has made – including those made on the *Adams v Options* court cases.

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 P'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 P'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."*

There are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr P's complaint. 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.

The facts of this case are also different, and I need to construe the duties Westerby owed to Mr P under COBS 2.1.1R in light of the specific facts of Mr P's case.

To confirm, I have considered COBS 2.1.1R – alongside the remainder of the relevant considerations, and within the factual context of Mr P'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 P 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 P on the merits of investing and/or transferring to the SIPP.

Overall, I am 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 P's case.

The regulatory publications

The FCA (and its predecessor, the Financial Services Authority – 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 adviser, if it is concerned about the suitability of what was recommended.*

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

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

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

The later publications

In the October 2013 finalised SIPP operator guidance, the FCA 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 unauthorised business warnings.*
>
> *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*

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

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

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

"Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers.

Examples of good practice we have identified include:

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

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

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

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

"Due diligence

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

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

- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme having checks which may include, but are not limited to:*

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

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

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

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

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

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

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

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

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

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

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

- *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 go 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 Abana. So, it clearly thought it was good practice to do so, at the very least.

I do not think the fact the "*Dear CEO*" letter post-dates the events that took place in relation to Mr P's complaint, mean that the examples of good practice it provides were not good practice at the time of the relevant events. The Principles that underpin that letter and the examples 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.

As part of its submissions Westerby has made the point that Abana was an "authorised person" under s.31 FSMA under its EEA passport and that s.20 FSMA explicitly shields authorised parties (such as Westerby) from the risks of accepting business from authorised parties acting outside of their permissions. Westerby highlights that this provision is in contrast to s.27 which shifts the risks of accepting business from *unauthorised* parties onto the authorised party. Westerby says, therefore, it's clearly the intention of FSMA to make authorised parties responsible for ensuring they act within their own permissions, and that another authorised party is not to be held liable for their failure to do so. Westerby contend that the Ombudsman's findings in the published decision contradict the legislation. Westerby has also previously submitted that parts of the regulatory publications referred to appear to directly contradict the intention of the legislation.

I have carefully considered Westerby's submissions, and the contents of s.20 and s.27 of FSMA. But to be clear, with regards to the contents of s.20, it's not my role to determine whether an offence has occurred or if there is something that gives rise to a right to take legal action. And I'm not making a finding here on whether Mr P's SIPP application and agreement with Westerby is void or unenforceable. Rather, I'm making a decision on what is fair and reasonable in the circumstances of this case – and for all the reasons I've set out above I'm satisfied that the Principles and the publications listed above are relevant considerations to that decision.

In determining this complaint, I need to consider whether, in accepting Mr P's SIPP application from Abana, 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 Abana had the required permissions to give advice on, and make arrangements in relation to, personal pensions in the UK before accepting Mr P's business from it.

Westerby says it did carry out due diligence on Abana 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 Abana 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 P's application from it.

The regulatory position

Abana 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 P'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, contractual scheme 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 P'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 Activities	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 IMD.

The guidance in SUP 13A.1.2G of the FCA Handbook at the time of Mr P's application for the SIPP (October 2013) 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 states (as at October 2013):

> "*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 4A permission from the appropriate UK regulator to do so (see the appropriate UK regulator's website: http://www.fca.org.uk/firms/about-authorisation/getting-authorised for the FCA and www.bankofengland.co.uk/pra/Pages/authorisations/newfirm/default.aspx for the PRA). 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 to the Act as a result of its other activities, the Part 4A permission is referred to in the Handbook as a top-up permission.*"

In the glossary section of the FCA Handbook "EEA authorisation" was defined in October 2013 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 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 Abana 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 Abana, 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 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 Abana required the relevant top-up permissions from FCA in order to carry on the regulated activities it was undertaking.

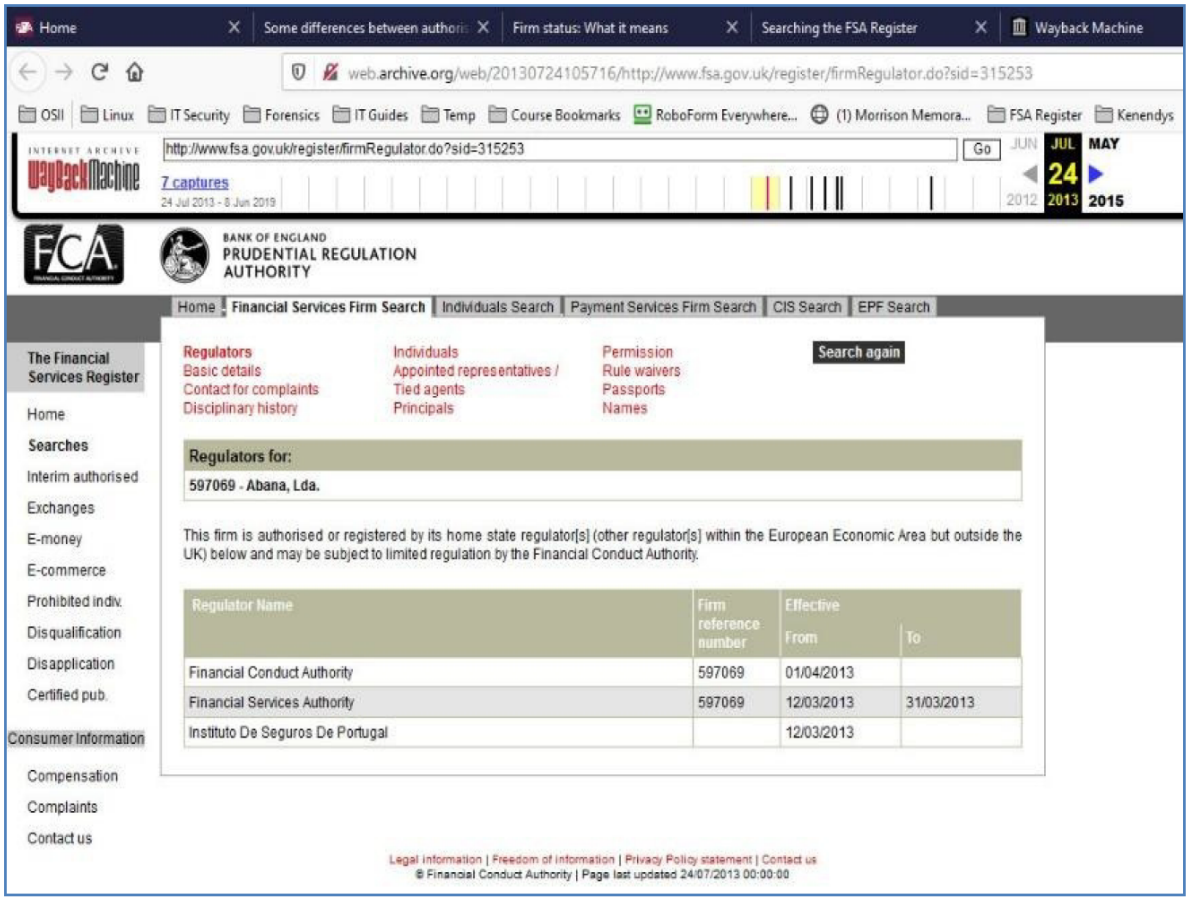
Westerby's checks on Abana's permissions

Westerby says it took appropriate steps to conduct due diligence on Abana and it could not and should not reasonably have concluded that Abana did not have the required top-up permissions. I have carefully considered all 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 Abana'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 Abana in the circumstances. And, to be clear, I think it fair and reasonable to say that the checks Westerby ought to have conducted on Abana's Register entry should have included a review of all the relevant information available.

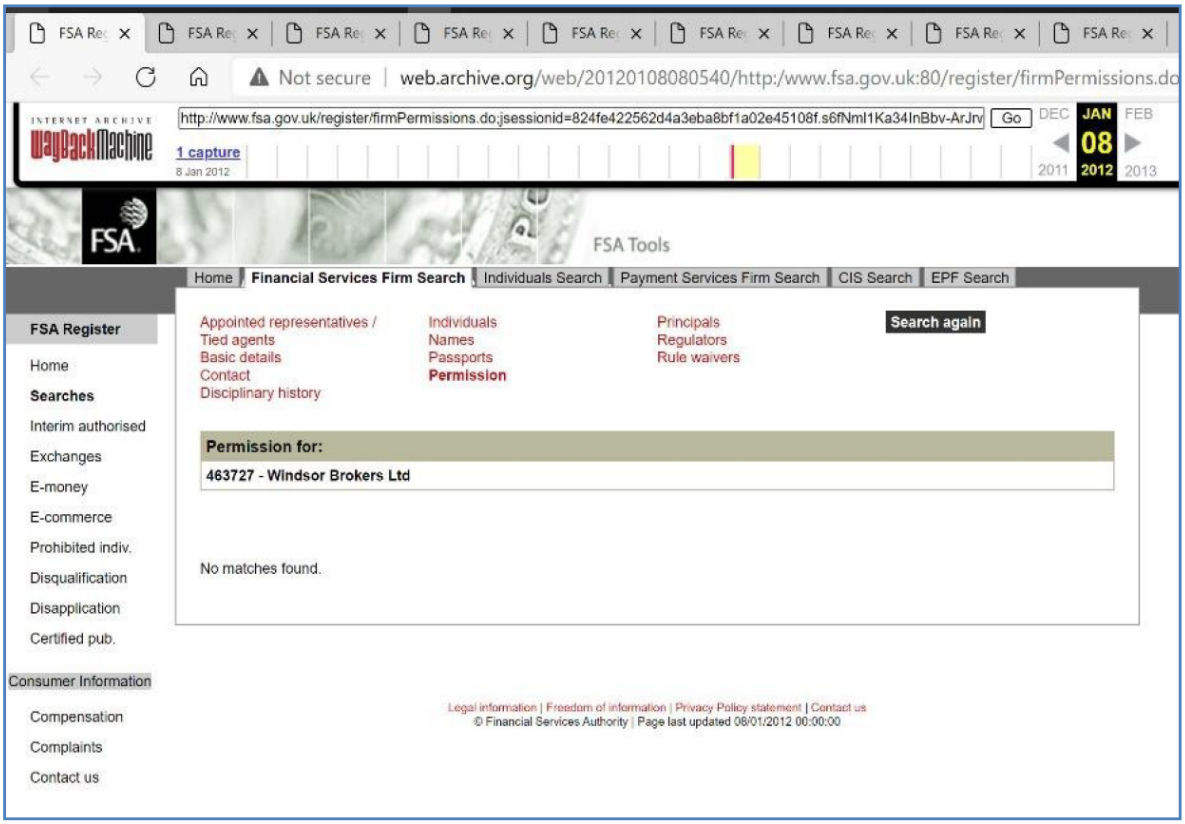
I have carefully considered the format of the Register in or around 2013 when Mr P's application was submitted by Abana. The third-party report on the Register provided by Westerby during the investigation of the complaint which was the subject of the published decision is helpful on the question of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



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. So, this screenshot shows that Abana'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 P'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 Abana's entry would have included a permission page at the relevant time.

Westerby's position, in short, is that the permission 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 P's SIPP application or earlier. The below example, dating from 2012, and relating to a Cypriot firm which, like Abana, 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 around the time of Mr P's application 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 Abana 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 P'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, 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. In other words, the FCA's response to our question supports what I've already said I'm satisfied has been demonstrated by the evidence available in this case.

I note Westerby has said more information should be provided about this. Westerby has been provided with the FCA's response to our question and has had ample opportunity (on

this complaint and other similar complaints under our consideration) to provide further information, expert reports and submissions on the format of the Register at the relevant time. 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.

Further, and as I've already mentioned above, the FCA's response to our question supports what I've already said I'm satisfied has been demonstrated by the evidence that's available in this case. So, my decision on this complaint would still be the same without the FCA's response to our question.

To summarise my conclusions so far, I am satisfied:

- That in order to meet its regulatory obligations, Westerby ought to have independently checked and verified Abana's permissions before accepting business from it. And it is fair and reasonable to expect Westerby to have checked the *totality* of Abana'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 Abana on the Register at the time of Mr P's application would have included a "Permission" page which Westerby ought to have checked.

If Westerby did check the Permission page for Abana 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 Abana at the relevant time. So, we have no evidence of what specific information was available on this page for Abana 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 Abana's Register entry. And, if this page had erroneously failed to contain any information on whether or not Abana 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 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 Abana needed permission from the FCA to give advice on and make arrangements for personal pensions in the UK. Therefore, before accepting business from Abana, Westerby needed to confirm that Abana held the required permissions. And, for the reasons I have set out above, I am satisfied that Abana's entry on the Register at the relevant time would have included a page with information on its permissions. And, 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 P's application from Abana 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.

I accept the 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 are something which are recorded on the FCA's public register, and that this was also the case in 2013 when Westerby accepted Mr P's application from Abana. So, although we do not have evidence of exactly what did appear on Abana'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 Abana did not – in fact – have the required permissions, as this was information that ought to have been publicly available, on the Register. So, I am not persuaded 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 Abana's permissions before accepting business from it.

So, if Westerby had thought it necessary to contact the FCA directly to confirm Abana'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. Abana 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 Abana'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 P's application from Abana in those circumstances. Westerby ought to have independently checked and verified Abana'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 Abana, then Westerby ought to have either found another way to verify Abana's permissions, or it ought to have declined to accept any applications from Abana until such a time as it could verify the correct position on Abana's permissions.

Furthermore, if Westerby was simply unable to independently verify Abana'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 Abana 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 Abana if the position was not clear.

So, to summarise:

- I am satisfied it was not fair and reasonable for Westerby to proceed to accept business from Abana if, as Westerby says, it was unable to establish what permissions Abana held.

- In that case Westerby should have sought confirmation from the FCA as to whether Abana 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 Abana held any permissions.

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

Could Westerby have relied on what Abana told it?

Westerby says that it agreed Terms of Business with Abana ("the Agreement") and, in

signing the Agreement, Abana confirmed it held the permissions it required.

Westerby has referred to the 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 Abana, 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 Abana warranted that it had the required permissions to introduce SIPPs business. I've noted what Westerby's said in response to the Investigator's view about the Agreement. And I've reviewed the contents of the Terms of Business Agreement of a different SIPP that Westerby has provided to us. However, I agree with the Investigator that the Agreement appears to be a generic document and not specific to Abana. 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 Abana 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 permissions being required and Abana 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 Abana required to be arranging and giving advice on personal pensions in the UK and that it requested, and received, confirmation from Abana 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 Abana 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 Abana had the required top-up permissions. If Westerby had carried out independent checks on Abana's permissions as required by its regulatory obligations, it ought to have been privy to information which did not reconcile with what Abana 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 Abana 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 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. Westerby's mentioned a meeting or meetings with Abana where Westerby received verbal assurance that Abana held the necessary permissions to give pension advice. But I've seen no written record of that meeting or meetings. And, in my opinion, if such a meeting was the way Westerby was intending to evidence Abana's permissions, in order to comply with its regulatory obligations, (in particular Principle 2 – to conduct its business with due skill, care and diligence, and Principle 3 – to take reasonable care to organise and control its affairs responsibly and effectively), Westerby should have had processes in place to ensure that it was able to evidence the due diligence it had carried out on Abana, including the steps taken to confirm Abana's permissions.

Further, based on the evidence I've seen, I don't think the meeting or meetings Westerby had with Abana provide something in writing on which it may have been reasonable for Westerby to rely. The corollary of this is that I don't therefore think COBS 2.4.6R (2) applies to the meeting/s.

Overall, 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 adviser 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 Abana did not have the required top-up permissions (i.e. if the information on Abana's Permission page had been correctly recorded), or in the

alternative, that the Register did not record the information on Abana'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 Abana 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 Abana's permissions, and by failing to do so, it did not meet the requirements it was under as a regulated SIPP operator.

Anomalous features

In my view, Westerby ought to have identified a risk of consumer detriment here. Mr P was taking advice on his pension from a business based in Portugal. That advice was to transfer from more conventional pension schemes 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 P as carrying a significant risk of consumer detriment. And it should have been aware that the role of the adviser was likely to be a very important one in the circumstances – emphasising the need for adequate due diligence to be carried out on Abana 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 P – 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 P 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 Abana'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

Westerby ought to have identified that Abana 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 Abana had the required permissions.

If Westerby had taken these steps, it would have established Abana 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 Abana 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 Abana.

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 P's application which, at the very least, emphasised the need for adequate due diligence to be carried out on Abana 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 across its submissions are factors which mitigate its decision to accept Mr P's application from Abana.

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

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

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

I am satisfied that if Westerby had refused to accept Mr P's application from Abana, and if Mr P had received an explanation as to why his application hadn't been accepted, Mr P would not have continued to accept or act on pensions advice provided by Abana (as he would then have been aware it didn't have the necessary permissions to provide such advice or, alternatively, that Westerby hadn't been able to independently verify that Abana had the necessary permissions to provide such advice).

I appreciate that Westerby says its contract was with Abana and not Mr P and that if Mr P's application was refused it wouldn't have been at liberty to, or had reason to, contact Mr P. But Mr P went through a process with Abana that culminated in him completing paperwork to set up a new Westerby SIPP and with the expectation that monies from existing pension plans would be transferred into the newly established SIPP. Having gone to the time and effort of doing this, I think it's most likely that if the Westerby SIPP wasn't then established, and if his pension monies weren't then transferred to Westerby, that Mr P would have wanted to find out why from Abana and Westerby.

And I wouldn't think it fair and reasonable to say that Westerby shouldn't compensate Mr P for his loss on the basis of any speculation that Abana and/or Westerby wouldn't have confirmed to Mr P the reason why the transfer hadn't proceeded if asked by him.

So, I think it's fair to conclude that one or more of the parties involved would have explained to Mr P that his application hadn't been accepted as Abana didn't have the necessary "top-up" permissions it needed to provide the advice or, alternatively, as Westerby hadn't been able to independently verify that Abana had the necessary "top-up" permissions to provide the advice. And that Mr P wouldn't then have continued to accept or act on pensions advice provided by Abana.

Further, I think it's very unlikely that advice from a business that did have the necessary permissions would have resulted in Mr P taking the same course of action. I think it's reasonable to say that a business that did have the necessary permissions 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 P would have proceeded with his application had he known his advisers were not, in his words, "*FCA compliant*". I have also not seen any evidence to show Mr P was paid a cash incentive. It therefore cannot be said he was "*incentivised*" to enter into the transaction. I recognise that Mr P was keen to retire "ASAP" and to receive his pension commencement lump sum, but I think his situation was very different to that of Mr Adams. Mr P was only eager to complete the transaction as he

believed, on the strength of Abana's advice, he was securing the best pension for himself. In short, had Mr P been informed that his application hadn't been accepted as Abana didn't have the necessary "top-up" permissions it needed to provide the advice or, alternatively, as Westerby hadn't been able to independently verify that Abana had the necessary "top-up" permissions to provide the advice, I think it more likely than not Mr P wouldn't have proceeded to transfer his monies into a Westerby SIPP.

To be clear, I don't think the existence of the letter from April 2014 which appears to be from Mr P to Westerby urging it to proceed with his instructions makes a difference to my findings here. In April 2014 Mr P had no reason not to trust his adviser's advice and push for the instructions he'd made on the back of that advice to be carried out. If, as I've found they should have done, Westerby had rejected his application in 2013, Mr P would not have reached the position of writing such a letter. And I don't think the content of that letter means he'd more likely than not have proceeded if Westerby had refused to accept his application.

In the circumstances, I am satisfied it is fair and reasonable to conclude that if Westerby had refused to accept Mr P's application from Abana, the transaction would not still have gone ahead. I know that Westerby thinks Mr P would have gone ahead using another SIPP provider who would have accepted the application and Mr P would be in the same position as he is in now. But I don't think it's fair and reasonable to say that Westerby shouldn't compensate Mr P for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr P's application from Abana.

Further, and in any eventuality, even if another SIPP provider had been willing to accept Mr P's application from Abana, that process would still have needed Mr P to be willing to continue to do business with Abana after Westerby had rejected his application for another application to proceed. And, as I've mentioned above, I'm not satisfied that Mr P would have continued to accept or act on pensions advice from Abana in such circumstances.

In any event, the point should be made that Mr P should not have had the option of proceeding with an application with Westerby as, for all the reasons I have set out, I think the only fair and reasonable course of action open to Westerby in the circumstances was to refuse to accept the application. And I do not think any other SIPP operator, acting fairly and reasonably, should have accepted the application from Abana either.

The involvement of Abana

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

Abana had a responsibility not to conduct regulated business that went beyond the scope of its permissions. Westerby was not required to ensure Abana 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 Abana, and acted in accordance with good practice and its regulatory obligations by independently checking Abana's permissions before accepting business from it, Westerby would not have done any SIPP business with Abana in the first place.

I am also satisfied that if Mr P had been told Abana was acting outside its permissions in giving pensions advice, or, alternatively, if he'd been told Westerby hadn't been able to independently verify that Abana had the necessary "top-up" permissions to provide the advice, then 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 Abana 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 P fairly.

The starting point, therefore, is that it would be fair to require Westerby to pay Mr P 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 P for his loss, including whether it would be fair to hold another party liable in full or in part. And, for the following reasons, I consider it appropriate and fair in the circumstances for Westerby to compensate Mr P 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 Abana, in advising Mr P to enter into a SIPP, is responsible for initiating the course of action that led to Mr P'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 P would not have come about in the first place, and the loss he suffered could have been avoided.

I think in the circumstances it would be fair for Westerby to have the option to take an assignment of any rights of action Mr P has against Abana before compensation is paid. Redress could in turn be made contingent upon Mr P's acceptance of this term of settlement. It will remain open to Westerby to seek compensation from Abana if it thinks there are grounds for it to recover some or all of the losses it is being held responsible for. Westerby's terms of business with Abana gives it scope to pursue this route, if it wishes.

Westerby might deem any indemnity from Abana and/or assignment of any action against Abana from Mr P to be effectively worthless. I accept that may be true. However, the key point here is that but for Westerby's failings, Mr P would not have suffered the loss he has suffered. So, the financial position of Abana, and the fact that Westerby may not be able to rely on an indemnity from Abana and/or the fact that any assignment of any action against that firm from Mr P might be worthless, does not lead me to change my overall view on this point.

I want to 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 P to the full extent of the financial losses he has suffered due to Westerby's failings and notwithstanding any failings by Abana.

Mr P taking responsibility for his own investment decisions

I note the point has been made by Westerby that consumers should take responsibility for

their own investment decisions. I've considered the actions of Mr P in relation to the mitigation of loss, in the section below. Beyond that, I'm satisfied that it wouldn't be fair or reasonable to say Mr P's actions mean he should bear the loss arising as a result of Westerby's failings.

Mr P took advice from a regulated adviser (albeit one acting outside the permissions it held – a fact unknown to Mr P) and used the services of a regulated personal pension provider, Westerby. And I'm satisfied that in the circumstances, for all the reasons given, it's fair to say Westerby should compensate Mr P for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr P should suffer the loss because he ultimately instructed the investments to be made.

Opportunity to mitigate losses

Westerby says it wrote to Mr P to highlight issues with the funds his SIPP invested in and to inform him of an opportunity to realise around half of his investment value. It says Mr P had a responsibility to take appropriate action to safeguard his funds and so should be responsible for at least half the losses he has suffered.

I have carefully considered 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 P to mitigate his loss.

I do not think it fair to say Mr P should have made a redemption request when Westerby wrote to him in November 2014. That letter required Mr P to seek advice, and urged him to contact his financial adviser, Abana. It seems Mr P did this, and was advised to keep the investments. In these circumstances, I am of the view that it is not fair to say Mr P ought to have acted differently. I am also of the view that Westerby did not act in accordance with its regulatory obligations in sending this letter. 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 adviser's renumeration was to be paid. So, by the time Westerby wrote to Mr P in November 2014, it would have had many opportunities to discover that Abana did not have the top-up permissions it needed to give advice or make arrangements on personal pensions in the UK.

For Westerby to have suggested that Mr P 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 and the requirement to treat Mr P fairly. In fact, it should have alerted Mr P to the fact that Abana did not have the required permissions and have suggested he seek independent advice from a regulated adviser as a matter of urgency.

Westerby says Mr P never requested a redemption of his investments but that had he done so he'd have been able to redeem approximately half of his funds. But in my view, it is unlikely a redemption request would have been successful.

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.

I further note the 24 April 2016 update from the SAMAIF suggests work to begin trading is still ongoing. In May 2016 Westerby informed Mr P that the SAMAIF fund was now part of the "suspended" Managed Portfolio S, and 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 appears to be consistent with what was said in the published decision, in which it was stated that 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.

I have not seen sufficient evidence to show a redemption request would have been successful even if it had been made in or after December 2015. And, taking into account the combination of factors I've set out above, I'm not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that Westerby has to pay to Mr P.

fair compensation

Westerby says that responsibility for Mr P's loss should lie with the advising firm – Abana. I have carefully considered what Westerby has said about the review carried out by the independent third-party compliance consultancy firm who found that Mr P was given unsuitable advice by Abana. I note that following the third-party compliance review Abana agreed to pay Mr P redress for the unsuitable advice he was given. However, as I understand it, Abana has paid no redress to Mr P.

It is possible that Mr P may have a valid complaint against Abana. As set out above, I can see that it may be arguable that Abana, in advising Mr P to purchase the SIPP, could be held responsible for initiating the course of action that has led to Mr P's loss. However, the complaint against Westerby is the complaint I am considering here.

For the reasons I set out earlier in this decision I consider that Westerby has failed to comply with its *own* distinct regulatory obligations under the Principles. It is therefore my view that in the circumstances, it is fair and reasonable to ask Westerby to compensate Mr P for the full measure of his losses – as it could have put a stop to things if it had acted fairly and reasonably by rejecting the application.

I therefore consider that in the circumstances, it is fair and reasonable to direct Westerby to compensate Mr P to the full extent of his losses.

Putting things right

My aim is to return Mr P to the position he would now be in but for what I consider to be Westerby's failure to carry out adequate due diligence checks before accepting Mr P's SIPP application from Abana.

Westerby should:

1. Calculate fair compensation by comparing the current position of the monies that

were invested with it to the position those monies would have been in had the transfer to Westerby not been made.

2. Obtain the actual transfer value of Mr P's SIPP, including any outstanding charges.

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

4. Pay an amount into Mr P's SIPP so that the transfer value is increased to equal the value 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.

5. Pay Mr P £750 to compensate him for the substantial distress, upset and worry the loss of his pension income has caused him.

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

I have explained how Westerby should carry out the calculation set out at 1-4 above in further detail below:

1. *Calculate fair compensation by comparing the current position of the monies that were invested with it to the position those monies would have been in had the transfer to Westerby not been made.*

I can't be certain of what funds, and in what proportions, those monies would have been invested in if they hadn't been transferred into the Westerby SIPP. It's possible they might have been retained in Mr P's existing policies, but I think it's also possible they might still have been transferred elsewhere so as to enable Mr P to access tax-free cash and with the residual benefits being invested in other holdings. Given the lack of certainty on this point, and having carefully considered this issue, for the purposes of quantifying redress in this case I think the fair and reasonable approach is to assume that the monies in question would have experienced a return from the date they were transferred into the Westerby SIPP and up until the date of this decision equivalent to that enjoyed by the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index). I'm satisfied that's a reasonable proxy for the type of return that could have been achieved over the period in question.

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

2. *Obtain the actual transfer value of Mr P's SIPP, including any outstanding charges.*

The total sum calculated in 1. minus the sum arrived at in 2. is the loss to Mr P's pension.

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

The SIPP only exists because of the investments made in 2014. 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 investment their *actual value* should be assumed to be nil for the purposes of calculation. To be clear, this would include their being given a nil value for the purposes of calculating the actual transfer value of Mr P's SIPP in (2).

Westerby may ask Mr P to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Mr P 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.

4. *Pay an amount into Mr P's SIPP so that the transfer value is increased to equal the value 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.*

Compensation shouldn't be paid into Mr P's SIPP if it would conflict with any existing protections or allowances.

If Westerby's unable to pay the compensation into Mr P's SIPP, or if doing so would give rise to protection or allowance issues, it should instead pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid.

The notional allowance should be calculated using Mr P's marginal rate of tax in retirement. For example, if Mr P 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 P would have been able to take a tax-free lump sum, the notional allowance should be applied to 75% of the total amount.

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 P an amount equivalent to five years' of future fees (based on the most recent year's fees), to ensure its unlikely Mr P 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 P's SIPP.

Interest

The compensation resulting from this loss assessment must be paid to Mr P 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

determination and award: I uphold the complaint. I consider that fair compensation should

be calculated as set out above. My final decision is that Westerby Trustee Services Limited should pay the amount produced by that calculation up to the maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Westerby Trustee Services Limited pay Mr P the balance plus any interest on the balance as set out above.

If the loss does not exceed £150,000, or if Westerby accepts the recommendation to pay the full loss as calculated above, Westerby should have the option of taking an assignment of Mr P's rights in relation to any claim he may have against Abana, and an assignment of the right to any future payment Abana may make to Mr P as part of the settlement agreed following the third-party review.

If the loss exceeds £150,000 and Westerby does not accept the recommendation to pay the full amount, any assignment of Mr P's rights should allow him to retain all rights to the difference between £150,000 and the full loss as calculated above.

If Westerby elects to take an assignment of rights before paying compensation, it must first provide a draft of the assignment to Mr P for his consideration and agreement. Any expenses incurred for the drafting of the assignment and its negotiation and approval by Mr P should be met by Westerby.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 8 December 2022.

Beth Wilcox
Ombudsman