DRN-3594685

The complaint

Mr R's complaint is about the acceptance of a self-invested personal pension ("SIPP") application by Westerby Trustee Services Limited ("Westerby"). He is concerned about the due diligence that Westerby carried out on the overseas financial advisor which had given Mr R advice to switch to the SIPP from his existing pension arrangements and make investments in it, as well as who submitted the application for the SIPP on Mr R's behalf. This business, Abana Unipessoal Lda ("Abana"), did not hold the correct regulatory permissions to give personal pensions advice in the UK. So, Mr R complains that the application for the SIPP should not have been accepted by Westerby and he holds it responsible for the loss he has suffered.

What happened

Westerby's relationship with Mr R started in or around February 2014 when it received his application for a SIPP. On the application form, Mr R's financial advisor was noted as Richard Fletcher of Abana. Abana is a financial advisory firm based in Portugal. In December 2013, Abana passported into the UK on an Insurance Mediation Directive (IMD) branch passport from 8 January 2014 to 7 January 2016 and an IMD services passport from 12 March 2013 to 29 December 2015. This meant it was authorised to carry out some regulated activities in the UK between those dates. I will discuss this in my findings below.

Mr R held three personal pension plans. In early 2014, he says that he was introduced to Richard Fletcher and Abana by a financial adviser. Mr Fletcher visited him, and he remembers being told at the time that if he was to move into the SIPP and invest as Mr Fletcher advised, he'd be able to take 25% of his pension at 55 and then up to 10% annually after retiring. He was told that his fund would grow at upwards of 10% a year. Mr R says he was led to believe there was no risk. He was told that one of the investments (which he describes as the Swiss asset) was a strong company and that the other, the Kijani fund, only dealt in commodities which it was selling before it had even bought them. I've described these investments in more detail below.

Mr R has described himself as a moderately cautious investor and wasn't comfortable with much risk. On the advice from Richard Fletcher of Abana, Mr R transferred just under £100,000 of his money to a SIPP with Westerby.

A SIPP application form was completed on 13 February 2014. Section 9 of the application asked, "*Do you have a financial advisor?*" This was answered "yes" and the details of Richard Fletcher of Abana were added. It was also instructed that initial commission of 5% of the switched value should be paid to Richard Fletcher.

An application form for an investment platform called E-Portfolio Solutions, provided by a business called Asset Management International ('AMI'), was also completed. This recorded the financial advisor as being Abana. Mr Fletcher, in his capacity as a financial adviser with Abana, signed a declaration on the application on 13 February 2014. The application was signed by Mr R on the same date. The form was signed by Westerby, as trustees of Mr R's SIPP, on 18 June 2014, after the switches from Mr R's existing pensions had been completed.

Once the transfers had taken place, the cash in the SIPP was transferred to the E-Portfolio platform. Some of the money was invested in the Kijani Commodity Fund, and some in the Swiss Asset Micro Assist Income Fund ("SAMAIF"). Both these funds had initially been based in Mauritius (with one later moving to the Cayman Islands).

On 11 November 2014, Westerby wrote to Mr R about his investments. It explained that the funds Mr R held would, following a Policy Statement from the Financial Conduct Authority (the FCA) in August 2014, be considered 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 advisor. It further explained that the investments might be higher risk than Mr R originally considered, and it was therefore imperative that Mr R discuss this with his financial advisor. It provided the details of Abana.

Westerby's letter also said the Mauritian Financial Services Commission had issued enforcement orders against the Kijani Fund and the SAMAIF. It said it had not established what the enforcement orders related to, but that no new investment in the funds was permitted. Westerby asked Mr R to confirm he'd sought regulated financial advice from Abana and whether he wanted to continue to hold the investments or for Westerby to attempt to sell them. Mr R provided confirmation that he wanted to keep the investments on 14 November 2014.

On or around 23 June 2015, Westerby sent a letter to Mr R providing an update on the Kijani fund. The letter explained:

- The Kijani fund was being investigated by a firm of accountants. 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. Enquiries were being made of AMI.
- Some investors were still waiting for the settlement of deals placed more than 90 days ago. So, if Mr R required funds there may be at least a 90-day delay.
- It strongly recommended that Mr R contact his regulated financial advisor and reminded him the investments were non-standard and so carried a higher degree of risk.
- Abana customers were being referred to a new business called Abana FS Ltd, which was directly authorised by the FCA.

Later that same month, I understand that Abana wrote to its customers explaining that it wasn't authorised to provide the advice it had given them. 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."*

Westerby sent Mr R further updates over the following months. In July 2015, Mr R was told the Kijani fund had been suspended (the repayment of the investment earlier mentioned did not materialise) and the business ultimately behind AMI and the E-Portfolio platform had had its licence suspended by the Mauritian Financial Services Commission. He was also told the SAMAIF had been suspended. In September 2015 it was confirmed that the investigation of the Kijani fund had discovered it had not made investments as it purported to. A petition to wind it up had been issued, with the accountants being appointed by the Cayman Islands Monetary Authority over the company that owned the fund. The E-Portfolio Platform was suspended.

On 23 December 2015, Westerby wrote to Mr R to say that the E-Portfolio Platform was no longer suspended, and that redemption could be requested for some of the funds. The Kijani Fund was illiquid and remained suspended, but the SAMAIF fund was expected to become liquid in the near future. A redemption form was enclosed. Mr R signed this on 18 February 2016 and returned it to Westerby, whom it reached on 23 February 2016. Westerby sent the redemption instructions to E-Portfolio the same day, although by that time it had become clear that SAMAIF wouldn't become tradeable again and its value was transferred to the suspended portfolio with Kijani.

Westerby was only able to redeem £360 odd of Mr R's investment. Westerby has said that if Mr R had sent back the redemption form earlier, it would have been likely to recover more of his money. But Mr R says that he was advised by both Westerby and Richard Fletcher in phone calls at the time that SAMAIF would start to trade imminently. So, that's why he didn't return the form until February.

The situation with both funds has not improved, and Mr R's investments in them, made on the E-Portfolio platform, currently have no realisable value.

Mr R complained to Westerby in March 2018. In its May 2018 final response letter to Mr R's complaint, and its subsequent submissions to this Service, Westerby said, in summary:

- The advice to Mr R to establish a SIPP came from Abana. This is a Portuguese regulated firm authorised to operate in the UK.
- Westerby accepted the SIPP via Abana in good faith, based on the information available to it at the time. It says that it checked the FCA register and the Portuguese register and that there weren't any further independent checks that could be carried out to establish that Abana didn't have the necessary permissions to advise on pensions in the UK.
- Westerby entered into an intermediary terms of business with Abana in which it warranted that it held and would maintain the necessary permissions to advise on SIPPs and the underlying investments.
- Mr R was advised by AMI to invest in the E-Portfolio and Westerby was given an explicit instruction to make the investments in the Kijani fund and SAMAIF.
- The investments were made on a regulated platform. At the time the funds were traded daily and accessible from other platforms. They weren't esoteric and at the time they met the FCA's definition of standard assets. No due diligence could have identified underlying problems at the time.

- When enforcement action was taken, Westerby contacted Mr R to tell him the assets were high risk. On Abana's advice, he opted to stay in the funds.
- If Mr R had chosen to redeem his holdings at the time, it is likely that he would have got a lot of his money back. Westerby couldn't provide that specific advice to Mr R as it wasn't regulated by the FCA to do so. That's why it told him to seek advice from Abana.
- A review of Abana's advice by an independent specialist found Abana to have been responsible for providing poor advice. Abana offered to pay redress to Mr R and others for this, for which it remains responsible.
- Mr R's complaint against Abana should be pursued rather than this complaint against Westerby. Westerby also provided our service with documentation to assist with our investigation of the Abana complaint

Westerby and its solicitors have mentioned some additional points in their submissions to this service. I don't intend to set them all out in detail, as we have received a number of lengthy letters relevant to not only this complaint but others that we've been dealing with at this Service. In summary though, Westerby has said:

- It carried out due diligence on Abana before accepting business that was introduced by it. Abana was authorised and regulated in Portugal by the Instituto de Seguros de Portugal (ISP) under reference 412378472.
- It verified on the ISP's online register that Abana held passported authorisations into the United Kingdom for both Life (insurance) and Non-Life activities. It also verified that Abana was authorised by the FCA, under reference 597069.
- It put in place a Terms of business with Abana which required Abana to ensure that all necessary permissions were maintained.
- It notes that Section 28 of the Financial Services and Markets Act (FSMA) allows for an agreement that would otherwise have been rendered unenforceable under Section 27 to be enforced if the court is satisfied that it is just and equitable in the circumstances of the case. One of the issues that is to be considered under this Section is whether it knew that Abana was (in carrying on the regulated activities of advising on pension transfers) contravening the general prohibition.
- It considers that it acted in good faith by accepting business that was introduced by Abana, and that this would place it in the scope of Section 28 in Mr R's case.

Our investigator thought the complaint should be upheld. She thought the fact Abana was based abroad should have made it stand out when Westerby was carrying out its due diligence checks. She said the entry for Abana on the FCA register would have shown that Abana was only authorised to carry out insurance or reinsurance mediation in the UK. Our investigator said that personal pensions advice is not an activity covered by the IMD and that Westerby, as a SIPP operator, ought to have had the knowledge and expertise to understand what permissions were required, and what services Abana was allowed to provide.

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

Westerby didn't agree. Its solicitors have sent us further lengthy submissions. A lot of these are similar to those made in other complaints against Westerby (with similar facts) that are being dealt with at this Service. So, my summary below is consolidated from what has been said on this complaint and others. Westerby has said:

- The investigator's view that Westerby didn't act with due care and diligence flowed from her view that it should have known Abana wasn't authorised to advise on pensions. Westerby disagrees and thinks it did carry out proper due diligence.

- Westerby did carry out the searches the investigator thought it should have made before accepting Mr R's SIPP. It searched the FCA register in May 2013 and established that Abana was EEA-authorised. It has a screenshot of the register which doesn't include a 'passports' section or make any mention of restrictions on Abana's permissions. Acting reasonably, Westerby couldn't have found details of the passport restrictions from the FCA register at the time.

- It has provided a copy of a report by the Complaints Commissioner, which Westerby thought supported its view that information in the FCA register was limited.

- Knowing that Abana's country of origin was Portugal, Westerby also searched the website of the Portuguese regulator. This showed that Abana was authorised to undertake both life and non-life business in the UK. There was nothing to put Westerby on notice that Abana wasn't authorised to advise UK investors.

- It was entirely reasonable for Westerby to rely on the entries in the FCA register and the Portuguese register.

- Abana's website said it was a specialist in compliance services to international financial advisers and also gave pension advice.

- Having carried out proper due diligence in May 2013, Westerby then followed good practice in setting up a terms-of-business agreement with Abana. In this agreement, Abana warranted it was suitably authorised in relation to the sale of the SIPP. There was no failure by Westerby to act with due care and diligence. And it thinks it was reasonable for it to rely on what Abana told it and warranted in the agreement. It does not think those terms and conditions could be said to be generic.

- COBS 11.2.19(2) states that a firm satisfies its obligations to a client if it executes an order following specific instructions from a client.

- As the investigator acknowledged, Westerby didn't provide Mr R with any advice. When Mr R signed the SIPP application he agreed he was solely responsible for all investment decisions.

- Mr R's loss has been caused by the advice he received from Abana. The FCA investigated Abana and third-party compliance experts reviewed the advice Mr R was given. It was found the advice was unsuitable, and if Abana had provided redress as was proposed Mr R would have been compensated for his loss. It's neither fair nor reasonable to expect Westerby to compensate Mr R in these circumstances.

- It can't understand why this service hasn't pursued Abana in respect of the redress it's failed to pay Mr R.

- Also, Mr R contributed to his own loss. Westerby wrote to him in 2014 when it became aware there were problems with some of the funds he'd invested in. He could have chosen to switch into different funds if he'd wanted to, but didn't do this.

- Westerby is unhappy with how Mr R's complaint has been framed. It thinks this service has encouraged him to complain about Westerby as his original complaint was about Abana.

- It was acting on an execution only basis. It wasn't required to investigate the permissions of third-party advisers. The investments were permitted investments and it was not part of its contractual relationship with Mr R to offer any advice and it was not permitted to do so.

- The FCA has not raised any concerns with Westerby about how it acted, even when it raised concerns with the regulator about Abana in 2015. So, if the FCA has not found any wrongdoing by Westerby, this sits at odds with recent ombudsman decisions.

  - Westerby thinks that if it had rejected Mr R's SIPP application, he'd have just gone to another SIPP provider to which Abana was referring clients. And Westerby wouldn't have been able to contact Mr R if it hadn't accepted the SIPP. So, he'd still have suffered the same losses.

- Westerby doesn't think it's fair that it should be responsible for Mr R's loss where Abana purposefully and intentionally acted outside of its permissions and should be solely responsible for those losses. It thinks this service should be pursuing Abana, rather than Westerby and that it's not fair to take into account Westerby's geographical location and the ease to hold it responsible.

- Westerby says that Abana was actively calling clients in 2014 to advise them to stay in the funds. So, Westerby's reference to Mr R taking advice from Abana in its letter of 11 November 2014 had no bearing on the outcome of his opting to stay in the funds.

Previous final decision on a complaint against Westerby

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

That decision features the same key point to that in Mr R's case – 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 to those it has made on Mr R's 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 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. Westerby subsequently reviewed Mr R's complaint, but said it was not prepared to change its position. It sent us a letter detailing its review, and a further letter setting out general submissions. I have summarised these below.

Westerby's additional submissions

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

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

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

- It was reasonable for Westerby to assume from the agreement that Abana had the necessary permissions. It does not accept that it ought to have been reasonably aware of cause to have questioned the accuracy of the statement in the agreement.

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

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

- In the published decision the ombudsman sought to distinguish the complaint from the situation in the *Adams* court case on the basis that Abana was offering an advisory service. It is unclear how Abana's contractually defined role impacts on the scope of duty owed by Westerby under COBS 2.1.1R. It was not part of Westerby's contractual obligations to investigate the permissions of third-party advisers.

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

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

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

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

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

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

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

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

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

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

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

- All Abana's clients (including those who, like Mr R, had originally been advised by Abana, and later novated to Abana) had two opportunities to mitigate losses:

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

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

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

- In Mr R 's case, there is no record of him having contacted Westerby to request a redemption following its letter of December 2015 until February 2016. So, it considers Mr R to be responsible for at least half of the losses in SAMAIF which it thinks could have been redeemed at that time.

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.

As I've noted above, Mr R complained to Westerby that it had failed to undertake sufficient due diligence on the funds before allowing them into his SIPP. I appreciate that Westerby thinks that this service prompted Mr R to make that complaint. But I haven't seen any evidence of that.

Mr R complained directly to Westerby in March 2018, having enquired of us whether he could also bring a complaint against it, having been prompted to do so by other investors with whom he was in contact. That complaint was referred to us in May 2018 after Mr R received Westerby's final response letter.

I appreciate that Westerby thinks that this complaint should really lie against Abana. But where a number of regulated entities may have responsibility for a consumer's loss, it is worth noting that The FCA Handbook DISP 3.5.2G provides that this service '*may inform the complainant that it might be appropriate to complain against some other respondent*'. We have conversations with lay customers every day about whom their complaint should be brought. And whilst I don't believe that to have happened here, it would in any event be something that our investigators would be expected to consider in the normal course anyway.

Mr R originally complained to Abana in May 2017 about the advice that he received from it and that complaint was escalated to this service. 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 R withdrew it. And we didn't issue an opinion or view on it. Westerby has similarly noted that Abana isn't able to satisfy any indemnity that it provided it under the terms of business between them. I am also not aware that Mr R has received any compensation from Abana direct or from the Financial Services Compensation Scheme (FSCS).

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 R 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 on what is fair and reasonable in the circumstances.

In response to the investigator's opinion, Westerby has asked for all the information I've relied upon in reaching my decision. Westerby already has access to this as it provided the information relevant to this complaint when we made our file request of it. Any other information I've relied on has been taken from other decisions of this service and correspondence between Westerby and my colleagues, all of which Westerby has access to already.

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 requirements they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."*

And at paragraph 77 of BBA Ouseley J said:

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

In *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) ("BBSAL"), Berkeley Burke brought a judicial review claim challenging the decision of an ombudsman who had upheld a consumer's complaint against it. The ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and 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 R'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 R'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 judgment, 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 R'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 R under COBS 2.1.1R in light of the specific facts of Mr R'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 R'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 R 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 R 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 R's case.

The regulatory publications

The FCA (and its predecessor, the Financial Services Authority (the 'FSA')) has issued a number of publications which remind SIPP operators of their obligations, and which set out how they might achieve the outcomes envisaged by the Principles, namely:

- The 2009 and 2012 thematic review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 "Dear CEO" letter.

The 2009 Thematic Review Report

The 2009 report included the following statement:

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

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

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

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

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

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

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

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

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

- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

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

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*
- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*
- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from non-regulated introducers*

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

"Due diligence

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

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*
- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
- *having checks which may include, but are not limited to:*
    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*
- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm"*

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

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

- *Correctly establishing and understanding the nature of an investment*
- *Ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*
- *Ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*
- *Ensuring that an investment can be independently valued, both at point of purchase and subsequently*
- *Ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc)*

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

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

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

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

Like the ombudsman in the BBSAL case, I do not think the fact that at least one of the publications post-dates the events that took place in relation to Mr R's complaint, mean that the examples of good practice they provide were not good practice at the time of the relevant events. Although the Dear CEO letter was published after the events subject to this complaint, the Principles that underpin it existed throughout, as did the obligation to act in accordance with the Principles.

It is also clear from the text of the 2009 and 2012 reports (and the *"Dear CEO"* letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' *understanding* of how the good practice standards shaped what was expected of SIPP operators changed over time, it is clear the standards themselves had not changed.

That doesn't mean that in considering what is fair and reasonable, I will only consider Westerby's actions with these documents in mind. The reports, Dear CEO letter and guidance gave non-exhaustive examples of good practice. They did not say the suggestions given were the limit of what a SIPP operator should do. As the annex to the Dear CEO letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

In this and other similar complaints with us, Westerby has said that Section 20 of FSMA (s.20) provides that an authorised person acting without permission doesn't make the transaction void or unenforceable and generally doesn't give rise to a right of action for breach of statutory duty. It says that this is the opposite of Section 27 of FSMA (s.27) which allows for the voidance of contracts where a party is acting without authorisation. So, it says s.20 explicitly shields authorised parties from the actions of another authorised party (such as Abana) that is in breach of their own requirements.

I've 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's something that gives rise to a right to take legal action and I'm not making a finding here on whether Mr R's application is void or unenforceable. Rather, I'm making a decision on what's 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 R'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 their 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 R'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 R'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 R'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 R'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 Insurance Mediation Directive.

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

The relevant rules regarding "top up" permissions could be found in the FCA Handbook at SUP 13A.7. SUP 13A.7.1G states (as at February 2014):

> *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 is defined (as at February 2014) 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 2014 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 the FCA so that it could carry on the regulated activities it was undertaking.

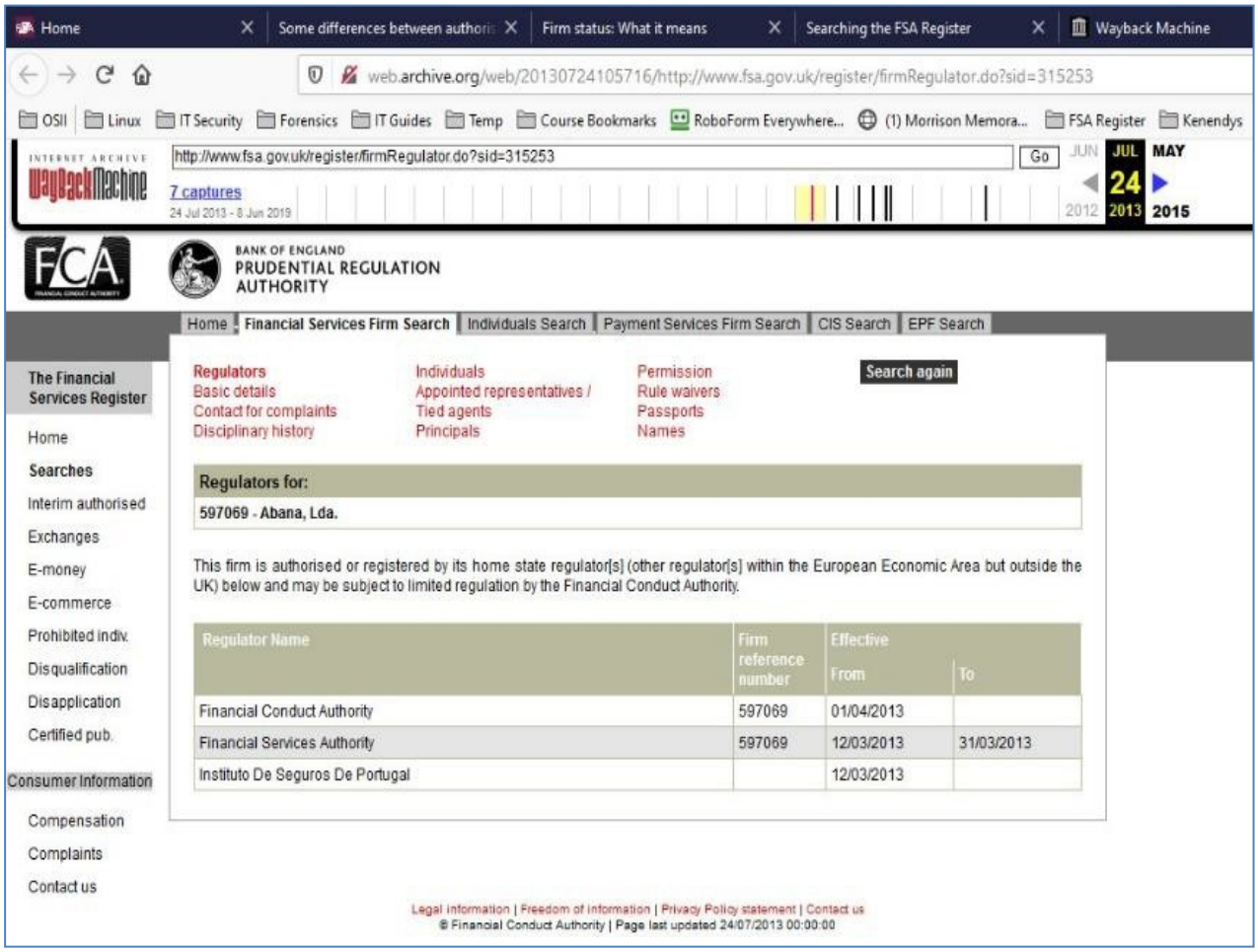
Westerby's checks on Abana's permissions

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'm 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.

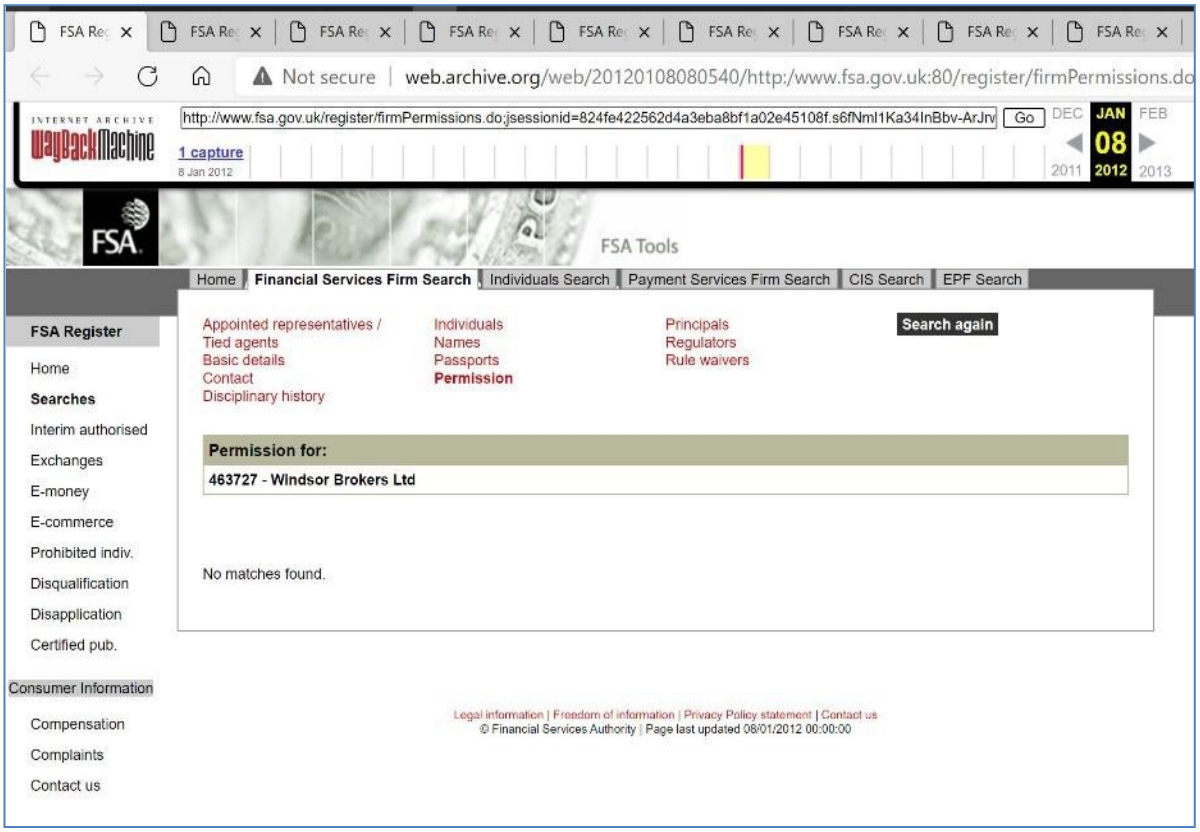
I have carefully considered the format of the Register around when Mr R's application was submitted by Abana. The third-party report on the Register provided by Westerby during the investigation of the complaint which was the subject of the published decision is helpful on the question of the format of the Register around the time of Mr R'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 R's SIPP application was submitted to Westerby in 2014 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 R'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 R'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 R'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 accords with what I've already said I'm satisfied has been demonstrated by the evidence that's available in this complaint. 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 accords with what I'm satisfied has been demonstrated by the evidence that's available in this complaint. So, my decision 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 R'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 then. 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 2013/14.

Westerby has, in previous submissions, referred to reports from the Complaints Commissioner both of which highlighted errors and/or weaknesses of the Register. In other 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 R'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 2014 when Westerby accepted Mr R's application from Abana. So, although we do not have evidence of exactly what did appear on Abana's "Permission" page in 2014, 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 R'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 content that 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. However, the Agreement appears to be a document of general application drafted in generic terms and has not been specifically amended to refer to Abana's own circumstances. 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 to establish whether Abana had the permissions it required.

So, for all the reasons I've set out above, I don't 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. However, I am not satisfied there was any other basis on which it was reasonable for Westerby to rely on 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 any 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 R was taking advice on his pension from a business based in Portugal. That advice was to transfer from 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 R as carrying a significant risk of consumer detriment. And it should have been aware that the role of the advisor was likely to be a very important one in the circumstances – emphasising the need for adequate due diligence to be carried out on 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 R – 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 R 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 R'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 R's application from Abana.

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

Is it fair to ask Westerby to pay Mr R 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 R's application from Abana, and explained to Mr R why it was not able to do so, Mr R wouldn't have continued to accept or act on pensions advice provided by Abana (as he would then have been aware it was not able to provide such advice). And I think it very unlikely advice from an authorised business would have resulted in Mr R taking the same course of action. I think it reasonable to say Mr R would have sought out a business with the required permissions and that business would have given suitable advice.

If Mr R had sought advice from a different advisor, I think it's more likely than not that the advice would've been to stay in his existing pensions. I think it's unlikely that another advisor, acting properly, would have advised Mr R to transfer away from his existing pensions in the way that Abana and Mr Fletcher did.

Westerby has said that if it had known Abana didn't have the required permissions, it would never have accepted any business from it in the first place. So, it thinks it wouldn't have had the opportunity to tell Mr R of this. But that's not what happened here as it was accepting business from Abana, including Mr R's. If it hadn't though, any other SIPP provider acting diligently should also not have accepted Mr R's SIPP. And if acting properly, would also have warned him, as I consider Westerby should have, about Abana's lack of permissions. So, the loss still wouldn't have occurred.

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've seen no evidence to show Mr R proceeded in the knowledge that the investment he was making was high risk and speculative, and that he was determined to move forward with the transaction in order perhaps to take advantage of a cash incentive or something else offered by Abana. I am satisfied that Mr R, unlike Mr Adams, was not eager to complete the transaction for reasons other than securing the best pension for himself. By his own admission at the time, he was a moderately cautious investor and wasn't comfortable with much risk. He'd been led to believe by Mr Fletcher and Abana that there was little to no risk in these investments. So, in my opinion, this case is very different from that of Mr Adams.

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

In any event, the point should be made that Mr R 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 don't 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 R's complaint about Westerby. While it may be the case that Abana gave unsuitable advice to Mr R to switch to a SIPP and make unsuitable investments, Westerby had its own distinct set of obligations when considering whether to accept Mr R'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.

I am also satisfied that if Mr R had been told Abana was acting outside its permissions in giving pensions advice, he would not have continued to accept or act on advice from that business. And, having taken into account all the circumstances of this case, it is my view that it is fair and reasonable to hold Westerby responsible for its failure to identify that 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 R fairly.

The starting point, therefore, is that it would be fair to require Westerby to pay Mr R compensation for the loss he has suffered because 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 R 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 R 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 R to enter into a SIPP, is responsible for initiating the course of action that led to Mr R'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 R would not have come about in the first place, and the loss he suffered could have been avoided.

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 R to the full extent of the financial losses he has suffered due to Westerby's failings. And, taking into account the combination of factors I've set out above, I am not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that Westerby is liable to pay to Mr R.

I do, however, think it would be fair for Westerby to have the option to take an assignment of any rights of action Mr R has against Abana before compensation is paid. Redress could in turn be made contingent upon Mr R's acceptance of this term of settlement.

It will then remain open to Westerby to seek compensation from Abana if it thinks there are grounds for it to recover some or all the losses it is being held responsible for.

Opportunity to mitigate losses

Westerby says it wrote to Mr R 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 R 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 R to mitigate his loss.

I don't think it fair to say Mr R should have made a redemption request when Westerby wrote to him in November 2014. That letter required Mr R to seek advice, and urged him to contact his financial advisor, Abana. It seems Mr R 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 R 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 advisor's renumeration was to be paid. So, by the time Westerby wrote to Mr R 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 R 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 R fairly. In fact, it should have alerted Mr R to the fact that Abana did not have the required permissions and have suggested he seek independent advice from a regulated advisor as a matter of urgency.

Westerby says Mr R did not request a redemption of his investments until February 2016, and he ought to have acted earlier. Mr R says that he was still being advised by both Westerby and Abana over the phone that one of the funds may begin trading again soon. So, it's easy to see why he didn't do anything immediately. In any event, in my view, it is unlikely a redemption request would have been successful anyway.

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 SAMAIF suggests work to begin trading is still ongoing. And I also again note that in June 2016 Westerby said:

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

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

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

So, I have also not seen sufficient evidence to show a redemption request would have been successful even if it had been made earlier.

Putting things right

My aim is to return Mr R 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 R's SIPP application from Abana.

I have also considered the upset and inconvenience Mr R has been caused because of the problems he's had with his pension. This situation must have been very worrying for him, particularly as he is a cautious investor who didn't have much appetite for risk. If Westerby hadn't accepted his SIPP application in the first place, the trouble he's experienced would have been avoided. So, I've included a sum of £500 compensation for how this has made him feel in the redress that I've provided for below.

Westerby should calculate fair compensation by comparing the value of Mr R's pensions, if he had not transferred, with the current value of his SIPP. In summary, Westerby should:

1. Obtain the notional transfer value of Mr R's previous pension plans, as at the date of this this decision, if they had not been transferred to the SIPP.

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

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

4. Pay an amount into Mr R'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 R £500 compensation for the distress and inconvenience he's been caused due to the problems with his pension.

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

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

1. *Obtain the notional transfer value of Mr R's previous pension plans if they had not been transferred into the SIPP.*

To do this, Westerby should work out the likely value of Mr R's pensions as at the date of this decision, had he left them where they were instead of transferring them to the SIPP.

Westerby should ask Mr R's former pension providers to calculate the current notional transfer value had he not transferred his pensions. If there are any difficulties in obtaining a notional valuation, then the FTSE UK Private Investors Income Total Return Index (and prior to 1 March 2017 the FTSE WMA Stock Market Income Total Return Index) should be used instead. That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

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

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

The total sum calculated in 1. minus the sum arrived at in 2. is the loss to Mr R'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 investments, 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 R's SIPP in 2.

Westerby may ask Mr R 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 R 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 R'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.*

I am also not certain whether, currently, Mr R can pay the redress into a pension plan. If he can, and assuming his doing so wouldn't give rise to any allowance or protection issues, it means that the compensation is able to be paid into a pension in the time until Mr R retires and he should be able to contribute to pension arrangements and obtain tax relief. If this is the case, the compensation should be reduced to notionally allow for the income tax relief Mr R could claim. The notional allowance should be calculated using Mr R's marginal rate of tax. For example, if Mr R is a basic rate taxpayer, the total amount should be reduced by 20%.

On the other hand, Mr R may not currently be able to pay the redress into a pension plan. But had it been possible to pay the compensation into the plan, it would have provided a taxable income. Therefore, the total amount to be paid directly to Mr R should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr R's marginal rate of tax in retirement. For example, if Mr R 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 R 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 R an amount equivalent to five years of future fees (based on the most recent year's fees), to ensure it's unlikely Mr R 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 R's SIPP.

interest

The compensation resulting from this loss assessment must be paid to Mr R or into his SIPP within 28 days of the date Westerby receives notification of his acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days.

My final decision

For the reasons outlined, my final decision is that I uphold Mr R's complaint.

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 R 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 R'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 R 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 R'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 R for his consideration and agreement. Any expenses incurred for the drafting of the assignment and its negotiation and approval by Mr R should be met by Westerby.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 11 November 2022.

James Kennard
Ombudsman