DRN-3638754

The complaint

Mr B complains that Westerby Trustee Services Limited ("Westerby") should've done more due diligence before accepting the investments he made in his Self-Invested Personal Pension ("SIPP").

What happened

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

The SIPP and investment applications

The SIPP application form, signed on 28 September 2012, confirmed that Mr B had an existing pension with a transfer value of around £95,000. The application form noted that Mr B had an Independent Financial Advisor ("IFA"). Mr F is listed as Mr B's IFA and it's noted that he would receive 2.5% of the fund transferred in initial commission.

The intended investment was listed as AMI platform.

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

An ePortfolio Solutions application form, also dated 28 September 2012, listed Mr F of Joseph Oliver as the advisor. No investments were listed in the application form.

Whilst no underlying investments were listed in the application forms (just the platform) it's clear from later correspondence that Mr B invested in the Kijani Commodity Fund ("Kijani fund") and the Swiss Asset Micro Assist Income Fund ("SAMAIF").

Abana Unipessoal Lda ("Abana LDA")

On 17 May 2013, Joseph Oliver LDA sent Westerby a letter confirming that in accordance with Mr F's AR agreement his clients return to him upon termination of the agreement. And, as he'd given the required notice to terminate his agreement, he was free to move his clients from Joseph Oliver LDA.

On the same day Abana LDA – another financial advisory firm based in Portugal – sent Westerby a letter confirming that it accepted the transfer to it of Mr F's Joseph Oliver LDA clients. So Abana LDA was the financial advice firm associated with Mr B's SIPP after this date.

Updates on the investments

On 11 November 2014, Westerby wrote to Mr B about his Asset Management International ("AMI") investments. Specifically, the Kijani fund and the SAMAIF. Westerby explained that it'd discovered that the Mauritius Financial Services Commission had made enforcement orders against the Protected Cell company under which the funds are held. And, that the Financial Conduct Authority's ("FCA") categorisation of the investments had changed to Non-Standard Assets. In relation to this Westerby said:

> *"You may now find that you consider the investments to be of higher risk than originally considered and it is therefore imperative that you discuss this immediately with your regulated Financial Adviser."*

Mr B was invited to complete the enclosed member instruction form once he'd spoken to his financial advisor to confirm whether or not he wanted to continue to hold these investments.

Westerby's letter confirmed that it wasn't giving and couldn't give advice in relation to the investments held within Mr B's SIPP. It strongly recommended that Mr B contact his *regulated financial adviser* to discuss his investments. Mr B's advisor was detailed as Mr F of Abana LDA.

Mr B returned the member instruction form to Westerby; this had been signed on 12 November 2014. The form confirmed that Mr B had sought advice from Mr F of Abana LDA and that he wanted to retain his existing holdings.

Westerby wrote to Mr B about his investments again on 23 June 2015. Again, it confirmed it wasn't giving and couldn't give financial advice and strongly encouraged him to contact his *regulated financial adviser*. Westerby informed Mr B that the Kijani fund was under investigation and that the fund managers had taken the decision to liquidate the funds and return client monies within 30 to 60 days.

It also reiterated that both the Kijani fund and SAMAIF were classified as non-standard assets. Westerby went on to say:

> *"Given the current position of the Kijani Fund, it is imperative that you discuss this immediately with your regulated Financial Adviser in order to receive their advice and guidance as to what action you may wish to take in light of the statement that funds are going to be returned to your SIPP investment account by Kijani."*

Westerby also provided an update relating to Mr B's appointed advisor:

> ***"Abana LDA Limited & Abana FS Limited***
>
> *We received notification of proposed changes in relation to your advice firm on Friday.*
>
> *All recent client queries for Abana LDA Ltd clients have been referred to and dealt with by* [redacted] *at the request of* [redacted] *Managing Director of Abana LDA Ltd.*
>
> [redacted] *has now become directly authorised with the FCA through her new company, Abana FS Ltd. She is therefore now employed with the new Abana company and no longer employed with Abana LDA Ltd.*

Abana LDA and Abana FS Ltd are in the process of 'novating' (moving over) all of the Abana LDA Ltd clients to Abana FS Ltd."

On 17 July 2015, Westerby wrote to Mr B with a further update on his investments. It notified him that the funds had been suspended. It also said:

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

A further update was provided to Mr B by Westerby on 23 December 2015, in relation to the platform, the Kijani fund and SAMAIF. It confirmed that the buy-out of the platform had completed and that redemptions could be made from non-suspended funds. It said it had been in touch with the new managers and AMI to confirm details of Mr B's redemption request and, as it understood, trades had been placed. Funds in SAMAIF were categorised as liquid, this appears to be on the basis that it was expected to trade again in a couple of months.

We haven't been provided with any details of the referenced redemption requests or any responses received.

Mr B's recollections

Mr B's told us that he was contacted by Mr F about his pensions and how they could be put to better use. He says that at the time of the advice, he was clear that he didn't want his pension, that it'd taken him many years to build up, exposed to risk. And, that he'd be happy with a return of 2% above inflation. He thought the investments he was making were low to medium risk split across a mixed portfolio. He wanted to retire before 60 so he could switch to part-time working to support his wife, as he's her full-time carer.

He says that to say his future has been taken from him is an understatement. He made these investments in good faith via an IFA who he believed to have been operating under the oversight of the UK regulator.

Our investigator's view

One of our investigators reviewed the complaint and concluded it should be upheld. In summary, the investigator said that:

- It's accepted that Westerby didn't and couldn't advise Mr B on the suitability of the SIPP or underlying investments.
- Westerby did have certain responsibilities when accepting Mr B's business.
- It had an agreement in place with Joseph Oliver LDA before it accepted Mr B's business and Westerby says that it made sure that Joseph Oliver LDA had the appropriate permissions.
- Joseph Oliver LDA wasn't a UK advisory business and, as a result of this, Westerby ought to have run heightened checks to make sure it had appropriate permissions to undertake the business proposed.
- It wasn't reasonable for Westerby to rely on its agreement with Joseph Oliver LDA and the declaration held therein in respect of its permissions. It ought to have independently verified Joseph Oliver LDA's permissions before accepting business from it.

- Westerby's told us that it checked the regulator's register. The copy it provided of the register from that time showed that Joseph Oliver LDA undertook insurance mediation, but nothing therein indicated that it had permission to give pension advice.
- This ought to have been sufficient to make Westerby aware that Joseph Oliver LDA wasn't permitted to give pension advice.
- Rights under a pension scheme are a specified investment under article 82 of the Regulated Activities Order ("RAO") – advice in respect of these types of investments aren't covered by the IMD, Joseph Oliver LDA wasn't permitted to give pension advice in the UK at all.
- Westerby as a regulated SIPP provider would've dealt with intermediaries on a regular basis and ought reasonably to have understood the authorisation requirements relating to pension business. And, in turn, what services Joseph Oliver LDA was allowed to provide under the circumstances.
- If Westerby had drawn the correct conclusions from its checks, it would've been apparent to it that Joseph Oliver LDA was undertaking regulated activities (advising on pensions) for which it didn't have the requisite permissions. And, it ought to have refused to accept business from Joseph Oliver LDA on that basis.
- If Westerby had done this, Mr B would most likely not have gone ahead with this transaction. So, he's lost out as a result of Westerby's failings and it's fair that it should compensate him for this.

Previous final decision on a complaint against Westerby

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

Although that decision relates to Abana LDA, rather than Joseph Oliver LDA, this complaint features the same key point – namely the permissions held and required by an incoming EEA firm dealing with personal pensions in the UK, and Westerby's knowledge of this. Westerby has made the same, or very similar, submissions on that case and its latest submissions on this case are made with reference to the published decision.

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

On this basis, Westerby was asked to review each outstanding complaint involving Abana LDA and Joseph Oliver LDA – including Mr B's – and if it wasn't prepared to change its position after taking account of the detailed reasons set out in the published decision, to explain why that was the case. Westerby declined to change its position and set out the details of its review. It's also made further submissions on this complaint, following the published decision.

Westerby's submissions

I've considered all the submissions Westerby has made over the course of this complaint. However, I've only included a summary of its most recent submissions here.

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

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

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

- It was reasonable for Westerby to assume from the agreement (in this case with Joseph Oliver LDA, but with Abana LDA in the published decision case) that Joseph Oliver LDA had the necessary permissions. It doesn't 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 wasn't available on the Register wouldn't have been provided to Westerby, yet says that if it had contacted the FCA directly, the FCA would've been able to confirm the relevant 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've indicated the broad permissions held under IMD by a firm which would've 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've 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 LDA was offering an advisory service. It's unclear how Abana LDA's (in this case Joseph Oliver LDA's) contractually defined role impacts on the scope of duty owed by Westerby under COBS 2.1.1R. It wasn't part of Westerby's contractual obligations to investigate the permissions of third-party advisors.

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

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

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

- Despite a related complaint about the actions of Abana LDA 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 LDA ought to have been decided first as the IFA involved in the transaction. At the very least, the complaints against Westerby and Abana LDA 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've found against Abana LDA in a number of complaints where a different SIPP operator was used and ordered Abana LDA to pay redress yet haven't pursued, or invited the complainants to pursue, the SIPP operator.

When detailing the outcome of its review of Mr B's complaint Westerby also made some further points. I've considered all of these but think the key ones which aren't already covered by the above, in summary, are:

- Westerby carried out all reasonable checks on publicly accessible registers in order to establish Joseph Oliver LDA's status. No further checks it could've carried out have been identified.

- It's acknowledged that the current register shows that Joseph Oliver LDA's permissions only relate to insurance and reinsurance mediation, as stated by the investigator, but based on the prints of the Register taken by Westerby at the time that the SIPP was established that wasn't the case in 2012.

- There were no other public records or search means other than those undertaken by Westerby that would've indicated a lack of permissions.

- Joseph Oliver LDA signed a Terms of Business that included a warranty that it held (and would maintain) the necessary permissions. Westerby shouldn't be held liable for this erroneous or false representation.

- Once a SIPP is established investments must be made in accordance with the instruction of the client. Having accepted the SIPP, Westerby had to execute Mr B's instructions.

- It was Joseph Oliver LDA's actions in acting outside of its permissions that resulted in the establishment of Mr B's SIPP. It was also Joseph Oliver LDA who advised the initial investment in and subsequent retention of high-risk funds. Westerby considers that the liability for the losses should lie with Joseph Oliver LDA.

I've also considered the outcome of Westerby's review of a similar complaint (also relating to the acceptance of business from Joseph Oliver LDA), following which it made some further points. I've considered all of these but think the key ones, in summary, are:

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

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

- The "Basic Details" page of Joseph Oliver'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 wasn't unreasonable to conclude that the Register simply didn't record Joseph Oliver LDA's permissions.

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

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

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

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

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

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

I sent my provisional decision explaining why I thought Mr B's complaint should be upheld. Westerby disagreed with my decision and made further submissions. I've read Westerby's submissions in their entirety here I've included a summary of what I consider to be the material points:

- Its submissions had been accurately summarised in my provisional decision but weren't then addressed.

- Following the published decision, it hadn't declined to change its position, it performed a review and there were no compelling reasons and/or evidence for it to change its position that the complaint ought not to be upheld.

- It had previously requested disclosure of: the details of the contact at the FCA with whom this service communicated; records of such communications; file notes or attendance notes; details of the FCA contact's role at the FCA; whether the FCA contact was dealing with the Register in 2013; and what the FCA contact's understanding of the Register in 2013 is based upon. It's only been provided with the FCA's response that's referred to in the published decision and it's not received the further disclosure it's requested. It maintains that this is completely unsatisfactory.

- In relation to this we've said that Westerby has been given ample opportunity to make further submissions on the format of the register at the time but it's not clear what information it could be expected to provide. It set out its position with supporting evidence and now has made a disclosure request to this service, which we've not complied with. So, it doesn't have access to crucial information and should be provided with this.

- It has provided evidence for the FCA confirming that any information not on the register would've been confidential. It disagrees that Joseph Oliver LDA's permissions would've been a matter of public record and would've been confirmed to it by the FCA. The FCA can only confirm what was on the register not what is missing from it which, in any event, is accepted to have been unreliable.

- It took reasonable steps to confirm Joseph Oliver LDA's permissions; it confirmed both orally and in writing that it had the requisite permissions. It was reasonable for Westerby to rely on what it was told by Joseph Oliver LDA and it's not clear what more Westerby could've done under the circumstances.

- It disagrees that the Written Agreement was vague and generic in nature. There is no ambiguity as to the wording of the 'sale' of SIPPs. The term *'permissions'* encompasses *'top-up'* permissions. And it's unrealistic to consider that any change of wording would have caused Joseph Oliver LDA to not provide the undertaking.

- It disagrees that the application referring to an unauthorised business JOML is an anomalous feature of the investments. JOML appears to be a branch of an authorised business. The reasonable conclusion is that Mr F was acting for an authorised business when carrying out the regulated activity of arranging the SIPP.

- *Adams v Options* confirmed that whilst establishing a SIPP is a regulated activity, advice on the underlying assets isn't.

- It wasn't part of its contractual obligations to Mr B to investigate the permissions of third-party advisers and anomalous features.

- It administers esoteric high-risk non-standard assets for members on a regular basis and there's nothing unusual or extraordinary about its administration of such investments. AMI was fairly typical of the types of investments being made.

- The extent and thoroughness of the due diligence conducted by Westerby is not recognised by the provisional decision. Westerby rejected numerous investment propositions and advisers on the basis that they didn't pass its rigorous due diligence. Westerby took the same careful stance when approached by Joseph Oliver LDA, it interrogated:

    - Its understanding of SIPPs
    - Where its business was being generated
    - Its technical knowledge

- Joseph Oliver LDA had good technical knowledge and confirmed that it had the correct permissions. Again, it was reasonable for Westerby to rely on the information provided by Joseph Oliver LDA.
- Westerby also enquired as to the types of investments Joseph Oliver LDA were likely to recommend to its clients. It confirmed that the AMI funds (authorised and regulated in Mauritius) were a group of funds that were of interest.

- Before accepting applications, it checked the FCA register and the permissions page, the latter was blank.

- It checked the Portuguese register which had to be translated into English. The Portuguese register explained that Joseph Oliver LDA was authorised to advise on "life" and "non-life", the latter Westerby understood meant investments and pensions.

- Much later, independent consultants appointed by the FCA also spoke to the Portuguese Regulator and were told that Abana (not Joseph Oliver LDA) was authorised to advise on pension products. But, its reasonable to conclude that the position would've been the same if queries had been made about Joseph Oliver LDA, seeing as it had the same permissions. So, no further enquiries would've altered Westerby's conclusions in relation to Joseph Oliver LDA.

- In Adams v Options it was said (at paragraph 163) that:

  > *"The claimant also relies on reviews, guidance and alerts which were published by the FCA in 2013, 2014, 2016 and 2017, after the events relevant to his claim in this case, and it seems to me that they can therefore have no direct bearing on the matters which I have to decide."*

- The October 2013 and 2014 regulatory publications were published after Mr B's SIPP was set up and shouldn't be applied retrospectively. Notwithstanding this, Westerby acted in accordance with the regulatory publications.

- The UK regulator was aware through data reported to it that Joseph Oliver LDA was introducing business to Westerby and at no point has it raised any issues or concerns about a breach of Westerby's duties and obligations.

- In the provisional decision I attempted to distinguish Mr B's complaint from the decision in *Adams* but I've made a material error of law in doing so. Westerby's said that:

  > *"In Adams HHJ Dight stated that the scope of the 'best interests' duty at COBS 2.1.1R was to be determined by "the relevant factual context" and, in particular, the parties' "defined… roles and functions in the transaction" as set out by the terms of their agreement. He therefore concluded that the duty argued for on Mr Adams' behalf did not arise because the defendant's role was limited to 'execution-only'."*

- I distinguished Mr B's complaint from the situation in *Adams* on the basis that Joseph Oliver LDA was offering an advisory service. It's unclear how Joseph Oliver LDA's contractually defined role impacts upon the scope of duty owed by Westerby under COBS 2.1.1R. It wasn't part of Westerby's contractual obligations to Mr B to investigate the permissions of third-party advisers. And it's wrong in principle to conclude that the contractual responsibilities of an unrelated third-party could somehow be used to define those owed by Westerby under COBS 2.1.1R.

- The *Options* appeal decision commented that s27 of the FSMA is designed to shift the risks of accepting business from unauthorised parties onto providers. However, s20 FSMA does the exact opposite – it explicitly shields authorised parties from the risks of accepting business from authorised parties acting outside their permissions (such as Joseph Oliver LDA). And FCA guidance I referred to in my provisional decision appears to directly contradict the intention of legislation.

- There should be some, if not a full, apportionment of liability made against Joseph Oliver LDA. And I've failed to assess apportionment.

- In a previous decision, a different ombudsman did deal with the apportionment issue where the complaint was against an EEA firm that had acted outside its permissions. The decision made an apportionment between the SIPP provider and the adviser on a 50/50 basis.

- The provisional decision sought to rely on the fact that Westerby has routes to recover any contribution from Joseph Oliver LDA as the basis for the decision that it should fully compensate Mr B. But in light of Joseph Oliver LDA's financial health any indemnity from Joseph Oliver LDA and/or assignment of any action against it from Mr B is effectively worthless.

- Appropriate liability should be attributed to Joseph Oliver LDA for its involvement in the losses that complainants have suffered. It's not clear why, nor is it reasonable that we've decided complaints against Westerby before those against Joseph Oliver LDA

- We've issued a separate decision upholding a complaint Mr B raised against Abana LDA about advice given by Mr F to transfer to an Avalon SIPP. This appears to be the same Mr B as the complainant in this case. Whilst that decision relates to a different advice firm, the parties were the same. Had Westerby declined to accept business from Joseph Oliver LDA it's reasonable to expect that the funds would simply have been placed with Avalon. There's no evidence that Mr B questioned with his adviser why his funds were being placed with Avalon rather than his existing SIPP with Westerby, had he made some basic enquiries, he would've learned that Westerby weren't accepting new business from Mr F. This, in turn, ought to have led him to question the advice he'd been given. Whilst Westerby couldn't have told Mr B the reasons for it declining new business from Mr F, this ought to have alerted him to potential issues and for him to then make some reasonable enquiries into issues with his adviser.

- Had it uncovered that Joseph Oliver LDA didn't have the relevant permissions (which for the reasons set out already, wasn't possible), it would've declined all business from Joseph Olive LDA from the outset, and would never have received Mr B's application or have been in a position to highlight Joseph Oliver LDA's lack of permissions.

- It wouldn't have been at liberty to contact investors directly to tell them why their application was refused.

- Also, based on the evidence, Mr B would've continued to accept or act on advice from Joseph Oliver LDA (later Abana). In April 2016, Mr B sought 'independent advice' from KB Wealth Management Limited – a firm owned and operated by one of Abana LDA's advisers.
- Mr B was the director of two businesses, the accountancy firm named on the incorporation documents of those businesses in 2014 was run by two individuals linked to Abana LDA via one of its appointed representatives. Westerby expects that when it wrote to Mr B in November 2014, he would've discussed this with his trusted adviser Mr F and his accountants, who are linked to Abana LDA. This reinforces the position that regardless of what Westerby told Mr B the outcome would be the same as it is now. And, it shouldn't fall to Westerby to compensate Mr B for his choice in advisers.

- The provisional decision concludes that, if Westerby was unable to independently verify Joseph Oliver LDA's permissions, it should've concluded that it was unsafe to proceed to accept business from it. If it was impossible to verify the permissions through the register, and a regulatory requirement to reject the business on these grounds (as suggested in the provisional decision), then it would make it impossible for an EEA-passported firm to do any business other than the "default" business allowed by its passport, regardless of any top-up permissions held. This may be construed as favouring "local" firms by the back door, and possibly unlawful under EU law.

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

- Mr B's opportunities to mitigate losses haven't been fully explored. For example, Westerby's letter of November 2014 explained that Mr B should seek advice from his financial adviser, Abana LDA. Mr B appears to have done this and was advised to keep the investments. The provisional decision concluded on this basis that it isn't fair to say that Mr B ought to have acted differently and made a redemption request at that stage. But, Westerby had no input in the actions of or the advice provided by Abana LDA, which has caused the losses.

- In the contents of the published decision against Abana LDA, which Westerby believes was brought by the same complainant (Mr B) it's stated that Mr F was a trusted source of financial advice, that Mr B had known him for many years and that Mr B had been happy with the advice he'd received from Mr F. It's reasonable to expect that Mr B would've followed Mr F's advice regardless of the contents of its November 2014 letter and anything that Westerby could've done within its scope.

- It's also noted that Mr B recalled saying that he only wanted his funds to be invested in 'blue chip' companies. Westerby's November 2014 letter would've alerted him to the fact that his funds were not invested in such companies. Following this letter any investor would've sought independent advice or at least made reasonable enquiries.

- Westerby wasn't under any regulatory obligation to send the November 2014 letter but it was concerned about the regulatory action being taken against the funds and wanted to make investors aware of the issues. Westerby was acting in the best interests of investors by monitoring the investments and flagging issues.

- Mr B ought to have realised there was something wrong with the advice he was receiving, especially considering his business background.

- In July 2015, Westerby informed Mr B that it wouldn't be transferring Abana LDA's clients to Abana FS Ltd on the basis that they [Abana FS Ltd] weren't suitably independent at this point any investor ought reasonably to have sought advice. Mr B took no action which supports Westerby's position that regardless of what it had put in the letters Mr B wouldn't have taken any action and would be in the same position.

- The letters of June and July 2015 were sent on the instruction of the FCA.

- It's since come to light that Abana LDA were actively calling clients to encourage them to stay in the funds. Westerby isn't responsible for Abana LDA's poor advice or its actions to encourage clients to stay in the funds.

- In 2016 Mr B appointed as his financial adviser KB Wealth Management Limited (KB Wealth), a firm owned and operated by one of Abana's advisers. He chose this firm to provide him with independent advice. No amount of warnings from Westerby or any other parties would've stopped Mr B from seeking advice from his trusted adviser.

- Westerby provided investors with as much information as it could as soon as it could, Mr B didn't take any opportunity to mitigate his losses and it has been proven that prompt action in relation to redemption requests would've mitigated his losses. It's unreasonable that Mr B didn't take any action.

- The findings set out in the provisional decision effectively conclude that Westerby should be responsible for Mr B's losses regardless of his failure to mitigate his losses. Westerby couldn't advise Mr B to take action or take action on his behalf.

- Westerby's duties must be interpreted in light of the contract. Westerby's contract with Mr B was execution-only and it had to follow his instructions and isn't responsible for any advice he received.

- There were other factors out of Westerby's control. Originally Abana LDA/Joseph Oliver LDA put their clients into the Kijani and SAMAIF funds directly. Later, without Westerby's authority, they made arrangements for funds to be placed into the "EPS Managed Fund" a Special Purpose Vehicle (SPV) which effectively was a fund of funds, made up of Kijani, SAMAIF and the TCA Global fund. When EPS started trading again it was split into two portfolios – Managed Portfolio S (suspended) containing Kijani and Managed Portfolio L (liquid). SAMAIF was included in the liquid portfolio as it was expected to start trading again. Redemptions from the fund were made by the managers selling TCA Global (which is how they were able to initially make redemptions). The TCA Global fund was used to subsidise the early redemption requests on the expectation that SAMAIF would begin trading again.

- The SIPP and investment applications would've been downloaded by Joseph Oliver LDA and completed by it with Mr B only after that the applications were sent to Westerby and processed in August 2013. Westerby had no contact with members to be.

Because agreement couldn't be reached, the case has been passed back to me for review.

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. Ultimately, I'm required to make a decision that I consider to be fair and reasonable in all the circumstances of the case.

Having considered all of the submissions made, my findings remain as set out in my provisional decision. I've largely reiterated these below, where appropriate I've expanded on these to address arguments made in response to my provisional decision.

Relevant considerations

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

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

At the time Mr B's application form was accepted by Westerby the regulator was the Financial Services Authority (FSA). Not long after Mr B's SIPP was established the regulator became the FCA. For ease of reference, outwith quotations, I've referred to the FCA throughout.

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

> *"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*
>
> *Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems*
>
> *Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."*

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

The BBSAL judgment also considers section 228 of FSMA and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the ombudsman in that complaint, which I have described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what is fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in BBSAL. I'm therefore satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

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

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

I acknowledge that COBS 2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client)* overlaps with certain 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 didn't so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

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

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

I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr B's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, as HHJ Dight noted, he wasn't asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP. The facts of the case were also different. And I need to construe the duties Westerby owed to Mr B under COBS 2.1.1R in light of the specific facts of Mr B's case. In the published decision it was noted that in Adams v Options SIPP HHJ Dight accepted that the transaction with Options SIPP proceeded on an execution-only basis i.e. without any advice from the business introducing the SIPP application. In contrast to that, the transaction between Mr B and Westerby proceeded on the footing that Mr B was being advised by an *authorised advisor.*

In its response to my provisional decision Westerby said that I'd sought to distinguish Mr B's complaint from the situation in *Adams* on the basis that Joseph Oliver LDA was offering an advisory service. That it's unclear how Joseph Oliver LDA's contractually defined role impacted upon the scope of duty owed by Westerby under COBS 2.1.1R. And that in attempting to distinguish Mr B's complaint from the decision in *Adams* I'd made a material error of law.

I've carefully considered what Westerby has said about this, but I'm still of the view that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams (summarised in paragraph 120 of the Court of Appeal judgment) and the issues in Mr B's complaint. In particular, as HHJ Dight noted, he wasn't asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP.

I explained in my provisional decision that the facts of the case were also different. And that I had to construe the duties Westerby owed to Mr B under COBS 2.1.1R in light of the specific facts of Mr B's case. And that's still my view.

In my provisional decision, I explained that in the published decision it was noted that in Adams v Options SIPP HHJ Dight accepted that the transaction with Options SIPP proceeded on an execution only basis, i.e. without any advice from the business introducing the SIPP application. And that the transaction between Mr B and Westerby proceeded on the footing that Mr B was being advised by an authorised advisor. I made that point in the provisional decision, and I've repeated it here, simply to highlight that there are factual differences between Adams v Options SIPP and Mr B's case.

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

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

I also want to emphasise here that I don't say that Westerby was under any obligation to advise Mr B on the SIPP and/or the underlying investments. Refusing to accept an application because it came about as a result of advice given by a firm which didn't have the required permissions to be giving that advice, and had been introduced by that same firm, isn't the same thing as advising Mr B on the merits of making certain investments and/or transferring to the SIPP.

So, I'm still satisfied that COBS 2.1.1R is a relevant consideration – but that it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Mr B's case.

The regulatory publications

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

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

The 2009 Thematic Review Report

The 2009 report included the following statement:

> *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its clients and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.*
>
> *It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.*
>
> …
>
> *We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect*

them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate SIPPs that are unsuitable or detrimental to clients.

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

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

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

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

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

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

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

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

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

It's relevant that when deciding what amounted to good industry practice in the BBSAL case, the ombudsman found that *"the regulator's reports, guidance and letter go a long way to clarify what should be regarded as good practice and what should not."* And the judge in BBSAL endorsed the lawfulness of the approach taken by the ombudsman. I'm also satisfied that Westerby, at the time of the events under consideration here, thought the 2009 thematic review report was relevant, and thought that it set out examples of good industry practice. Westerby *did* carry out due diligence on Joseph Oliver LDA. So, it clearly thought it was good practice to do so, at the very least.

I've carefully considered what Westerby's said about the publications post-dating the events that are the subject of this complaint. However, I remain of the view stated in my provisional decision, like the ombudsman in the BBSAL case, I don't think the fact the publications, (other than the 2009 Thematic Review Report), post-date the events that took place in relation to Mr B's complaint, mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

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

That doesn’t mean that in considering what’s fair and reasonable, I’ll 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 didn’t say the suggestions given were the limit of what a SIPP operator should do. As the annex to the Dear CEO letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

In response to my provisional decision Westerby’s stated that the *Options* appeal decision commented that s27 of the FSMA is designed to shift the risks of accepting business from unauthorised parties onto providers. But s20 of the FSMA does the exact opposite – it explicitly shields authorised parties from the risks of accepting business from authorised parties acting outside their permissions (such as Joseph Oliver LDA). And Westerby’s highlighted that FCA guidance I’d referred to in my provisional decision, and which I’ve repeated above, appears to directly contradict the intention of legislation.

I’ve carefully considered Westerby’s submissions, and the contents of s20 and s27 of the FSMA. But, to be clear, it’s not my role here to determine whether an offence has occurred, or whether a transaction’s void or unenforceable or whether there’s something that’s taken place that gives rise to a right of action for breach of statutory duty. 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 B’s SIPP application from Joseph Oliver LDA, Westerby complied with its regulatory obligations to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regard to the interests of its customers, to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I’m looking to the Principles and the publications listed above to provide an indication of what Westerby could’ve done to comply with its regulatory obligations and duties.

In this case, the business Westerby was conducting was its operation of SIPPs. I’m 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, later, FCA during its work with SIPP operators. This included confirming, both initially and on an ongoing basis, that introducers that advise clients have the appropriate permissions to give the advice they’re providing.

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

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

At the outset I should note that, in this case, it appears to be accepted that Mr F of Joseph Oliver LDA was the advisor who advised on this business. However, based on the paperwork, it isn't definitively clear which business Westerby was accepting business from – Joseph Oliver LDA or Joseph Oliver Marketing Limited ("JOML") – a UK registered company, which wasn't authorised by the FCA. The SIPP application simply says Mr F's full name and the investment application says "*Joseph Oliver*" is the advising business – which could refer to either Joseph Oliver LDA or JOML. So, I've considered both possibilities – starting with Joseph Oliver LDA.

If the advisor was Joseph Oliver LDA?

The regulatory position

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

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

Under Article 2 of the Insurance Mediation Directive 2002/92/EC, *"insurance mediation"* and *"reinsurance mediation"* are defined as:

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

In the FSA's consultation paper 201, entitled *"Implementation of the Insurance Mediation Directive for Long-term insurance business"* it's 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 (then FSA) Perimeter Guidance Manual ("PERG") offers guidance to persons, such as Westerby, running personal pension schemes. The guidance in place at the time the application was made for Mr B's SIPP confirms that a personal pension scheme, for the purpose of regulated activities (PERG 12.2):

> *"…is defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the Regulated Activities Order) as any scheme other than an*

occupational pension scheme (OPS) or a stakeholder pension scheme that is to provide benefits for people:

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

It goes on to say:

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

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

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

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

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

I note this shows Article 82 investments aren't covered by the Insurance Mediation Directive.

The guidance in SUP 13A.1.2G of the FCA Handbook at the time of Mr B's application for the SIPP explains that an EEA firm wishing to carry on activities in the UK which are outside the scope of its EEA rights (i.e. its passporting rights) will require a "top up" permission under Part 4A of the Act (the Act being FSMA). In other words, it needs "top up" permissions from the regulator 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 (then FSA) Handbook at SUP 13A.7. SUP 13A.7.1G states (as at September 2012):

> *“If a person established in the EEA:*
>
> *(1) does not have an EEA right;*
> *(2) does not have permission as a UCITS qualifier; and*
> *(3) does not have, or does not wish to exercise, a Treaty right (see SUP 13A.3.4 G to SUP 13A.3.11 G);*
>
> *to carry on a particular regulated activity in the United Kingdom, it must seek Part IV permission from the FSA to do so (see the FSA website "How do I get authorised": http://www.fsa.gov.uk/Pages/Doing/how/index.shtml). This might arise if the activity itself is outside the scope of the Single Market Directives, or where the activity is included in the scope of a Single Market Directive but is not covered by the EEA firm's Home State authorisation. If a person also qualifies for authorisation under Schedules 3, 4 or 5 of the Act as a result of its other activities, the Part IV permission is referred to in the Handbook as a top-up permission.”*
>
> In the glossary section of the FCA Handbook EEA authorisation is defined (as at September 2012) 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.”*

The guidance at SUP App 3 of the FCA Handbook (which I set out above) was readily available in 2012 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 didn’t fall under IMD passporting – they required FCA permission for Joseph Oliver LDA to conduct them in the UK. Westerby, acting in accordance with its own regulatory obligations, should’ve ensured it understood the relevant rules, guidance and legislation I’ve referred to above, (or sought advice on this, to ensure it could gain the proper understanding), when considering whether to accept business from Joseph Oliver LDA, which was an EEA firm passporting into the UK. It should therefore have known – or have checked and discovered – that a business based in Portugal that was EEA authorised needed to have top up permissions to give advice and make arrangements in relation to personal pensions in the UK. And that top up permissions had to be granted by the UK regulator, the FCA.

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

Westerby’s checks on Joseph Oliver LDA’s permissions

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

Westerby says it took appropriate steps to conduct due diligence on Joseph Oliver LDA and it couldn't and shouldn't reasonably have concluded that Joseph Oliver LDA didn't have the required top up permissions. I've carefully considered all of 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 Joseph Oliver LDA's permissions before accepting business from it. I therefore consider it's fair and reasonable to expect Westerby to have checked the Register entry for Joseph Oliver LDA in the circumstances. And, to be clear, I think it fair and reasonable to say that the checks Westerby ought to have conducted on Joseph Oliver LDA's Register entry should've included a review of all the relevant information available.

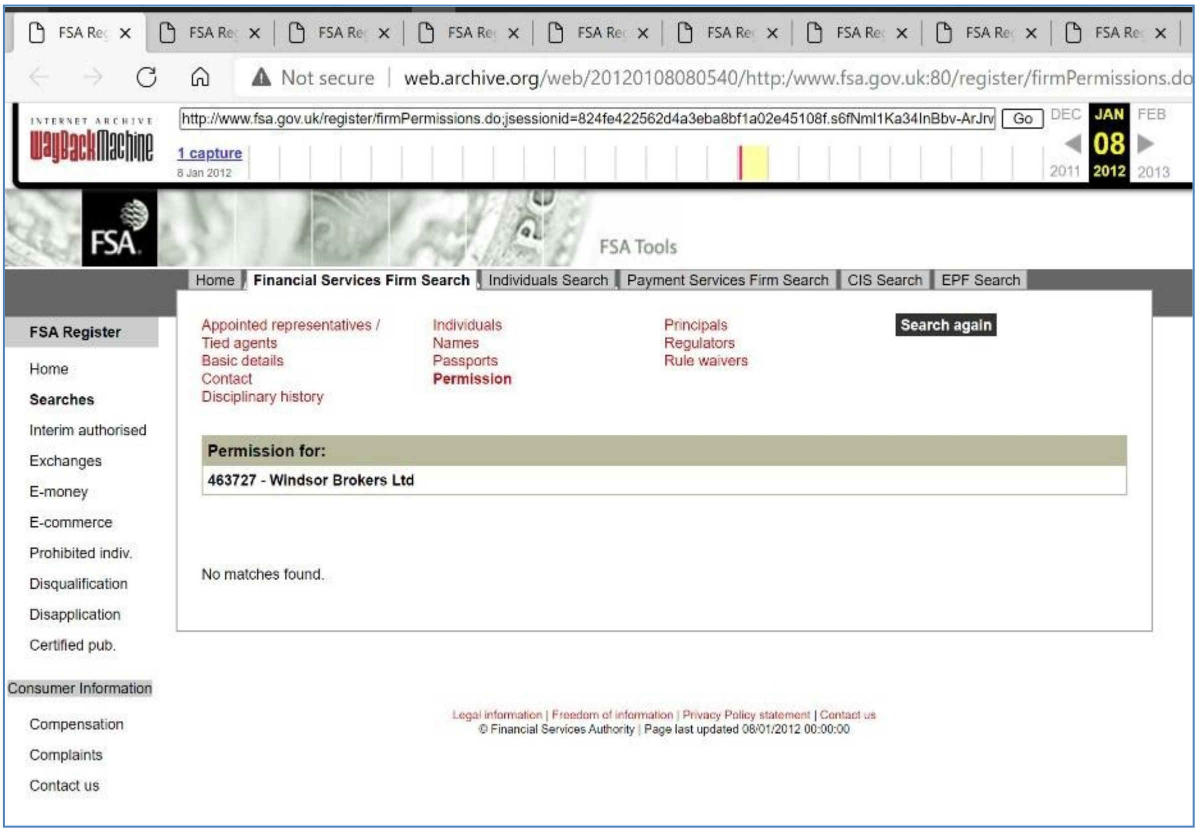
I've carefully considered the format of the Register in or around 2012 when Mr B's application was submitted by Joseph Oliver LDA.

The third-party report on the Register provided by Westerby during the investigation of the complaint which was the subject of the published decision is helpful on the question of the format of the Register at the time of Mr B's SIPP application.

Snapshots of entries in the register provided show the information that was available at the time, as depicted in the image below. Each of the red titles at the top of the entry (i.e. "Regulators", "Basic details", and "Contact" etc) is a hyperlink to another page of the entry on the Register. Whilst this pre-dates Mr B's application by a few months, I'm satisfied the entry for Joseph Oliver LDA would've followed the same format (a similar format is also depicted in later snapshots provided). So, this screenshot shows that Joseph Oliver LDA's 2012 entry on the Register would've included both "Permission" and "Passports" pages (amongst other pages). It's therefore reasonable to conclude from the below screenshot that the format of the Register at or around the time of Mr B's SIPP application was submitted to Westerby in 2012 included pages which provided information in relation to both a firm's passport details and in relation to a firm's permissions. Indeed, Westerby appears to accept Joseph Oliver LDA's entry would've included a permissions page at the relevant time.

Westerby's position, in short, is that the permissions page was blank, and the Register entry couldn't 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 – such as the one below – which *were* archived, dating from the around the time of Mr B's SIPP application or earlier. The below example, dating from 2012, and relating to a Cypriot firm which, like Joseph Oliver LDA, was an incoming EEA firm, is particularly helpful:



This shows that the Permission page for this incoming EEA firm did exist in 2012, and that it showed "*no matches found*". This is strong evidence that the format of the Register for EEA firms did include a page with information on a firm's permissions, even if all it recorded is that "no matches are found", (i.e. it had no permissions from the FCA).

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

All of this information taken together demonstrates that, when Mr B's application was submitted to Westerby, the format of the Register did contain a page labelled "Permission" and this page is where a firm's permissions would be set out on the Register. And, where a firm didn't 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 around the time Mr B's application was accepted. 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 at – or around – the relevant time. 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 case.

Westerby's said, amongst other things, more information should be provided about the details of the contact with the FCA. But, as I explained in my provisional decision, Westerby's already been provided with the FCA's response to our question. So, I'm satisfied that Westerby's had the opportunity to consider the response I've considered, and that it's also had the opportunity to make further submissions to us, and indeed it has made further submissions to us. So, I remain satisfied that I can fairly determine this complaint now and that Westerby doesn't 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've already said I'm satisfied has been demonstrated by the evidence that's available in this case. So, my decision on this complaint would still be the same with or without the FCA's response to our question.

To summarise my conclusions so far, I'm satisfied:

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

- The format of the Register in 2012 did include a "Permission" page and it follows that the entry for Joseph Oliver LDA on the Register at the time of Mr B's application would've included a "Permission" page which Westerby ought to have checked.

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

To be clear, I don't accept Westerby's submission that information about a firm's permissions was simply not available for an online user in – or around – 2012. Indeed, evidence provided by it contradicts this assertion.

Westerby has, in previous submissions, referred to reports from the Complaints Commissioner both of which highlighted errors and/or weaknesses of the Register. In its more recent 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've considered the submissions Westerby has made on this point.

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

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

I accept FCA will not (and wouldn't) confirm details about a firm that aren't 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 2012 when Westerby accepted Mr B's application from Joseph Oliver LDA.

Although we don't have evidence of exactly what did appear on Joseph Oliver LDA's "Permission" page in 2012, if it'd erroneously been left blank, I think it's fair and reasonable to conclude the FCA would've been able to confirm the position that Joseph Oliver LDA didn't – in fact – have the required permissions, as this was information that ought to have been publicly available on the Register. So, I'm not persuaded by Westerby's submissions on this point and I'm satisfied contacting the FCA was a sensible and proper route open to it to verify Joseph Oliver LDA's permissions before accepting business from it.

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

In response to my provisional decision Westerby's highlighted that this complaint arises from the FCA's negligence in failing to complete the permissions page for Joseph Oliver LDA on the public register. But, to be clear, even if there was an issue with Joseph Oliver LDA's entry on the Register I still don't think it is fair and reasonable to conclude that it was appropriate – or in accordance with its regulatory obligations – for Westerby to have proceeded with Mr B's application from Joseph Oliver LDA in those circumstances. Westerby ought to have independently checked and verified Joseph Oliver LDA's permissions before accepting business from it. If there was no information available or accessible on the Register at the relevant time to reveal the permissions position of Joseph Oliver LDA, then Westerby ought to have either found another way to verify Joseph Oliver LDA's permissions, or it ought to have declined to accept any applications from Joseph Oliver LDA until such a time as it could verify the correct position on Joseph Oliver LDA's permissions.

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

So, to summarise, I'm satisfied:

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

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

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

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

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

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

Westerby, in previous submissions, has referred to 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) provided 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 said:

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

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

I've carefully considered what Westerby's said about the Written Agreement in response to my provisional decision. Amongst other things, it's contended that the Written Agreement wasn't vague and generic in nature and that the term 'permissions' encompasses 'top-up' permissions.

However, I remain of the view that the Agreement appears to be a generic document and not specific to Joseph Oliver LDA. It doesn't 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".*

I remain of the view that this doesn't amount to a clear statement that Joseph Oliver LDA had the required top up permissions for it to advise on and arrange personal pensions in the UK that Westerby would be entitled to rely on.

The activity of advising on rights under personal pension schemes isn't 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 doesn't refer specifically to top up permissions being required and Joseph Oliver LDA warranting that it has top up permissions to conduct personal pension business in the UK.

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

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

So, for all the reasons I've set out above, I 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. Westerby has referred, in previous submissions to the FCA's thematic review TR16/1 and to Gen 4 Annex 1 of the FCA Handbook, and I've considered this question with those details in mind. However, I'm 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've 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 don't 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's told us it checked the Register. It's also told us its procedure was to check the Register every time a SIPP application is received from an introducer, and every time advisor fees are paid from the SIPP. It says that, in its view, this demonstrates good practice, as per the FCA's 2009 thematic review report. That's a view I share.

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

If the advisor was instead JOML?

As noted at the outset, it isn't definitively clear which entity was the advisor here – Joseph Oliver LDA or JOML. The SIPP application form lists Mr F and the platform application form simply lists Joseph Oliver. Westerby appears to have accepted the business on the basis that it was dealing with Mr F acting for Joseph Oliver LDA and the evidence points to this being the correct position. However, I've nonetheless accounted for the possibility of JOML's involvement.

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

However, I've only briefly covered this point as there is evidence to show Mr F was representing Joseph Oliver LDA at the time and Westerby says the provider of the E-Portfolio platform has confirmed its relationship was with Joseph Oliver LDA, not JOML. So, I think the likely outcome, had Westerby either assumed the application(s) were advised on by JOML and rejected it/them on that basis – or have queried this on the basis the application(s) had to be advised on by an authorised business – would've been that the application(s) was/were then submitted through Joseph Oliver LDA. Or, it would've simply been confirmed the Joseph Oliver referenced in the application was indeed Joseph Oliver LDA.

Anomalous features

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

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

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

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

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

Further points

Westerby's said it's contrary to European Union law to discriminate against a firm on the basis of the EEA country in which it's been established. However, in my view, carrying out adequate checks on Joseph Oliver LDA's permissions doesn't equate to treating Joseph Oliver LDA differently by virtue of its location. Westerby should've carried out these checks on *any* firm introducing advised business to it.

Westerby's said it provided quarterly Product Sales Data reports to the FCA, and that the FCA never expressed any concerns about it accepting business from Joseph Oliver LDA. I've seen no evidence to suggest that at the time Westerby accepted Mr B's application from Joseph Oliver LDA, a factor in its decision to do so was that it had been reporting the previous business it had been doing with Joseph Oliver LDA to the FCA, and that the FCA hadn't raised any concerns with it about this business. In any event, I'm of the view that this is irrelevant, because if Westerby had acted in compliance with its regulatory obligations, it wouldn't have accepted business from Joseph Oliver LDA *at all* and Joseph Oliver LDA would therefore not have featured in its reporting to the FCA.

There seems to be no basis on which Mr B's application could, or would, have proceeded on the understanding Joseph Oliver LDA was an unregulated introducer. Westerby seems to have understood from the outset that Joseph Oliver LDA wasn't simply an introducer of investments to its customers. It was carrying on the regulated activities of advising and arranging. It seems that in any event, Westerby had a policy not to accept introductions from unregulated businesses. So, in the circumstances, I don't think it's fair and reasonable to make any findings based on the fact that Westerby was able to accept introductions from unregulated businesses, as that wasn't what happened in this case.

I appreciate that there's also an argument that if it had been identified that Joseph Oliver LDA didn't have the required *"top-up"* permissions, Joseph Oliver LDA might have applied for, and been granted, the relevant *"top-up"* permissions. However, I find no merit in this line of argument. I'm required to consider what's fair and reasonable in all the circumstances of this case. And in this case, Westerby accepted business from a firm which didn't have the required permissions to be carrying on the business that it did. And, Westerby failed to identify this fact prior to accepting Mr B's application. So, this is what I need to consider here – not a possible situation that *could've* happened.

Westerby's submitted that where complaints have been received by this service against both Joseph Oliver LDA and Westerby, that we should decide the complaint against Joseph Oliver LDA before, or at the same time as, the complaint against Westerby. Later in this decision, I've addressed the question of whether it's fair to ask Westerby to pay Mr B compensation in the circumstances of this complaint.

In conclusion

Having carefully reconsidered all of the evidence in this case, including the submissions in response to my provisional decision, I've arrived at the same conclusion as I reached in my provisional decision. For completeness, I've repeated this conclusion below.

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

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

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

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

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

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

Due diligence on the underlying investments

In light of my conclusions about Westerby's regulatory obligations to carry out sufficient due diligence on introducers, and given my finding that in the circumstances of this complaint Westerby failed to comply with these obligations, I've not considered Westerby's obligations under the Principles in respect of carrying out sufficient due diligence on the underlying investments. It's my view that had Westerby complied with its obligations under the Principles to carry out sufficient due diligence checks on Joseph Oliver LDA, then this arrangement wouldn't have come about in the first place.

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

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

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

I still think it's most likely that if Westerby had refused to accept Mr B's application from Joseph Oliver LDA, and explained to Mr B why it wasn't able to do so, Mr B wouldn't have continued to accept or act on pensions advice provided by Joseph Oliver LDA (as he would then have been aware it wasn't able to provide such advice). And I think it very unlikely advice from an appropriately authorised business would've resulted in Mr B taking the same course of action. I think it reasonable to say Mr B would've sought out a business with the required permissions and that a competent business would've given suitable advice.

In Adams v Options SIPP, the judge found that Mr Adams would've 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 B proceeded in the knowledge that the investments he was making were high risk and speculative, and that he was determined to move forward with the transaction in order to take advantage of a cash incentive offered by Joseph Oliver LDA.

Instead, it appears Mr B understood the investment, via the SIPP, would offer a higher return than his existing pension, and he says he told Mr F of Joseph Oliver LDA that he didn't want to expose his pension to risk and doesn't recall being told there was any risk involved. In his submissions to us Mr B highlighted on a number of occasions that he thought he'd been dealing with a FCA authorised advisor, so I think this was important to him and he appears to have placed some weight on the fact that he was (so far as he was aware at the time) dealing with an appropriately authorised advisor.

I've also not seen any evidence to show Mr B was paid a cash incentive. It therefore can't be said he was "incentivised" to enter into the transaction. I'm satisfied that Mr B, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams.

In response to my provisional decision, Westerby's contended that Mr B would likely have proceeded with the transfer and investments regardless of the actions it took. It's highlighted that other SIPP providers were accepting such investments at the time and says the transactions would've been effected with another provider.

Westerby might argue that another SIPP operator would've accepted Mr B's application, had it declined it. But I don't think it's fair and reasonable to say that Westerby shouldn't compensate Mr B for his loss on the basis of speculation that another SIPP operator would've made the same mistakes as I've found Westerby did. I think it's fair instead to assume that another SIPP provider would've complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr B's application from Joseph Oliver LDA.

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

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

In response to my provisional decision Westerby's said that had it uncovered that Joseph Oliver LDA didn't have the relevant permissions, it wouldn't have accepted business from Joseph Oliver LDA and it would never have received Mr B's application. Westerby also says its contract was with Joseph Oliver LDA not Mr B and that if Mr B's application had been refused it wouldn't have been at liberty to, or had reason to, contact Mr B.

But Westerby *did* receive Mr B's application, so I'm considering what it ought to have done having received Mr B's application. And for the reasons I've explained at length above I'm satisfied that, having received Mr B's application from Joseph Oliver LDA, it shouldn't then have accepted Mr B's SIPP application.

Mr B went through a substantive process with Joseph Oliver LDA that culminated in him completing paperwork to set up a new Westerby SIPP and with the expectancy that monies from existing pension provision would be transferred into the newly established SIPP. Having gone to the time and effort of doing this, I think it's *most likely* that if the Westerby SIPP wasn't then established, and if his pension monies weren't then transferred to Westerby, that Mr B would've wanted to find out why from Joseph Oliver LDA and Westerby.

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

Instead, I think it's fair to conclude that one or more of the parties involved would've then explained to Mr B that his application hadn't been accepted because Joseph Oliver LDA didn't have the necessary *"top-up"* permissions it needed to provide the advice, or alternatively, because Westerby hadn't been able to independently verify that Joseph Oliver LDA had the necessary *"top-up"* permissions to provide the advice. And that Mr B wouldn't then have continued to accept or act on pensions advice provided by Joseph Oliver LDA. Further, I think it's very unlikely that advice from a business that did have the necessary permissions would've resulted in Mr B taking the same course of action. I think it's reasonable to say that a business that did have the necessary permissions would've given suitable advice.

In response to my provisional decision, Westerby highlighted a number of things which it believes support its contention that Mr B would've continued to act on pension advice from Joseph Oliver LDA regardless, such as:

- Mr B appointed KB Wealth as his financial advisor.
- An accountancy firm linked to Joseph Oliver LDA/Abana LDA was appointed in relation to Mr B's business.
- Mr B had a longstanding relationship with Mr F, who he considered to be his trusted adviser.

I don't dispute that Mr B trusted Mr F as his adviser but I disagree with Westerby's assertion that the corollary of that is that, even if Mr B discovered that Mr F was acting for a firm that had been giving him advice it wasn't permitted to, he would've continued to accept pension advice from Mr F/Joseph Oliver LDA. To the contrary, Mr B trusted Mr F/Joseph Oliver LDA to act honestly, in his best interests, to give suitable advice and look after his finances so I think the discovery that Joseph Oliver LDA didn't have the necessary permissions to advise him would have, if anything, a more devastating impact on the relationship than it might under different circumstances.

I've noted what was said in Westerby's June 2015 and July 2015 letters about Abana (FS) Ltd. But I've not seen sufficient evidence to show that Mr B was aware that KB Wealth was the same business as Abana (FS) Ltd. But, even if I had, I can't see that Mr B was ever told that KB Wealth didn't have the *necessary permissions* to provide him with pension advice and that he still then decided to consult with it.

So, I don't think the situation with KB Wealth is analogous to the situation with Joseph Oliver LDA. And it's still my view that, once he'd been told that his application hadn't been accepted as Joseph Oliver LDA didn't have the necessary *"top-up"* permissions it needed to provide the advice, or alternatively as Westerby hadn't been able to independently verify that Joseph Oliver LDA had the necessary *"top-up"* permissions to provide the advice, Mr B wouldn't then have continued to accept or act on pension advice provided by Joseph Oliver LDA.

Further, I think it's still reasonable to say that a business that did have the necessary permissions would've given suitable advice. And as Mr B's application for the SIPP was received before Abana (FS) Ltd had been incorporated, I'm also satisfied that any advice given to Mr B in 2012 from a firm other than Joseph Oliver LDA wouldn't have been from Abana (FS) Ltd/KB Wealth.

The involvement of Joseph Oliver LDA

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

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

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

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

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

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

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

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

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

I explained in my provisional decision that Westerby could have the option to take an assignment of any rights of action Mr B has against Joseph Oliver LDA before compensation is paid. Compensation could be made contingent upon Mr B's acceptance of this term of settlement.

In response to this, Westerby's said that any indemnity from Joseph Oliver LDA and/or assignment of any action against it from Mr B is effectively worthless.

I accept that may be true. However, the key point here is that but for Westerby's failings, Mr B wouldn't have suffered the loss he's suffered. As a result, the trading/financial position of Joseph Oliver LDA, and the fact that Westerby may not be able to rely on an indemnity from Joseph Oliver LDA and/or the fact that any assignment of any action against Joseph Oliver LDA from Mr B might be worthless, doesn't lead me to change my overall view on this point. And, as such, I remain of the opinion that it's appropriate and fair in the circumstances for Westerby to compensate Mr B to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by Joseph Oliver LDA.

In response to my provisional decision Westerby's also highlighted that in a previous decision involving an EEA firm that had acted outside its permissions, a different ombudsman made an apportionment between the SIPP provider and the advisor on a 50/50 basis.

We consider each complaint on its own merits, and the question I have to address in this case is whether, in all of the circumstances of this specific complaint, it's fair to ask Westerby to compensate Mr B to the full extent of the financial losses he's suffered due to its failings and, for the reasons I've already given above, I'm satisfied it is.

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

In addition to the financial loss suffered, I think the loss of the pension provision that's the subject of this complaint caused Mr B significant distress. It's clear from his submissions to us that Mr B was reliant on these funds being available to him in retirement and that their loss is a source of great concern for him. I think it's fair that Westerby compensate Mr B for this as well.

Mr B taking responsibility for his own investment decisions/choice of adviser

I note the point has been made by Westerby that consumers should take responsibility for their own investment decisions and choice of advisers. I've considered the actions of Mr B in relation to the mitigation of loss, in the section below. Beyond that, I'm satisfied that it wouldn't be fair or reasonable to say Mr B's actions mean he should bear the loss arising as a result of Westerby's failings.

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

Opportunity to mitigate losses

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

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

Westerby says it disagrees with the finding in my provisional decision that efforts to redeem the investments wouldn't have been successful. Westerby says that in the complaint that was the subject of the published decision, the consumer was able to redeem their funds in May 2016. And it's likely that Mr B could've also mitigated his losses with a timely redemption request.

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

In response to my provisional decision Westerby's said, amongst other things, that it was acting in the best interests of investors by keeping an eye on the investments and flagging issues with them. Further, that following its November 2014 letter, any investor would've sought independent financial advice or made some reasonable lines of enquiries.

I don't think it fair to say Mr B should've made a redemption request when Westerby wrote to him in November 2014. That letter required Mr B to seek advice, and urged him to contact his then financial advisor, Abana LDA. Mr B appears to have taken action having received that letter and approached his financial advisor. I say this because Mr B returned the member instruction form, this confirmed he'd sought advice from Mr F of Abana LDA and wanted to retain his existing holdings.

I'm also of the view that Westerby didn't act in accordance with its regulatory obligations in sending this letter. In the complaints about introductions from Abana LDA, Westerby says its process was to check an advisory firm's permissions every time it received an application to open a SIPP, and every time an advisor's renumeration was to be paid. So, by the time Westerby wrote to Mr B in November 2014, it would've had many opportunities to discover that Joseph Oliver LDA then (later) Abana LDA didn't have the top up permissions they respectively needed to give advice or make arrangements on personal pensions in the UK. For Westerby to have suggested that Mr B seek advice from Abana LDA once problems with the funds he'd invested in had come to light, is a further failing of it to comply with its regulatory obligations and the requirement to treat Mr B fairly. In fact, it should've alerted Mr B to the fact that Abana LDA didn't have the required permissions and have suggested he seek independent advice from an appropriately regulated advisor as a matter of urgency.

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

It's not clear what, if any, action Mr B took following these letters. There is reference to a redemption request in one of the letters, but we've not been provided with details of any request or what may have came of it. In any case, I'm not persuaded any effort to redeem the investments at that point would've been successful. I note the December 2015 letter is somewhat contradictory as it says the suspension of SAMAIF has been lifted but then says that the lift of the suspension is "not yet active" (i.e. it's still suspended). We've also seen a letter from Westerby which suggests SAMAIF was still suspended in June 2016 and hadn't been trading in the meantime. So, I've also not seen sufficient evidence to show a redemption request would've been successful even if it had been made.

Putting things right

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

If Mr B had sought advice from a different advisor, I think it’s more likely than not that the advice would’ve been to stay in his existing pension. I think it is unlikely that another advisor, acting properly, would’ve advised Mr B to transfer away from his existing pension. Equally, as Mr B wasn’t unhappy with his existing pension and had only considered moving it due to contact from Mr F, he may well have simply decided not to seek further advice and keep the pension.

In light of the above, Westerby should calculate fair compensation by comparing the current position to the position Mr B would be in if he hadn’t transferred from his existing pension. We don’t have details of the pension that was transferred to the SIPP beyond the name of the provider and the amount transferred. There is some reference from Mr B to this being a workplace pension. So, I’ve set out alternative ways for Westerby to go about calculating redress depending on the nature of Mr B’s then existing pension.

If the pension was a personal pension with no guarantees (safeguarded benefits as per their current FCA Handbook glossary definition) or a defined contribution workplace pension. Westerby should follow the below steps.

Treatment of the illiquid assets held within the SIPP

I think it would be best if any illiquid assets held could be removed from the SIPP. Mr B would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investment/s may prove difficult, as there is no market for it. For calculating compensation, Westerby should establish an amount as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment/s.

If Westerby is able to purchase the illiquid investment/s then the price paid to purchase the holding/s will be allowed for in the current transfer value (because it will have been paid into the SIPP to secure the holding/s).

If Westerby is unable, or if there are any difficulties in buying Mr B's illiquid investment/s, it should give the holding/s a nil value for the purposes of calculating compensation. In this instance Westerby may ask Mr B to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding/s. That undertaking should allow for the effect of any tax and charges on the amount Mr B may receive from the investment/s and any eventual sums. Westerby will have to meet the cost of drawing up any such undertaking.

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

Westerby should first contact the provider of the plan which was transferred into the SIPP and ask it to provide a notional value for the policy as at the date of this decision. For the purposes of the notional calculation the provider should be told to assume no monies would’ve been transferred away from the plan, the monies in the policy would’ve remained invested in an identical manner to that which existed prior to the actual transfer.

Any contributions or withdrawals Mr B has made will need to be taken into account whether the notional value is established by the ceding provider or calculated as set out below.

Any withdrawal, income or other distribution out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would’ve enjoyed is allowed for.

If there are any difficulties in obtaining a notional valuation from the provider, then Westerby should instead arrive at a notional valuation by assuming half the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index and the other half would have enjoyed a return in line with the monthly average rate for the fixed rate bonds with 12 to 17 months maturity as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis. That is a reasonable proxy for the type of return that could have been achieved over the period in question.

The notional value of the plan of Mr B's existing plan if monies hadn't been transferred (established in line with the above) less the current value of the SIPP is Mr B's loss.

Pay an amount into Mr B's SIPP so that the transfer value is increased by the loss calculated above.

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

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr B as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

If the pension transferred was a defined benefit workplace pension – the loss of the safeguarded benefits will need to be taken into account, and Westerby should follow the approach below.

As above, I think Mr B would most likely have retained his existing scheme. If the pension transferred was a defined benefit occupational pension scheme, I consider he would've remained in the occupational scheme. Westerby must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the FCA in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out as at the date of my final decision, and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr B's acceptance of the decision.

Westerby may wish to contact the Department for Work and Pensions ("DWP") to obtain Mr B's contribution history to the State Earnings Related Pension Scheme ("SERPS or S2P").

These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr B's SERPS/S2P entitlement.

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

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr B as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

The compensation amount must where possible be paid to Mr B within 90 days of the date Westerby receives notification of his acceptance of my final decision. Further 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 for any time, in excess of 90 days, that it takes Westerby to pay Mr B.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90-day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90-day period in which interest won't apply.

If the pension transferred was a personal pension with guaranteed benefits of some form, these should be taken into account in order to accurately calculate the loss that Mr B has suffered as a result of transferring his pension to a SIPP.

However, without knowing the form that these took I can't set out redress that would effectively take these into account. I invited Mr B to send me details of any applicable guarantees in response to my provisional decision and if appropriate I'd set out revised redress. I explained that any such information had to be provided by the deadline the parties were given for responding to this provisional decision at the very latest. And unless such information is forthcoming from Mr B by this date, I'd then proceed on the basis that there were no such guarantees. No information in relation to applicable guarantees was forthcoming, so I've not set out how redress should be calculated if there are any applicable guarantees.

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

SIPP fees

If the investments can't be removed from the SIPP, and it hence cannot be closed after compensation has been paid, then it wouldn't be fair for Mr B to have to continue to pay annual SIPP fees to keep the SIPP open. As such, Westerby should pay an amount into Mr B's SIPP equivalent to five years' worth of the fees that will be payable on the SIPP (based on the most recent year's fees). Five years should allow enough time for the issues with the investments to be dealt with, and for them to be removed from the SIPP. As an alternative to this, Westerby can agree to waive any future fees which might be payable by Mr B's SIPP.

Interest

The compensation resulting from this loss assessment must be paid to Mr B or into his SIPP within 28 days of the date Westerby receives notification of his acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days. Unless the pension transferred was a defined benefits occupational pensions scheme, in which case the interest applicable is set out within the relevant section above.

Distress & inconvenience

I think the loss of the pension provision that is the subject of this complaint caused Mr B significant distress, and this is clear from his submissions to this service, and Westerby should pay him £750 to compensate him for this.

My final decision

For the reasons given, my final decision is to uphold Mr B's complaint against Westerby. I direct it to compensate Mr B as set out above.

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 B 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 B's rights in relation to any claim he may have against Joseph Oliver LDA, and an assignment of the right to any future payment Joseph Oliver LDA may make to Mr B as part of the settlement agreed following the third-party review.

If the loss exceeds £150,000 and Westerby doesn't accept the recommendation to pay the full amount, any assignment of Mr B'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 B for his consideration and agreement. Any expenses incurred for the drafting of the assignment should be met by Westerby.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 6 September 2022.

Nicola Curnow
Ombudsman