DRN-3756713

The complaint

Mrs G has a Self-Invested Personal Pension ('SIPP') with Westerby Trustee Services Limited ('Westerby'). Mrs G transferred monies from three existing pension arrangements into the SIPP and the transferred monies were then invested in holdings that haven't performed as well as hoped.

Mrs G has complained about her SIPP and says that she's unhappy with Westerby and that it should have completed more checks.

What happened

Westerby has been represented by solicitors for periods of our investigation of this complaint, and the solicitors representing Westerby 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.

Abana Unipessoal Lda ('Abana') is a financial advisor firm based in Portugal. In December 2013, Abana passported into the UK on an Insurance Mediation Directive ('IMD') branch passport from 8 January 2014 to 7 January 2016 and an IMD services passport from 12 March 2013 to 29 December 2015. This means that during those dates, Abana was an EEA-authorised firm and permitted to carry out some regulated activities in the UK.

A Westerby SIPP application form was signed on 9 January 2014. Section 9 of the application says "*Do you have a financial advisor*?". This was answered "*yes*" and the details of Mr F of Abana were added. It was also instructed that an initial fee of 3% of the switched value should be paid to Abana. It was noted in the application form that pension monies worth a little under £60,000 in total were to be transferred in from three existing pension plans.

An application form for an investment platform called ePortfolio Solutions, distributed in the UK by a business called Asset Management International ('AMI'), was also completed. This recorded the financial advisor as being Abana. Mr F, as a financial advisor with Abana, signed a declaration on the application form on 9 January 2014, the application form was signed by Mrs G on the same date. It was also signed by Westerby, as trustees of Mrs G's SIPP, in February 2014. Some of the money placed on the ePortfolio Solutions platform was to be invested in the Kijani Commodity Fund ('the Kijani Fund'), some in the Swiss Asset Micro Assist Income Fund ('SAMAIF'), and some in the International Money Market Fund, all of which were based in Mauritius.

Tax-free cash payment of just over £15,000 was paid to Mrs G in May 2014.

On 11 November 2014, Westerby wrote to Mrs G about her investments in the Kijani and SAMAIF funds. It explained that the funds would, following a Policy Statement from the Financial Conduct Authority ('FCA') in August 2014, be considered to be non-standard assets. It explained that the funds might be higher risk than Mrs G originally considered. Its letter also said the Mauritian Financial Services Commission ('MFSC') had issued enforcement orders against companies under which both the Kijani and the SAMAIF funds were 'cells'.

It explained that non-standard assets are often speculative and high risk, and that it only permitted such assets where full investment advice had been provided by a regulated financial advisor or where the investor was a High Net Worth/Sophisticated or Elective Professional Investor. It further explained that the investments might be higher risk than Mrs G originally considered, and it was therefore imperative that Mrs G discuss this with her financial advisor.

Westerby strongly urged Mrs G to contact her regulated financial advisor, and it provided the details for Mr F and Mr G of Abana, and asked Mrs G to confirm whether she wanted to continue to hold the investments or for Westerby to attempt to sell them. Mrs G signed a form on 13 November 2014 to confirm that she'd sought financial advice and wished to retain her investments in the funds. The adviser details on the form were left blank. But

Mrs G has since confirmed that she sought advice from Mr F before completing this form.

On 23 June 2015, Westerby wrote to Mrs G providing an update on the Kijani Fund. The letter reminded Mrs G that the Kijani and SAMAIF funds were now considered non-standard assets and explained:

- The Kijani fund was being investigated by auditors. The fund managers had taken the decision to liquidate all assets and return client investments within 30 to 60 days.
- This information had been given to Westerby by AMI, but it hadn't been able to ascertain who made the statement originally.
- Some investors had made redemption requests over 90 days ago but not received any money.
- The advisor dealing with Abana clients (by this point a Mrs B, not Mr F) had become "directly authorised with the FCA" under a new firm – Abana (FS) Ltd.
- Abana customers were in the process of being novated (moved over) to Abana FS Ltd.
- Again it strongly urged Mrs G to contact her "regulated financial advisor", (referring, I assume, to Abana (FS) Ltd). It didn't however ask Mrs G to confirm whether she wanted to continue to hold the investments on this occasion.

On 26 June 2015, Mrs G called Westerby as she was concerned about its recent letter and wanted more information about what she should do. The call note suggests Westerby told Mrs G that it couldn't give her advice. Mrs G explained that she had tried to call Mr F of Abana but he hadn't got back to her. Mrs G asked if it was possible to take funds from the AMI account and Westerby confirmed it was but that it could take up to 90 days. Mrs G said she would take the weekend to think about it.

On 29 June 2015, Mrs G called Westerby again. The call notes say she felt misinformed as she wasn't aware her investments were high risk. She said she felt the best way

forward was to take her money out of the portfolio. Westerby said it would send her the relevant forms for her to complete, which it did the same day.

Mrs G has provided a copy of the redemption form she returned. It was noted on the form that she wanted to "*redeem all liquid funds as soon as possible and all illiquid funds as and when it was possible to do so*". I note Westerby said in its final response letter that Mrs G's redemption form was sent to ePortolio in July 2015.

Westerby then wrote to Mrs G again on 17 July 2015. Although a copy of this letter has not been provided on Mrs G's case, I've seen a copy on another complaint this service has considered. This letter explained that the licence of the administrator of the ePortfolio Solutions platform had been suspended by the MFSC. The letter also explained to Mrs G that other funds held within her SIPP had also been suspended, including the SAMAIF. It was explained towards the end of the letter that:

> "…*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*."

In the accompanying letter Westerby explained that Abana customers weren't, in fact, being novated to Abana (FS) Ltd. Westerby said it understood the reason for this was that Abana didn't consider Abana (FS) Ltd to be suitably independent to provide advice on Mrs G's SIPP. Westerby urged Mrs G to have her SIPP reviewed immediately by an independent financial advisor ('IFA') with the necessary permissions. It also said if Mrs G had any queries about its letter, she should address them to a Mr G of Abana and it provided Mr G's contact details.

On 27 July 2015, Mrs G wrote to Westerby to complain about the Kijani Fund and Mr F. Westerby forwarded this complaint to Abana as it said Mr F had not been employed by Westerby.

On 28 July 2015, Westerby wrote to Mrs G, providing an update on her portfolio. It confirmed the overall value was just under £48,000, with just under £43,700 in suspended funds. The letter confirmed these values had been provided by ePortfolio Solutions.

There's then a letter from Westerby to Mrs G dated 10 September 2015, in which Westerby explains that trading on the ePortfolio Solutions platform was suspended pending the appointment of new management and reconciliation of funds. This letter also stated that the Kijani Fund was suspended, the SAMAIF was suspended, the International Money Market Fund was suspended and that the TCA Global Fund could not be accessed due to the suspension of the ePortfolio Solutions platform pending appointment of new management. Regarding the Kijani Fund the letter also explains that there remains a high degree of uncertainty about the return of funds to investors and that it could take a number of years for matters to be dealt with completely.

On 23 December 2015 Westerby wrote to Mrs G again. While a copy of this letter has not been provided on Mrs G's case, Westerby said in its final response letter that it advised Mrs G that the ePortfolio Solutions platform was no longer suspended, and that it was possible to make redemptions from some of the underlying funds. It confirmed that the funds were held in a "managed portfolio" which had been established by Abana LDA, prior to the suspension of the funds. This was split into two separate portfolios by ePortfolio Solutions:

- Managed Portfolio S represented the suspended funds, and consisted of the Kijani Commodity Fund;
- Managed Portfolio L represented the liquid funds, and consisted of the SAMAIF and another fund, the TCA Global Fund.

Westerby has said that at the time it was expected that the SAMAIF would become liquid

in the near future, so it had been included in the "liquid" funds.

Mrs G called Westerby on 8 March 2016. The call note says Mrs G asked if there had been any movement with EPS (which I've taken to mean ePortfolio Solutions). Mrs G was told that some redemptions were coming through. Mrs G said she would like to request redemption of her funds so Westerby agreed to send out a redemption form.

I've also seen a copy of a 24 April 2016 update from SAMAIF to investors, this explains that the re-structured SAMAIF has (since 22 April 2016) been licensed by the MFSC and suggests that work to begin trading is still ongoing. And in its 6 June 2016 submissions to us on a separate complaint featuring SAMAIF Westerby said:

> "*The SAMAIF is also currently not trading. It is our understanding that they are currently in communication with the Mauritian regulators in order to enable redemptions from the fund, however there are no definitive timescales as yet*."

Westerby has previously sought to clarify that the quoted wording above, which is taken from a letter Westerby sent to us on 6 June 2016, was given by Abana.

On 24 May 2016, Westerby wrote to Mrs G to confirm that redemption from her liquid funds held via the platform had been received in her SIPP bank account. Westerby said that, to date, £20,833.01 had been received.

Westerby issued a further letter to Mrs G on 28 May 2021 in respect of the Kinjani fund. This said that "*Investors such as yourself, who did not submit a valid claim prior to the 17th March 2015, will be classified as 'ordinary unredeemed investors' and will only be paid a redemption amount should there be any surplus funds remaining following the payment of liquidation expenses and accepted redemption claims. It is not clear what surplus, if any, will be available, and we will therefore continue to assume that your SIPP's investment in Kijani has no value"*.

Prior to the above letter being issued, in July 2018, Mrs G complained to Westerby. Westerby issued its final response to the complaint on 19 September 2018. Amongst other things, Westerby said:

- Mrs G was advised to establish her SIPP by Abana LDA, a regulated firm that was authorised to operate within the United Kingdom;
- Abana was, and remains, regulated by the Portuguese financial services regulator. It was authorised to provide advice within the UK under European Economic Area Passporting rules; the Portuguese regulator's register showed that its passported permissions were for "Life" (insurance) and "Non-Life" (non-insurance, including pensions) business.
- Westerby verified that Abana was authorised by the Financial Conduct Authority to carry out business in the UK. In accordance with its standard practice.
- Westerby established an Intermediary Terms of Business with Abana; such agreements are recognised as good practice by the Financial Conduct Authority (FCA) and its predecessor, the Financial Services Authority (FSA).
- Westerby accepted the SIPP via Abana in good faith, based on the information available to it at the time;
- Mrs G's investments were placed via the ePortfolio Solutions platform, which was distributed by AMI. The advice to do so was provided by Abana and Mrs G provided an explicit instruction to make these investments;
- The investments were made via a regulated platform, into funds that were (at that time) daily traded and accessible from a number of other platforms. There

were no due diligence checks that could have revealed the underlying problems with the funds at that time;

- When Westerby became aware of enforcement actions against two of the investments it contacted Mrs G to alert her to the fact that they were potentially high risk. Mrs G confirmed that she wished to retain these investments;
- Had Mrs G chosen to redeem these investments at that time it is likely that she would have recovered her funds.
- Westerby could not have advised Mrs G to redeem the investments as it does not hold the necessary permissions from the FCA to do so;
- Once it became possible to redeem a portion of Mrs G's fund it acted diligently by informing her.
- Westerby wrote to Mrs G on 23rd December 2015 to advise that the ePortfolio Solutions platform was no longer suspended, and that it was possible to make redemptions from some of the underlying funds.
- A redemption form had already been sent to ePortfolio Solutions in July 2015.
- Redemption funds of £20,833.01 were received from Managed Portfolio L on 16 March 2016, and were paid to Mrs G as Flexi-Access Drawdown income on 6 March 2017, at her request.

One of our investigators reviewed Mrs G's complaint and said that Westerby ought to have identified that Abana needed "*top-up*" permissions to advise on and make arrangements for personal pensions in the UK, and taken all the steps available to it to independently verify that Abana had the required permissions. And that if Westerby had taken these steps, it would have established Abana 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 Abana 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 Abana. Our investigator concluded that as Westerby shouldn't have accepted Mrs G's SIPP application from Abana, it was fair and reasonable for Westerby to compensate Mrs G for her financial loss.

Following the view the investigator explained to Mrs G that we were proceeding on the understanding that the pension plans transferred into the SIPP were defined contribution plans without any guarantees attached. The investigator said that if Mrs G thought that there were guarantees attached to the plans transferred into her SIPP she should let us know and provide us with any evidence she had to demonstrate this was the case. To date, the information received from Mrs G doesn't suggest her plans were anything other thing other than defined contribution plans without any guarantees attached.

Westerby didn't agree with the investigator's view and, amongst other things, it said that:

- Section 20 of the Financial Services and Markets Act 2000 ('FSMA') provides that an authorised person acting without permission doesn't make the transaction void or unenforceable, and it doesn't give rise to any right of action for breach of statutory duty (save for in limited circumstances). This is the opposite approach to someone acting without authorisation (as per section 27 of the FSMA).
- That primary legislation allows for the voiding of contracts where a party is acting without authorisation (section 27), but explicitly removes this provision where an authorised party acts outside of their permissions (section 20), demonstrates that Parliament's intention was that an authorised party shouldn't be held liable for losses flowing from another authorised party's breach of their own requirements.

- It was no part of Westerby's contractual obligations and/or legal obligations (as set out in section 20 of the FSMA) to Mrs G to investigate the permissions of third-party advisors.
- It's previously requested, amongst other things, 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. Westerby has highlighted in previous submissions to this service that 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.
- Submissions it's made haven't been fully addressed.
- It took all reasonable steps to verify Abana's permissions.
- It disagrees that Abana not holding the relevant permissions would have been a matter of public record. The FCA could only confirm what was on the Register, not what was missing from it. And the FCA cannot provide any more information than that which is provided on the Register.
- There have been various criticisms of the FCA Register over the years, and it may on occasion have contained errors.
- Abana had confirmed orally and in writing that it had the necessary permissions and it was reasonable for Westerby to rely on this.
- It disagrees that the Written Agreement was vague and generic in nature. The term "permissions" encompasses "*top-up*" permissions. And it's unrealistic to consider that any change of wording would have caused Abana to not provide the undertaking.
- During the changeover from the FSA to the FCA, the FSA allowed a further twelve months for firms to alter their paperwork, including agreements, letterheads and business cards. The date of the Written Agreement falls under this time period.
- The investigator's view downplays the extent and thoroughness of the due diligence it performed. It met with Abana's representatives and obtained information from them. Abana's representatives had good technical knowledge and confirmed that Abana had the correct permissions.
- It was reasonable to rely on the information provided by Abana in writing, together with Westerby's meetings with Abana and the due diligence performed.
- Before accepting applications, it checked the FCA Register and the permissions page, the latter was blank.
- It checked the Portuguese Register, this explained that Abana 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 was authorised to advise on pension products. If Westerby had contacted the Portuguese regulator, it would have been told the same.
- If it was impossible to verify the permissions through the FCA Register, and also a regulatory requirement to reject the business on these grounds, it

would make it impossible for an EEA-passported firm to do any business other than the default business allowed by their passport regardless of any *top-up* permissions held. This may be construed as favouring local firms by the back door and might possibly be unlawful under EU law.

- Westerby undertook due diligence before accepting the introductions from Abana in accordance with the guidance.
- Abana was adamant that it had the correct permissions, presented itself as knowledgeable and professional and at no time did it present any reason to doubt its credibility.
- This service hasn't considered properly the application of COBS 2.4.6R (and COBS 2.4.8 G).
- Westerby provided quarterly Product Sales Data reports to the FSA and later the FCA, those organisations were aware through the reports that Abana was introducing business to Westerby. And in 2015 Westerby was in contact with the FCA about Abana. On these occasions the FCA didn't raise any issues or allegations to Westerby about a breach of Westerby's duties and obligations.
- Abana's actions were more serious than any alleged failures by Westerby.
- It's important that this service doesn't overlook the gravity of Abana's wrongdoing, when considering this complaint against Westerby and the issue of apportionment.
- Abana has now ceased to trade and it seems that the insolvency of Abana (and possibly the lack of insurance cover) has influenced the conclusion that Westerby should compensate Mrs G fully for her losses.
- 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 advisor on a 50/50 basis.
- It has requested a copy of the details of the outcome of this service's investigation of Mrs G's complaint against Abana.
- Any complaint against Abana ought to be decided first, or at the same time, as the complaint against Westerby.
- Abana's clients were offered redress by Abana with the involvement of Complete Compliance and Mrs G isn't entitled to be compensated for her losses twice.
- Had it uncovered that Abana didn't have the relevant permissions, it would have declined all business from Abana from the outset, and would never have received Mrs G's application or have been in a position to highlight Abana's lack of permissions.
- It wouldn't have been at liberty to contact investors directly to tell them why their application was refused.
- If it had rejected Mrs G's application, Abana would have re-applied on behalf of Mrs G to another SIPP provider that Abana was using and that SIPP provider would have accepted the application.
- This service needs to give true weighting to the fact that Abana's clients trusted its advice.
- Having been ordered by the FCA to pay full redress to its client, Abana then

refused to do so. Little/nothing was done to enforce awards made against Abana for redress to investors on similar complaints before Abana ceased to trade. Losses caused by the apparent failings of other authorities shouldn't rest with Westerby.

- Following its November 2014 letter, any investor would have sought independent financial advice or made some reasonable enquiries.
- Mrs G's 17 November 2014 instruction to retain her funds, re-confirmed her acceptance of the risk of the loss of her funds which has now materialised.
- Mrs G made no contact with Westerby following their December 2015 letter, however it is acknowledged that she had already submitted a redemption form in July 2015. This was processed once it became possible to redeem funds and £20,833.01 (approximately half of the investment) was returned to the SIPP bank account in March 2016. This was held in cash pending instructions from Mrs G, before being paid to her in May 2017 as pension income.
- The redemption sought and received supports the view that if Mrs G had responded to Westerby's November 2014 letter above it is highly likely she would have been able to recover 100% of her funds.
- The investigator's view fails to take proper account of Mrs G's failure to mitigate her losses.
- Further investigations ought to be made with Mrs G as to what steps she did take to mitigate her losses, as no/little action is insufficient to discharge her duty to mitigate.
- It has since come to light that Abana was actively calling clients to encourage them to stay in the funds. Whether or not there was a reference in Westerby's letter in November 2014 to Mrs G to seek advice from Abana is therefore an irrelevant point and had no bearing on the outcome as Mrs G would have reverted to her existing adviser, regardless of the reference to Abana in Westerby's letter.
- By concluding that it wasn't reasonable for Mrs G to take some action after its letters, this service is effectively deciding that Westerby was always liable for any subsequent losses irrespective of the duty on Mrs G to mitigate her losses.
- The application form for the SIPP would have been downloaded by Abana and completed by it with Mrs G. Only after this was it sent to Westerby and processed in January 2014.
- Originally, Abana put its clients into the Kijani and SAMAIF funds directly.
- Later on, Mr F of Abana made arrangements (without Westerby's authority) for the funds to be placed into the "EPS Managed Fund" – a Special Purpose Vehicle ('SPV') which essentially acted as a "fund of funds", comprised of the Kijani, SAMAIF and the TCA Global funds.
- When ePortfolio Solutions started trading again, they split the funds into two portfolios – Managed Portfolio S containing the Kijani Fund, and Managed Portfolio L containing SAMAIF and TCA Global funds ("S" standing for "Suspended", and "L" for "Liquid").
- SAMAIF was included in Portfolio L as it was expected to begin trading again. Redemptions from this fund were made by the managers selling TCA Global – hence they were able to make redemptions initially, but TCA Global was ultimately depleted (it had effectively been used to subsidise the early

redemption requests in the expectation that SAMAIF would begin trading again – a decision by the SPV managers that Westerby had no control over).

Previous final decision on a complaint against Westerby

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

That decision relates to Abana and 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 some of its recent 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 (amongst others) outstanding complaints involving Abana – including Mrs G'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 didn't change its position.

Other submissions from Westerby

I've carefully considered all the submissions Westerby has made over the course of this complaint and others this service has considered. This includes further submissions it's made following on from the published decision. Amongst other things, Westerby has said:

- A number of points raised haven't been addressed by this service.
- The published decision confirms we contacted the FCA about whether "*top-up*" permissions appear on the FCA Register and that 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."
- There's been no 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. This service should provide full disclosure of this information. Not to do so is procedurally unfair.
- An understanding of what was on the Register in 2013 isn't proof of what was actually on the Register at the relevant time.
- It was reasonable for Westerby to assume from the Terms of Business agreement that Abana had the necessary permissions. Further, 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 by the FCA if it wasn't already on the Register. But the published decision also says that if Westerby had contacted the FCA directly the FCA would have been able to confirm Abana's permissions. No information has been provided about this and the

FCA's position generally.

- Westerby made a Freedom of Information request to the FCA. And, in response, the FCA confirmed that in 2013, the Register would have indicated the broad permissions held under IMD by a firm which would have been either insurance mediation or reinsurance mediation and that there was no requirement under the IMD to display more detailed activities. Any further information not displayed on the Register would have been considered confidential information under Section 348 of the FSMA which prohibits disclosure of this information.
- In the published decision the ombudsman sought to distinguish the complaint from the situation in the Adams court case on the basis that Abana was offering an advisory service. It's unclear how Abana's contractually defined role impacts on the scope of duty owed by Westerby under COBS 2.1.1R. It was no part of Westerby's contractual obligations to investigate the permissions of third-party 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 and causation.
- Despite a related complaint about the actions of Abana, in the published decision the ombudsman decided that Westerby should compensate the consumer for the full extent of his financial losses.
- Abana has ceased trading and closed, as such any indemnity from Abana and/or assignment of any action against it would now be worthless.
- Complaints made against Abana to this service ought to have been decided first, or at least at the same time as complaints against Westerby. This service dealing with the complaint against Westerby first has led to the failure to address the issue of apportionment.
- This service has found against Abana in a number of complaints involving a different SIPP operator, and ordered Abana to pay redress yet we haven't pursued, or invited the complainants to pursue, the SIPP operator.

Westerby has also made a number of other submissions to us previously, some in this complaint and others in separate complaints featuring Abana and 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. These submissions include that:

- GEN 4 Annex 1 states that an incoming (EEA) firm must make details of the extent of its permissions clear on request. This shows that the FCA directs that the firm should confirm its permissions. Its Terms of Business provided for such a request and effectively formalised this disclosure through a signed agreement.
- The FSMA acknowledges that there's a general principle that consumers should take responsibility for their decisions, a principle which the FCA should have regard to when considering consumer protection. This service is part of the consumer protection provisions under the FSMA, it follows that we must similarly have regard to this principle. There's a clear intention in law that consumers have a level of responsibility. And this service has issued other decisions which take account of a consumer's failure to take action to mitigate their losses.

- Its due diligence wasn't simply a check of the Register. Its Chairman and Compliance Oversight was present at several face to face meetings with Abana's advisor and Compliance Director. And he was thorough in his "testing" of their processes and due diligence.
- This culminated in Westerby establishing a legal document – the Terms of Business – in which Abana warranted that it had the required permissions to introduce the SIPP. Abana therefore effectively "defrauded" it.
- It's able to accept applications from non-regulated introducers. This isn't something it has done, but it's acceptable to the FCA.
- It doesn't hold a copy of the *"Permission"* page for Abana.
- It's been able to retrieve archived copies of the page for other passported firms from the relevant time period. In every case the *"Permission"* page simply shows "No matches found".
- The "Basic Details" page of Abana's Register entry included a field labelled "Undertakes Insurance Mediation", but the field was left blank; for UK firms it was always completed.

Westerby's argument isn't that there weren't other sections of the Register, rather it's that Abana's permissions couldn't be determined from the Register due to the limited information available. In other words, Westerby doesn't accept that, at the relevant time (when the online Register was viewed), that there was information regarding permissions available or accessible by an online user.

My provisional findings

I issued a provisional decision upholding this complaint on 3 November 2023. Mrs G responded and confirmed that she didn't have anything further to add. Despite being chased, Westerby didn't provided any further comments.

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.

Having done so, I remain of the view that the complaint should be upheld for the reason I've previously set out. As such, and in the absence of any further comments from either party, I've largely repeated what I said in my provisional decision below.

When considering what's 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.

The parties to this complaint have provided detailed submissions to support their position and I'm grateful to them for doing so. I've considered these submissions in their entirety. However, I trust that they won't take the fact that my final decision focuses on what I consider to be the central issues as a discourtesy. To be clear, the purpose of this decision isn't to comment on every individual point or question the parties have made, rather it's to set out my findings and reasons for reaching them.

Mrs G has complained that she's unhappy with Westerby and it should have completed more checks.

It appears from the content of Westerby's final response letter that Westerby understood Mrs G's complaint to encompass the adequacy of checks it undertook as a SIPP provider when accepting her business and on investments made after it had accepted her business. I say that because, in responding to Mrs G's complaint, Westerby sought to clarify to Mrs G some of its duties as her SIPP provider. Westerby said that there were no due diligence checks that could have revealed the underlying problems with the funds at that time. Westerby also referenced some steps it had taken when it became aware of issues with the investments.

And Westerby explained that it had carried out due diligence on Abana before accepting business from it, including information about some of those checks.

The Financial Ombudsman Service is an informal dispute resolution forum. A complaint made to us need not be, and rarely is, made out with the clarity of formal legal pleadings. Our service deals with complaints, not causes of action.

Given the general nature of Mrs G's complaint (she simply says she's unhappy with Westerby and it should have completed more checks), in deciding what's fair and reasonable in the circumstances, it's appropriate to take an inquisitorial approach. And, ultimately, what I'll be looking at here is whether Westerby took reasonable care, acted with due diligence and treated Mrs G fairly, in accordance with her best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mrs G's complaint is whether it was fair and reasonable for Westerby to have accepted Mrs G's SIPP application in the first place. So, I need to consider whether Westerby carried out appropriate due diligence checks on Abana before deciding to accept Mrs G's SIPP application from it.

Before I go on to address the merits of the complaint, for completeness, I think it's worth confirming here that I'm satisfied Mrs G referred her complaint within time under the rules that apply. The rules I must follow in determining whether we can consider this complaint are set out in the Dispute Resolution ('DISP') rules, published as part of the FCA's Handbook. In particular, DISP 2.8.2.

The section of the rules that applies to this complaint means that, unless Westerby consents, we can't look into this complaint if it's been brought:

- more than six years after the event complained of;
- or, if later, more than three years after Mrs G was aware – or ought reasonably to have become aware – she had cause for complaint;

Mrs G is complaining about events which took place in 2014. She signed her SIPP application form on 9 January 2014 and her complaint was raised with Westerby in 2018. So within six years. As such, I'm satisfied Mrs G has complained within time under the rules that apply.

Relevant considerations

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

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

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

and diligence.

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if I were to reach a decision on a complaint without taking the Principles into account in deciding what's fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in BBSAL. I'm therefore 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 Mrs G'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 Mrs G's case.

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

The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim, on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal 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*."

In my view 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 Mrs G'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.

The facts of Mr Adams' and Mrs G's cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Mrs G's case. And I need to construe the duties Westerby owed to Mrs G under COBS 2.1.1R in light of the specific facts of Mrs G'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. And the transaction between Mrs G and Westerby in this complaint proceeded on the footing that Mrs G was being advised by an authorised advisor. Again, I make this point simply to highlight that there are factual differences between Adams v Options SIPP and Mrs G's case.

So, I've considered COBS 2.1.1R – alongside the remainder of the relevant considerations, and within the factual context of Mrs G'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, I'm required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in Adams v Options SIPP. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I also want to emphasise that I don't say that Westerby was under any obligation to advise Mrs G 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 Mrs G on the merits of investing and/or transferring to the SIPP.

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

The regulatory publications

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

- The 2009 and 2012 Thematic Review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 "*Dear CEO*" letter.

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 stated:

"*This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*

All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a 'client' for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."

The October 2013 finalised SIPP operator guidance also set out the following:

"*Relationships between firms that advise and introduce prospective members and SIPP operators*

Examples of good practice we observed during our work with SIPP operators include the following:

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un-authorised business warnings.*

- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*

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

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

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

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

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

- *having clear terms of business agreements in place which govern relationships*

and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and

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

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

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

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

- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*

- *having checks which may include, but are not limited to:*

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

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

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

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

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

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

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

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

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

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

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

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

Like the ombudsman in the BBSAL case, I don't think the fact that there was a publication (the "*Dear CEO*" letter) which post-dated the events that took place in relation to Mrs G's complaint, mean that the examples of good practice it provided weren't good practice at the time of the relevant events. Although the later publication was 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 the investigator's assessment, Westerby stated that s20 of FSMA provides that an authorised person acting without permissions doesn't make the transaction void or unenforceable and it doesn't give rise to any right of action for breach of statutory duty (save in limited circumstances). And that this is the opposite approach to someone acting without authorisation, as per s27 of the FSMA. Westerby has said that Parliament's intention was that an authorised party shouldn't be held liable for losses flowing from another authorised party's breach of their own requirements and that this service shouldn't depart from statute. Westerby has also previously submitted that part of the regulatory publications we've referred to also appear 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, with regards to the contents of s20, it's not my role to determine whether an offence has occurred or if there's something that gives rise to a right to take legal action and I'm not making a finding here on whether Mrs G's application is void or unenforceable. Rather, I'm making a decision on what's fair and reasonable in the circumstances of this case – and for all the reasons I've set out above I'm satisfied that the Principles and the publications listed above are relevant considerations to that decision.

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

In this case, the business Westerby was conducting was its operation of SIPPs. I'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 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 have undertaken sufficient due diligence checks to ensure Abana had the required permissions to give advice on and make arrangements in relation to personal pensions in the UK before accepting Mrs G's business from it.

Westerby says it carried out due diligence on Abana before accepting business from it. And from what I've seen I accept that it undertook some checks. However, the question I need to consider is whether Westerby ought to have, in compliance with its regulatory obligations, identified that Abana 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 Mrs G's application from it.

The regulatory position

Abana, at the time of the transaction, was based in Portugal and was authorised and

regulated in Portugal by Autoridade de Supervisao de Seguros e Fundos de Pensoes ('ASF'). As I've mentioned above, Abana held an IMD branch passport from 8 January 2014 to 7 January 2016 and an IMD services passport from 12 March 2013 to 29 December 2015.

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 of 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 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 Mrs G's SIPP confirms that a personal pension scheme, for the purpose of regulated activities (PERG 12.2):

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

- *on retirement; or*
- *on reaching a particular age; or*
- *on termination of service in an employment*". It goes on to say:

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

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

Westerby itself had regulatory permission to establish and operate personal pension schemes – a regulated activity under Article 52 of the Regulated Activities Order. It didn't

have permission to carry on the separate activity under Article 10 of effecting and carrying out insurance.

At the time of Mrs G'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 Directive2 **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 Mrs G'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 the 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 at SUP 13A.7. SUP 13A.7.1G states (as at January 2014):

"*If a person established in the EEA:*

(1) does not have an EEA right;

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

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

to carry on a particular regulated activity in the United Kingdom, it must seek Part 4A permission from the appropriate UK regulator to do so (see the appropriate UK regulator's website: http://www.fca.org.uk/firms/about-authorisation/getting- authorised for the FCA and www.bankofengland.co.uk/pra/Pages/authorisations/newfirm/default.aspx for the PRA).

This might arise if the activity itself is outside the scope of the Single Market Directives, or where the activity is included in the scope of a Single Market Directive but is not covered by the EEA firm's Home State authorisation. If a person also qualifies for authorisation under Schedules 3, 4 or 5 to the Act as a result of its other activities, the Part 4A permission is referred to in the Handbook as a top-up permission."

In the glossary section of the FCA Handbook EEA authorisation is defined (as at January 2014) as:

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

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

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

The guidance at SUP App 3 of the FCA Handbook (which I've set out above) was readily available in 2014 and clearly illustrated that EEA-authorised firms may only carry out specified regulated activities in the UK if they have the relevant EEA passport rights.

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

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

Westerby's checks on Abana's permissions

Westerby says it took appropriate steps to conduct due diligence on Abana and it couldn't, and shouldn't, reasonably have concluded that Abana 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 Abana's permissions before accepting business from it. I think it's fair and reasonable to expect Westerby to have checked the Register entry for Abana in the circumstances. And I think it's fair and reasonable to say that the checks Westerby ought to have conducted on Abana's Register entry should have included a review of all the relevant information available.

Westerby says it checked Abana's entry on the Register. So, I think it's clear that Westerby thought it should check the Register, rather than simply asking Abana what permissions it

had and then merely relying on what Abana said.

Westerby says that, at the time of Mrs G's SIPP application, there wasn't information available or accessible on the FCA Register that would have shown Abana's permissions position. It says that screenshots show that the Register at that time didn't include a "*Passports*" section, or make any mention of any restrictions on Abana's permissions.

Westerby also believes that the FCA would have been unable to confirm Abana's permissions if asked, as this information wasn't available on the then Register.

I've carefully considered everything Westerby's said about the format of the Register in or around 2014, when Mrs G's application was submitted by Abana.

Westerby has previously submitted that:

"*WTS [Westerby] searched Abana on the Financial Services register on 10 May 2013 and established that they were EEA authorised. Please refer to the enclosed copy screenshot of the search dated 10 May 2013. This shows that the search results did not include a "Passports" section, or any mention in the "notices" or "other information" sections of any restrictions on Abana's permission, which would be usual if there had been any restriction. Whilst WTS accept that a present day search includes a "Passports" section, they dispute that a search in May 2013 did, as illustrated by the enclosed screenshot. Acting reasonably, WTS could not have found details of the passport permission from a search of the Financial Services register at that time.*"

The following print out from the Register was provided to us:

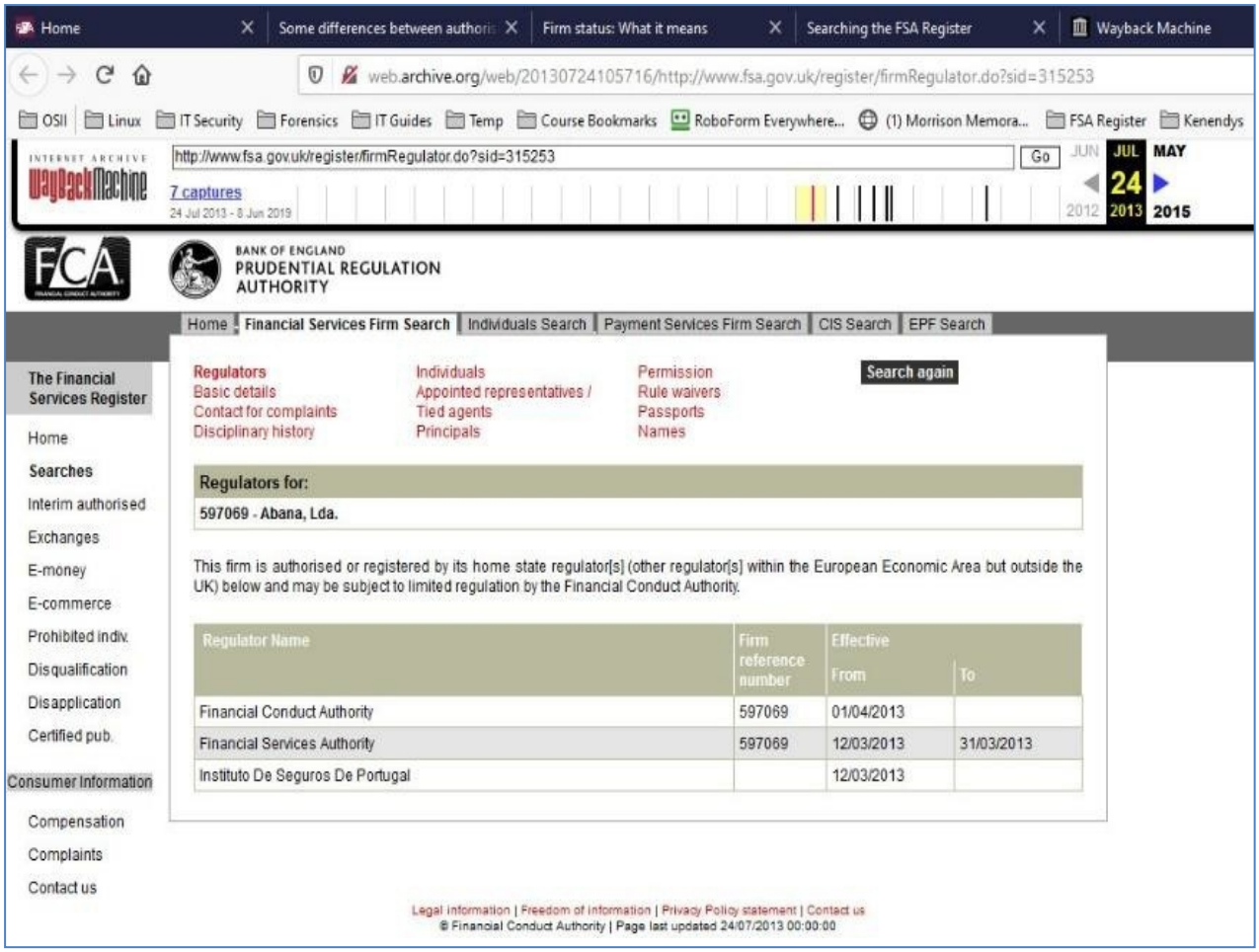
The Financial Services Register

Basic details for:

597069 - Abana, Lda.

Current status:	EEA Authorised
Effective Date:	12/03/2013
Tied Agent:	
Undertakes Insurance Mediation:	
Registered under Money Laundering Regulations:	
Address: The address shown is the firm's principal place of business. If the firm is a company, this address may be the same as its registered office but it does not have to be. A company's registered office can be found by contacting Companies House.	Praceta do Sol Nascente, No 39 Alcabiddeche 2645 087
Phone:	- - -
Fax:	
Email:	
Website:	
Notices:	
Other information:	Consumers considering or currently doing business with passported EEA firms ('EEA Authorised'), may wish to ask for further information from the firm or its UK branch about its complaints and compensation arrangements. This is because the position may differ compared to a UK authorised firm.

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 to discussions about the format of the Register at the time of Mrs G's SIPP application. The report included the following screenshot of the archived Register for Abana (dated 24 July 2013):



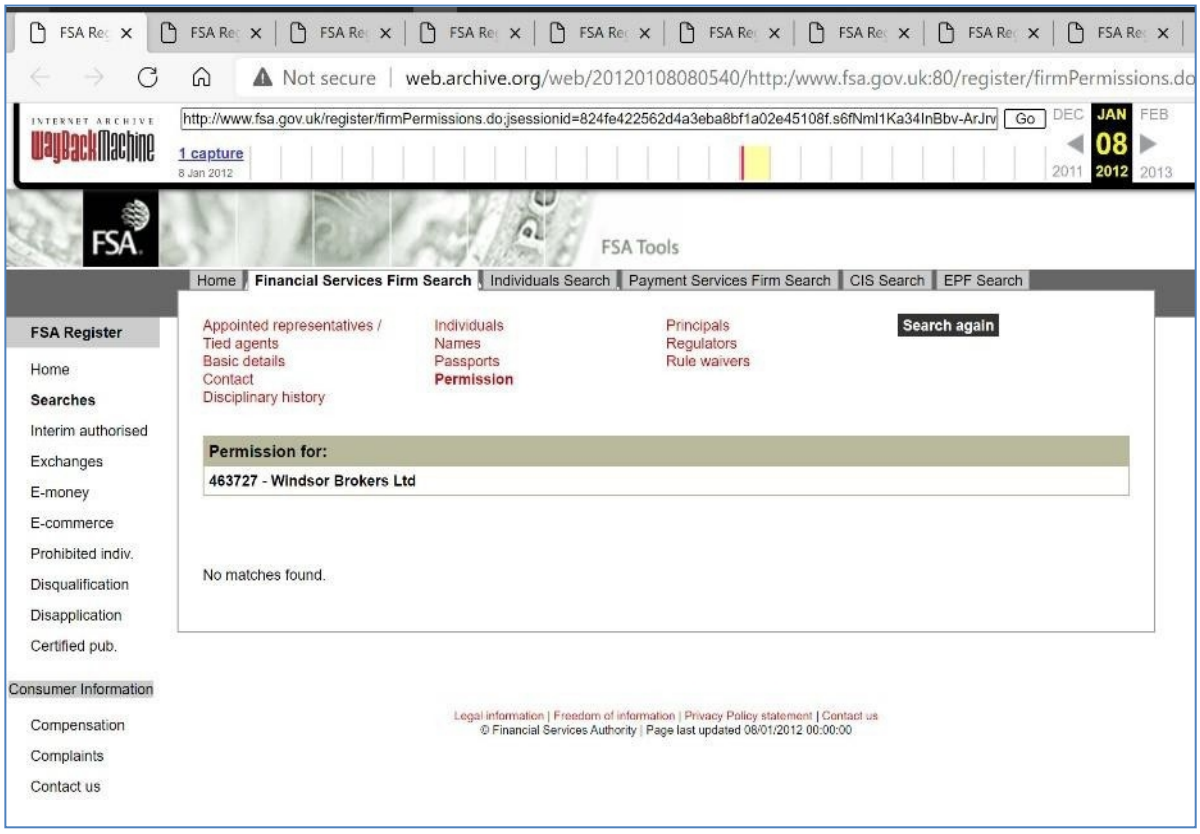
Each of the red titles at the top of the entry for Abana (Regulators, Basic details, Contact for complaints, Disciplinary History and so on) is a hyperlink to another page of Abana's entry on the Register. So, this screenshot shows that Abana's 2013 entry on the Register would have included, amongst other things, both *"Permission"* and "*Passports*" pages. And it's reasonable to conclude from the above screenshot that the format of the Register, in or around the time Mrs G's SIPP application was submitted to Westerby in 2014, included pages which provided information in relation to both a firm's passport details and in relation to a firm's permissions.

Elsewhere in the third-party report it says there's no evidence that in 2013 the Register contained any "*Permissions data*" relating to Abana that could have been searched by Westerby. The report refers to paragraph 24 as forming the basis for this conclusion.

I've carefully reviewed the third-party report. Paragraph 24 only confirms that if the hyperlink to the *"Permission"* page is clicked, there's no archive of that specific *"Permission"* page. In my view, the fact this hyperlink yielded nothing when clicked just speaks to the limitations of the internet archive in question. So, I don't think paragraph 24 shows that no *"Permission"*

page for Abana existed in 2013. However, I do think that evidence provided elsewhere in the third-party report strongly suggests a *"Permission"* page did exist for Abana.

Only the "*Regulators*" page has been archived for Abana's entry on the Register from 2013. But the third-party report provides examples of several *"Permission"* pages for other firms which were archived, dating from around the time of Mrs G's SIPP application or earlier. The below example, dating from 2012, and relating to a Cypriot firm which, like Abana, was an incoming EEA firm, is particularly helpful:



This shows that the *"Permission"* page for this incoming EEA firm did exist in 2012, and that it showed "*No matches found*". This is strong evidence that the format of the Register for EEA firms did include a page with information on a firm's permissions, even if all it recorded was 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.

I'm satisfied that all of this information taken together demonstrates that, when Mrs G's application was received by Westerby, the format of the FCA Register contained a page labelled *"Permission"* 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 simply state "*No matches found*" (as there were no permissions to display).

This is consistent with the information we received from the FCA when we asked it to confirm whether "*top-up*" permissions appear on the Register, and whether this has changed since 2013. In response, the FCA confirmed that "*top-up*" permissions do appear on the Register under the *"Permission"* page, and that it understands the same information was available on the Register in 2013. In other words, the FCA's response to our question accords with what I've already said I'm satisfied has been demonstrated by the evidence that's available in this case.

Westerby has said, amongst other things, more information should be provided about the details of the contact with the FCA. But, Westerby has already been provided with the FCA's response to our question. So, I'm satisfied that Westerby has had the opportunity to consider the response, and that it's also had the opportunity to make further submissions to us on this point. And I'm 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 without the FCA's response to our question.

Accordingly, I'm satisfied that:

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

- The format of the Register in 2013 included a *"Permission"* page. And it follows that the entry for Abana on the Register, at the time of Mrs G's application, would have included a *"Permission"* page which Westerby ought to have checked.

In previous submissions to us, Westerby seemed to suggest that the "Basic details" page was the totality of the Register entry available for Abana at the relevant time. But, as I understand it, Westerby now seems to accept that the Register did include other sections. But says that, at the relevant time, these sections didn't contain any further information about Abana's passports or permissions.

Westerby has been unable to produce evidence to demonstrate that it did in fact check the *"Permission"* page for Abana before it accepted Mrs G's SIPP application from it. But even if it did check the *"Permission"* page for Abana at the relevant time, Westerby appears to have failed to have kept a record of this check and, unfortunately, the 2013 record of the *"Permission"* page for Abana hasn't been archived. So, we've no evidence of what specific information was available on the *"Permission"* page for Abana at the relevant time.

However, in light of the evidence I've set out above, I'm satisfied that there would have been a *"Permission"* page available on Abana's Register entry. And, if this page had erroneously failed to contain any information on whether or not Abana held the relevant permissions, (for example, if the *"Permission"* page had erroneously been left blank), Westerby ought to have taken further steps to ascertain what the correct position was. So, I don't agree with Westerby's submission that information about a firm's permissions wasn't available for an online user at the time of Mrs G's application. And, in my view, the third-party report submitted by Westerby demonstrates the contrary to be the correct position.

Westerby has previously referred to a Complaints Commissioner's report that highlights some issues with the Register. I appreciate that there have been criticisms of the Register and that it may, on occasion, have contained errors. However, I'm satisfied that a regulated market participant such as Westerby, acting in accordance with its regulatory obligations, ought to have understood that Abana needed permission from the FCA to give advice on and make arrangements for personal pensions in the UK. Therefore, before accepting business from Abana, Westerby needed to confirm that Abana held the required permissions. And, for the reasons I've detailed above, I'm satisfied that Abana's entry on the Register at the relevant time would have included a *"Permission"* page. And, if this page hadn't set out any information (for example, if the *"Permission"* page had erroneously been left blank) Westerby, in accordance with its regulatory obligations, shouldn't have accepted Mrs G's application from Abana before carrying out further enquiries to clarify the correct position on Abana's permissions.

Westerby says that the FCA won't confirm details about a firm that aren't available on its public register, I accept that. However, and for all the reasons I've given above, I'm satisfied that "*top-up*" permissions are something that are recorded on the FCA's public register, and that this was also the case at the date Westerby accepted Mrs G's application from Abana.

Westerby says that Abana not holding the relevant permissions wouldn't have been a matter of public record. Further, that the FCA could only confirm what was on the Register, not what was missing from it and that the FCA would have been unable to provide any more information than that which was provided on the Register.

As I've mentioned above, we don't have evidence of exactly what did appear on Abana's *"Permission"* page at the relevant time. However, this was information that ought to have been publicly available on the Register, so I'm satisfied that whether Abana had "*top-up*" permissions was a matter of public record. And, if the *"Permission"* page had erroneously been left blank, I think it's fair and reasonable to conclude that, if asked, the FCA would have been able to confirm the position that Abana didn't have the required permissions.

So, I think contacting the FCA was a sensible and proper route open to Westerby to verify Abana's permissions before accepting business from it. And if Westerby had contacted the FCA directly to confirm Abana's permissions because the Register didn't contain the relevant details, I don't think the restriction Westerby has referred to regarding what the FCA could confirm would have prevented Westerby getting the information it needed. Abana didn't have any "*top-up*" permissions. That was a matter of public record. So, I think the FCA would have been able to confirm this to Westerby.

To be clear, even if there was an issue with Abana's Register entry, or if I'm wrong in my finding that Abana's entry on the Register at the relevant time included a *"Permission"* page, (and the "Basic details" page was the totality of the Register entry for Abana in 2013 and later at the time of Mrs G's application), I don't think it's fair and reasonable to conclude that it was appropriate – or in accordance with its regulatory obligations – for Westerby to have proceeded with Mrs G's application from Abana in those circumstances.

Westerby ought to have independently checked and verified Abana's permissions before accepting business from it. And if there was no information available or accessible on the Register at the relevant time to reveal the permissions position of Abana, then Westerby ought to have either found another way to verify Abana's permissions, or it ought to have declined to accept any applications from Abana until it could verify the correct position on Abana's permissions.

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

So, to summarise, I'm satisfied that:

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

- In that case Westerby should have sought confirmation from the FCA as to whether Abana held any "*top-up*" permissions. And, as I'm satisfied this would have been a matter of public record, I think the FCA would have been able to confirm whether Abana held any permissions.

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

Could Westerby have relied on what Abana told it?

Westerby says that it agreed Terms of Business with Abana ('the Agreement') and, in signing the Agreement, Abana confirmed it held the permissions it required.

Westerby has referred to meetings that took place between it and Abana. It says Abana confirmed its permissions in these meetings. And that, as Abana was an authorised firm, it was entitled to rely on what Abana had told it.

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

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

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

And COBS 2.4.8 G says:

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

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

Westerby, in previous submissions, has confirmed that it kept no records of the discussions it had with Abana during the meetings it's referred to, nor did Westerby record in writing specifically what Abana told it about the permissions it held. Westerby has said that SIPP

operators aren't required to meet with introducing IFAs before accepting business from them and, as such, it didn't have formal records of the discussions it had with Abana.

However, Westerby now seeks to rely on these meetings to evidence that it did take steps to ascertain Abana's permissions and that Abana had confirmed to Westerby that it had the required "*top-up*" permissions. In my opinion, if these meetings were the way Westerby was intending to evidence Abana's permissions, in order to comply with its regulatory obligations, in particular Principle 2, (to conduct its business with due skill, care and diligence), and Principle 3, (to take reasonable care to organise and control its affairs responsibly and effectively), Westerby should have had processes in place to ensure that it was able to evidence the due diligence it had carried out on Abana, including the steps taken to confirm Abana's permissions.

Further, I don't think any meetings Westerby had with Abana amounts to Abana providing something in writing on which it may have been reasonable for Westerby to rely, as it was a verbal exchange only and there appears to be nothing in writing arising from these meetings. The corollary of this is that I don't therefore think COBS 2.4.6R (2) applies to the meetings.

Westerby says that the meetings it had with Abana culminated with Westerby establishing a legal document – the Agreement – in which Abana warranted that it had the required permissions to introduce SIPPs business.

I've noted what Westerby's said about the Written Agreement. And I've reviewed the contents of the Terms of Business Agreement of a different SIPP provider that Westerby has provided to us.

Having carefully considered everything, I remain of the view that the Agreement appears to be a generic document and not specific to Abana. 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.e. the meetings at which Westerby claims Abana gave verbal assurances as to its permissions).

The Agreement provides as follows:

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

In my view this doesn't amount to a clear statement that Abana had the required "*top-up*" permissions for it to advise on and arrange personal pensions in the UK that Westerby would be entitled to rely on.

In addition, 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 I think 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 Abana warranting that it has "*top-up*" permissions to conduct personal pensions business in the UK.

After carefully considering the terms of the Agreement, and all the submissions Westerby made in relation to what it says Abana told it about the permissions held, I'm not satisfied on the evidence provided that Westerby did establish what "*top-up*" permissions Abana required

to be arranging and giving advice on personal pensions in the UK and that it requested, and received, confirmation from Abana that it held those permissions. I'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 Abana warranted it had the required "*top-up*" permissions.

In any event, it's my view that Westerby should have done more to independently verify that Abana had the required "*top-up*" permissions. If Westerby had carried out independent checks on Abana's permissions as required by its regulatory obligations, it ought to have been privy to information which didn't reconcile with what Abana 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 Abana did have the permissions it required.

So, for the reasons I've set out above, I don't think COBS 2.4.6R (2) applies to either the meetings Westerby had with Abana or the Agreement the parties entered into. However, I've also given careful thought to whether it was reasonable for Westerby to rely on these things 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 the meetings and Agreement, and 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 at the point that it received Mrs G's SIPP application. 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 FSA's 2009 Thematic Review Report. And 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 Abana didn't have the required "*top-up*" permissions (i.e. if the information on Abana's *"Permission"* page had been correctly recorded), or in the alternative, that the Register didn't record the information on Abana's *"Permission"* page in order for Westerby to confirm the position one way or the other (for example, if the *"Permission"* page had erroneously been left blank).

This means that either Westerby ought to have become aware of information which didn't reconcile with what Abana had told it about its permissions in the meetings and the

Agreement, or that it was still under a regulatory obligation to undertake further enquiries to independently check Abana's permissions, and by failing to do so, it didn't meet the requirements it was under as a regulated SIPP operator.

Anomalous features

In my view, Westerby ought to have identified a risk of consumer detriment here. Mrs G was taking advice on her pension from a business based in Portugal. That advice was to transfer the monies from existing personal pension plans into a SIPP, and then to send the majority of the money transferred into the SIPP to investments based in Mauritius (with one later moving to the Cayman Islands). The investments involved were unusual, and specialised.

And the chances of them being suitable investments for a significant portion of a retail investor's pension were very small. So, given the relevant factors, Westerby ought to have viewed the application from Mrs G as carrying a significant risk of consumer detriment. And it should have been aware that the role of the advisor was likely to be a very important one in the circumstances – emphasising the need for adequate due diligence to be carried out on Abana to independently ensure it had the correct permissions to be giving advice on personal pensions in the UK.

I don't expect Westerby to have assessed the suitability of such a course of action for Mrs G – 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 Mrs G fairly and act in her best interests.

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

Further points

Westerby has previously 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 Abana's permissions doesn't equate to treating Abana differently by virtue of its location. Westerby should have carried out these checks on any firm introducing advised business to it.

Westerby has said it provided quarterly Product Sales Data reports to the regulator, and that the regulator never expressed any concerns about it accepting business from Abana. I've seen no evidence to suggest that at the time Westerby accepted Mrs G's application from Abana, a factor in its decision to do so was that it had been reporting the previous business it had been doing with Abana to the regulator, and that the regulator 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 Abana at all and Abana would therefore not have featured in its reporting to the regulator.

Westerby has previously said that it's able to accept applications from non-regulated introducers. But there seems to be no basis on which Mrs G's application could, or would, have proceeded on the understanding Abana was an unregulated introducer. Westerby seems to have understood from the outset that Abana 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 was not the circumstances involved in this case.

I appreciate that there's an argument that if it had been identified that Abana didn't have the required "*top-up*" permissions, Abana 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 Mrs G's application. So, this is what I need to consider here – not a possible situation that could have happened.

Westerby has submitted that where complaints have been received by this service against both Abana and Westerby, that we should decide the complaint against Abana 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 Mrs G compensation in the circumstances of this complaint. But, before going on to address that issue in detail below, and just in case there's been a misunderstanding, I wanted to clarify that Mrs G previously made a complaint about Abana to us, but that case was subsequently closed after Abana had ceased trading. And we hadn't issued an opinion or view on the merits of that complaint before then.

In conclusion

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

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

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 Mrs G's application which, at the very least, emphasised the need for adequate due diligence to be carried out on Abana to independently ensure it had the correct permissions to be giving advice on personal pensions in the UK.

It'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 Mrs G's application from Abana.

I'm therefore satisfied the fair and reasonable conclusion in this complaint is that Westerby shouldn't have accepted Mrs G's SIPP application from Abana.

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 Abana, then this arrangement wouldn't have come about in the first place.

Is it fair to ask Westerby to pay Mrs G compensation in the circumstances?

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

I think it's more likely than not that if Westerby had refused to accept Mrs G's application from Abana and Mrs G had received an explanation as to why her application hadn't been accepted (as Abana didn't have the necessary "*top-up*" permissions it needed to provide such advice, or alternatively as Westerby hadn't been able to independently verify that Abana had the necessary "*top-up*" permissions to provide such advice), Mrs G wouldn't have continued to accept or act on pensions advice provided by Abana. And I think it's very unlikely that advice from a business that did have the necessary permissions would have resulted in Mrs G taking the same course of action. I think it's reasonable to say that a business that did have the necessary permissions would have given suitable advice.

I appreciate that Westerby might say that its contract was with Abana not Mrs G and that if Mrs G's application was refused it wouldn't have been at liberty to, or had reason to, contact Mrs G.

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

Mrs G went through a process with Abana that culminated in her completing paperwork to set up a new Westerby SIPP and with the expectancy that monies from her existing pension plans would be transferred into the newly established SIPP. Having gone to the time and effort of doing this, I think it's more likely than not that if the Westerby SIPP wasn't then established, and if her pension monies weren't then transferred to Westerby, that Mrs G would have wanted to find out why from Abana and Westerby.

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

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

Further, I think it's likely that if Westerby had refused to accept Mrs G's application from Abana, and explained to Mrs G why it wasn't able to do so, Mrs G wouldn't have continued to accept or act on pensions advice provided by Abana (as she 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 Mrs G taking the same course of action. I think it reasonable to say Mrs G would've sought out a business with the required permissions and that a competent business would've given suitable advice.

It's not possible to say precisely what that advice would have been. But I've thought about the action Mrs G has taken since the transfer completed and I've considered the letter she sent Westerby in July 2015.

In April 2014, not long after the transfer had completed, Mrs G took a tax-free cash. Just over a year later she wrote to Westerby. In this letter, dated 27 July 2015, Mrs G explained that she had been using the tax-free cash to top up her state pension. She also said she'd been told by Mr F the new arrangement with Westerby was a replacement for an annuity and if she'd known there was any risk involved she would most certainly have taken an annuity.

I find Mrs G's testimony plausible in this regard and I think it's likely that if she'd had received suitable advice, she would have secured annuities after taking her tax-free cash, either with her existing pension providers (if there were any guarantees on her existing plans which meant these would provide the highest income), or on the open market if that would have provided better value.

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

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

But, in this case, I've seen no evidence to show Mrs G proceeded in the knowledge that the investments she was making were high risk and speculative, and that she was determined to move forward with the transaction in order to take advantage of a cash incentive offered by Abana. I've not seen any evidence to show Mrs G was paid a cash incentive. It therefore cannot be said she was "incentivised" to enter into the transaction. So, in my opinion, this case is very different from that of Mr Adams.

Westerby has contended that Mrs G would likely have proceeded with the transfer and subsequent 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 have been effected with another provider.

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

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

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if Westerby had

refused to accept Mrs G's application from Abana, the transaction wouldn't still have gone ahead.

The involvement of Abana

Westerby has said that a complaint against Abana, ought to have been decided first or, at the very least, complaints against it and Abana ought to have been decided together.

Westerby has also said that we've upheld complaints against Abana where there was another SIPP operator involved and that we've not pursued or invited consumers to pursue complaints against that other SIPP operator. I've carefully considered these points but, as I explain below, I'm satisfied that it's fair to require Westerby to compensate Mrs G for the full measure of her loss.

In this decision I'm considering Mrs G's complaint about Westerby. While it may be the case that Abana gave unsuitable advice to Mrs G to transfer the monies from her existing pension plans into a SIPP and make unsuitable investments, Westerby had its own distinct set of obligations when considering whether to accept Mrs G's application for a SIPP.

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

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

I'm also satisfied that if Mrs G had been told that Abana was acting outside its permissions in giving pensions advice, or alternatively that Westerby hadn't been able to independently verify that Abana had the necessary "*top-up*" permissions to provide such advice, she wouldn't have continued to accept or act on advice from it. 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 Abana 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's 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 Mrs G fairly.

The starting point therefore, is that it would be fair to require Westerby to pay Mrs G compensation for the loss she's suffered as a result of Westerby's failings. I've considered whether there's any reason why it wouldn't be fair to ask Westerby to compensate Mrs G for her loss, including if it would be fair to hold another party liable in full or in part. And I'm satisfied it's appropriate and fair in the circumstances for Westerby to compensate Mrs G to

the full extent of the financial losses she's suffered due to its failings.

I accept that it may be the case that Abana, in advising Mrs G to enter into a SIPP, is responsible for initiating the course of action that led to Mrs G'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 Mrs G wouldn't have come about in the first place, and the loss she suffered could have been avoided.

Westerby could have the option to take an assignment of any rights of action Mrs G has against Abana before compensation is paid. And the compensation could be made contingent upon Mrs G's acceptance of this term of settlement.

Westerby has previously said that as Abana's ceased to trade then any indemnity from Abana and/or assignment of any action against it is effectively worthless.

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

Westerby has 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.

The circumstances and facts of the other complaint Westerby has mentioned appear to be very different to Mrs G's complaint. And it also looks like the SIPP provider in the other complaint had already compensated the consumer for half of their losses before the ombudsman was asked to decide the complaint against the EEA firm.

Importantly, 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 Mrs G to the full extent of the financial losses she'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. And I'm of the view that it's appropriate and fair in the circumstances for Westerby to compensate Mrs G to the full extent of the financial losses she'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 Mrs G.

Mrs G taking responsibility for her own investment decisions

I note the point has been made by Westerby that consumers should take responsibility for their own investment decisions. I've considered the actions of Mrs G 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 Mrs G's actions mean she should bear the loss arising as a result of Westerby's failings.

Mrs G took advice from a regulated advisor (albeit one acting outside the permissions it held – a fact unknown to Mrs G) 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 Mrs G for the loss she's suffered. I don't think it would be fair to say in the circumstances that Mrs G should suffer the loss because she ultimately instructed the investments to be made.

Opportunity to mitigate losses

Westerby says it wrote to Mrs G to highlight issues with the funds her SIPP was invested in and to inform her of an opportunity to realise some of her investment value. It says Mrs G had a responsibility to take appropriate action to safeguard her funds and so should be responsible for the losses she's suffered.

I've carefully considered this point but don't think it's fair for any reduction to be made to fair compensation on the basis of a failure by Mrs G to mitigate her loss.

I don't think it would be fair to say Mrs G should have made a redemption request when Westerby wrote to her in November 2014. The November 2014 letter required Mrs G to seek advice, and urged her to contact her financial advisor, Abana. It asked Mrs G to confirm – by returning a member instruction form - if she wanted to retain her investments or attempt to sell them.

Mrs G returned the form confirming she wished to retain the investments but the adviser details on the form were left blank. However, Mrs G has confirmed that she contacted Mr F at Abana for advice on this matter before making this decision. This advice would have been consistent with what we have seen on other cases where Abana generally seems to have advised its clients to retain the holdings in question. In these circumstances, I'm of the view that it's not fair to say Mrs G ought to have acted differently.

Westerby has told us that 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 remuneration was to be paid. Westerby had received a number of introductions from Abana before November 2014. So, by the time Westerby wrote to Mrs G in November 2014, it would have had many opportunities to discover that Abana didn't have the "*top-up*" permissions it needed to give advice or make arrangements on personal pensions in the UK. As such, it's my view that for Westerby to have suggested that Mrs G seek advice from Abana once problems with the funds she'd invested in had come to light, is a further failing of Westerby in relation to its regulatory obligations and the requirement to treat Mrs G fairly.

On 23 June 2015, Westerby wrote to Mrs G providing an update on the Kijani Fund. This letter said "*Kijani is currently being investigated by PWC [Price Waterhouse Cooper Chartered Accountants] and they require a further 90 days to complete this; charging fees along the way.*

To ensure clients are not affected, Kijani fund managers have taken the decision to liquidate all assets and return client monies within 30/60 days, in-line with standard redemption timescales.

We are awaiting official updates, however we know that Kijani wish to re-launch a fund asap so it is in their best interest for relationships and reinvestment to action the above redemptions efficiently."

Although this letter told Mrs G there was an investigation into the Kijani fund, it also said she would be getting her money back. So I don't think it would have been unreasonable if Mrs G had decided not to take any action following receipt of this letter. However, as she was unsure what to do, Mrs G tried to call Mr F of Abana. She was unable to contact him so she called Westerby to ask for advice. Westerby wasn't able to give her advice but it did confirm she could redeem funds in the "*AMI account*". It also said this could take 90 days.

After taking a few days to think about matters, Mrs G called Westerby again on 29 June 2015, as she had decided the best way forward was to take her money out of the portfolio. She subsequently completed and returned a redemption form in July 2015, confirming she wanted to "*redeem all liquid funds as soon as possible and all illiquid funds as and when it was possible to do so*". So I think Mrs G took action to redeem funds as soon as she was aware there was a problem.

The redemption form was sent to ePortfolio Solutions in July 2015. It appears Mrs G called Westerby again in March 2016 to say that she wanted to redeem her funds and Westerby said a form would be issued. But the evidence I've seen suggests the redemption form had already been received in July 2015 and forwarded to ePortfolio Solutions. £20,833.01 was received from Managed Portfolio L on 16 March 2016, and Mrs G has since taken this as an income payment. However, it wasn't possible to redeem funds in Managed Portfolio S – which contained the Kijani fund – and correspondence issued after this date suggests this fund has been suspended.

So, despite Mrs G requesting that this fund was redeemed shortly after receiving Westerby's letter in June 2015, this hasn't been possible. Westerby's letter of 28 May 2021 confirmed that as Mrs G didn't submit a valid redemption claim for the Kijani fund before 17 March 2015, she will only be paid a redemption if there is a surplus after payment of liquidation expenses and accepted redemption claims.

I'm not aware of Mrs G having received any further payments from the Kijani fund. But taking into account the combination of factors I've set out above, And given that I'm satisfied Mrs G requested redemption of this fund as soon as she was aware there was a problem with it, I'm not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that Westerby has to pay to Mrs G.

I would also add that even if I'm wrong, and Mrs G didn't submit a redemption form until March 2016, I still don't think it would be fair to reduce the compensation amount Westerby has to pay. This is because I've also noted that in the complaint that was the subject of the published decision Westerby has confirmed in a letter dated 21 December 2015 that it summarised the situation with the Kijani fund to the complainant in that case, in October 2015, as "*suspended, in liquidation. Likely to take a number of years. Unclear as to what will come back".*

So, in any eventuality, I also think there's insufficient evidence to show any redemption request made in relation to the Kijani fund after Westerby's July 2015 letter would have been successful.

Fair compensation

Westerby says that responsibility for Mrs G's loss should lie with Abana.

As set out above, I accept that it may be the case that Abana, in advising Mrs G to enter into a SIPP, could be responsible for initiating the course of action that led to Mrs G's loss.

However, the complaint against Westerby is the complaint I'm considering here. And for the reasons I've set out earlier in this decision, I consider that Westerby has failed to comply with its own distinct regulatory obligations under the Principles. It's therefore my view that it's fair and reasonable for Westerby to compensate Mrs G for the full measure of her losses – as Westerby could have put a stop to things if it had acted fairly and reasonably by rejecting Mrs G's application.

I therefore consider that in the circumstances, it's fair and reasonable to direct Westerby to compensate Mrs G to the full extent of her losses.

In addition to the financial loss that Mrs G has suffered as a result of the problems with her pension, I think that the losses suffered to Mrs G's pension provisions have caused Mrs G distress and I think that it's fair for Westerby to compensate Mrs G for this as well.

Putting things right

My aim is to return Mrs G to the position she would now be in but for what I consider to be Westerby's failure to verify that Abana had the correct permissions to be providing advice on pensions in the UK before accepting Mrs G's SIPP application from it.

As I've already mentioned above – if Mrs G had sought advice from a different advisor, who was qualified to give pension advice, I think it's very unlikely that advice would have resulted in Mrs G taking the same course of action. It's not possible to say precisely what Mrs G would have done differently. But based on her circumstances and the available information, I think it's most likely that she would have elected to take maximum tax free cash in April 2014 (as she did in fact do) and then used the remaining funds to purchase the highest available income on the open market, on the terms set out below. So, to fully compensate Mrs G, Westerby will need to establish the income that would have been available to her at the time, compensate her for the income she's missed out on and then pay to her enough to now purchase an income at the level she would have been able to purchase at the date I've found she would likely taken benefits, so when she took her tax free cash.

I note that Mrs G has received some money from her SIPP, initially tax-free cash and later an income payment in respect of the monies she was able to redeem from the investments made, these payments will need to be taken into account in the calculating of compensation due to Mrs G as set out below.

I've set out below in more detail how Westerby should go about undertaking the

calculation. To put matters right, Westerby should do the following:

Mrs G's past loss

A) Westerby should ask the operators of Mrs G's previous pension plans to calculate the notional values of her plans, as at 10 April 2014 – being the date Mrs G took her tax-free cash and when I think she would have otherwise taken her benefits – had she not transferred into the SIPP.

If there are any difficulties in obtaining notional valuations from the operators of Mrs G's previous pension plans, Westerby should instead calculate a notional valuation by ascertaining what the monies transferred away from the plans would have been worth, as at 10 April 2014, had they achieved a return from the date of transfer equivalent to the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index).

I'm satisfied that's a reasonable proxy for the type of return that could have been achieved over the period in question.

The amount of tax-free cash and any income payments Mrs G received should then be deducted from the combined notional value of all plans.

B) Mrs G has said she'd have taken annuities, so Westerby should establish the level of annuities she would have been able to obtain on the open market with the sum total of the remaining after she took her tax free cash. Mrs G hasn't expressed the terms on which she would have taken these annuities, under the circumstances I think it's fair and reasonable to conclude this would most likely have been monthly in arrears with no guaranteed term and on a single life basis.

C) Calculate the sum total of net income payments that Mrs G has missed, plus 8% simple interest per year from the date each annuity payment would have been paid to date of the final decision.

D) The total established as at step C is Mrs G's past lost and should be paid to her directly as a lump sum.

Mrs G's future loss

E) Establish the capital cost of purchasing an annuity paying an income of the level established above, on the above terms.

F) Establish the current actual transfer value of Mrs G's SIPP, as of the date of the final decision, less any outstanding charges.

G) If the capital cost of purchasing an annuity in E) is higher than the current transfer value of Mrs G's SIPP in (F) then she also has a current/future loss and Westerby will need to compensate her for this amount as well (if the current actual value of the SIPP is higher than the capital cost of purchasing the annuity, then the balance can be offset against the established past loss).

H) Pay a commercial value to buy Mrs G's share in any investments that cannot currently be redeemed.

I'm satisfied that Mrs G's Westerby SIPP only still exists because of the illiquid investments that are held within it. And that but for these investments Mrs G's monies could have been transferred away from Westerby. In order for the SIPP to be closed and further SIPP fees to be prevented, any remaining investments need to be removed from the SIPP.

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

If Westerby is unwilling or unable to purchase the investments, then the actual value of any investments it doesn't purchase should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include these being given a nil value for the purposes of ascertaining the current value of Mrs G's SIPP in step F).

If Westerby doesn't purchase the investments, it may ask Mrs G to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Mrs G may receive from the investments,

and any eventual sums she would be able to access from the SIPP. Westerby will need to meet any costs in drawing up the undertaking.

I) Pay an amount into Mrs G's SIPP, so that the transfer value of the SIPP is increased by an amount equal to the loss calculated in G). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

Compensation shouldn't be paid into a pension plan if it would conflict with any existing protections or allowances.

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

The notional allowance should be calculated using Mrs G's actual or expected marginal rate of tax in retirement. It's reasonable to assume that Mrs G is a basic rate taxpayer, so the reduction would equal 20%.

Westerby should provide the details of the calculations to Mrs G in a clear, simple forma

In order to be fair to Westerby, it should have the option of payment of the redress being contingent upon Mrs G assigning any claim she may have against Abana to Westerby (including the right to any future payment Abana may make to Mrs G as part of the settlement agreed following the third-party review) – but only in so far as Mrs G is compensated here. The terms of the assignment should require Westerby to account to Mrs G for any amount it subsequently recovers against Abana that exceeds the loss paid to Mrs G.

If Westerby elects to take an assignment of rights before paying compensation, it must first provide a draft of the assignment to Mrs G for her consideration and agreement. Any expenses incurred for the drafting of the assignment must be met by Westerby.

Westerby should also pay Mrs G £500 for the distress and inconvenience the problems with her pension have caused her. In addition to the financial loss that Mrs G has suffered as a result of the problems with her pension, I think that the loss suffered to Mrs G's pension provisions has caused Mrs G distress. And I think that it's fair for Westerby to compensate her for this as well.

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 Mrs G to have to continue to pay annual SIPP fees to keep the SIPP open. As such, Westerby should pay an amount into Mrs G'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 Mrs G's SIPP.

Interest

The compensation resulting from this loss assessment must be paid to Mrs G or into her SIPP within 28 days of the date Westerby receives notification of Mrs G's acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8%

per year simple from the date of my final decision to the date of settlement if the compensation isn't paid within 28 days.

My final decision

For the reasons given, I uphold this complaint and I direct Westerby Trustee Services Limited to calculate and pay fair compensation to Mrs G as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 21 December 2023.
Lorna Goulding
Ombudsman