DRN-3972516

The complaint

Mr H complains that Westerby Trustee Services Limited ('Westerby') failed to carry out sufficient due diligence before accepting his applications to transfer to a Self-Invested Personal Pension ('SIPP') to invest in Dolphin, causing him a financial loss. Mr H says it should compensate him for his loss.

For simplicity, I refer to Mr H throughout, even where the submissions I'm referring to were made by his representative.

What happened

I've outlined what I think are some of the key parties and events involved in Mr H's complaint below.

<u>Involved parties</u>

Westerby

Westerby is a regulated pension provider and administrator. It's authorised to arrange deals in investments, deal in investments as principal, establish, operate or wind up a personal pension scheme and to make arrangements with a view to transactions in investments.

German Property Group companies

These companies were set up in Germany and weren't regulated by the Financial Conduct Authority ('FCA').

AS German Property Group GmbH, formerly Dolphin Trust GmbH (which was also formerly Dolphin Capital GmbH) ('Dolphin GmbH') was seemingly set up in 2008 to acquire historic sites in Germany in need of restoration with tax concessions. The plan was that properties would be sold to German investors once development potential and planning permission was in place. And funding for development of projects was by way of loan notes issued to investors.

The properties were meant to be held by a Special Purpose Vehicle ('SPV') through Dolphin GmbH. And Dolphin Capital 80. Project GmbH & Co KG ('DC80'), set up in 2011, was separately used for the purpose of accepting investor's monies and issuing the loan notes in respect of the properties.

The security was meant to be by way of first legal charge granted on the properties by Dolphin GmbH, whereby it was intended that the investor's funds would be paid (as set out below) to DC80 upon the transfer of the legal charge by Dolphin GmbH into the name of the Security Trustee (held in favour of the loan note holder). And the Security Trustee would then only release the security if loan note holders had been repaid.

The promotional material advertised that the investment funds would be paid by investors directly to a German law firm, who'd hold the funds in a secure account until the purchase of the property took place and the security documentation was issued, at which point the funds would be paid to DC80. However, this seemingly changed in or around August 2014 by which time the German law firm no longer received any of the investment monies, albeit some of the documentation continued to reflect this process.

The loan notes issued were usually for a period of between two to five years and widely promoted with fixed annual returns of 10 to 15% paid six monthly, with the return of the capital at the end of the term. And, in or around 2021, Dolphin GmbH and DC80 entered administration.

The transaction

I understand that in, or around, June 2014, Mr H met with HSP Financial Planning Ltd ('HSP') – an authorised independent financial adviser – as he wanted to transfer his final salary occupational pension schemes ('OPS') to a SIPP for more flexibility and to invest through Rockpool investment managers. And in respect of the latter, it was noted at the time that Westerby was one of only a couple of SIPP providers to have approved this investment.

On 15 August 2014, HSP wrote to Mr H and confirmed that, having completed an analysis, it didn't recommend the transfer due to the benefits he'd be giving up. HSP said that if Mr H still wanted to go ahead with this, against its advice, he'd need to set out why he wanted to do so in his own words. And, on 17 August 2014, Mr H responded to HSP and said, in summary, that he wanted to transfer as:

- His OPS' were inflexible, these work against the financial and lifestyle requirements of his life and he wanted more control over the funds.
- Due to his health his wife's life expectancy is far greater than his and with a SIPP she'd benefit from 100% of the income and a better lifestyle than with the OPS.
- Due to his career he is a professional financier and investor. So he is a sophisticated investor with a superior understanding of risk and reward. The OPS isn't tailored to his requirements and is underperforming compared to a bespoke pension.
- Tax free cash available with the OPS is less than through a SIPP.

It seems Westerby received Mr H's SIPP application and associated documents from HSP on 21 August 2014. And, at the same time, HSP explained to Westerby that the transfer was going ahead on an insistent client basis. Mr H's SIPP application form, signed and dated by him the day before, confirmed that he was employed in corporate finance and he ticked a box which said he intended to invest his SIPP monies in 'UK Commercial Property'. Mr H said HSP was his financial adviser and that it would receive an initial payment of £7,500 from the SIPP fund but no ongoing payment. And Mr H waived his 30-day cancellation period in respect of the establishment of the SIPP because he wanted 'Potential immediate investment of funds'.

Westerby also received Mr H's completed non-standard asset questionnaire, signed by him on 11 July 2014. This said, in summary, that Mr H's net worth was between £250,000 to £500,000 and his annual income between £100,000 to £150,000. And Mr H confirmed he had financial services in corporate finance and as an adviser on private equity transactions, but said that he had no relevant professional qualifications. He also confirmed he had investment experience with trading accounts, such as finspreads. And Mr H went on to declare, amongst other things, that:

- The information in the questionnaire was true to the best of his knowledge.
- Westerby reserved the right to ask for evidence of the information disclosed.
- Westerby wouldn't be held responsible for any decisions made or losses arising as a

result of the information being incorrect or incomplete.

Westerby has said that Mr H's SIPP was established on 22 August 2014. And, on 27 August 2014, Westerby provided Mr H with a list of structured investment products, of which it said it had approved several, such as Dolphin, Best International – which operated ABC Corporate Bond V ('ABC') – and Rockpool.

Funds totalling just over £1,000,000 were then transferred into Mr H's Westerby SIPP from three existing OPS schemes between September 2014 and January 2015.

In mid-September 2014, Mr H became a SIPP Club member – an unauthorised firm at the time. Mr H explained to a Mr B of SIPP Club that he was interested in asset backed investments with a yield and planned repayment/exit date. And, in response, Mr B told him to consider the Dolphin investment and provided Mr H with a link to the due diligence it had completed on this.

On 14 September 2014, Mr H emailed Westerby and said he'd been investigating the Dolphin investment, he'd carried out his research through SIPP Club and wanted to invest in this.

On 22 September 2014, Mr H signed a Dolphin Loan Note Offer document and confirmed, amongst other things, that he'd fully read and understood the terms and conditions detailed in the Loan Note Instrument Documentation that had been provided to them and that he understood a first legal charge would be registered to secure the loan note amount and interest. At the bottom of the Loan Note Offer document it said in small writing, amongst other things, that the document should be read in association with the Information Memorandum and Loan Note Instrument, which is a detailed legal document explaining how the loan notes worked. And that once it received this signed Loan Note Offer Letter and the investment money had been banked by the German law firm then the investor would receive the Loan Note Certificate.

In September 2014, Mr H invested £100,000 in Dolphin. And he received a Dolphin Loan Note Certificate, dated 25 September 2014, which certified that Westerby and Mr H were the registered holders of 'Average 13.8% FIXED RATE 6 Monthly Payment' secured loan notes. And that these were subject to the provisions contained in the Instrument.

In October 2014, Mr H took a pension commencement lump sum from his Westerby SIPP of just over £244,000 and he also went on to draw an income from this until around 2020.

Mr H also went on to make several other investments within his Westerby SIPP, including into Rockpool and ABC. Both parties are aware that a more recent complaint from Mr H about Westerby's acceptance of the ABC investment into his SIPP will be responded to separately, so I don't intend to comment on this here.

It seems Mr H received a return in the form of interest from his Dolphin investment totalling around £54,000, with the last payment received in March 2019. And now Mr H's Dolphin investment is seemingly valued at nil.

<u>Mr H's complaint</u>

Mr H first complained, via his representatives, to Westerby in March 2021. He said, in summary, that it didn't do enough due diligence on Dolphin investment, nor on the introducer which was introducing customers to a Westerby SIPP to invest in this high-risk unregulated investment. Mr H said that Westerby shouldn't have accepted his applications, he was a retail customer, and that this had caused him to lose out.

Westerby replied in May 2021 and, unhappy with this response, Mr H referred his complaint to our Service shortly after. When doing so, Mr H clarified that he wasn't using HSP's services – nor the services of any independent financial adviser – in relation to the investments made through the Westerby SIPP. He said the names of the investments were instead provided to him by Westerby from its approved list.

Westerby has said in its responses in respect of Mr H's complaint and in similar cases with our Service against it concerning the same, or similar, investments, amongst other things, that:

- Mr H has said he was referred to Westerby by a Mr B of SIPP Club. However, the documents refer to a regulated firm, HSP. To its knowledge, Mr H completed the SIPP application documents with HSP's, rather than SIPP Club's, involvement.
- It didn't have an agreement with SIPP Club to accept referrals from it and as far as it was aware, SIPP Club wasn't providing advice. And it denies the assertion that it was in frequent receipt of SIPP applications from SIPP Club.
- Mr H confirmed he hadn't received advice to establish his SIPP on his application form and other documents. And it hasn't been provided with any evidence that Mr H was advised to do so. It understands the transfer to the Westerby SIPP was arranged by HSP on an insistent client basis – with Mr H setting out his reasons for insisting on the transfer – and that Mr H wasn't provided with investment advice.
- HSP first proposed to become an introducer of business to Westerby in mid-August 2014. It entered terms of business with HSP in mid-August 2014, as well as checking its FCA authorication. HSP completed a 'know your introducer' questionnaire. And Westerby only received two introductions from HSP, of which Mr H was the second.
- It does understand that Mr H was introduced to the Dolphin investment by SIPP Club though. But, while SIPP Club wasn't authorised to give advice, this isn't a reason to reject business or investments referred by it and FCA guidance supports that it can accept this. To its knowledge, SIPP Club didn't carry out any regulated activities in respect of Mr H. There's no evidence it provided him with investment advice – Mr H's letter supporting that he was an insistent client makes it clear he understood he would be investing in funds using his experience, rather than any other parties.
- SIPP Club promoted itself as a service for high net worth/sophisticated investors seeking investments with a higher potential for return – investors were required to acknowledge on SIPP Club's website that its role was to provide information and not advise. So even if it was proven that SIPP Club breached s.19 FSMA, Westerby thinks it would be granted relief under s.28 FSMA.
- Mr H confirmed on its non-standard asset questionnaire that had a significant income and net assets, as well as significant financial and investment experience due to his employment and investment history. This, combined with the information Mr H provided to explain why he was going ahead on an insistent client basis, provided reassurance that he was a sophisticated investor, who was able to make his own decisions without advice. Mr H also met the definition of a high-net worth investor. And Mr H's claim that he wasn't contradicts the information he provided at the time.
- *Adams v Options SIPP* [2020] EWHC 1229 (Ch) held that the SIPP provider hadn't breached its statutory or common law duties to the claimant and that their losses flowed solely from his decision to proceed with a high risk, speculative investment. And, amongst other things, that: '*A duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed in my judgment as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed.*'.
- Mr H's SIPP was clearly established for the purpose of making non-standard assets,

considering this was used to make several investments into these.

- While the Dolphin investment was recognised as a high risk, non-standard asset, this was not in itself a reason to deem it unacceptable as a SIPP investment, in line with the FCA's statements on this matter.
- Westerby did, however, restrict investments into SIPPs to cases where either (a) the SIPP member met the FCA's definition of a high net worth or sophisticated investor, who could reasonably be expected to understand the risks, or (b) where the SIPP member had been advised to make the investment by a regulated financial adviser.
- While Dolphin has been placed into administration this is due to investment risk and not authenticity, as the investment was genuine.
- High risk investments are not manifestly unsuitable for inclusion within a SIPP. These can be appropriate under certain circumstances.
- There has been limited formal FCA guidance as to the extent of due diligence a SIPP provider is expected to undertake. Westerby's due diligence processes are based on the FCA's July 2014 *"Dear CEO"* letter. It met this criteria in respect of Mr H's investments. Such investments that are speculative in nature aren't manifestly unsuitable as a SIPP asset.
- The publications are not determinative of what constitutes good practice. Adams confirmed there is no provision in law for a claim based on an alleged breach of the guidance, as opposed to the FCA rules. This set out that the Reviews do not provide "*guidance*" and even if they were considered statutory guidance made under FSMA s.139A, any breach would not give rise to a claim for damages under FSMA s.138D.
- It carried out extensive checks on Dolphin prior to Mr H's investment. And, in the absence of evidence this wasn't genuine or inappropriate as a SIPP asset, it concluded it was acceptable.
- It's difficult to verify land charges on German properties. Such information is only disclosed under very specific circumstances. So it isn't possible to independently verify the charges.
- It completed a review of its due diligence and found that interest and capital repayments were being made as these fell due and the security trustee confirmed land charges were in place. The fact that interest and capital was being repaid was evidence this was operating as expected and not impaired.
- From 2013 onwards funds were remitted by it to an account presented to be in the name of the German law firm. At the time of its initial checks that law firm was still acting for Dolphin and did so until 2014. Dolphin continued to present the German law firm was its legal adviser until 2017 and Westerby had no reason to question this as it had already verified the firm had acted for Dolphin for some time.
- The investment documents were clear that Dolphin loan notes were high risk, with the second page of the brochure clearing stating that this was a promotion that hadn't been approved by an authorised person and that relying on it could lead to a risk of an investor losing all assets invested.
- The Information Memorandum explained that loan notes involve a high degree of risk and investors should consider if this investment is suitable for them. It then went on to list specific factors that could lead to a loss of funds, such as unforeseen costs and development problems, valuations being less than anticipated and that it said in bold that investors wouldn't be able to claim to the FSCS.
- The Loan Note offer directed Mr H to read the Information Memorandum and Loan Note Instrument, so it's unlikely he wouldn't have seen this information.
- The SIPP was introduced by a regulated adviser who could be expected to have assessed the suitability of the Dolphin investment. This investment met HMRC and FCA criteria for consideration as to whether it was a permissible investment. So it had no reason to conclude there was a risk of consumer detriment.
- If Westerby had refused to accept the Dolphin investment within Mr H's SIPP then he would have found an alternative provider – it's aware of a number of SIPP providers

who were permitting investments when Mr H’s Dolphin investment was made.

- It acted on an execution only basis. It didn’t and wasn’t responsible for providing advice or assessing suitability. And Mr H’s losses flow from his decision to proceed with a high-risk investment. Mr H should take responsibility for his own decisions in the circumstances. And due to the general principle that customer’s should take responsibility for their own investment decisions, if compensation is awarded against it this should be reduced due to contributory negligence.

One of our Investigators reviewed Mr H’s complaint and said that it should be upheld. And, while Mr H accepted our Investigator’s findings, Westerby responded with further comments. It said, amongst other things, that:

- HSP’s role hasn’t been fully considered – it was responsible for assessing the suitability of the investments for Mr H and in doing so it was responsible for conducting due diligence on the investment.
- As a SIPP provider, Westerby’s responsibilities in respect of due diligence were limited to conducting due diligence in line with FCA guidance and to ensuring the investment was allowable in line with HMRC rules. Westerby has evidenced the comprehensive due diligence undertaken and that it met standards set by the FCA.
- Loan notes as an investment class are allowable by HMRC within a pension scheme. It identified as part of its due diligence that the investment was structured appropriately as expected of a loan note and that there were real and secured assets against the Dolphin project. Based on this, it reasonably concluded that the investment was real and secure at the time.
- At the time of investing there were no apparent warning signs that indicated fraud. Our Service has drawn factually incorrect conclusions using the benefit of hindsight based on information that has come to light only after Dolphin’s business entered into administration proceedings and after an independent insolvency practitioner has had an opportunity to access all information in relation to the business, including information that could never have been accessed by Westerby.
- There was no evidence at any point before 2018 of any issues surrounding Dolphin that would have been reasonably found in the public domain. As potential issues came to light, Westerby took appropriate and reasonable steps in relation to Dolphin including but not limited to stopping the payment of any new monies into Dolphin and not allowing any roll-over of investments.
- Westerby at each review obtained and reviewed appropriate accounts in relation to Dolphin. For example, the balance sheets as at 31 December 2014 and 2015 filed at the German Company Register, together with copies of the December 2016 draft management accounts being the most recent accounting period for both companies. It is, therefore, simply not correct to say that the annual financial statements had not been prepared for a number of years or that financial information was not readily available and not asked for by it. And there is nothing in the accounts that would reasonably have given Westerby any cause for concern as to whether this was a legitimate investment. On the contrary, these confirm that the investment was operating as it should, with substantial assets held by Dolphin.
- A SIPP provider’s role is simply to determine if the investment is suitable to be allowed into a SIPP wrapper, not to advise on the commercial merits of it. There was nothing to put Westerby on notice that there was any reason to be concerned about the cashflows from 2015 onwards, this is only known with the benefit of hindsight.
- In reference to comments around the legal charges, it is incorrect to say that Westerby relied entirely on a list of properties provided to it by the security trustee against which security had been registered in favour of noteholders. It was provided with copies of legal charges, relevant planning permission and listed building certificates, which it has provided to us.

- There was no reason for it to doubt the validity of the information and documents which were provided to it by appropriately registered and regulated legal and other firms in the UK and overseas.
- It was entitled to rely on the documentation it received, including confirmation from the German law firm of its role, unless or until it was told that the arrangements had changed (at which point it would have carried out further due diligence regarding the new arrangements). It carried out appropriate due diligence on the German law firm involved and had no reason to suspect the truth of what it was told.
- It is incorrect to say that the marketing material was "guaranteeing" returns of at least 12%. The brochure correctly and accurately stated that returns were "fixed", but it also included specific reference to risk factors and Westerby doesn't believe that any investor reading the brochure could reasonably believe the investment was low risk.
- It was made clear to Mr H in the documents that the investment was high risk and, had he thought this was not acceptable he ought to have spoken to a financial adviser. Whilst it is noted that some of the marketing literature indicates the investment is low risk, the conflict between the marketing literature and the legal instrument of the investment that the client had to agree to would not have been reason to prevent the investment from being held in a SIPP wrapper.
- There is no question of Westerby having failed to carry out its own obligations properly and then looking to excuse its failures by relying on a disclaimer. Rather, as explained in *Adams*, the disclaimers set out the scope of its obligations and confirm that responsibility for assessing the suitability of the investment remains with Mr H, rather than the SIPP provider. Any complaint in relation to this investment ought not be upheld against Westerby, as the client had to take responsibility for her own investment decisions.
- It's not unusual that high net worth and/or sophisticated customers wanted to go into high risk non-standard investments via a SIPP.
- We've placed significant weight on Dolphin's marketing material not explicitly stating the investment wasn't regulated and had no FSCS recourse. Westerby agrees some information isn't on the marketing literature, but this is why the investment was limited to high net worth and/or sophisticated investors or those who received regulated financial advice.
- It has had sight of Dolphin literature that was presented to customers which explicitly confirmed that Dolphin wasn't regulated by the FCA nor covered by the FSCS. And while it recognises the concerns about some of the investment literature, Westerby took a cautious approach and didn't allow ordinary retail customers to access the investment, only high net worth or sophisticated customers, or those who'd been assessed and advised by a regulated financial adviser. And such clients ought reasonably to know there are risks and should undertake their own due diligence (or have receive advice) to assess the suitability of the investment.
- It is reasonable to conclude that if it had not accepted Mr H's application, he would have sought another SIPP provider who would have allowed the investment, of which there were many. It's likely that Mr H would have found another SIPP provider and eventually invested in Dolphin elsewhere. It strongly refutes that another provider would have acted differently and not permitted Mr H's investment application.
- Mr H's losses are the result of his own decision to invest into a high-risk investment which ultimately, and regrettably failed.

Because no agreement could be reached the case has been passed to me for a decision.

I let both parties know that my reasons for thinking Mr H's complaint should be upheld are largely the same as our Investigator in respect of the Dolphin investment, but I clarified the redress I was recommending and why. I haven't set out the content of my initial thoughts in full again here though, as these remain largely the same and are therefore largely repeated below in ‘What I’ve decided – and why’ and ‘Putting things rights’.

Westerby responded and said that, while it doesn’t agree the complaint should be upheld as it doesn’t consider that it was in breach of its obligations, it accepts I will uphold Mr H’s complaint. However, it said that Mr H had received significant interest payments from the Dolphin investment which should be taken into account in the redress calculation. And that as Mr H’s pension is now in payment his tax band should be known rather than assuming he is a basic rate taxpayer.

Mr H responded and said that he accepted my initial thoughts and he provided a HMRC PAYE income tax estimate for 2024 to 2025 which said that he’s likely to be a basic rate taxpayer.

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.

Preliminary point – jurisdiction

For the avoidance of doubt, I am considering this preliminary point based on the applicable rules and law and not based on what is fair and reasonable in all the circumstances.

While Westerby hasn’t consented to us considering Mr H’s complaint if it was made outside our time limits set out in the Dispute Resolution (‘DISP’) Rules – found in the Financial Conduct Authority’s handbook – and DISP 2.8.2R in particular, it hasn’t disputed that Mr H’s complaint has been made in time in its submissions to our Service. And, for completeness, having briefly considered the timescales in which Mr H has made his complaint, I think it has been made in time for us to consider it, for the below reasons.

I recognise that as well as having complained to Westerby that it didn’t carry out sufficient due diligence on Dolphin investment itself, Mr H also complained it didn’t do sufficient due diligence on the party that was introducing customers, like him, to a Westerby SIPP to make this high-risk unregulated investment. I’m conscious though that Mr H’s complaint letter was seemingly somewhat templated. And Mr H has clarified that he wasn’t first introduced to the investments, seemingly Dolphin and ABC – the latter of which I’ve explained will be responded to separately – until after the transfer to the SIPP and that this was by Westerby itself. So I think the events complained of here and which are in dispute concern Westerby’s acceptance of Mr H’s Dolphin application.

Mr H’s March 2021 complaint to Westerby was made more than six years after it accepted his Dolphin application in 2014. But I haven’t seen anything that makes me think Mr H knew, or ought reasonably to have become aware, that he had cause for complaint about its acceptance of this more than three years before he complained to Westerby. I say this because Mr H continued to receive a return in the form of interest payments on his Dolphin investment until March 2019. In addition, it was only from June 2019 that Westerby started to make Mr H aware of repayment delays given his investment was due to – but didn’t successfully – mature in September 2019. I can see that Westerby first wrote to Mr H to make him aware of the potential for bankruptcy in February 2020. And Mr H’s March 2021 complaint to Westerby was made within three years of these dates. So I’m satisfied Mr H’s complaint was referred in time for us to consider it and I’ve gone on to consider the merits of the complaint below.

The merits of Mr H's complaint

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

I've looked at everything, including all the points made by the parties, and taken this into account alongside the considerations I've detailed above. I have not, however, responded below to all the points made; I have concentrated on what I consider to be the main issues.

I'm required to determine this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

I have taken into account a number of considerations including, but not limited to:

- The agreement between the parties.
- The Financial Services and Markets Act 2000 ("FSMA").
- Court decisions relating to SIPP operators, in particular Options UK Personal Pensions LLP v Financial Ombudsman Service Limited [2024] EWCA Civ 541 (*"Options"*) and the case law referred to in it including:
    - Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474 ("*Adams"*)
    - R (Berkeley Burke SIPP Administration) v Financial Ombudsman Service [2018] EWHC 2878 (*"Berkeley Burke"*)
    - Adams v Options SIPP UK LLP [2020] EWHC 1229 (Ch) (*"Adams – High Court"*)
- The Financial Conduct Authority ("FCA") (previously Financial Services Authority) ("FSA") rules including the following:
    - PRIN Principles for Businesses
    - COBS Conduct of Business Sourcebook
    - DISP Dispute Resolution Complaints
- Various regulatory publications relating to SIPP operators and good industry practice.

The legal background:

As highlighted in the High Court decision in *Adams* the factual context is the starting point for considering the obligations the parties were under. And in this case it is not disputed that the contractual relationship between Westerby and Mr H is a non-advisory relationship.

Setting up and operating a SIPP is an activity that is regulated under FSMA. And pensions are subject to HM Revenue and Customs rules. Westerby was therefore subject to various obligations when offering and providing the service it agreed to provide – which in this case was a non-advisory service.

I have considered the obligations on Westerby within the context of the non-advisory relationship agreed between the parties.

The case law:

I'm required to determine this complaint by reference to what is in my opinion fair and reasonable in all the circumstances. I am not required to determine the complaint in the same way as a court. A court considers a claim as defined in the formal pleadings and they will be based on legal causes of action. Our Service was set up with a wider scope which means complaints might be upheld, and compensation awarded, in circumstances where a court would not do the same.

The approach taken by our Service in two similar (but not identical) complaints was challenged in judicial review proceedings in the *Berkeley Burke* and the *Options* cases. In both cases the approach taken by the ombudsman concerned was endorsed by the court. A number of different arguments have therefore been considered by the courts and may now reasonably be regarded as resolved.

It is not necessary for me to quote extensively from the various court decisions.

The Principles for Businesses:

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"* (see PRIN 1.1.2G). The Principles apply even when the regulated firm provides its services on a non-advisory basis, in a way appropriate to that relationship.

Principles 2, 3 and 6 are of particular relevance here. They 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 am satisfied that I am required to take the Principles into account (see *Berkley Burke*) even though a breach of the Principles does not give rise to a claim for damages at law (see *Options*).

The regulatory publications and good industry practice:

The regulator 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 Report included:

> *"We are concerned by a relatively widespread misunderstanding among SIPP operators that they bear little or no responsibility for the quality of the SIPP business that they administer, because advice is the responsibility of other parties, for example Independent Financial Advisers…*
>
> *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."

The Report also included:

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."*

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 unauthorised business warnings.*

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

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

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

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

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

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

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

- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from nonregulated 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 the relevance, I've considered these in their entirety.

The 2009 and 2012 Thematic Review Reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 finalised guidance is). However, all of the publications provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take them into account (as did the ombudsman whose decision was upheld by the court in the *Berkeley Burke* case).

Points to note about the SIPP publications include:

- The Principles on which the comments made in the publications are based have existed throughout the period covered by this complaint.
- The comments made in the publications apply to SIPP operators that provide a non-advisory service.
- Neither court in the *Adams* case considered the publications in the context of deciding what was fair and reasonable in all the circumstances. As already mentioned, the court has a different approach and was deciding different issues.
- What should be done by the SIPP operator to meet the regulatory obligations on it will always depend upon the circumstances.

What did Westerby's obligations mean in practice?

I'm satisfied that to meet its regulatory obligations when conducting its operation of its non-advisory SIPP business, Westerby was required to consider whether to accept or reject particular investments and/or referrals of business with the Principles in mind. I say this based on the overarching nature of the Principles (as is clear from the case law) and based on good industry practice. I am also satisfied that bearing in mind the Principles and good industry practice that this obligation was not confined *only* to rejecting an investment on the basis it was not allowed by the SIPP Trust or HMRC regulations.

I am satisfied that to meet its regulatory obligations when conducting its operation of its non-advisory SIPP business, a SIPP operator could decide not to accept a referral of business or a request to make an investment without it giving the customer advice. And I am satisfied that in practice many did refuse to accept business and/or refuse to make investments without giving advice.

I am satisfied that, to comply with its regulatory obligations, a non-advisory SIPP operator should have due diligence processes in place to check any firms introducing business to them and the investments they are asked to make on behalf of members or potential members. And that they should use the knowledge gained from the due diligence checks to decide whether to accept such business and/or allow a particular investment.

Westerby's due diligence on the Dolphin investment

I think Westerby's obligations certainly went beyond checking that the Dolphin investment existed and would not result in tax charges and I think it understood this at the time. I say this because, Westerby has provided us with some of the information that it has said it considered before accepting the Dolphin investment within its SIPPs.

This shows that prior to permitting the Dolphin investment into its SIPPs seemingly around or prior to August 2013 (and therefore prior to accepting Mr H's 2014 application to invest in this) Westerby reviewed, amongst other things, the following, which was seemingly provided to it by Dolphin as part of a due diligence pack:

- Investment brochures and completed project brochures. Including, for example, pictures and a summary listing completed projects.
- A significant number of documents in German, seemingly containing development plans, drawings, district approvals and registry documents, for example, dating from 2012 to 2014.
- A sample Loan Note Offer document, Instrument and Information Memorandum.
- Legal opinion and advice obtained by Dolphin on the investment. For example, in respect of financial promotions, FSMA and compliance issues.
- Several letters from the German law firm, outlining the investment structure and security.
- Investor testimonials.
- Credit information.
- Letters dating from in or around October 2014 from the security trustee, listing recent land charges that Dolphin had established for it, which it holds as security for Dolphin's loan note project.
- Dolphin's 'Clarity on Marketing Rules & Practices' document, dated September 2012.
- A 'Declaration of Previous Trading' dated September 2012.

Westerby has also provided us with some evidence of the due diligence it undertook into Dolphin which included, for examples, obtaining and reviewing copies of accounts and annual returns in respect of involved parties and carrying out credit checks as well as internet searches. And I can see that Westerby commissioned a report by a third-party dated October 2013.

While Westerby hasn't told us how many of its customers went on to invest in Dolphin and over what timescales it accepted this investment into its SIPPs – despite previously being asked to do so – given it commissioned the third-party report in October 2013, it seems likely that it had already been receiving applications for the Dolphin investment by that point.

Amongst other things, the third-party report set out that:

- It had been asked to assist in Westerby's review process on a proposed investment to assess its capability of being held within a pension arrangement.
- While internet searches on the parties involved, including Dolphin and the German law firm for example, didn't highlight any adverse history, information was limited due to the overseas domicile of some parties.
- Investors are granted legal charge over the property, which is registered to the SPV. Although it was seemingly later clarified by the German law firm that investors weren't granted this, as the trustee held the legal charge.
- The structure of the investment and that annual interest is paid half yearly under the Income Option, although no documentation seen indicates when the payment dates are.
- There's no exit strategy, as each project is tied into a SPV established for the particular listed building. The project dictates when the SPV closes and the process

is meant to be automatic.

- All investment monies will be held in a protected solicitors account with the German law firm.
- Valuations reports will be provided on an annual basis, but there doesn't appear to be anything within the documentation that states where the valuations will be published.
- As the investment is in Germany, no FSCS protection is offered. Only claims against an FCA regulated adviser, where advice is given, may be covered in the event of default.
- The review was based on the following documents:

    - Undated Dolphin Information Sheet – I can't see that Westerby has provided us with a copy of this from the time, despite having previously been asked to do so by our Service. I've only been provided with a copy dated much later, from 2017.
    - Frequently Asked Questions sheet undated – I can't see that Westerby has provided us with a copy of this, despite having previously been asked to do so by our Service.
    - Information Memorandum dated September 2013 – I can't see that Westerby has provided us with a copy of this, despite having previously been asked to do so by our Service. The earliest copy provided is dated September 2014.
    - Sample Loan Note Offer unsigned and undated.
    - Further Opinion Note signed and dated 18th September 2013.
    - QC Opinion Note signed and dated 11th April 2013.

- In conclusion, under '*Any other comments*', it suggested that SIPP operators obtain an acknowledgement from members of the high risk, illiquid nature of this investment. It also went on to confirm that the investment was capable of being held in a SIPP.

Having carefully considered all the information made available to us to date, I don't think Westerby's actions went far enough. As I explain in more detail below, I'm not satisfied that Westerby undertook sufficient due diligence on the Dolphin investment before it decided to accept this into its SIPPs. Further, based on what it knew or ought to have known had it undertaken sufficient due diligence, I think Westerby failed to draw a reasonable conclusion on accepting the Dolphin investment into its SIPPs at all.

If Westerby had completed sufficient due diligence, what ought it reasonably to have discovered?

<u>Third party report</u>

In respect of the information about the Dolphin investment compiled for Westerby by a third-party, it provided Westerby with what I think was a brief report that was intended to assess whether the investment was capable of being held within a SIPP. It seems that it was based on material provided to Westerby by Dolphin as part of its due diligence pack. And the report makes no comment on the available Dolphin marketing material and financial accounts and what I think were clear concerns with this, for the reasons below. So I think the report was of limited value. And I note that this report was commissioned by Westerby in October 2013, when I can see that it had already permitted the Dolphin investment within its SIPPs from at least as early as August 2013.

<u>Dolphin's marketing material</u>

I recognise Dolphin seems to have provided Westerby with a copy of its 'Clarity on Marketing Rules & Practices' document, which said, amongst other things, that introducers should '*tell and not to sell*' and that they should direct investors to regulated advisers if needed. And that Dolphin provided letters from firms regulated in the UK which said, for example, that they were happy from a promotions perspective having reviewed the investment due diligence documents.

However, amongst other things, the Annex to the 2014 Dear CEO letter states that

> '*Finally, we found many firms continuing to rely on marketing and promotional material produced by investment providers as part of due diligence processes, despite previous guidance highlighting the need for independent assessment of investments.'*

Importantly, and consistent with its regulatory obligations, I think that Westerby should have had regard to, and given careful consideration to, Dolphin's marketing material itself when undertaking due diligence into the proposed Dolphin investment and before permitting this into its SIPPs. And that includes conducting some further basic independent searches.

Had it done so, I think that Westerby should have been concerned that neither the marketing material nor the website clearly reflected the risks. For the reasons given below, I think it's fair to say that the information provided about the Dolphin investment was at best unclear and that a number of the statements made in promotional material were misleading.

Dolphin's 16-page brochure entitled 'Investment Opportunity UK Brochure' (which I will refer to as the 'UK Brochure') – that Westerby provided us with as part of its file on the initial due diligence it carried out in 2013 on the Dolphin investment, and which seems to date from August 2012 – contained what I think were prominent statements.

For example, under a key feature heading, it said that it offered a '***Fixed** 12% return per annum*' and that it was a '***Low Risk** Investment*' (emphasis added). And page four of the document set out more details of the 'key features' as follows:

- '*FIXED RETURN OF 12% per annum on capital invested*' (no emphasis added).
- Another UK SIPP provider had already approved the investment, '*thoroughly assessed it and described it as a **Low Risk** investment opportunity*' (emphasis added).
- '*A **simple** and totally transparent process*' (emphasis added).
- A UK based law firm had assessed that the investment as compliant with UK company, regulatory and pension legislation.
- It said in bold type that an exclusive agreement had been reached with Four Gates, a major German Fund Provider, who had agreed to purchase at least €100m worth of property from Dolphin, per annum, over the next five years.
- Investment funds are sent directly to the German law firm, who hold the funds in a secure account until the purchase of the property takes place and security documentation is issued.
- That '*UK Investors are **investing into the Dolphin structure, which simply uses German Listed Buildings as the underlying asset class. UK Investors do not have to consider the usual risks, legal responsibilities or on-going costs that are often associated with buying or owning property abroad.***' (no emphasis added).

So the relevant marketing material made available to investors prior to and/or at the time that Westerby decided to permit the Dolphin investment within its SIPPs referred to the investment as '*low risk*' on different occasions, drawing attention to this on the first page of the brochure and throughout. It made the investment out to be less risky than investors purchasing their own property abroad. And I think it's interesting that the Dolphin investment was marketed here as a simple and transparent process, when it took several letters from the German law firm to explain the investment process and structure, as well as different opinions from other regulated parties. So I don't think that the Dolphin investment was by any means simple, and it's accepted that it was in fact a high-risk non-standard investment.

Westerby has said it reviewed a different brochure which made it clear that the investment was high risk. And that it has had sight of another brochure which explicitly confirmed that Dolphin wasn't regulated by the FCA nor covered by the FSCS. It seems Westerby is referring to two documents entitled 'Information Sheet', which are only four pages long and the first dates from 2017 onwards. The second is undated and Westerby hasn't suggested it reviewed this prior to permitting the investment within its SIPP or told us when it was provided with this.

And, in any event, as I've said above, the UK Brochure seems to date from August 2012 and to be the full brochure for prospective investors, given its length and that this was entitled 'UK Brochure'. And I think this is likely the brochure Westerby reviewed prior to permitting the investment within its SIPPs in 2013 given that, as I've said above, it provided us with this as part of its file on the initial due diligence it carried out on the Dolphin investment in 2013.

I recognise that page three of the UK Brochure referenced the need for potential investors to read the Memorandum of Information document. While I don't appear to have been provided with the September 2013 version of this as highlighted above, I have been provided with one dating from September 2014 which said, amongst other things, that:

- The investment wasn't regulated by the FCA and that there was no recourse to our Service and the FSCS.
- Although this is a short-term secured investment, there can be no guarantee the specified (or any) return will be achieved.
- An investment in Loan Notes involves a high degree of risk, along with providing examples of risks such as German property prices falling. And it said that investors could lose their return, or all or part of their investment.

And I recognise that the UK Brochure itself said under 'Risk Factors' that the investment is for those who accept they can absorb the associated risks. And that investors should be aware they will be required to bear the financial risks of the investment, which they should understand and satisfy themselves that this is suitable for them. It also detailed some of the risks, such as a major fall in property prices and said that past performance isn't necessarily a reliable indication of future performance.

However, the UK Brochure immediately tempered this by saying directly underneath that Dolphin minimises the risks through in-depth due diligence. And, in any event, by that point, Dolphin had also already highlighted to customers in different places that the investment was low risk and simple. And while the UK Brochure said that a UK law firm had assessed the investment to be compliant with UK regulation and legislation, there was no reference in the brochure itself to the fact the investment wasn't actually regulated by the FCA and that there was no recourse to our Service and the FSCS.

Turning to Dolphin's website, in May 2014 for example there was a pop up before going on to the website, which said:

- It wasn't authorised or regulated by Germany's financial regulation authority, or that in Ireland or any other jurisdiction.

- Particular regard should be given to the risks page.
- Investors must understand that the risks associated with unregulated investments, including real estate investment, such as economic factors which can positively and negatively affect market values.
- Investors are recommended to take tax, legal and other advice they may consider necessary to consider the benefits and risks.
- It reserved the right to require potential investors to sign a consent that they are either high net worth or sophisticated and that they have taken authorised advice before entering into any investment opportunity.
- Prospective investors are required to sign a notice confirming that independent financial advice has been taken.

While the main website repeated some of this, at no point did either the pop up or the website specifically say that there was a lack of regulation by the FCA in the UK and that this meant that investors had no protection from FSCS or recourse to our Service. And while it said this was an unregulated investment, it didn't say or clearly explain that it is a high-risk non-standard investment.

The website did contain further risk warnings on a separate 'Risks' page, such as the potential risk of the removal of the tax break incentive by the German government, sales becoming difficult due to a major fall in property prices or lack of availability of loans to property buyers. And it said that past performance is not necessarily a reliable indication of future performance. However, I think it immediately tempered these warnings directly underneath when it again said that Dolphin minimised the risks through the completion of an in-depth Due Diligence and analysis process. And when it said that, while one of these risks might leave an investor exposed to losing all the invested funds, one or all of those events occurring was unlikely.

In addition, as I've said, the investment was marketed as offering a fixed return and, looking at Dolphin's website in May 2013 and 2014, it also said on the home page that the investment offered a '*Fixed Rate return of Interest*'. The ability to pay such a return depended on a number of factors though, such as securing and buying the properties for less than market value, then selling these with planning consent to allow loan note funds to be returned. And there wasn't sufficient explanation in the marketing material I've seen about the factors that the anticipated high returns were likely based on, other than the investment provider's own confidence in its business model and marketplace. I can't see anything which shows what the promoted 12% fixed return per annum was based upon or how Dolphin intended to fund this.

I don't seem to have been provided with any evidence of the agreement Dolphin said that it had with Four Gates in the UK Brochure and how this was progressing. Instead the Information Memorandum said on page 11 that Dolphin had no prior arrangements in place with any potential property acquirer. And while the Information Memorandum said there were no guaranteed returns, and I recognise fixed and guaranteed returns aren't necessarily the same thing, I think the promotional material failed to qualify the fixed return the investment was clearly and consistently marketed as providing. Such that it is fair to say there was a risk that investors would have understood the fixed returns to be guaranteed. And, as I'll come on to later, Dolphin's financial accounts weren't full and approved to support the secure position being promoted.

So, I think the information given in the Information Memorandum was at odds with what other marketing materials at the time stated about the investment being low risk with fixed returns. And I'm not persuaded that customers would've understood that this investment was high risk with no guarantees and/or financial regulation and protection. I think this ought to have raised significant concerns with Westerby about the way the investment was being marketed. And that it was highly likely that investors could be investing in Dolphin without appreciating the risks involved.

In addition, I've seen copies of two letters that were seemingly the cover letters to the Dolphin due diligence pack that was sent to potential investors, both dated from mid to late 2012. While I note that the letter dated September 2012 said, amongst other things, that the value of investments can go up or down, that investors might not get back what they put in and past performance isn't a guarantee of future performance, it had already set out that all investors have been paid the promised fixed returns and had their capital refunded in full. And the second letter provided no risk warnings but said at the bottom that 'Our focus is to provide a reliable, **low risk** investment opportunity…We offer a **Fixed** Return of 12% per annum' (my emphasis).

I think it's worth clarifying here that I'm aware Dolphin did go on to pay some returns seemingly in the way it had marketed to investors. But this is known with the benefit of hindsight when, as set out above, I'm considering what Westerby knew or ought reasonably to have known had it undertaken sufficient due diligence prior to first permitting the investment into its SIPPs. And, while Westerby recognised that Dolphin is an alternative investment and may be high risk and/or speculative in light of non-standard asset questionnaire, it should have been concerned that the marketing material didn't clearly highlight the risks associated with unregulated investments such as this. The investment was certainly not low risk and simple on any reasonable analysis, even though it appears to have been marketed as such to pension investors.

For the reasons I've given, the promotional was unclear, contradictory in places and misleading in others. So, Westerby should have had significant concerns about how the investment was being promoted and the information being provided to investors about the investment. There was a significant risk of consumer detriment, as there was a real risk that investors could be investing in Dolphin without appreciating the risks involved. I think that these concerns alone ought to have led Westerby to conclude that it shouldn't permit this investment within its SIPPs, and at the very least this ought to have led Westerby to understand the importance of undertaking comprehensive independent due diligence.

<u>Dolphin's accounts</u>

I recognise that Westerby did obtain and review some accounts in relation to Dolphin and DC80 in particular. So it clearly understood this to be important in meeting its obligations when deciding whether to permit the investment within its SIPPs. And, for ease of reference, I can see that Westerby has provided us with the below in respect of these companies accounts (in some instances the wording I've referenced below when setting these out has been translated from German). However, I don't think Westerby's actions went far enough, for the reasons given.

- DC80's accounts:
    - Annual financial statement for the period January to December 2015, including details for 2014, wasn't deposited until more than a year later, in February 2017. And this information was seemingly pulled by Westerby in July 2017.
    - Annual financial statement for the period January to December 2016, including details for 2015, was dated as of 31 December 2016 but marked as a 'draft'.

In which case, Westerby doesn't appear to have been provided with or sought any financial statements from DC80 until late 2016 to mid-2017, despite seemingly permitting the investment into its SIPPs from late 2013. The above statements also don't cover the financial periods 2011, 2012, 2013. And information in respect of 2014 can only be derived from the 2015 annual financial statement.

- Dolphin's accounts:
    - Dolphin Capital GmbH annual financial statement for the period from January to December 2012, including details for 2011, wasn't ascertained until more than a year later, on 3 March 2014.
    - Dolphin Capital GmbH credit reports contained financial information for the period January to December 2011 and 2012 respectively, including details for 2009, 2010 and 2011, but with 2013 marked as 'unknown'. These reports were provided to or pulled by Westerby in March, August and October 2014.
    - Dolphin Trust GmbH annual financial statement for the period January to December 2014, including details for 2013, wasn't created until nearly two years later, in September 2016. And this information was seemingly pulled by Westerby in June 2017.
    - Dolphin Trust GmbH annual financial statement for the period January to December 2015, including details for 2014, was deposited a year and half later, in June 2017.
    - Dolphin Trust GmbH annual financial statement for the period January to December 2016, including details for 2015, was dated as of 31 December 2016 but marked as a 'draft'.

Again, I can't see that Westerby was provided with or sought any financial statements in respect of Dolphin until March 2014, despite seemingly permitting the investment into its SIPPs, or at least considering doing so, from at least mid-2013.

Information in respect of 2011 could only be derived from the 2012 annual statement and the credit reports obtained or provided to Westerby from March 2014.

Information in respect of 2013 wasn't available when it permitted the investment into its SIPPs and when it accepted Mr H's investment into Dolphin in 2014. In fact, this wasn't created until nearly years later, in September 2016, and even then it could only be derived from the 2014 financial statement.

And I can't see that Westerby was provided with a full annual financial statement for 2009, 2010, 2011 or 2013, even in draft form.

So, in summary, while Westerby may have obtained or been provided with some accounts, it isn't enough for it to have just obtained these. Had Westerby reviewed these then, looking at the information, I think it ought reasonably to have become aware that there were significant delays and gaps in full and proper annual financial accounts being produced.

I think that the lack of full and proper annual financial accounts that Westerby ought reasonably to have identified in light of the above is supported by the insolvency administrator's expert assessment in respect of DC80, which set out in respect of the group of companies accounts, amongst other things, that:

‘150. The tests for a commingling of assets in the relationship between the insolvency debtor [DC80] *and its limited partner, AS German Property Group GmbH, are met.*

151. There are no properly prepared, approved and published annual financial statements for the insolvency debtor. Documents were only able to be identified at all for the years 2011, 2012, 2014, 2015 and 2018; these suggest that annual financial statements should have been prepared. However…these documents do not comply with commercial law regulations…

…

153. With regard to proper accounting in accordance with § 238 HGB [HGB seemingly being Germany's commercial code and accounting standards for how companies must prepare and report financial statements]*, it is not readily possible for an expert third party to obtain an overview of the business transactions and the situation of the business.*

…

161. The breach of the obligation to keep accounts in the qualified case of the absence of proper and comprehensible accounts as a whole is demonstrable in the present case…’

I think this supports that if Westerby had attempted to independently check the published company accounts in light of the concerns it ought to have had from the information available to it, this likely would not have come to anything as our understanding is that full and proper company accounts hadn’t been published for some years, which in itself is unusual under the circumstances. So, Westerby would likely have had to ask Dolphin for those accounts. And had it done so, given what I’ve explained above, I think it’s likely that either Westerby would have been provided documents similar to those reviewed by the insolvency practitioner, which would have shown incomplete and inadequate bookkeeping or Dolphin may have declined to provide the requested information. And, in either event, this ought to have been of significant concern to Westerby.

<u>The investment structure</u>

In addition, I think the following were also risks associated with the Dolphin investment:

- Despite the German law firm explaining in a letter dated 9 January 2013 that it and Dolphin were independent from the security trustee, the insolvency administrator’s expert assessment noted that it was the German law firm who agreed to the cancellation of land charges until the end of 2017 – if it was confirmed that the secured loan notes had been satisfied in full – rather than the trustee. And that the German law firm was the contact person in respect of the trust, rather than the security trustee itself.

- The third-party report prepared for Westerby noted that while the structure of the investment and that annual interest is paid half yearly under the Income Option, no documentation seen indicates when the payment dates are.

- The third-party report noted that valuation reports were meant to be provided on an annual basis, but that there doesn’t appear to be anything within the documentation that states where these would be published. I note that Westerby was provided with brochures setting out previous sale values and dates, as well as basic Word document lists with end values on, for example. But I can't see that Westerby sought information on where the valuation reports – which were seemingly different to the brochures – would be published or copies of these. Or that it sought to ensure the investment could be independently valued both at point of purchase and subsequently.

- The loan notes were meant to be secured by a first-ranking land charge on the relevant property, which was to be granted in the name of the security trustee in favour of the loan note holders.

  Westerby has provided a significant number of documents in written in German, seemingly containing development plans, drawings, district approvals and registry documents, for example, dating from 2012 to 2014. And while some do appear to include documents discussing granting of security to the security trustee, I can't see that these set out which loan note holders the particular charges were in favour of. And Westerby hasn't pointed us to the particular documents it feels supports its position (and in English translation), despite having previously been given the opportunity to do so by our Service.

  In addition, a letter from the German law firm dated 31 October 2012 clearly set out that there should be two appendixes to the Security Trustee Conditions – those meant to be in place between the investor and the security trustee as part of the Loan Note Instrument – which would set out the property the charge was secured on and the particular noteholders that this was for. However, I haven't seen any evidence of such appendixes being completed setting out this information. I haven't been provided with a copy for Mr H and I can't see that Westerby queried the lack of completed appendixes with Dolphin and/or the security trustee to satisfy itself as to the respective security that had been advertised.

  Westerby has also provided 'Confirmation of Land Charges' letters from the security trustee to Dolphin, dated October 2014 for example, where the security trustee listed recent land charges that Dolphin had established for or assigned to it, and which the security trustee said it held as security for the loan note scheme. But, unlike those provided to Westerby in 2017 which refer to an attached annex naming the investors that were meant to be the note holders in the scheme (although I note I don't appear to have been provided with a copy of the annex itself), these 2014 letters don't refer to any such information. And I can't see anything to suggest Westerby sought to check with Dolphin which loan note holders the charges were in relation to to satisfy itself as to the respective security.

  Investors themselves don't appear to have been provided with proof that such charges were in place in their favour. And, for the reasons given above, it seems that where charges were granted it was unclear which investors these were in respect of. This is further supported by insolvency administrator's expert assessment, which noted that:

  '*82. The investors were promised that the funds raised would be secured by (certificated) land charges (Briefgrundschulden) held by trustees. Where such land charges were created* ***at all****, they are, as far as I have been able to ascertain to date, in any case in* ***very few cases of any value****, were* ***regularly not held by the trustees in favour of the investors*** *and were frequently also* ***not validly established in favour of the investors*** *either under real estate law or insolvency law.*' (my emphasis).

And that:

'*323. …the value of these land charges… were regularly registered in the amount of a multiple of the actual property value*.'

- As set out above, it was widely promoted that the funds of those who invested in Dolphin would be paid to the German law firm and held in escrow i.e. these would only be made available to the debtor if corresponding land registry collateral existed, which would be held by the trustee, I think reassuring investor's as to the security of the investment and that it was again 'low risk'. For example, the UK brochure referenced above said that:

  '*All investment funds are sent directly to* [the German law firm] *a respected Berlin firm of Lawyers, who hold the funds in a secure account until the purchase of the property takes place and the security documentation is issued*.'

  And the insolvency administrator's expert assessment set out that:

  '*According to my further research, the insolvency debtor, when seeking investors, particularly in Great Britain and Ireland, not only advertised Germany as a location, but also that the investment was particularly safe because all amounts invested would first be paid by the investors into escrow accounts of* [the German law firm] *commissioned by the debtor.* [The German law firm] *would only forward the collected amounts to the insolvency debtor once the agreed collateral had been registered in the form of first ranking land charges and the certificates for these had been handed over to the trustee.*

  According to the discussions we had with investors, at least for some investors it was precisely this circumstance that was decisive in deciding to invest with the insolvency debtor and to invest their old-age pension funds there, since the interposition of the lawyers as trustees suggested a special degree of safety.'

  The insolvency administrator's expert assessment sets out though that, as of August 2014, no funds were forwarded to the German law firm at all. Instead 80% of investor's funds was converted to Euros by another bank and sent to DC80 or other companies within the group.

  The expert assessment also sets out that documentation and marketing material continued to advertise, at least in the UK, after September 2014 that investor funds would be paid to the German law firm in the way set out above, despite this no longer being the case.

  And it goes on to say (some of which is touched upon above) that:

  'As already indicated, the business/advertising model of the insolvency debtor was based not only on the flow of money via "trustworthy lawyers", but also essentially on offering investors investments supposedly secured with first-ranking in rem collateral, which had the quality of bank collateral. This collateral was to be held by trustees collectively for a large number of investors.

  Ladon Intertrust Treuhandgesellschaft mbH (Ladon) and Dactilus GmbH in particular acted as trustees in this context, with Ladon initially acting essentially in the concept financing of the insolvency debtor and Dactilus GmbH acting more in the project financing business area.

The insolvency debtor concluded agreements with investors on Loan Note Instruments, Loan Note Offers and secured loan note certificates in order to establish the trustee relationships. However, the documents do not contain any detailed references to specific collateral; instead, the contractual arrangement was limited to referring to "secured loan notes" in the loan note certificate and to including the following wording before the signature line in Loan Note Offers:

I understand that BK Law will ensure that a First Legal Charge will be registered in order to secure the Loan Note Amount and Interest.

***For its part, the insolvency debtor then concluded a (first) Framework Trust Agreement with Ladon in 2012, in which, significantly, not the investors but the insolvency debtor itself was specified as the trustor.** Furthermore, the Framework Trust Agreement and the structure of the Loan Note Instruments provided that Ladon should still conclude individual trust agreements with the respective investor on this basis, which, however, obviously never took place (for more details, see nos. 243 et seq. below).'*

- In respect of commission, the insolvency administration said that *'For the investor funds raised in the United Kingdom and Ireland alone, I am currently assuming a commission volume of up to **EUR 100,000,000.00** which may be relevant to liability.'.*

Investment due diligence summary

Looking at all of the above, I think there were significant warning signs and risks associated with the Dolphin investment, namely:

- There was no investor protection associated with this investment – investors didn't have recourse to our Service or the FSCS.
- It was illiquid – there was no exit strategy, the customer couldn't sell their interest in the investment and realising it was project dependent.
- It was being targeted for investment by pension investors, it was a speculative overseas based investment with inherent high risks that made it very obviously unsuitable for all but a small category of investors and even then, only a small part of such an investor's portfolio.
- The high projected and fixed returns set out should have been questioned. I don't expect Westerby to have been able to say the investment would have been successful. But such high projected returns without any apparent basis should have given Westerby cause to question its credibility.
- The investment didn't operate as it was marketed: invested monies weren't held in escrow then allocated to a specific property, for years (if not from the outset) it was operated as a Ponzi scheme with repayments funded by incoming investments and the German law firm hadn't been on retainer since 2014.
- The lack of properly prepared and approved annual financial statements should have been questioned.
- The marketing material either didn't contain, or was unclear, as to the risks associated with the investment. So, Westerby should have been concerned that consumers may have been misled or did not properly understand the investment they intended to make.
- It misled investors in relation to the security of their investment.
- While the loan notes were seemingly governed by UK law, the properties these were in respect of were based overseas and would be subject to the domestic laws and regulations that apply in respect of the sale and purchase of these. That created

additional risk.

Had Westerby undertaken appropriate due diligence then some of the type of information it ought reasonably to have asked for, if provided, would have demonstrated that the investment didn't operate as claimed, or, if not provided, then Westerby couldn't have been assured Dolphin operated as claimed and it wouldn't have then been treating consumers fairly by proceeding to permit (or continuing to permit) the investment in its SIPP without having obtained the requisite information to be satisfied that it understood the nature of the investment/assets were real and secure/the investment scheme operated as claimed.

I think Westerby reasonably would have discovered that full and proper annual financial statements hadn't been published for years and at least aspects of the investment weren't operating as Dolphin said it would and there was a risk customers were being misled. Overall, even if it did not and could not have uncovered everything highlighted, I think that Westerby could and should have reasonably uncovered enough that it ought to have concluded that shouldn't permit the Dolphin investment in its SIPPs.

These were 'red flags', so to speak, which should've caused Westerby significant concern and led it to conclude that it shouldn't permit Dolphin to be held in its SIPPs.

I appreciate Westerby has said that it restricted investment into this to those who were seemingly high net worth and/or sophisticated investors, or to those who had received regulated financial advice. But I'm satisfied that if it had undertaken sufficient due diligence, it's fair and reasonable to say that Westerby ought reasonably to have identified the type of red flags highlighted above, and that it ought to have drawn the conclusions I've set out, based on what was known and/or discoverable at the time.

As such, and based on the available evidence, I don't think Westerby undertook appropriate steps or drew reasonable conclusions from the information that I'm satisfied would have been available to it, had it undertaken adequate due diligence into the Dolphin investment before it did so. I don't think Westerby met its regulatory obligations and, in accepting Mr H's application to invest in Dolphin, it allowed his funds to be put at significant risk.

There's a difference between accepting or rejecting a particular investment for a SIPP and advising on its suitability for the individual investor. As I've said, I accept Westerby wasn't expected to, nor was it able to, give advice to Mr H advice on the suitability of the SIPP and/or the investment for him personally. To be clear, I'm not making a finding that Westerby should have assessed this for Mr H. I accept it had no obligation to give him advice, or to otherwise ensure the suitability of an investment for him.

And I'm also not saying that Westerby shouldn't have allowed the Dolphin investment into its SIPPs because it was high risk. Instead, my fair and reasonable decision is that there were things Westerby knew or ought to have known about the Dolphin investment, which ought to have led Westerby to conclude it wouldn't be consistent with its regulatory obligations or good practice to allow it into its SIPPs.

I think that Westerby ought to have concluded from very early on, and certainly before it accepted Mr H's investment application, that there was a significant risk of consumer detriment if it accepted the Dolphin investment into its SIPPs and that the Dolphin investment wasn't acceptable for its SIPPs.

As such, and based on the available evidence, I don't think Westerby undertook appropriate steps or drew reasonable conclusions from the information that I'm satisfied would have been available to it, had it undertaken adequate due diligence into the Dolphin investment. I don't think Westerby met its regulatory obligations and good industry practice, and it allowed Mr H's funds to be put at significant risk.

To be clear, I don't say Westerby should have identified all issues which later came to light. I only say that, based on the information that was available at the relevant time had it undertaken sufficient due diligence, Westerby should have identified that there was a significant risk of consumer detriment if it permitted the investment within its SIPPs. And it's my fair and reasonable opinion that appropriate checks would have revealed issues which were, in and of themselves, sufficient basis for Westerby to have declined to accept the Dolphin investment in its SIPPs before Mr H applied to invest in this with it. And it's the failure of Westerby's due diligence that's resulted in Mr H being treated unfairly and unreasonably.

In summary, I don't regard it as fair and reasonable to conclude that Westerby acted with due skill, care and diligence, or treat Mr H fairly, by permitting the Dolphin investment within its SIPPs. Westerby didn't meet its regulatory obligations or the standards of good practice at the time, and it allowed Mr H's pension fund to be put at significant risk as a result.

I'm satisfied that Westerby wasn't treating Mr H fairly or reasonably when it accepted his Dolphin application. And, for further reasons I'll come on to below, if that had been declined/rejected then I think it's unlikely his Dolphin investment would have been made.

Did Westerby act fairly and reasonably in proceeding with Mr H's instructions?

Westerby has said it had to act in accordance with Mr H's instructions and that it was obliged to proceed in accordance with COBS 11.2.19R, as this obliged it to execute the specific investment instructions of its client once the SIPP had been established.

Before considering this point, I think it is important for me to reiterate that, it was not fair and reasonable for Westerby to have accepted the Dolphin investment into its SIPPs in the first place. So in my opinion, the opportunity to proceed in reliance on an indemnity should not have arisen at all in Mr H's case.

Having to execute the transaction as a result of COBS 11.2.19R was considered and rejected by the judge in BBSAL. In that case Jacobs J said:

> *'The heading to COBS 11.2.1R shows that it is concerned with the manner in which orders are to be executed: i.e. on terms most favourable to the client. This is consistent with the heading to COBS 11.2 as a whole, namely: "Best execution". The text of COBS 11.2.1R is to the same effect. The expression "when executing orders" indicates that it is looking at the moment when the firm comes to execute the order, and the way in which the firm must then conduct itself. It is concerned with the "mechanics" of execution; a conclusion reached, albeit in a different context, in Bailey & Anr v Barclays Bank [2014] EWHC 2882 (QB), paras [34] – [35]. It is not addressing an anterior question, namely whether a particular order should be executed at all. I agree with the FCA's submission that COBS 11.2 is a section of the Handbook concerned with the method of execution of client orders, and is designed to achieve a high quality of execution. It presupposes that there is an order being executed, and refers to the factors that must be taken into account when deciding how best to execute the order. It has nothing to do with the question of whether or not the order should be accepted in the first place.'*

I therefore don't think that Westerby's argument on this point is relevant to its obligations under the Principles to decide whether or not to execute the instruction to make the Dolphin investment i.e. to proceed with the application.

Indemnities

In my view it's fair and reasonable to say that just having Mr H sign indemnity declarations wasn't an effective way for Westerby to meet its regulatory obligations to treat him fairly, given the concerns Westerby ought to have had about the investment. Westerby knew that Mr H had signed forms intended to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on such indemnities when Westerby knew, or ought to have known, the Dolphin investment was putting him at significant risk wasn't the fair and reasonable thing to do.

In the circumstances I think very little comfort could have been taken from the declaration stating that Mr H understood the investment risks. Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse Mr H's application.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr H signed meant that Westerby could ignore its duty to treat him fairly. I'm satisfied that indemnities contained within the contractual documents don't absolve Westerby of its regulatory obligations to treat customers fairly when deciding whether to accept or reject business.

Westerby had to act in a way that was consistent with the regulatory obligations that I've set out in this decision. In my view, Westerby was not treating Mr H fairly by asking him to sign an indemnity absolving it of all responsibility, and relying on such an indemnity, when it ought to have known that Mr H was being put at significant risk.

Is it fair to ask Westerby to compensate Mr H?

In deciding whether Westerby is responsible for any losses that Mr H has suffered on his investments I need to consider what would have happened if Westerby had done what it should have done i.e. had it not accepted or proceeded with his applications.

When considering this I have taken into account the Court of Appeal's supplementary judgment in Adams ([2021] EWCA Civ 1188), insofar as that judgment deals with restitution/compensation.

I am required to make the decision I consider to be fair and reasonable in all the circumstances of the case and I do not consider the fact that Mr H might have signed an indemnity means that he shouldn't be compensated if it is fair and reasonable to do so.

In deciding whether Westerby is responsible for any losses that Mr H has suffered on the Dolphin investment in his SIPP I need to look at what would have happened if Westerby had done what it should have done.

As I've said, I consider that Westerby failed to comply with its own regulatory obligations and good industry practice and didn't put a stop to the transactions that are the subject of this complaint. More specifically, I don't think Westerby should have permitted the Dolphin investment within its SIPPs and before Mr H's application to invest in this.

Westerby should have refused Mr H's Dolphin application. That should have been the end of the matter – Westerby should have told Mr H that it could not accept the business. And I am satisfied, if that had happened, the arrangement for Mr H would not have come about in the first place, and the loss he suffered could have been avoided.

Westerby has said that Mr H would have proceeded with the transaction elsewhere with another provider regardless of its involvement. But I'm not persuaded by this.

I've considered the experience Mr H detailed at the time on Westerby's non-standard asset questionnaires in respect of his employment history and investment experience, for example. And that he was seemingly eager to invest in Dolphin as he was made aware that the interest rate being offered was likely to fall.

But Mr H was acting in his personal capacity, so he was under no obligation to undertake his own due diligence into the Dolphin investment, whereas Westerby was. And the evidence from the time – an email from Mr H to Westerby on 14 September 2014 – shows Mr H instead relied on Mr B of SIPP Club's due diligence into this. When considering this, I think it's important to bear in mind that in my experience Mr B of SIPP Club was a firm that was avidly promoting Dolphin, I understand it received significant commission for doing so and it had a vested interest in customers going ahead with the investment. And, while Westerby might have taken some comfort in allowing an individual like Mr H to invest in high-risk investments, given the issues with the Dolphin investment it shouldn't have permitted investment into this at all.

So had Westerby, as a regulated firm, explained to Mr H even in general terms why it would not accept his Dolphin investment application or that it was terminating the transaction, I find it very unlikely that he would have tried to find another SIPP operator to invest in Dolphin with.

And, in any event, I don't think it's fair and reasonable to say that Westerby shouldn't compensate Mr H for his loss based on speculation that another SIPP operator would have made the same mistakes as I think 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 permitted the Dolphin investment into its SIPPs.

So I'm satisfied that Mr H would not have continued with the Dolphin investment, had it not been for Westerby's failings. And, I consider that Westerby failed unreasonably to put a stop to that course of action when it had the opportunity and obligation to do so.

I have considered paragraph 154 of the *Adams v Options* High Court judgment, which says:

> "*The investment here was acknowledged by the claimant to be high risk and/or speculative. He accepted responsibility for evaluating that risk and for deciding to proceed in knowledge of the risk. A duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed in my judgment as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed."*

For the reasons I've set out, I'm satisfied that it would not be fair to say Mr H's actions mean he should bear the loss arising because of Westerby's failings. I do not say Westerby should not have accepted the application because the investment was high risk. I acknowledge Mr H was warned of the high risk and declared he understood that. But, as I set out above, Westerby did not share significant warning signs with Mr H the investment so that he could make an informed decision about whether to proceed or not. And, in any event, Westerby should not have asked him to sign the indemnity at all as the investment application should never have been accepted or alternatively the transaction should have been terminated at a much earlier stage in the process.

So I am satisfied in the circumstances, for all the reasons given, that it is fair and reasonable to conclude that Westerby should compensate Mr H for the loss he has suffered.

I am not asking Westerby to account for loss that goes beyond the consequences of its failings. I am satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I am not able to determine. However, that fact should not impact on Mr H's right to fair compensation from Westerby for the full amount of his loss.

Mr H taking responsibility for his own decisions

I've considered this point carefully and I'm satisfied that it wouldn't be fair or reasonable to say Mr H's actions mean he should bear the loss arising because of Westerby's failings.

For the reasons given above, I think that if Westerby had acted in accordance with its regulatory obligations and good industry practice it shouldn't have nor permitted his investment application. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr H wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

As I've made clear, Westerby needed to carry out appropriate due diligence the Dolphin and reach the right conclusions. I think it failed to do this. And merely having Mr H sign forms containing declarations wasn't an effective way of Westerby meeting its obligations, or of escaping liability where it failed to meet these.

Mr H used the services of a regulated provider, trusting it to act in his best interests. So, I don't think it would be fair to say in the circumstances that Mr H should suffer the loss because he ultimately instructed the transaction to be effected. Overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair to say Westerby should compensate Mr H for the loss he's suffered.

What would have otherwise happened?

My aim is to return Mr H as closely as possible to the position he would now be in but for what I consider to be Westerby's due diligence failings.

While Dolphin was the first investment Mr H made after opening his Westerby SIPP and this was soon after he transferred the first of his existing pensions to it, the evidence from the time shows that Mr H was first introduced to and decided to invest in Dolphin after he'd already decided to transfer to Westerby and had applied to open the SIPP with it.

For example, when asked how Mr H made the decision to invest in Dolphin, he told us this was after Westerby provided him with an investment list which included this. And I can see this list was provided to Mr H on 27 August 2014, after he had already applied to open the Westerby SIPP on 21 August 2014. I can also see from Mr H's email chain with Mr B of SIPP Club in mid-September 2014 that Mr H didn't express an interest in a specific investment, such as Dolphin, to it. Instead, Mr H said he was 'fairly open' and for now he was looking to invest in asset backed with a yield and planned repayment/exit date. And Mr H was then pointed to the Dolphin investment.

In addition, there's evidence from the time that Mr H was transferring to a Westerby SIPP in particular to make another investment, namely Rockpool, which he later went on to do. And that Westerby was noted as one of only a few providers who accepted investments in that at the time.

So I've seen nothing to suggest that Mr H wouldn't have otherwise transferred his existing pensions, and to the Westerby SIPP, if it hadn't permitted the Dolphin investment. I think it's fair and reasonable to say that it's likely Mr H would have invested differently though and that Westerby should put him back into the position he would likely have been in if he hadn't invested in Dolphin via his Westerby SIPP, for the above reasons.

In which case, I think that Westerby should do the following to put things right, on a fair and reasonable basis.

Putting things right

My aim is to return Mr H as closely as possible to the position he would now be in but for what I consider to be Westerby's due diligence failings.

For the reasons set out above, I think that had Westerby done what it should have and refused to permit the Dolphin investment within its SIPPs, I think it's most likely that Mr H wouldn't have invested in this. I take the view that Mr H would have invested differently. It's not possible to say precisely what he would have done. But I'm satisfied that what I've set out below is fair and reasonable way to put things right in the circumstances.

To compensate Mr H, on a fair and reasonable basis, Westerby must:

- Compare the performance of Mr H's Dolphin investment with that of the benchmark shown below. If the actual value is greater than the fair value, no compensation is payable.

  If the fair value is greater than the actual value, there is a loss and compensation is payable.

- Westerby should add interest as set out below.

- Westerby should pay into Mr H's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If Westerby is unable to pay the total amount into Mr H's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr H won't be able to reclaim any of the reduction after compensation is paid.

- The notional allowance should be calculated using Mr H's actual or expected marginal rate of tax at his selected retirement age.

- I said to both parties that it is reasonable to assume that Mr H is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%. However, if Mr H would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

I let Westerby and Mr H know that if either of them disputed that this is a reasonable assumption, they must let us know as soon as possible and that it won't be possible for us to amend this once any final decision has been issued on the complaint. And, while Mr H didn't dispute this, Westerby said that it doesn't agree that it is reasonable to assume Mr H is likely to be a basic rate taxpayer. It said that as Mr H's pension is now in payment his tax band should be known rather than assuming he is a basic rate taxpayer. But I've seen nothing to evidence Mr H will be a higher rate taxpayer in retirement. And he has confirmed, with evidence in the form of a HMRC PAYE income tax estimate for 2024 to 2025, that he's likely to be a basic rate taxpayer. So, having considered Westerby's comments, I'm not minded to change my view.

- If the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

- Pay to Mr H £250 for the distress and inconvenience caused by the loss of a proportion of his pension provision.

- Westerby must also provide the details of its redress calculation to Mr H in a clear, simple format.

Income tax may be payable on any interest paid. If Westerby deducts income tax from the interest it should tell Mr H how much has been taken off. Westerby should give Mr H a tax deduction certificate in respect of interest if Mr H asks for one, so **he** can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
The monies invested in Dolphin	Still exists but illiquid	FTSE UK Private Investors Income Total Return Index	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

This means the actual amount payable from the Dolphin investment at the end date.

It may be difficult to find the *actual value* of the illiquid investment/s. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case. Westerby should establish an amount it's willing to accept for the investment/s as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment/s.

If Westerby is able to purchase the illiquid investment/s then the price paid to purchase the holding/s will be allowed for in the actual value.

If Westerby is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the *actual value*. Westerby may require that Mr H provides an undertaking to pay Westerby any amount **he** may receive from the illiquid assets in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Westerby will need to meet any costs in drawing up the undertaking.

Fair value

This is what the monies invested in Dolphin would have been worth at the end date had they produced a return using the benchmark.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal, income or other distributions paid out of the investment should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Westerby totals all those payments and deducts that figure at the end.

SIPP fees

If the investment/s can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mr H to have to pay annual SIPP fees to keep the SIPP open. But, for the sake of completeness, if the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Distress & inconvenience

I think the loss of part of the pension provision that is the subject of this complaint has likely caused Mr H some distress and frustration. It would understandably have been worrying to have found out he'd lost this and particularly when considering he's unwell. And Westerby should pay Mr H £250 to compensate him for this. I think this is a fair and reasonable amount in the circumstances, when also bearing in mind this investment made up a small proportion – around 10% – of Mr H's respective overall Westerby SIPP pension monies.

Why is this remedy suitable?

I've decided on this method of compensation because:

- I can't say definitively into what holdings, and in what proportions, Mr H's monies would have been invested had Westerby not accepted his Dolphin application. However, overall, I consider the benchmark below is a fair and reasonable proxy for the return Mr H's monies might have experienced over the period in question if they hadn't been invested in the manner that they were.

- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds.

- I'm satisfied that the mix and diversification provided by using a benchmark of the FTSE UK Private Investors Income total return index for the investment would be a fair measure for comparison for what Mr H's monies might have been worth if they hadn't been and invested in the manner that they were.

My final decision

For the reasons given, my final decision is that I uphold Mr H's complaint and Westerby Trustee Services Limited must put things right in the way I've set out above.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

Determination and award: I provisionally require Westerby Trustee Services Limited to pay Mr H the compensation amount as set out in the steps above, up to a maximum of £160,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Westerby Trustee Services Limited pays Mr H the balance.

My recommendation would not be binding. Further, it's unlikely that Mr H can accept my final decision when issued and go to court to ask for the balance. Mr H may want to consider getting independent legal advice before deciding whether to accept the final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 11 April 2025.

Holly Jackson
Ombudsman