DRN-4513927

The complaint

Mr H complains that Westerby Trustee Services Limited (Westerby) did not carry out sufficient due diligence before accepting the investments he made in his Westerby Self-Invested Personal Pension (SIPP).

What happened

Both Westerby and Mr H are represented by professional third parties, and they have both made submissions at various times. For simplicity, I have referred to Westerby and Mr H throughout, whether the submissions came directly from Westerby, Mr H, or were made on their behalf.

The SIPP and investment applications

Mr H held two personal pension schemes with one provider. The total value of these schemes was approximately £63,200.

Acting on the advice of a Mr F from a business called Abana Unipessoal LDA (Abana), on 27 March 2014 Mr H completed an application for a Westerby SIPP, and requested to switch the cash value of his pensions into the SIPP. Abana was a financial adviser firm based in Portugal. In December 2013 Abana 'passported' into the UK on an Insurance Mediation Directive (IMD) branch passport, effective from 8 January 2014 to 7 January 2016, and an IMD services passport from 12 March 2013 to 29 December 2015. This meant that between those dates Abana was an EEA-authorised firm and permitted to carry out some regulated activities in the UK.

Mr H withdrew £15,950 as tax-free cash (TFC), and on the advice of Abana, the remainder (£43,482.22) was invested via an ePortfolio Solutions Platform in the Kijani Commodity Fund, which was at the time based in Mauritius (later based in the Cayman Islands) and the Swiss Asset Micro Assist Income Fund (SAMAIF), which was based in Mauritius.

The SIPP application showed that Mr F, as the financial adviser, would receive commission of 5% of the total transfer value (approximately £3,160).

Updates on the investments

Our Service hasn't been provided with copies of the specific letters that Westerby sent to Mr H in 2014 and 2015, but in its submissions to our Service it is accepted that it sent similar letters to its SIPP holders who had invested in Kijani and SAMAIF. These letters are summarised below:

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

Westerby "*strongly urged*" clients to contact their "*regulated financial advisor*", Abana, and asked them to confirm whether they wanted to continue to hold the investments or for Westerby to attempt to sell them. Mr H did not respond to Westerby at this point. He did however contact Westerby in April 2015 and completed a partial redemption request for the sum of £15,360 (this resulted in Mr H receiving £13,000 in March 2016).

On 23 June 2015 Westerby again wrote to its clients about their investments in the Kijani and SAMAIF funds. This letter reminded its clients that the funds were now considered non-standard assets. In relation to the Kijani fund the letter explained it had been announced that the fund managers had taken the decision to liquidate all the fund's assets and return client money within 30-60 days, but it wasn't clear where the announcement had come from and some investors had made redemption requests over 90 days ago but not received any money.

This letter also explained the adviser dealing with Abana clients (by this point a Ms B, not Mr F) had by that point become "*directly authorised with the FCA*" under a new firm – Abana FS Ltd. This was a UK based, FCA authorised firm.

Again Westerby "*strongly urged*" its clients to contact their "*regulated financial advisor*". It did not however ask them to confirm if they wanted to continue to hold the investments on this occasion.

A further letter about the funds from Westerby to its clients followed on 17 July 2015. This explained that the administrator of the ePortfolio Solutions platform had had its licence suspended by the MFSC. It further explained that efforts were underway to trace where the Kijani fund had been invested and that both that fund and the SAMAIF fund were suspended. The letter said a further update would follow. At its conclusion the letter said:

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

In the accompanying letter Westerby explained that Abana clients weren't being novated to Abana FS Ltd after all. Westerby explained it understood the reason for this was that Abana didn't consider Abana (FS) Ltd to be suitably independent to provide advice on Westerby SIPPs. Westerby urged its clients to have their SIPP reviewed immediately by an independent financial adviser (IFA) with the necessary permissions. It also advised its clients to contact a Mr G of Abana if they had any queries, and provided Mr G's contact details.

Westerby wrote to Mr H again in December 2015, and whilst I've not seen a copy of the specific letter sent to Mr H, from other complaints we've received I'm aware that this letter explained:

"…we now have further information regarding the EPS platform, the Swiss Asset Micro Assist Income Fund (SAMAIF) and the Kijani Fund…

…We have been in correspondence with the new managers of the platform and with Asset Management International…

The illiquid funds within your portfolio cannot be sold at present, and will remain within the SIPP EPS account for the time being."

The letter also set out the current value of consumers' liquid and illiquid elements of their investments, noting that this was based on information that had been provided to Westerby. After the value of the liquid funds were denoted, it was stated *"(SAMAIF expected to trade again in February)*" and after the value of the illiquid funds were denoted it was stated *"(this is not a true value - please see below)".*

The letter said the following about SAMAIF:

"We have been informed that the suspension on this fund has been lifted, however it is not yet active, pending final authority from the Mauritius Financial Services Commission.

EPS have included the value of this fund in the Liquid Funds referred to above. We have been advised that this is because the underlying assets and the value of the fund have been verified, and that the fund is expected to begin trading again in February 2016."

The letter also set out the redemption timescale for what were described as underlying funds, including the TCA Global Credit Fund, the Lucent Strategic Land Fund and the Premier Socially Responsible Investment Fund.

As a result of this December 2015 letter Mr H called Westerby. He requested a redemption form, and this was submitted by Westerby on 29 January 2016 to arrange a full encashment when the funds began to trade (no encashment was forthcoming).

In February 2021 Our Service issued a final decision on another complaint involving Westerby's acceptance of a SIPP application from Abana ('the published decision'). This has been published on our website under reference DRN7770418. And I've seen an email on that complaint dated 15 April 2016, in which Westerby emailed a client and explained that their holdings in the Kijani and SAMAIF funds were illiquid and that:

"*Due to the liquidity issues with the funds within the portfolio, the Managed Portfolio was split into two – Managed Portfolio S representing the Suspended funds (mostly Kijani) and Managed Portfolio L representing the Liquid funds (initially approximately 20% TCA Global and 80% SAMAIF). ePortfolio Solutions have advised us that SAMAIF was initially included in the Liquid portfolio as it was expected to begin trading again immediately, however this has not yet happened."*

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

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

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

Mr H says that he complained to Abana and his complaint was referred to a firm called Complete Compliance Support Ltd. Complete Compliance Support Ltd wrote to Mr H and explained that due to unsuitable advice from Abana Mr H's pension had suffered a loss. The letter included a calculation of the redress Complete Compliance Support Ltd thought Mr H was due. Mr H has confirmed that he hasn't received any compensation to date.

Mr H's complaint to Westerby

On 27 November 2020 Mr H, via a representative, complained to Westerby. In summary he said that had Westerby completed adequate due diligence and warned him about concerns with the EEA regulated introducer, Abana, then he would not have made the investments. He also thought that Westerby should have raised concerns about the investment and structure of the SIPP (invested in un-regulated, high-risk funds), as well as his personal unsuitability for a SIPP. So Westerby should therefore not have accepted his business from Abana.

But Westerby didn't think Mr H's complaint was one it needed to consider, as it thought he'd made it too late under the regulator's rules. It said that Mr H had six years from the event he complained about, or three years from when he would reasonably have been aware of issues which would give cause for complaint. Westerby pointed out that Mr H's SIPP was established on 14 January 2014 (this may have been an error on Westerby's behalf as the SIPP application was stamped as having been received on 2 April 2014) and the investments made on 16 May 2014, and both of these events were more than six years before he made his complaint. And as Mr H had been aware of problems with the investments in 2014 and 2015 his complaint had been made too late.

Mr H didn't agree and asked our Service to consider his complaint.

Our Investigator's view – jurisdiction

Having reviewed everything our Investigator thought that Mr H's complaint was one that our Service could consider. He acknowledged that the event complained about occurred more than six years before Mr H made his complaint. But he didn't think the letters sent to him between 2014 and 2015, although showing significant problems with the investments in his SIPP, provided evidence that suggested Mr H connected Westerby to those problems or that it was responsible for the losses.

Our Investigator's view – merits

Our Investigator said that he thought Westerby ought to have identified that Abana needed "*top-up"* permissions to advise on and make arrangements for personal pensions in the UK. And Westerby ought to have taken all the steps available to it to independently verify that Abana had the required permissions. He thought that had Westerby taken these steps it would either have established that Abana didn't have the regulatory permissions it required to give advice on or arrange personal pensions in the UK, or it would have been unable to confirm whether Abana had the required permissions. In either event, Westerby hadn't acted in accordance with its regulatory obligations nor good industry practice by proceeding to accept business from Abana. So as Westerby shouldn't have accepted Mr H's SIPP application from Abana in the first place, it was fair and reasonable for Westerby to compensate Mr H for his financial loss.

Westerby's response to the Investigator's view

Westerby maintained that Mr H had made his complaint too late under s14a of the Limitation Act 1980. It said that this statute was what the regulator's timeliness rules (DISP2.8.2) were based upon, and this statute showed that Mr H only had to be aware of a problem, and that he knew enough to justify setting about investigating the possibility of whether Westerby was responsible.

Westerby also stated it thought there had been procedural irregularities in the way our Service had investigated the complaint, namely:

- Our Service had re-directed Mr H's complaint to Westerby and had not investigated Abana.
- Our Service had misinterpreted Mr H's original complaint and raised an entirely new complaint against Westerby, which was made too late under the regulator's rules.
- Our Service had failed to provide Westerby with an opportunity to answer the complaint before we issued our view.

Westerby then went on to explain why it disagreed with our Investigator's view. In summary, it said:

- Section 20 of the Financial Services and Markets Act 2000 ('FSMA') provides that an authorised person acting without permission doesn't make the transaction void or unenforceable, and it doesn't give rise to any right of action for breach of statutory duty (save for in limited circumstances). This is the opposite approach to someone acting without authorisation (as per section 27 of the FSMA).
- That primary legislation allows for the voiding of contracts where a party is acting without authorisation (section 27), but explicitly removes this provision where an authorised party acts outside of their permissions (section 20). This demonstrates that Parliament's intention was that an authorised party shouldn't be held liable for losses flowing from another authorised party's breach of their own requirements.
- It was no part of Westerby's contractual obligations and/or legal obligations (as set out in section 20 of the FSMA) to Mr H to investigate the permissions of third-party advisers. The investments were permitted investments and it was not part of Westerby's contractual relationship with Mr H to have offered advice on the investments.
- It's previously requested, amongst other things, disclosure of: the details of the contact at the FCA with whom this Service communicated; records of such communications; file notes or attendance notes; details of the FCA contact's role at the FCA; whether the FCA contact was dealing with the Register in 2013; and what the FCA contact's understanding of the Register in 2013 is based upon. (Westerby has highlighted in previous submissions to this Service that it's only been provided with the FCA's response that's referred to in the published decision and it's not received the further disclosure it's requested.)
- It disagrees that Abana not holding the relevant permissions would have been a matter of public record. The FCA could only confirm what was on the Register, not what was missing from it. And the FCA cannot provide any more information than that which is provided on the Register.
- Abana had confirmed orally and in writing that it had the necessary permissions, and it was reasonable for Westerby to rely on this.

- It disagrees that the Written Agreement was vague and generic in nature. The term *"permissions"* encompasses *"top-up"* permissions. And it's unrealistic to consider that any change of wording would have caused Abana to not provide the undertaking.
- There was no ambiguity in the word "*sale"* of the SIPP in the Written Agreement.
- The wording of the Written Agreement was specific to Abana, it was drafted in line with FCA due diligence expectations and was *"fit for the purpose intended".*
- It took all reasonable steps to verify Abana's permissions.
- Before accepting applications, it checked the FCA Register and the permissions page, the latter was blank.
- It checked the Portuguese Register, this explained that Abana was authorised to advise on *"life"* and *"non-life"*, the latter Westerby understood meant investments and pensions.
- Westerby undertook due diligence before accepting the introductions from Abana in accordance with the guidance.
- Abana was adamant that it had the correct permissions, presented itself as knowledgeable and professional and at no time did it present any reason to doubt its credibility.
- This Service hasn't considered properly the application of COBS 2.4.6R (and COBS 2.4.8G).
- There was nothing more Westerby could have done that would have changed the outcome
- *Adams v Options* (paragraph 23) showed that the FCA were fully aware that businesses were accepting introductions from unregulated brokers on an execution only basis, and had not objected.
- Westerby provided quarterly Product Sales Data reports to the FSA and later the FCA. Those organisations were aware through the reports that Abana was introducing business to Westerby. And in 2015 Westerby was in contact with the FCA about Abana. On these occasions the FCA didn't raise any issues or allegations to Westerby about a breach of Westerby's duties and obligations.
- If it was impossible to verify the permissions through the FCA Register, and also a regulatory requirement to reject the business on these grounds, it would make it impossible for an EEA-passported firm to do any business other than the default business allowed by their passport regardless of any top-up permissions held. This may be construed as favouring local firms by the back door and might possibly be unlawful under EU law.
- If it had rejected Mr H's application, Abana would have re-applied on behalf of Mr H to another SIPP provider that Abana was using and that SIPP provider would have accepted the application. And this Service needs to give true weighting to the fact that Abana's clients trusted its advice.
- Had it uncovered that Abana didn't have the relevant permissions, it would have declined all business from Abana from the outset, and would never have received Mr H's application or have been in a position to highlight Abana's lack of permissions.

- It wouldn't have been at liberty to contact investors directly to tell them why their application was refused.
- It sought clarification from our Service if Mr H had made a complaint against Abana.
- Our Service had failed to assess apportionment, which was contrary to a previously published Ombudsman's decision in similar circumstances.
- But for the FCA's failings in maintaining its permissions page for Abana, and for failing to conduct proper checks on Abana and its activities, Westerby would not have accepted the introduction from Abana and would not now be facing the complaints leveled against it.
- It was Westerby's vigilance that led to it first raising the alarm that the funds were failing.
- Abana was the entity responsible for Mr H's losses and it was Abana who should compensate him. Abana's failings were more serious than any alleged failings by Westerby, and Abana has been found liable previously by the FCA and our Service for giving bad advice and was ordered to pay full redress.
- Any complaint made against Abana ought to have been investigated first, or if not first, then at the same time as the complaint against Westerby. It did not understand why the complaint against Westerby had been determined first. The geographical location of Westerby, as opposed to being overseas, should have no bearing on the determination of liability.
- There were several previous Ombudsman's decisions regarding Abana and another SIPP provider, whereby the Ombudsman had determined Abana was liable for the losses incurred by the consumer. It did not understand why this complaint was being determined in a different manner.
- Having been ordered by the FCA to pay full redress to its client, Abana then refused to do so. Little/nothing was done to enforce awards made against Abana for redress to investors on similar complaints before Abana ceased to trade. Losses caused by the apparent failings of other authorities shouldn't rest with Westerby. Irrespective of our Service's view as to liability, there is a separate duty on Mr H to mitigate his losses, and little or no action is not sufficient to discharge that duty. Any compensation should be reduced to take account of this failure:
    - Mr H did not respond to its letter in November 2014. Had he done so promptly it was highly likely he would have been able to recover 100% of his funds.
    - Mr H made a partial redemption request in April 2015 resulting in him receiving £13,000 in March 2016.
    - If Mr H had acted promptly as a result of its December 2015 letter, it was likely he would have received at least a 50% redemption. So this ought to be considered in any determination of compensation.
    - Whether or not there was a reference in Westerby's letter in November 2014 to Mr H to seek advice from Abana is an irrelevant point and had no bearing on the outcome as Mr H would have reverted to his existing adviser, regardless of the reference to Abana in Westerby's letter.
    - That Mr H elected to retain the funds that had been highlighted as high-risk and under enforcement actions means the general principle that he should take responsibility for his decisions ought to be applied, particularly as Mr H believed at all times the investments were not 'high risk'.

    - By concluding that it wasn't reasonable for Mr H to take some action after its letters, this Service is effectively deciding that Westerby was always liable for any subsequent losses irrespective of the duty on Mr H to mitigate his losses.
    - Westerby was unable to advise Mr H to take his money out, nor could it unilaterally instruct the encashments on his behalf.
- The application form for the SIPP would have been downloaded by Abana and completed by it with Mr H. Only after this was it sent to Westerby, and Westerby had no contact with the Members-to-be prior to receiving the application.

Previous final decision on a complaint against Westerby

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

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

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

On this basis, Westerby was asked to review (amongst others) outstanding complaints involving Abana – including Mr H's – and if it wasn't prepared to change its position after taking account of the detailed reasons set out in the published decision, to explain why that was the case. Westerby didn't change its position.

Other submissions from Westerby

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

- A number of points raised haven't been addressed by this Service.
- The published decision confirms we contacted the FCA about whether *"top-up"* permissions appear on the FCA Register and that the *"FCA confirmed that top up permissions do appear on the Register under the "Permission" page and that the FCA understands the same information was available on the Register in 2013."*
- There's been no disclosure of: the details of the contact at the FCA with whom this Service communicated; records of such communications; file notes or attendance notes; details of the FCA contact's role at the FCA; whether the FCA contact was dealing with the Register in 2013; and what the FCA contact's understanding of the Register in 2013 is based upon. This Service should provide full disclosure of this information. Not to do so is procedurally unfair.
- An understanding of what was on the Register in 2013 isn't proof of what was actually on the Register at the relevant time.

- It was reasonable for Westerby to assume from the Terms of Business agreement that Abana had the necessary permissions. Further, it doesn't accept that it ought to have been reasonably aware of cause to have questioned the accuracy of the statement in the Agreement.
- The published decision concedes that information which wasn't available on the Register wouldn't have been provided to Westerby by the FCA if it wasn't already on the Register. But the published decision also says that if Westerby had contacted the FCA directly the FCA would have been able to confirm Abana's permissions. No information has been provided about this and the FCA's position generally.
- Westerby made a Freedom of Information request to the FCA. And, in response, the FCA confirmed that in 2013, the Register would have indicated the broad permissions held under IMD by a firm which would have been either insurance mediation or reinsurance mediation and that there was no requirement under the IMD to display more detailed activities. Any further information not displayed on the Register would have been considered confidential information under Section 348 of the FSMA which prohibits disclosure of this information.
- In the published decision the ombudsman sought to distinguish the complaint from the situation in the Adams court case on the basis that Abana was offering an advisory service. It's unclear how Abana's contractually defined role impacts on the scope of duty owed by Westerby under COBS 2.1.1R. It was no part of Westerby's contractual obligations to investigate the permissions of third-party advisers.
- In the published decision the ombudsman failed to follow DISP 3.6.3G, which provides: *"Where a complainant makes a complaint against more than one respondent in respect of connected circumstances, the Ombudsman may determine that the respondents must contribute towards the overall award in the proportion that the Ombudsman considers appropriate."*
- The ombudsman failed to assess apportionment and causation.
- Despite a related complaint about the actions of Abana, in the published decision the ombudsman decided that Westerby should compensate the consumer for the full extent of his financial losses.
- Abana has ceased trading and closed, as such any indemnity from Abana and/or assignment of any action against it would now be worthless.
- Complaints made against Abana to this Service ought to have been decided first, or at least at the same time as complaints against Westerby. This Service dealing with the complaint against Westerby first has led to the failure to address the issue of apportionment.
- This Service has found against Abana in a number of complaints involving a different SIPP operator, and ordered Abana to pay redress, yet we haven't pursued, or invited the complainants to pursue, the SIPP operator.

Westerby has also made a number of other submissions to us previously, some in this complaint and others in separate complaints featuring Abana and the same key point – namely the permissions held and required by an incoming EEA firm dealing with personal pensions in the UK, and Westerby's knowledge of this. These submissions include that:

- GEN 4 Annex 1 states that an incoming (EEA) firm must make details of the extent of its permissions clear on request. This shows that the FCA directs that the firm should confirm its permissions. Its Terms of Business provided for such a request and effectively formalised this disclosure through a signed agreement.

- The FSMA acknowledges that there's a general principle that consumers should take responsibility for their decisions, a principle which the FCA should have regard to when considering consumer protection. This Service is part of the consumer protection provisions under the FSMA, it follows that we must similarly have regard to this principle. There's a clear intention in law that consumers have a level of responsibility. And this Service has issued other decisions which take account of a consumer's failure to take action to mitigate their losses.
- Its due diligence wasn't simply a check of the Register. Its Chairman and Compliance Oversight was present at several face-to-face meetings with Abana's adviser and Compliance Director. And he was thorough in his *"testing"* of their processes and due diligence.
- This culminated in Westerby establishing a legal document – the Terms of Business – in which Abana warranted that it had the required permissions to introduce the SIPP. Abana therefore effectively *"defrauded"* it.
- It's able to accept applications from non-regulated introducers. This isn't something it has done, but it's acceptable to the FCA.
- It doesn't hold a copy of the *"Permission"* page for Abana.
- It's been able to retrieve archived copies of the page for other passported firms from the relevant time period. In every case the *"Permission"* page simply shows *"No matches found".*
- The *"Basic Details"* page of Abana's Register entry included a field labelled *"Undertakes Insurance Mediation",* but the field was left blank; for UK firms it was always completed.
- Westerby's argument isn't that there weren't other sections of the Register, rather it's that Abana's permissions couldn't be determined from the Register due to the limited information available. In other words, Westerby doesn't accept that, at the relevant time (when the online Register was viewed in 2013), that there was information regarding permissions available or accessible by an online user.

As no agreement could be reached the complaint has been passed to me for a review.

On 9 October 2023 I issued a provisional decision on this complaint. In summary, I concluded that Mr H had made his complaint in time and it was within the jurisdiction of our Service, so was one that I could consider the merits of.

And having done so, I concluded that the complaint should be upheld. I thought Westerby ought to have identified that Abana needed *"top-up"* permissions to advise on and make arrangements for personal pensions in the UK, and ought to have taken all the steps available to it to independently verify that Abana had the required permissions.

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

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

Additionally, Westerby ought to have considered the anomalous features of this business. These were further factors relevant to Westerby's acceptance of Mr H's application which, at the very least, emphasised the need for adequate due diligence to be carried out on Abana

to independently ensure it had the correct permissions to be giving advice on personal pensions in the UK.

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

I was therefore satisfied the fair and reasonable conclusion in this complaint was that Westerby shouldn't have accepted Mr H's SIPP application from Abana.

In response to my provisional decision Westerby did not accept that Mr H's complaint had been made in time. Westerby said that I was correct in my view that Mr H was aware, or ought reasonably to be aware, following his receipt of its letters in 2014, 2015 and 2016, that there was a problem that had caused him loss or damage, and this was more than three years before he complained to Westerby.

However, Westerby went on to say that my provisional decision, when considering our Service's jurisdiction and Mr H's date of knowledge, had failed to take account of the following points:

- The provisions of S.14A Limitation Act 1980 meant that given the circumstances prevailing there was no good reason why Mr H did not seek expert advice following its letters in 2014, 2015 and 2016 which was reasonable for him to do. Had he sought expert advice this would have led him to knowledge of all requisite facts.
- The email that Mr H wrote on 11 December 2017, and the trail before it, showed he was aware of the need and appropriateness of seeking expert advice. He was clearly aware at this time of matters which would justify him seeking a solicitor or IFA/accountant whose advice may have led him to knowledge of the requisite facts.
- Mr H had retained a previous professional adviser [DPRS] who had initially pursued a claim against Abana on his behalf. Westerby was unaware when Mr H first consulted DPRS and it questioned what advice DPRS may have provided Mr H about a possible claim against Westerby.
- Mr H's complaint against Westerby was made by a different representative in August 2021. Westerby questioned when this firm was engaged by Mr H.
- Westerby questioned what eventually caused Mr H to make his complaint against it in August 2021 and what additional information that he didn't know earlier caused him to complain.

Regarding the merits of Mr H's complaint, Westerby said that despite repeated requests, we hadn't provided it with the information it thought we should provide regarding the enquiries made of the FCA and its response. Therefore, Westerby hadn't had the opportunity to make further submissions on this point.

Following my provisional decision Mr H stated that he'd first engaged with a professional representative (DRSP) in May 2018, and following this his complaint was submitted regarding Abana. It was whilst this complaint was being considered by our Service that we informed him that it might be appropriate to complain against Westerby. DRSP went into administration in 2021 so his current representatives were appointed in June 2021.

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.

In doing this I've also taken into account both Mr H's and Westerby's submissions in response to my provisional decision. And having done so I am not persuaded to change my findings. I am satisfied that Mr H's complaint is one that is within the jurisdiction of our Service, and I'm satisfied on the balance of probabilities that it ought to be upheld.

Jurisdiction

I've reconsidered all the evidence and arguments in order to decide whether we can consider Mr H's complaint.

The rules I must follow in determining whether we can consider this complaint are set out in the Dispute Resolution ('DISP') rules, published as part of the FCA's Handbook.

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

- more than six years after the event complained of;
- or, if later, more than three years after Mr H was aware – or ought reasonably to have become aware – he had cause for complaint;
    - unless the complaint was brought within the time limits, and there's a written acknowledgement or some other record of it having been received; or
    - unless, in the view of the Ombudsman, the failure to comply with the time limits was as a result of exceptional circumstances.

Westerby says that Mr H's complaint was raised outside these time limits. Westerby says that it first received Mr H's complaint on 27 November 2020. Having seen the complaint letter I'm satisfied that the crux of the complaint was that Westerby didn't undertake sufficient due diligence on Abana, nor the investments themselves, and as a result of this he's suffered losses that Westerby should compensate him for.

The application for the Westerby SIPP was completed on 27 March 2014. Mr H's pension funds were transferred into it and invested in the Kijani Funds and SAMAIF. This all occurred more than six years before Mr H had referred his complaint to either Westerby or us.

So I've gone on to consider whether Mr H referred his complaint more than three years from the date on which he either was aware, or ought reasonably to have become aware, he had cause for complaint. And when I say here cause for complaint, I mean cause to make this complaint about this respondent firm, Westerby, not just knowledge of cause to complain about anyone at all.

Westerby wrote to Mr H at several points during 2014, 2015 and 2016. Westerby asserts that it is the contents of these letters, when taken together, that mean Mr H ought reasonably to have known there was a problem, and that he'd suffered a loss as a result of that problem. And given everything that had happened he ought reasonably to have known Westerby might be responsible for the problem, or that he should have made reasonable enquiries to establish that Westerby might have been responsible.

The time limits for bringing a complaint to the Financial Ombudsman Service are set out in the DISP section of the FCA Handbook, and I make this decision having full regard to Westerby's submission in regards to S.14A.

In *The Official Receiver v Shop Direct Finance Company Limited* [EWCA] Civ 367 Singh LJ said:

> *44. The FCA Handbook is similar in its drafting style to the Financial Services Authority's Client Assets Sourcebook (CASS), which was considered by this Court in Re Lehman Brothers International (Europe) (No 2) [2010] EWCA Civ 917; [2011] 2 BCLC 184*
>
> *…*
>
> *46. For present purposes I derive the following propositions from the judgments in Re Lehman Brothers:*
>
> *(1) Ultimately it is the actual wording of a provision that must govern any decision as to its effect.*
>
> *(2) The Handbook should be read as a whole, taking an holistic and iterative approach, so that a preliminary view on one provision can be tested by reference to the rest of the relevant provisions.*
>
> *(3) The provision should be construed in the light of its overall purpose.*
>
> *(4) It should be construed on the basis that it is intended to produce a practical and commercially sensible result. The rules should be taken to be grounded in reality. The court should keep in proportion any drafting infelicities.*

And Nugee LJ said the following in relation to DISP 2.8.2R

> *155. The resemblance to the ordinary limitation periods for claims in negligence where there is also a primary period of 6 years (under s.2 of the Limitation Act 1980 ("LA 1980")) and a secondary period of 3 years from the date of the claimant's actual or constructive knowledge (under s.14A LA 1980) is striking. We have in fact been shown evidence that this is not a coincidence, but even without this material (which is of doubtful admissibility) it would have been a reasonable assumption that the general structure was modelled on the LA 1980 provisions and was designed to do the same thing in general terms.*
>
> *156. What then is the purpose of having these two time-limits? The purpose of an ordinary limitation period is to prevent stale claims from being litigated, the period of 6 years being fixed as a generally reasonable period to bring a claim. This explains the primary period. But as is well-known that could and did lead to some claimants who had suffered latent injury or damage finding that they had lost their rights to sue before they even knew, or could reasonably be expected to know, that they had been injured or suffered loss. Provision was therefore made, first in ss.11 and 14 LA 1980 (applicable to claims for personal injury) and subsequently in s.14A LA 1980 (applicable to other claims in negligence), for the claimant to have 3 years from his date of knowledge to bring a claim. The purpose of this is obvious. It was to remedy the injustice of a claimant's claim being time-barred before they knew, or could reasonably be expected to know, that they had a claim. On the other hand the selection of a (relatively short) 3 year time period shows that another purpose was to provide that once they did, or should, have that knowledge they should get on with the claim and bring proceedings reasonably promptly. Precisely the same in my view applies to the secondary time-limit in DISP 2.8.2R(2)(b). The purpose of the rule is to prevent a complainant from losing the right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware.*

The term 'cause for complaint' is not defined in the Handbook. The term *complaint* (in italics) is defined, and it is reasonable to infer in light of the above guidance on interpreting the Handbook (and guidance in GEN 2.2.1R in the Handbook: *"Every provision in the Handbook must be interpreted in the light of its purpose."*) that the definition of the word *complaint,* was intended to apply to the phrase cause for complaint.

The term '*complaint* 'is defined for the purposes of DISP in the FCA handbook as:

> *"any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service…which:*
>
> *(a) Alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and*
>
> *(b) Relates to an activity of that respondent, or any other respondent with whom that respondent has some connection in marketing or providing financial services or products …which comes under the jurisdiction of the Financial Ombudsman Service."*

So the Glossary definition of complaint requires that the act or omission complained of must relate to an activity of "that *respondent*" or firm (my emphasis).

Accordingly, the material points required for Mr H to have awareness of a cause for complaint include:

- awareness of a problem
- awareness that the problem had or may have caused him material loss, and
- awareness that the problem was or may have been caused by an act or omission of Westerby (the respondent in this complaint).

It is therefore my view that it is necessary for Mr H to have an awareness (within the meaning of the rule) that related to Westerby, not just awareness of a problem that had caused a loss. Knowledge of a loss alone is not enough. It cannot be assumed that upon obtaining knowledge of a loss that a consumer had knowledge of its cause. And I do not accept that the three-year time limit necessarily means that knowledge of a loss means that the consumer has three years to make enquiries to discover all parties who might be responsible, failing which they run out of time to make a complaint. As Nugee LJ said in *The Official Receiver* case "*the purpose of the rule is to prevent a complainant from losing the right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware."*

So, there are a number of points that I think are relevant to the discussions here:

- In order to be aware of cause for complaint the complainant should reasonably know there's a problem, that they have or may suffer loss, and that someone else is responsible for the problem – and who that someone is. So, to have knowledge of cause for complaint about Westerby, Mr H needs to be aware, or ought reasonably to be aware, that there's a problem which has caused, or may cause, him loss and that Westerby is responsible.
- Mr H transferred a little over £63,000 into his SIPP in 2014 and once he'd withdrawn his entitlement to £15,950 in tax-free cash, £43,482.22 was invested into the Kijani Fund and SAMAIF.

- Mr H says he was given assurances that the investment would expose his monies to little or no risk.
- Westerby wrote to Mr H at several points during 2014, 2015 and 2016. Assuming Mr H did receive copies of the correspondence from Westerby that I've referred to above, I'm satisfied that the contents of those letters are likely to mean that Mr H was aware, or ought reasonably to have become aware, more than three years before he complained to Westerby, that there was a problem that had caused him some loss or damage. But, I'm not satisfied that the contents of the letters would have, or ought to have, made Mr H aware that Westerby had responsibility for the position he was in.
- To be clear, while I'm satisfied it was known by Mr H that the Kijani and SAMAIF investments were held within his Westerby SIPP, there's nothing I've seen that was sent to Mr H more than three years before his complaint was referred to Westerby that would have caused Mr H, or a reasonable retail investor in his position, to link Westerby to the losses his pension monies had suffered. I think it's worth highlighting that Mr H wasn't advised by Westerby about setting up the SIPP or the suitability of investments. And I think the obvious first thought when losses were suffered would have been that his financial advisers, Abana, might have given poor advice.
- The relationship between Westerby and Mr H is different to an adviser/client relationship. Westerby didn't give Mr H advice. Mr F of Abana gave Mr H advice. He advised Mr H to take out a SIPP with Westerby, transfer existing pension arrangements to it and invest in investments through the ePortfolio Solutions platform. So if the investments made were disappointing Mr H would reasonably have considered Abana to have been responsible.
- It's not obvious why Mr H should, initially at least, consider Westerby to be responsible if the problem was disappointing investments within the SIPP. Mr H knew Westerby hadn't recommended the investments to him. And he knew, or should have known, from the content of the correspondence that Westerby was sending to him from 2014 onwards, that it wasn't Westerby's role to give advice. For example, amongst other things, Westerby said that:

  "It is important to emphasise from the outset that we are not providing advice in relation to the investment funds held under your SIPP, and we cannot do so as we are not authorised by the Financial Conduct Authority to provide financial advice."
- From what Westerby said to consumers in the correspondence it issued from 2014 onwards, I think that it would, or should, have been understood by Mr H that investments that had previously been classed as standard assets when the investments were first made were later changed to non-standard assets. Further, that non-standard assets were often speculative and high risk and Westerby only permitted such assets where full investment advice had been provided by a regulated financial advisor or where the investor was a High Net Worth/Sophisticated or Elective Professional Investor.
- Westerby also explained, in general terms, that Abana's business was being novated over to Abana FS Ltd (which was directly regulated by the FCA). And later clarified that the novation wasn't going ahead because Abana FS Ltd wasn't suitably independent. Westerby said that *"…we recommend that you seek financial advice from an independent financial adviser who is authorised by the Financial Conduct Authority. Please be aware that as detailed in our accompanying letter Abana FS Limited are not deemed to be suitably independent."*

- The letters from Westerby I've mentioned above didn't expressly say that Abana wasn't authorised to give advice on the establishment of the SIPP, the transfer into the SIPP or how SIPP monies would be invested at the time that advice was given. Nor did the letters otherwise indicate any fault on the part of Westerby.
- So, the letters didn't say that Westerby had failed to identify that Abana didn't have the requisite permissions to give the advice it gave to Mr H. Or that Westerby should have checked Abana's permissions and that it had failed to do so. Or, alternatively (if this was Westerby's position at the time), that it had checked and it had been misled by Abana about this. So, in my view, the letters don't hint at any breach of duty on the part of Westerby, nor was there any suggestion in them that Westerby might have some responsibility for the losses that had been suffered. Nor did Westerby offer to review its conduct or invite complaints in the letters.
- Mr H has said the first time he engaged any advisers, other than Abana, was when he engaged his initial advisers DRSP in May 2018. And it was DRSP that submitted his complaint against Abana. DRSP have since gone into liquidation, so I have no way of verifying this date or what Mr H was advised. However, I also have no reason to doubt Mr H's testimony, and the dates generally match the timeline of what has happened. So on balance I'm satisfied that May 2018 was the first time Mr H took professional advice from any business other than Abana.
- I've seen no evidence that Mr H had been told by any party, including DPRS or his current representative, more than three years prior to his raising a complaint with Westerby in November 2020, that Westerby may have done something wrong and might be wholly or partly responsible for the position he was in.
- I don't think Mr H would need to have understood the details of a SIPP provider's obligations to have been aware (or in a position whereby he ought reasonably to have been aware) of his cause for complaint. But I think Mr H would have needed to have actual or constructive awareness that an act or omission of Westerby had a causative role in the loss. And I don't think there was any information available to Mr H more than three years before his complaint was made to Westerby that ought reasonably to have made him aware that he could attribute his problem to acts or omissions by Westerby.

Overall then, given the problem with the investments Mr H had been advised to make the obvious party to think had caused the loss was the party who recommended he make those investments – Abana. I am not aware of anything that Westerby said or did at the outset of its relationship with Mr H that would have caused him to think it might be responsible if such a problem occurred. Nor am I aware of anything it said or did that would have caused Mr H to think it was responsible once the problem had occurred. In the circumstances I consider that Mr H was acting reasonably in looking to Abana and in not himself thinking that Westerby might also be responsible for his loss or for not seeking advice as to whether he might have cause for complaint or a claim against anyone in addition to Abana.

I do not say Mr H was obliged to seek expert advice from, for example, solicitors in relation to the loss he suffered but whether obliged to or not he did seek professional advice in 2018 (within three years of his complaint being made to Westerby being made). And I am satisfied from the submissions received that he was initially advised he might have cause to complain about the adviser and that he was later made aware it might be appropriate to complain against Westerby (and did then complain to Westerby within three years of this).

I don't think it's reasonable to expect Mr H to have carried out more investigations than he did to find out who was responsible for his loss and how he could claim redress. Although Mr H's awareness of his cause for complaint took several years to emerge, I think he was

engaged in the matter, took reasonable steps, and didn't simply choose not to pursue any action.

I've carefully reconsidered all the evidence we've been provided and, on balance, I don't think Mr H's circumstances were such that a reasonable investor in his position ought to have concluded that Westerby had done something wrong more than three years before Mr H's complaint was raised with Westerby.

So, I don't think that Mr H was aware, or ought reasonably to have become aware, that he had cause for complaint against Westerby more than three years before his complaint was referred to Westerby. Accordingly, I'm satisfied this complaint has been brought in time and that it's one we can consider.

The merits of Mr H's complaint

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint, including Westerby's submissions in response to my provisional decision. And when considering what's fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

The parties to this complaint have made a number of detailed points and provided a lot of evidence, and I have looked at it all. We're an informal dispute resolution service, set up as a free alternative to the courts. In deciding this complaint I've focussed on what I consider to be the heart of the matter, rather than commenting on every issue in turn. This isn't intended as a discourtesy to any party, but rather it reflects the informal nature of our Service, its remit and my role in it.

Mr H has complained that he's unhappy with Westerby and that it 'mis-managed' his SIPP. He has gone on to provide more detail of his complaint. He said:

"…*that had Westerby Trustee Services Ltd completed adequate due diligence, and warned* [Mr H] *about concerns with the EEA regulated introducer, Abana Unipessoal LDA, then* [Mr H] *would not have made the investments."*

The complaint letter then goes on to state that Westerby should also have raised concerns as to the suitability and structure of the SIPP (invested in un-regulated, high-risk funds) as well as Mr H's personal unsuitability for the SIPP. And therefore Westerby should not have accepted the business from Abana.

Westerby didn't respond to the Investigator's findings on the merits of Mr H's complaint as it asserted that the complaint had been made too late. But in response to our Service it has said that the complaint was driven by our Service, and that we have stepped outside of our role and remit. But I don't agree. Mr H had already complained to our Service about Abana and the role it played in his losses, and Mr H hadn't, at that stage, made a complaint to Westerby. The Regulator's rule book, and in particular DISP 3.5.2G, provides that this Service *"may inform the complainant that it might be appropriate to complain against some other respondent",* so I do not agree that our Service has acted unfairly or partially here.

Westerby has submitted that where complaints have been received by this Service against both Abana and Westerby, that we should decide the complaint against Abana before, or at the same time as, the complaint against Westerby. Later in this decision, I've addressed the question of whether it's fair to ask Westerby to pay Mr H compensation in the circumstances of this complaint. But, before going on to address that issue in detail below, and just in case

there's been a misunderstanding, I wanted to clarify that Mr H previously made a complaint about Abana to us, but that case was subsequently closed after Abana had ceased trading. And we hadn't issued an opinion or view on the merits of that complaint before then.

In deciding what's fair and reasonable in the circumstances, it's appropriate to take an inquisitorial approach. And, ultimately, what I'll be looking at here is whether Westerby took reasonable care, acted with due diligence and treated Mr H fairly, in accordance with his best interests, and what I think is fair and reasonable in light of that. And I think the key issue in Mr H's complaint is whether it was fair and reasonable for Westerby to have accepted his SIPP application in the first place. So, I need to consider whether Westerby carried out appropriate due diligence checks on Abana before deciding to accept Mr H's SIPP application from it.

Relevant considerations

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

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

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

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

In *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) ('BBSAL'), Berkeley Burke brought a judicial review claim challenging the decision of an Ombudsman who had upheld a consumer's complaint against it. The

Ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The Ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and hadn't treated its client fairly.

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

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

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

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

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

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

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

The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim, on the basis that Mr Adams was seeking to advance a case that was radically

different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal didn't so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

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

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

In my view there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams (summarised in paragraph 120 of the Court of Appeal judgment) and the issues in Mr H's complaint. In particular, as HHJ Dight noted, he wasn't asked to consider the question of due diligence *before* Options SIPP agreed to accept the store pods investment into its SIPP.

The facts of Mr Adams' and Mr H's cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Mr H's case. And I need to construe the duties Westerby owed to Mr H under COBS 2.1.1R in light of the specific facts of Mr H's case.

In the published decision it was noted that in *Adams v Options SIPP* HHJ Dight accepted that the transaction with Options SIPP proceeded on an execution only basis, i.e. without any advice from the business introducing the SIPP application. And the transaction between Mr H and Westerby in this complaint proceeded on the footing that Mr H was being advised by an authorised adviser (Abana). I make this point simply to highlight that there are factual differences between *Adams v Options SIPP* and Mr H's case.

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

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

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

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

The regulatory publications

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

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

The 2009 Thematic Review Report

The 2009 report included the following statement:

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

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

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

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

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*
- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*
- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*
- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*
- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*
- *Identifying instances of clients waiving their cancellation rights, and the reasons for this."*

The later publications

In the October 2013 finalised SIPP operator guidance, the FCA stated:

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

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

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

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

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

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

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

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

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

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

Due diligence

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

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

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

The July 2014 *"Dear CEO"* letter provided 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 set out how a SIPP operator might meet its obligations in relation to investment due diligence. It said those obligations could be met by:

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

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

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

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

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

Like the Ombudsman in the BBSAL case, I don't think the fact there was a publication (the "*Dear CEO"* letter) which post-dated the events that took place in relation to Mr H's

complaint, mean that the examples of good practice it provided weren't good practice at the time of the relevant events. Although the later publication was published after the events subject to this complaint, the Principles that underpin it existed throughout, as did the obligation to act in accordance with the Principles.

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

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

In response to the investigator's assessment, Westerby has stated that s20 of FSMA provides that an authorised person acting without permissions doesn't make the transaction void or unenforceable and it doesn't give risk to any right of action for breach of statutory duty (save in limited circumstances). And that this is the opposite approach to someone acting without authorisation, as per s27 of the FSMA. Westerby has said that Parliament's intention was that an authorised party shouldn't be held liable for losses flowing from another authorised party's breach of their own requirements and that this Service shouldn't depart from statute. Westerby has also previously submitted that part of the regulatory publications we've referred to also appear to directly contradict the intention of legislation.

I've carefully considered Westerby's submissions, and the contents of s20 and s27 of FSMA. But to be clear, with regards to the contents of s20, it's not my role to determine whether an offence has occurred or if there's something that gives rise to a right to take legal action, and I'm not making a finding here on whether Mr H's application is void or unenforceable. Rather, I'm making a decision on what's fair and reasonable in the circumstances of this case – and for all the reasons I've set out above I'm satisfied that the Principles and the publications listed above are relevant considerations to that decision.

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

In this case, the business Westerby was conducting was its operation of SIPPs. I'm satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business. The Regulators' reports and guidance provided some examples of good practice observed by the FSA and FCA during its work with SIPP operators. This included confirming, both initially and on an ongoing basis, that introducers that advise clients have the appropriate permissions to give the advice they're providing.

So taking account of the factual context of this case, it's my view that in order for Westerby to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), it should have

undertaken sufficient due diligence checks to ensure Abana had the required permissions to give advice on, and make arrangements, in relation to personal pensions in the UK before accepting Mr H's business from it.

Westerby says it carried out due diligence on Abana before accepting business from it. And from what I've seen I accept that it undertook some checks. However, the question I need to consider is whether Westerby ought to have, in compliance with its regulatory obligations, identified that Abana didn't in fact have the *"top-up"* permissions from the FCA it required to be giving advice on, and arranging, personal pensions in the UK. And whether Westerby should, therefore, not have accepted Mr H's application from Abana.

The regulatory position

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

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

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

In the FSA's consultation paper 201, entitled *"Implementation of the Insurance Mediation Directive for Long-term insurance business"* it's stated (on page 7):

"We are implementing the IMD for general insurance and pure protection business… from January 2005 (when they will require authorisation).

Unlike general insurance and pure protection policies, the sale of life and pensions policies is already regulated. Life and pensions intermediaries must be authorised by us and are subject to our regulation."

Chapter 12 of the FCA's Perimeter Guidance Manual ('PERG') offers guidance to persons, such as Westerby, running personal pension schemes. The guidance in place at the time the application was made for Mr H's SIPP confirms that a personal pension scheme, for the purpose of regulated activities (PERG 12.2):

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

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

It goes on to say:

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

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

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

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

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

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

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

The relevant rules regarding *"top-up"* permissions could be found at SUP 13A.7. SUP 13A.7.1G states (as at March 2014):

> *"If a person established in the EEA:*
>
> *(1) does not have an EEA right;*
>
> *(2) does not have permission as a UCITS qualifier; and*
>
> *(3) does not have, or does not wish to exercise, a Treaty right (see SUP 13A.3.4 G to SUP 13A.3.11 G);*

to carry on a particular regulated activity in the United Kingdom, it must seek Part 4A permission from the appropriate UK regulator to do so (see the appropriate UK regulator's website: http://www.fca.org.uk/firms/about-authorisation/getting-authorised for the FCA and www.bankofengland.co.uk/pra/Pages/authorisations/newfirm/default.aspx for the PRA). This might arise if the activity itself is outside the scope of the Single Market Directives, or where the activity is included in the scope of a Single Market Directive but is not covered by the EEA firm's Home State authorisation. If a person also qualifies for authorisation under Schedules 3, 4 or 5 to the Act as a result of its other activities, the Part 4A permission is referred to in the Handbook as a top-up permission."

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

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

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

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

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

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

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

Westerby's checks on Abana's permissions

Westerby says it took appropriate steps to conduct due diligence on Abana and that it couldn't, and shouldn't, reasonably have concluded that Abana didn't have the required *"top-up"* permissions. I've carefully considered all of Westerby's submissions on this point.

The Register

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

I'm satisfied that, in order to meet its regulatory obligations, Westerby ought to have independently checked and verified Abana's permissions before accepting business from it. I think it's fair and reasonable to expect Westerby to have checked the Register entry for Abana in the circumstances. And I think it's fair and reasonable to say that the checks Westerby ought to have conducted on Abana's Register entry should have included a review of all the relevant information available.

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

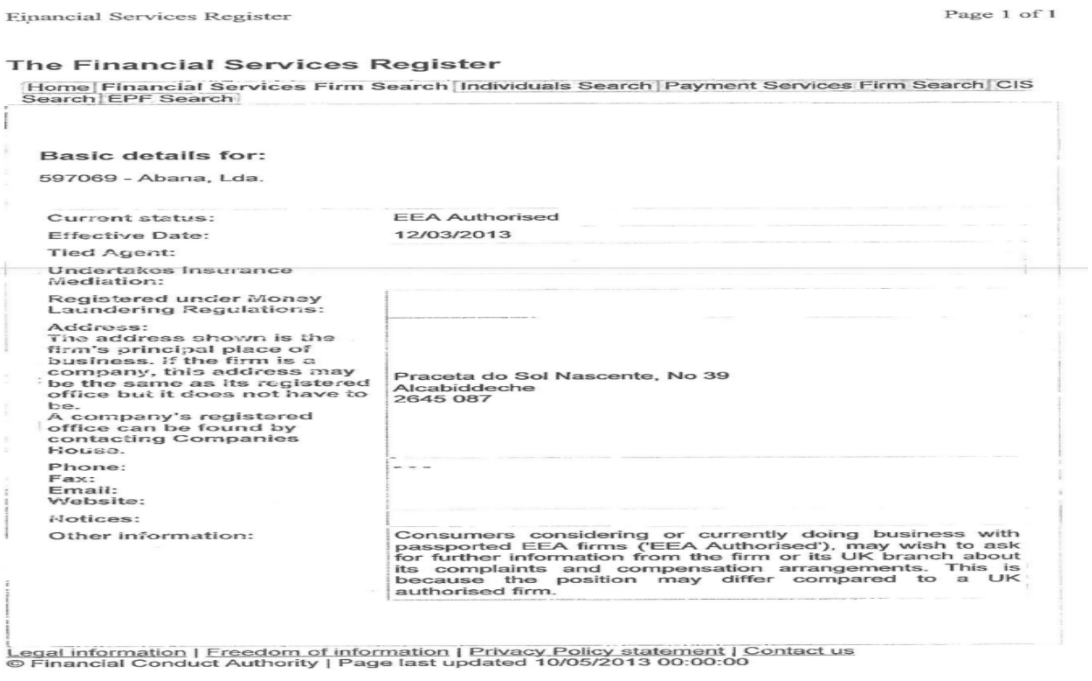
Westerby says that, at the time of Mr H's SIPP application, there wasn't information available or accessible on the FCA Register that would have shown Abana's permissions position. It says that screenshots show that the Register at that time didn't include a *"Passports"* section, or make any mention of any restrictions on Abana's permissions. Westerby also believes that the FCA would have been unable to confirm Abana's permissions if it had asked, as this information wasn't available on the Register at the time.

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

Westerby has previously submitted that:

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

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



Financial Services Register Page 1 of 1

The Financial Services Register

Home | Financial Services Firm Search | Individuals Search | Payment Services Firm Search | CIS Search | EPF Search

Basic details for:

597069 - Abana, Lda.

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

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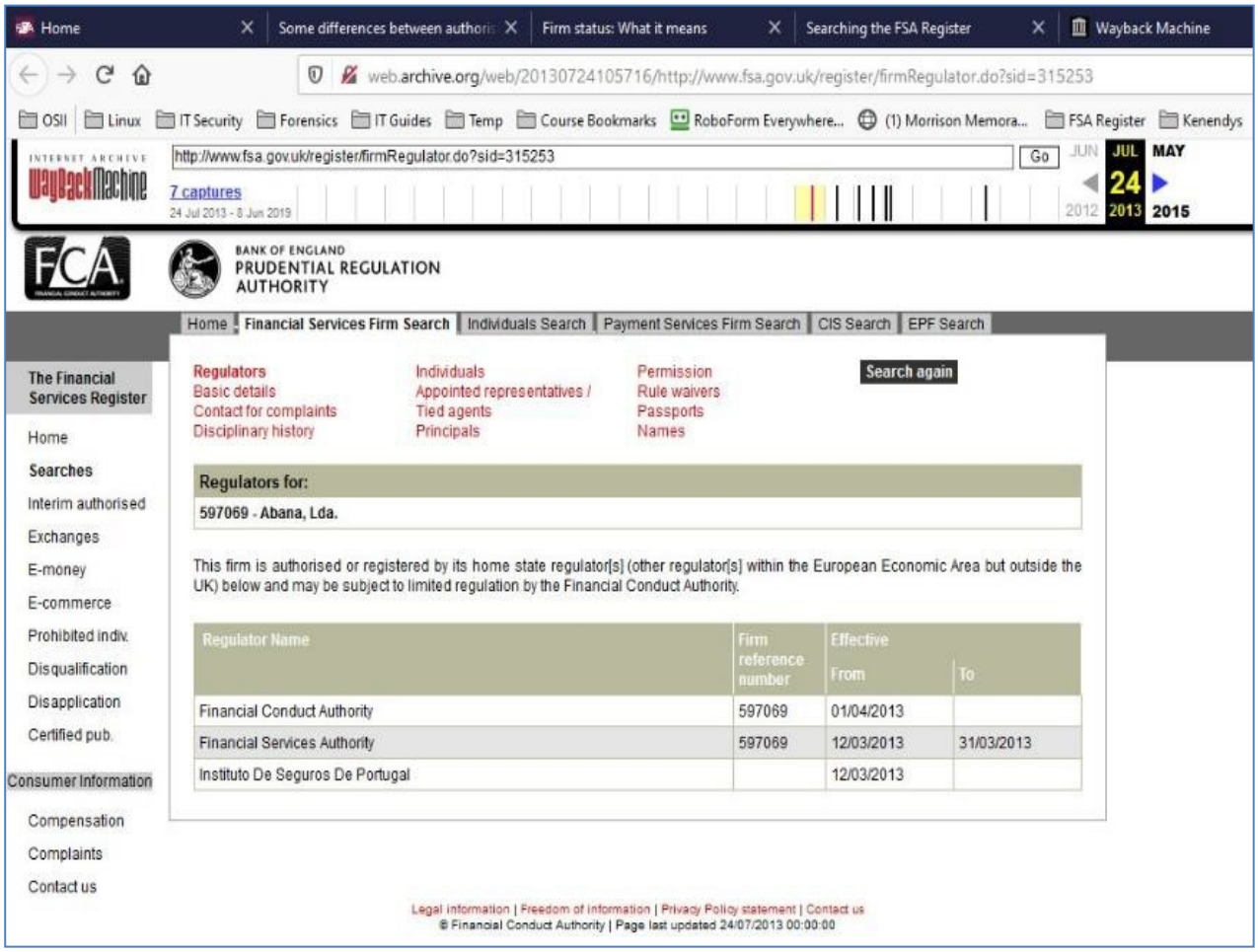
The third-party report on the Register, provided by Westerby during the investigation of the complaint which was the subject of the published decision, is helpful to discussions about the format of the Register at the time of Mr H's SIPP application. The report included the following screenshot of the archived Register for Abana (dated 24 July 2013):

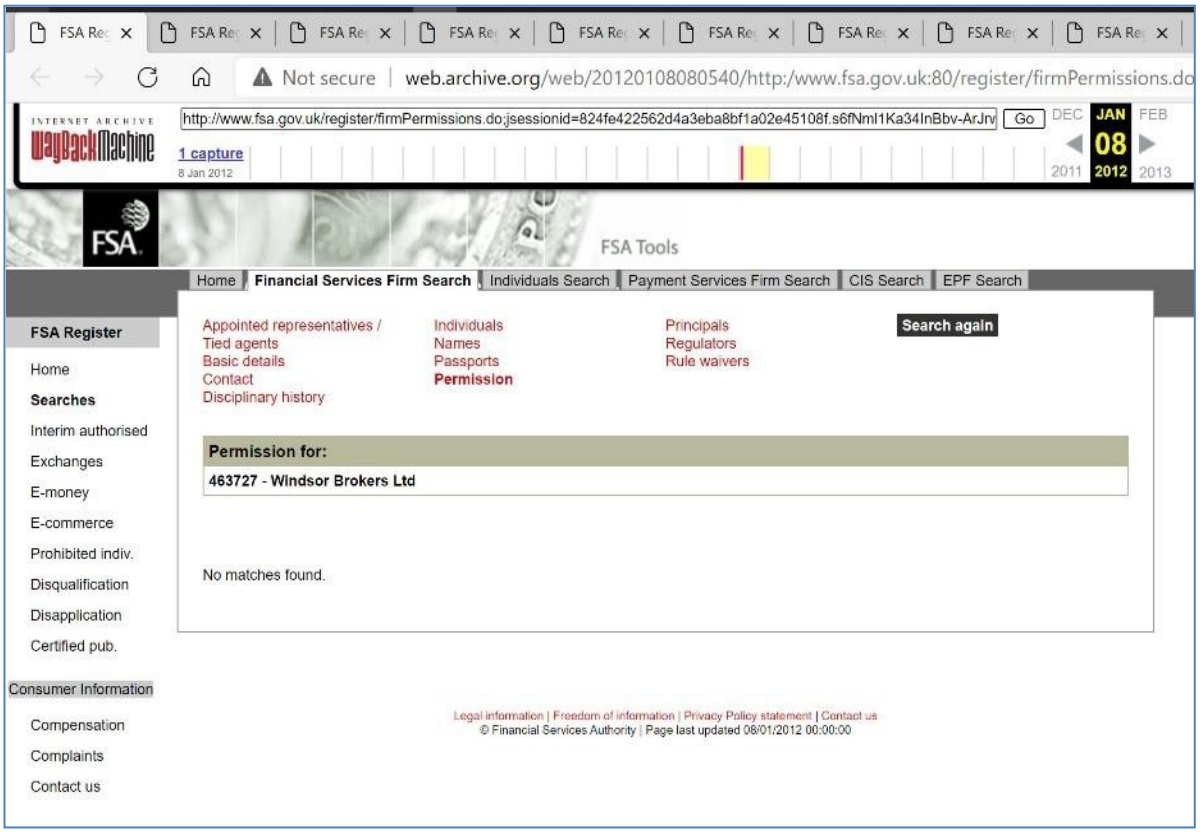


Each of the red titles at the top of the entry for Abana (Regulators, Basic details, Contact for complaints, Disciplinary History and so on) is a hyperlink to another page of Abana's entry on the Register. So, this screenshot shows that Abana's 2013 entry on the Register would have included, amongst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

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

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

page for Abana existed in 2013. However, I do think that evidence provided elsewhere in the third-party report strongly suggests a *"Permission"* page *did* exist for Abana.
Only the *"Regulators"* page has been archived for Abana's entry on the Register from 2013. But the third-party report provides examples of several *"Permission"* pages for other firms which were archived, dating from around the time of Mr H's SIPP application or earlier. The below example, dating from 2012, and relating to a Cypriot firm which, like Abana, was an incoming EEA firm, is particularly helpful:



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

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

I'm satisfied that all of this information taken together demonstrates that, when Mr H's application was received by Westerby, the format of the FCA Register contained a page labelled *"Permission"* where a firm's permissions would be set out on the Register. And, where a firm didn't have any FCA permissions at the time of the search, the *"Permission"* page on their Register entry would simply state "*No matches found*" (as there were no permissions to display).

This is consistent with the information we received from the FCA when we asked it to confirm whether *"top-up"* permissions appear on the Register, and whether this has changed since 2013. In response, the FCA confirmed that *"top-up"* permissions do appear on the Register under the *"Permission"* page, and that it understands the same information was

available on the Register in 2013. In other words, the FCA's response to our question accords with what I've already said I'm satisfied has been demonstrated by the evidence that's available in this case.

Westerby has reiterated in response to my provisional decision, that more information should be provided about the details of the contact with the FCA. But, Westerby has already been provided with the FCA's response to our question. So, I'm satisfied that Westerby has had the opportunity to consider the response, and that it's also had the opportunity to make further submissions to us on this point. And I'm satisfied that I can fairly determine this complaint now and that Westerby doesn't need to be provided with further information on this point.

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

Accordingly, I'm satisfied that:

- In order to meet its regulatory obligations, Westerby ought to have independently checked and verified Abana's permissions before accepting business from it. And it's fair and reasonable to expect Westerby to have checked the *totality* of Abana's Register entry in the circumstances.
- The format of the Register in 2013 included a *"Permission"* page. And it follows that the entry for Abana on the Register, at the time of Mr H's application, would have included a *"Permission"* page which Westerby ought to have checked.

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

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

However, in light of the evidence I've set out above, I'm satisfied that there would have been a *"Permission"* page available on Abana's Register entry. And, if this page had erroneously failed to contain any information on whether or not Abana held the relevant permissions, (for example, if the *"Permission"* page had erroneously been left blank), Westerby ought to have taken further steps to ascertain what the correct position was. So, I don't agree with Westerby's submission that information about a firm's permissions wasn't available for an online user in 2013. And, in my view, the third-party report submitted by Westerby demonstrates the contrary to be the correct position.

Westerby has previously referred to a Complaints Commissioner's report that highlights some issues with the Register. I appreciate that there have been criticisms of the Register and that it may, on occasion, have contained errors. However, I'm satisfied that a regulated market participant such as Westerby, acting in accordance with its regulatory obligations, ought to have understood that Abana needed permission from the FCA to give advice on

and make arrangements for personal pensions in the UK. Therefore, before accepting business from Abana, Westerby needed to confirm that Abana held the required permissions. And, for the reasons I've detailed above, I'm satisfied that Abana's entry on the Register at the relevant time would have included a *"Permission"* page. And, if this page hadn't set out any information (for example, if the *"Permission"* page had erroneously been left blank) Westerby, in accordance with its regulatory obligations, shouldn't have accepted Mr H's application from Abana before carrying out further enquiries to clarify the correct position on Abana's permissions.

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

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

As I've mentioned above, we don't have evidence of exactly what did appear on Abana's *"Permission"* page in 2013. However, this was information that ought to have been publicly available on the Register, so I'm satisfied that if Abana had *"top-up"* permissions, this was a matter of public record. And, if the *"Permission"* page had erroneously been left blank, I think it's fair and reasonable to conclude that, if asked, the FCA would have been able to confirm the accuracy of the record, and whether Abana had the required permissions (as this would be a matter of public record).

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

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

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

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

wasn't in-line with Westerby's regulatory obligations, for it to proceed with accepting business from Abana if the position wasn't clear.

So, to summarise, I'm satisfied that:

- It wasn't fair and reasonable for Westerby to proceed to accept business from Abana if, as Westerby says, it was unable to establish what permissions Abana held.
- In that case Westerby should have sought confirmation from the FCA as to whether Abana held any *"top-up"* permissions. And, as I'm satisfied this would have been a matter of public record, I think the FCA would have been able to confirm whether Abana held any permissions.

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

Could Westerby have relied on what Abana told it?

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

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

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

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

> *"(2) A firm will be taken to be in compliance with any rule in this sourcebook that requires it to obtain information to the extent it can show it was reasonable for it to rely on information provided to it in writing by another person."* And COBS 2.4.8 G says:
> *"It will generally be reasonable (in accordance with* COBS 2.4.6R (2)*) for a firm to rely on information provided to it in writing by an unconnected authorised person or a professional firm, unless it is aware or ought reasonably to be aware of any fact that would give reasonable grounds to question the accuracy of that information."*

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

Westerby, in previous submissions, has confirmed that it kept no records of the discussions it had with Abana during the meetings it's referred to, nor did Westerby record in writing specifically what Abana told it about the permissions it held. Westerby has said that SIPP operators aren't required to meet with introducing IFAs before accepting business from them and, as such, it didn't have formal records of the discussions it had with Abana.

However, Westerby now seeks to rely on these meetings to evidence that it did take steps to ascertain Abana's permissions and that Abana had confirmed to Westerby that it had the required *"top-up"* permissions. In my opinion, if these meetings were the way Westerby was

intending to evidence Abana's permissions, in order to comply with its regulatory obligations, in particular Principle 2, (to conduct its business with due skill, care and diligence), and Principle 3, (to take reasonable care to organise and control its affairs responsibly and effectively), Westerby should have had processes in place to ensure that it was able to evidence the due diligence it had carried out on Abana, including the steps taken to confirm Abana's permissions.

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

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

I've carefully considered what Westerby has said about the Agreement.

Having carefully considered everything, I'm of the view that the Agreement appears to be a generic document and not specific to Abana. It doesn't refer to, nor require either party to confirm or warrant the accuracy of information supplied during a prior due diligence process (i.e. the meetings at which Westerby claims Abana gave verbal assurances as to its permissions).

The Agreement provides as follows:

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

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

In addition, the activity of advising on rights under personal pension schemes isn't mentioned; rather, the authorisation is said to relate to "*the sale of the SIPP"* which I think is an ambiguous term. And, the warranty that *"he/she is suitably authorised"* is generic and doesn't refer specifically to *"top-up"* permissions being required and Abana warranting that it has *"top-up"* permissions to conduct personal pensions business in the UK.

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

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

permissions. So, in failing to take this step, I think it's fair and reasonable to conclude that Westerby didn't do enough in order to establish whether or not Abana did have the permissions it required.

So, for the reasons I've set out above, I don't think COBS 2.4.6R (2) applies to either the meetings Westerby had with Abana or the Agreement the parties entered into. However, I've also given careful thought to whether it was reasonable for Westerby to rely on these things generally. Westerby has referred, in previous submissions, to the FCA's Thematic Review TR16/1 and to Gen 4 Annex 1 of the FCA Handbook, and I've considered this question with those details in mind. However, I'm not satisfied there was any other basis on which it was reasonable for Westerby to rely on the meetings and Agreement, and for much the same reasons as I've given above in relation to COBS 2.4.6R (2).

As the 2009 Thematic Review report makes clear, good practice, consistent with a SIPP operator's regulatory obligations under the Principles, included:

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

The 2009 report also makes it clear that a SIPP operator should have systems and controls which adequately safeguarded their clients' interests. So, it was good practice to confirm a firm had the appropriate permissions and to do so in a way which adequately safeguarded their clients' interests. And I don't think simply asking the firm if it had the permissions or requiring it to sign something providing this confirmation was sufficient to meet this standard of good practice. This is a view Westerby itself appears to have shared at the time, as it has told us it checked the Register at the point that it received Mr H's SIPP application. It's also told us its procedure was to check the Register every time a SIPP application is received from an introducer, and every time adviser fees are paid from the SIPP. It says that, in its view, this demonstrates good practice, as per the FSA's 2009 Thematic Review Report. And that's a view I share.

So Westerby shouldn't have – and didn't – rely solely on the Agreement. And, as mentioned above, for all the reasons I've given, I think Westerby's check of the Register ought to have led to the conclusion that Abana didn't have the required *"top-up"* permissions (i.e. if the information on Abana's *"Permission"* page had been correctly recorded), or in the alternative, that the Register didn't record the information on Abana's *"Permission"* page in order for Westerby to confirm the position one way or the other (for example, if the *"Permission"* page had erroneously been left blank).

This means that either Westerby ought to have become aware of information which didn't reconcile with what Abana had told it about its permissions in the meetings and the Agreement, or that it was still under a regulatory obligation to undertake further enquiries to independently check Abana's permissions, and by failing to do so, it didn't meet the requirements it was under as a regulated SIPP operator.

Anomalous features

In my view, Westerby ought to have identified a risk of consumer detriment here. Mr H was taking advice on his pension from a business based in Portugal. That advice was to transfer the monies from existing personal pension plans into a SIPP, and then to send a large proportion of the money transferred into the SIPP to investments based in Mauritius. The investments involved were unusual, and specialised. And the chances of them being suitable investments for a significant portion of a retail investor's pension were very small. So, given

the relevant factors, Westerby ought to have viewed the application from Mr H as carrying a significant risk of consumer detriment. And it should have been aware that the role of the adviser was likely to be a very important one in the circumstances – emphasising the need for adequate due diligence to be carried out on Abana to independently ensure it had the correct permissions to be giving advice on personal pensions in the UK.

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

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

Further points

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

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

Westerby has previously said that it is able to accept applications from non-regulated introducers. But there seems to be no basis on which Mr H's application could, or would, have proceeded on the understanding Abana was an unregulated introducer. Westerby seems to have understood from the outset that Abana wasn't simply an introducer of investments to its customers, but that it was carrying on the regulated activities of advising and arranging. It seems that in any event, Westerby had a policy not to accept introductions from unregulated businesses. So, in the circumstances, I don't think it's fair and reasonable to make any findings based on the fact that Westerby was able to accept introductions from unregulated businesses, as that was not the circumstances involved in this case.

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

In conclusion

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

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

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

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

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

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

Due diligence on the underlying investments

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

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

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

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

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

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

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

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

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

Further, I think it's very unlikely that advice from a business that did have the necessary permissions would have resulted in Mr H taking the same course of action. I think it's reasonable to say that a business that did have the necessary permissions would have given suitable advice.

I recognise that Mr H took TFC following the switch into the Westerby SIPP and that a transfer away from his existing plans might have been necessary to access TFC. I've given careful consideration to this aspect when considering the counterfactual position.

I have not had sight of any recommendation documents prepared by Abana for Mr H, so I can't state definitively what was said at the time. Mr H's testimony is that he did not need to take the TFC, and had no intention initially to do so. Further, that it was only on the suggestion of Abana that he became aware that it was possible. Mr H says the TFC was used to go on holiday with his wife. So, based on the submissions we've received, there was no pressing need to withdraw the cash and Mr H says that he only did so on the suggestion of Abana. I think it's reasonable to say that if Mr H had been advised by a different adviser with the necessary permissions it's more likely than not he wouldn't have been advised to access TFC if Mr H didn't need to access it at that time. And I think it's more likely than not that Mr H would then have acted in accordance with such advice.

On balance, had Mr H sought advice from a different adviser, who was qualified to give pension switching advice, I think it's more likely than not that the advice would have been to retain his existing pension plans. Alternatively, Mr H might have simply decided not to seek pensions advice elsewhere from a different adviser at all, and still then retained his existing pension plans.

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

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

Mr H received a little under £16,000 as TFC, but he didn't have to transfer into the Westerby SIPP specifically or to make the investments Abana recommended so as to access his TFC. These were pension monies he could have accessed elsewhere had they been needed and, as I've mentioned above, Mr H's testimony is that they weren't.

Importantly, I've seen no evidence to show Mr H proceeded in the knowledge that the investments he was making were high risk and speculative, and that he was determined to move forward with the transaction in order to take advantage of a cash incentive offered by Abana. I've not seen any evidence to show Mr H was paid or offered a cash incentive akin to the incentive that was paid to Mr Adams. And, in my opinion, this case is very different from that of Mr Adams.

Westerby has contended that Mr H would likely have proceeded with the transfer and subsequent investments regardless of the actions it took. It's highlighted that other SIPP providers were accepting such investments at the time, and says the transactions would have been effected with another provider. And Westerby might argue that another SIPP operator would have accepted Mr H's application had it declined it. But I don't think it's fair and reasonable to say that Westerby shouldn't compensate Mr H for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found Westerby did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr H's application from Abana.

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

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

The involvement of Abana

Westerby has said that a complaint against Abana ought to have been decided first or, at the very least, complaints against it and Abana ought to have been decided together. Westerby has also said that we've upheld complaints against Abana where there was another SIPP operator involved and that we've not pursued or invited consumers to pursue complaints against that other SIPP operator. I've carefully considered these points but, as I explain below, I'm satisfied that it's fair to require Westerby to compensate Mr H for the full measure of his loss.

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

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

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

I'm also satisfied that if Mr H had been told that Abana was acting outside its permissions in giving pensions advice, or alternatively that Westerby hadn't been able to independently verify that Abana had the necessary *"top-up"* permissions to provide such advice, he wouldn't have continued to accept or act on advice from it. And, having taken into account all the circumstances of this case, it's my view that it's fair and reasonable to hold Westerby responsible for its failure to identify that Abana didn't have the required *"top-up"* permissions to be giving advice and making arrangements on personal pensions in the UK.

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

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

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

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

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

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

Westerby has also highlighted that in a previous decision involving an EEA firm that had acted outside its permissions, a different Ombudsman made an apportionment between the SIPP provider and the adviser on a 50/50 basis.

The circumstances and facts of the other complaint Westerby has mentioned appear to be very different to Mr H's complaint. And it also looks like the SIPP provider in the other

complaint had already compensated the consumer for half of their losses before the Ombudsman was asked to decide the complaint against the EEA firm.

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

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

Mr H taking responsibility for his own investment decisions

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

Mr H took advice from a regulated adviser (albeit one acting outside the permissions it held – a fact unknown to Mr H) and used the services of a regulated personal pension provider, Westerby. And I'm satisfied that in the circumstances, for all the reasons given, it's fair to say Westerby should compensate Mr H for the loss he's suffered. 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 investments to be made.

Opportunity to mitigate losses

Westerby says it wrote to Mr H to highlight the investment issues with the funds that were held in his SIPP and to inform him of an opportunity to realise some of his investment value. It says Mr H had a responsibility to take appropriate action to safeguard his funds and so should be responsible for the losses he's suffered.

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

I don't think it would be fair to say Mr H should have made a redemption request when Westerby wrote to him in November 2014. The November 2014 letter required Mr H to seek advice, and urged him to contact his financial adviser, Abana. Based on other cases we've seen, Abana generally seems to have advised its clients to retain the holdings in question. And I think it's more likely than not that had Mr H reverted to Abana as Westerby had suggested, he too would have been advised to retain the holdings in question. In these circumstances, I'm of the view that it's not fair to say Mr H ought to have acted differently.

Westerby has told us that its process was to check an advisory firm's permissions every time it received an application to open a SIPP, and every time an adviser's remuneration was to be paid. Westerby had received a number of introductions from Abana before March 2014. So, by the time Westerby wrote to Mr H in November 2014, it would have had many opportunities to discover that Abana didn't have the *"top-up"* permissions it needed to give advice or make arrangements on personal pensions in the UK. As such, it's my view that for Westerby to have suggested that Mr H seek advice from Abana once problems with the

funds he'd invested in had come to light, is a further failing of Westerby's regulatory obligations and the requirement to treat Mr H fairly.

Westerby has said that Mr H didn't respond to the November 2014 letter, but it said Mr H did request a partial redemption in April 2015, for the sum of £15,360. (This resulted in Mr H receiving £13,000 in March 2016).

In its June 2015 letter to Mr H, Westerby had mentioned that Abana clients were being moved over to Abana (FS) Ltd – a UK based firm authorised by the FCA. Westerby then explained to Mr H in July 2015 that clients were no longer being moved over to Abana (FS) Ltd. And said it understood the reason for this was that Abana didn't consider Abana (FS) Ltd to be suitably independent to provide advice on Mr H's SIPP.

Westerby also urged Mr H to have his SIPP reviewed by an IFA with the necessary permissions. I think that was a fair and reasonable step to take in the circumstances, which goes some way towards correcting Westerby's earlier failure to meet its regulatory obligations by referring Mr H back to Abana.

Mr H doesn't appear to have taken any further action following these letters. In the June 2015 letter Mr H was told of an investigation into the Kijani Fund, but he was told at the same time that he'd be getting his money back. And the letter of 10 September 2015 then explained that all trading on the ePortfolio Solutions platform had been suspended. So, I don't think it fair to say Mr H could, or should, have done anything further at that time. That's because I think following the June 2015 update it was reasonable for Mr H to think he didn't need to do anything, and following the September 2015 update it was reasonable for him to conclude he couldn't do anything.

And I've also noted that in the complaint that was the subject of the published decision Westerby has confirmed in a letter dated 21 December 2015 that it summarised the situation with the Kijani fund to the complainant in that case, in October 2015, as "*suspended, in liquidation. Likely to take a number of years. Unclear as to what will come back".*

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

There was then the December 2015 letter in which it was explained that a suspension on the SAMAIF might lift, but I think it's fair to consider that by that point there was a lot of uncertainty surrounding the status of the fund and it wasn't at all clear what level of loss Mr H might be crystallising if he were to sell his investment. So, even if the suspension was lifted as envisaged, I don't think it's fair to say Mr H has contributed to his loss by not ordering its full redemption. And I also think the December 2015 letter is somewhat contradictory as it says the suspension of SAMAIF has been lifted but then says that the lift of the suspension is "*not yet active"* (i.e. it's still suspended).

I've noted that redemption forms were requested by Mr H as a result of the December 2015 letter. Westerby has said that Mr H delayed returning these, and so it was unable to submit them until 29 January 2016. But I'm not satisfied from the available evidence that any unreasonable delay was caused by Mr H that resulted in there being no further redemption made.

I've seen a copy of a 24 April 2016 update from SAMAIF to investors, this explains that the re-structured SAMAIF has (since 22 April 2016) been licensed by the MFSC and suggests that work to begin trading is still ongoing. And I note that in June 2016 Westerby stated in a letter it sent to us in another complaint that SAMAIF still wasn't trading yet.

All of which suggests SAMAIF was still suspended for quite some time after the 23 December 2015 letter and it's not clear if that suspension was ever lifted. This appears to be consistent with what was said in the published decision, in which it was stated that the amount paid to the SIPP in that case likely came from another investment rather than the Kijani or SAMAIF funds, as both appeared to have been suspended over the relevant period in that case.

So, there's insufficient evidence to show a further redemption request submitted after July 2015 would have been successful, even if Westerby had received Mr H's redemption form before January 2016. And, taking into account the combination of factors I've set out above, I'm not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that Westerby has to pay to Mr H.

Fair compensation

Westerby says that responsibility for Mr H's loss should lie with Abana. As set out above, I accept that it may be the case that Abana, in advising Mr H to enter into a SIPP, could be responsible for initiating the course of action that led to his loss.

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

I am therefore satisfied that in the circumstances, it's fair and reasonable to direct Westerby to compensate Mr H to the full extent of his losses.

In addition to the financial loss that Mr H has suffered as a result of the problems with his pension, I think that the losses suffered to his pension provision has caused him distress, and as such I think that it's fair for Westerby to compensate Mr H for this as well.

Putting things right

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

As I've already mentioned above – if Mr H had sought advice from a different adviser, who was qualified and had the required permissions to give pension switching advice, I think it's more likely than not that the advice would have been to retain his existing pension plans. I think it's unlikely that another adviser, acting properly, would have advised Mr H to transfer away from his existing pension plans. Alternatively, Mr H might have simply decided not to seek pensions advice elsewhere from a different adviser and still then retained his existing pension plans.

In light of the above, Westerby should calculate fair compensation by comparing the current position to the position Mr H would be in if he hadn't transferred from his existing pension plans. In summary, Westerby should:

1) Obtain the current notional value, as at the date of the final decision, of Mr H's previous pension plans, if they hadn't been transferred to the SIPP.

2) Obtain the actual current value of Mr H's SIPP, as at the date of this decision, less any outstanding charges.
3) Deduct the sum arrived at in step 2) from the sum arrived at in step 1).
4) Pay a commercial value to buy Mr H's share in any investments that cannot currently be redeemed.
5) Pay an amount into Mr H's SIPP, so that the transfer value of the SIPP is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.
6) Pay Mr H £500 for the distress and inconvenience the problems with his pension have caused him.

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

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

I've explained how Westerby should carry out the calculation, set out in steps 1 - 6 above, in further detail below:

1) *Obtain the current notional value, as at the date of the final decision, of Mr H's previous pension plans, if they hadn't been transferred to the SIPP.*

   Westerby should ask the operators of Mr H's previous pension plans to calculate the current notional value of Mr H's plans, as at the date of the final decision, had he not transferred into the SIPP. Westerby must also ask the same operators to make a notional allowance in the calculations, so as to allow for any additional sums Mr H has contributed to, or withdrawn from, his Westerby SIPP since its inception. To be clear this doesn't include SIPP charges or fees paid to third parties like an adviser.

   But for Abana's involvement Mr H might not have accessed his TFC when he did. However, Mr H has had the benefit of these monies, so it's only fair and reasonable they're allowed for in this redress calculation to avoid Mr H being overcompensated. To do this, Westerby should calculate the proportion of the total TFC taken that it's reasonable to apportion to each transfer into the SIPP, this should be proportionate to the actual sums transferred in. And Westerby should then ask the operators of Mr H's previous pension plans to make a notional deduction equivalent to the respective calculated apportionments, so as to allow for the monies that were taken as TFC. The total notional deductions allowed for shouldn't equate to any more than the actual TFC taken. And the notional deductions should be deemed to have occurred on the date on which TFC was actually paid to Mr H.

   Any notional contributions or notional withdrawals to be allowed for in the calculations should be deemed to have occurred on the date on which monies were actually credited to, or withdrawn from, the Westerby SIPP by Mr H.

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

I'm satisfied that's a reasonable proxy for the type of return that could have been achieved over the period in question. And, again, there should be a notional allowance in this calculation for any additional sums Mr H has contributed to, or withdrawn from, his Westerby SIPP since its inception, including the TFC.

2) *Obtain the actual current value of Mr H's SIPP, as at the date of the final decision, less any outstanding charges.*

This should be the current value as at the date of this decision.

3) Deduct the sum arrived at in step 2) from the sum arrived at in step 1).

The total sum calculated in step 1) minus the sum arrived at in step 2), is the loss to Mr H's pension provisions.

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

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

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

If Westerby is unwilling or unable to purchase the investments, then the actual value of any investments it doesn't purchase should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include their being given a nil value for the purposes of ascertaining the current value of Mr H's SIPP in step 2).

If Westerby doesn't purchase the investments, it may ask Mr H to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Mr H may receive from the investments, and any eventual sums he would be able to access from the SIPP. Westerby will need to meet any costs in drawing up the undertaking.

5) Pay an amount into Mr H's SIPP, so that the transfer value of the SIPP is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

The amount paid should allow for the effect of charges and any available tax relief. Compensation shouldn't be paid into a pension plan if it would conflict with any existing protections or allowances.

If Westerby is unable to pay the compensation into Mr H's SIPP, or if doing so would give rise to protection or allowance issues, it should instead pay that amount direct to

him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

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

It's 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% and as Mr H has already taken his full 25% tax-free allowance there should be no adjustment to this reduction.

6) *Pay Mr H £500 for the distress and inconvenience the problems with his pension have caused him.*

In addition to the financial loss that Mr H has suffered as a result of the problems with his pension, I think that the loss suffered to his pension provisions has caused Mr H distress. And I think that it's fair for Westerby to compensate him for this as well.

SIPP fees

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

Interest

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

My final decision

For the reasons given, my final decision is that I uphold Mr H's complaint against Westerby Trustee Services Limited and require it to compensate Mr H as set out above.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 15 January 2024.

Chris Riggs
Ombudsman