DRN-4520306

The complaint

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

Mr C has complained about his SIPP and says that he's unhappy with Westerby and that it should have completed more checks.

What happened

Westerby has been represented by solicitors for periods of our investigation of this complaint, and the solicitors representing Westerby have made submissions on behalf of Westerby at various times. For simplicity, I've referred to Westerby throughout, whether the submissions came directly from Westerby or were made on its behalf.

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

Mr C says that in 2014 he was visited by Mr F2, a former family friend who said he worked for Abana. Mr C says Mr F2 said he could achieve a higher return on his pension than he was currently getting. After a further meeting, where Mr C agreed he had a 'medium' attitude to risk, the Westerby SIPP was introduced to him.

A Westerby SIPP application form was signed on 14 January 2014. Section 9 of the application says "*Do you have a financial advisor?*". This was answered *"yes"* and the details of Mr F of Abana were added, not Mr F2. It was also instructed that an initial fee of 5% of the switched value should be paid to Abana. It was noted in the application form that pension monies worth around £54,780 were to be transferred in from an existing personal pension plan. The investment strategy was described as 'via AMI'.

Mr C also completed an application form on the same day for an investment platform called ePortfolio Solutions, distributed in the UK by a business called Asset Management International ('AMI'). Abana and Mr F's details were also given in the Financial Adviser details section of the application form. And the initial dealing instructions were that his funds should be invested equally between the Kijani Commodity Fund ('the Kijani Fund') and the Swiss Asset Micro Assist Income Fund ('SAMAIF'), both of which were based in Mauritius. The SIPP was established on 24 January 2014. On 11 April 2014, £55,257.90 was ultimately transferred to the SIPP and a total of £51,329.56 was then invested.

Mr C signed a form on 24 May 2014 confirming that he had received advice from Mr F2 of Abana in relation to the Kijani and SAMAIF investments and that his SIPP funds should be invested equally between them.

On 11 November 2014, Westerby wrote to Mr C about his 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 Mr C originally considered. Its letter also said the Mauritian Financial Services Commission ('MFSC') had issued enforcement orders against companies under which both the Kijani and the SAMAIF funds were 'cells'.

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

Westerby strongly urged Mr C to contact his regulated financial advisor, and it provided the details for Mr F and Mr G of Abana, and asked Mr C to confirm whether he wanted to continue to hold the investments or for Westerby to attempt to sell them.

Mr C tells us that on receipt of this letter, he immediately contacted Mr F2 of Abana, airing his concerns. Mr C said Mr F2 assured him there was nothing to worry about and that his money was invested in the same fund. So, Mr C signed a form on 14 November 2014 to confirm that he'd sought financial advice from Mr F of Abana and wished to retain his investments in the funds.

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

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

Westerby then wrote to Mr C again on 17 July 2015 and explained that the licence of the administrator of the ePortfolio Solutions platform had been suspended by the MFSC. The letter also explained to Mr C that other funds held within his SIPP had also been suspended, including the SAMAIF. It was explained towards the end of the letter that:

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

In the accompanying letter Westerby explained that Abana customers weren't, in fact, being novated to Abana (FS) Ltd. Westerby said it understood the reason for this was that Abana

didn't consider Abana (FS) Ltd to be suitably independent to provide advice on Mr C's SIPP. Westerby urged Mr C to have his SIPP reviewed immediately by an independent financial advisor ('IFA') with the necessary permissions. It also said if Mr C had any queries about its letter, he should address them to a Mr G of Abana and it provided Mr G's contact details.

On 23 December 2015 Westerby wrote to Mr C again. The letter said:

"…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 to confirm details of your redemption (sale) request. We understand that trades in the underlying funds have been placed.

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

Based on the information that we have been provided with, the current value of the liquid and illiquid elements of the investment are as follows:

Liquid Funds: £28,003.62 (SAMAIF expected to trade again in February)
Illiquid Funds: £28,357.18 (this is not a true value - please see below)"

The letter asked Mr C to contact Westerby if he wished to redeem any of the liquid funds.

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

The letter says 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."

Mr C says despite the additional letters he received from Westerby about the status of the investments, he was again reassured by Mr F2 not to worry.

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. And I've seen an email on that complaint dated 15 April 2016, in which Westerby emailed a consumer and explained that holdings in the Kijani and SAMAIF fund 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 imminently, 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 licensed by the MFSC and suggests that work to begin trading is still ongoing. And in its 6 June 2016 submissions to us on a separate complaint featuring SAMAIF Westerby said:

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

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

In 2017 Mr C complained to Abana about the advice he received. And in 2020 Mr C complained, via the Financial Ombudsman, about Westerby's role in the transaction. He said Westerby had a duty of care to investors and didn't carry out sufficient due diligence on the investment proposition or Abana before accepting it into his SIPP.

In response to Mr C's complaint, amongst other things, Westerby said that:

- All advice was provided by Abana and liability for unsuitable advice to make investments should rest with Abana.
- Westerby acts as SIPP Trustee and Scheme Administrator, it doesn't and can't provide advice on SIPPs or underlying investments.
- Westerby doesn't hold the relevant regulatory permissions to provide financial advice.
- As SIPP Trustee and Scheme Administrator, Westerby has a responsibility to assess the acceptability of an investment for inclusion in a SIPP.
- While issued after the events complained about, it considers the due diligence it undertook on Mr C's investment was in accordance with the standards detailed in the FCA's July 2014 *"Dear CEO"* letter.
- Arrangements under the Westerby SIPP are strictly member-directed.
- At the time Mr C's SIPP investments were made, there was no reason to conclude that they didn't satisfy Westerby's requirements.
- Under the terms of the Trust Deed it couldn't undertake any investment purchases or redemptions without Mr C's authority to do so.
- It carried out due diligence on Abana before accepting business from it. And verified that Abana was authorised to operate within the UK under an EEA passport.
- Abana is authorised and regulated in Portugal by the Autoridade de Supervisao de Seguros e Fundos de Pensoes, formely the Instituto de Seguros de Portugal ('ISP').
- It verified on the ISP's Register that Abana held passported authorisations into the UK for both life (insurance) and non-life activities. It also verified that Abana was authorised by the FCA.
- It established an Intermediary Terms of Business with Abana.
- The Terms of Business included a warranty that the introducer holds, and undertakes to maintain, the necessary permissions to advise on SIPPs and the underlying investments.
- Westerby's standard procedure was to check the Financial Services Register every time a SIPP was established and every time advisor remuneration was paid, to verify that the introducer remained authorised.
- The advice provided to Mr C by Abana has been subject to an independent compliance review, carried out by Complete Compliance Support Limited ('CCS') who concluded that the advice was unsuitable.
- Abana has accepted that it's liable for the losses suffered as a result of its advice and CCS carried out redress calculations.

- Abana's offer of redress should be enforced, rather than Mr C seeking redress from Westerby.
- Despite clear warnings from Westerby in November 2014 that funds were likely to be high risk, Mr C instructed it to retain existing investments.
- It understands that Mr F and Abana advised Mr C and other investors that Westerby's November 2014 letter was *"scaremongering"*.
- Redemptions were being made at that time and had Mr C instructed Westerby to request a full redemption, he would likely have been able to recover his entire pension fund.
- No amount of due diligence that Westerby undertook would have enabled it to establish that the Kijani Fund was subject to fraud.
- It wrote to Mr C again to inform him that it was possible to make redemptions from part of his account on 23 December 2015.
- As a result of Mr C's failure to contact it and complete a redemption form, the opportunity to recover approximately half of his fund was lost.
- Westerby can't be held liable for Mr C's decision to invest in the funds, his subsequent decision to retain the funds or his failure to return a redemption form to it to arrange a redemption when the opportunity arose.

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 C'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.

The Financial Ombudsman Service's investigation

One of our investigators reviewed Mr C's complaint. He noted that Mr C said he only ever dealt with Mr F2, not Mr F. But the Investigator was satisfied that Mr F2 was working for Mr F at the time – this was reflected in the application forms Westerby received, which said Mr F was Mr C's financial adviser, not Mr F2. So, the Investigator was satisfied that the advice Mr C received ought to be treated as having been given by Mr F of Abana.

The Investigator said that Westerby ought to have identified that Abana needed *"top-up"* permissions to advise on and make arrangements for personal pensions in the UK, and taken all the steps available to it to independently verify that Abana had the required permissions. And that if Westerby had taken these steps, it would have established Abana didn't have the permissions it required to give advice or make arrangements for personal

pensions in the UK, or that it was unable to confirm whether Abana had the required permissions. In either event, it wasn't in accordance with its regulatory obligations nor good industry practice for Westerby to proceed to accept business from Abana. Our investigator concluded that as Westerby shouldn't have accepted Mr C's SIPP application from Abana, it was fair and reasonable for Westerby to compensate Mr C for his financial loss.

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

- The Financial Ombudsman Service had created this complaint out of an existing complaint against Abana – this is an abuse of power.
- Mr C has brought his complaint too late as it was made more than six years after the SIPP was established in January 2014 and more than three years after he became aware of the loss to his pension fund.
- The Investigator's view essentially held Westerby liable for Abana's unsuitable advice.
- Section 20 of the Financial Services and Markets Act 2000 ('FSMA') provides that an authorised person acting without permission doesn't make the transaction void or unenforceable, and it doesn't give rise to any right of action for breach of statutory duty (save for in limited circumstances). This is the opposite approach to someone acting without authorisation (as per section 27 of the FSMA).
- That primary legislation allows for the voiding of contracts where a party is acting without authorisation (section 27), but explicitly removes this provision where an authorised party acts outside of their permissions (section 20), demonstrates that Parliament's intention was that an authorised party shouldn't be held liable for losses flowing from another authorised party's breach of their own requirements.
- It was no part of Westerby's contractual obligations and/or legal obligations (as set out in section 20 of the FSMA) to Mr C to investigate the permissions of third-party advisors.
- It's previously requested, amongst other things, disclosure of the details of the contact at the FCA with whom this service communicated; records of such communications; file notes or attendance notes; details of the FCA contact's role at the FCA; whether the FCA contact was dealing with the Register in 2013; and what the FCA contact's understanding of the Register in 2013 is based upon. Westerby has highlighted in previous submissions to this service that it's only been provided with the FCA's response that's referred to in the published decision and it's not received the further disclosure it's requested.
- Submissions it's made haven't been fully addressed.
- It took all reasonable steps to verify Abana's permissions.
- It disagrees that Abana not holding the relevant permissions would have been a matter of public record. The FCA could only confirm what was on the Register, not what was missing from it. And the FCA cannot provide any more information than that which is provided on the Register.
- There have been various criticisms of the FCA Register over the years, and it may on occasion have contained errors.
- Abana had confirmed orally and in writing that it had the necessary permissions and it was reasonable for Westerby to rely on this.
- It disagrees that the Written Agreement was vague and generic in nature. The term *"permissions"* encompasses *"top-up"* permissions. And it's unrealistic to consider that any change of wording would have caused Abana to not provide the undertaking.
- During the changeover from the Financial Services Authority ('FSA') to the FCA, the FSA allowed a further twelve months for firms to alter their paperwork, including agreements, letterheads and business cards. The date of the Written Agreement falls under this time period.

- The investigator's view downplays the extent and thoroughness of the due diligence it performed. It met with Abana's representatives and obtained information from them. Abana's representatives had good technical knowledge and confirmed that Abana had the correct permissions.
- It was reasonable to rely on the information provided by Abana in writing, together with Westerby's meetings with Abana and the due diligence performed.
- Before accepting applications, it checked the FCA Register and the permissions page, the latter was blank.
- It checked the Portuguese Register, this explained that Abana was authorised to advise on *"life"* and *"non-life"*, the latter Westerby understood meant investments and pensions.
- Much later, independent consultants appointed by the FCA also spoke to the Portuguese Regulator and were told that Abana was authorised to advise on pension products. If Westerby had contacted the Portuguese regulator, it would have been told the same.
- If it was impossible to verify the permissions through the FCA Register, and also a regulatory requirement to reject the business on these grounds, it would make it impossible for an EEA-passported firm to do any business other than the default business allowed by their passport regardless of any top-up permissions held. This may be construed as favouring local firms by the back door and might possibly be unlawful under EU law.
- Westerby undertook due diligence before accepting the introductions from Abana in accordance with the guidance.
- Abana was adamant that it had the correct permissions, presented itself as knowledgeable and professional and at no time did it present any reason to doubt its credibility.
- This service hasn't considered properly the application of COBS 2.4.6R (and COBS 2.4.8 G).
- Westerby provided quarterly Product Sales Data reports to the FSA and later the FCA, those organisations were aware through the reports that Abana was introducing business to Westerby. And in 2015 Westerby was in contact with the FCA about Abana. On these occasions the FCA didn't raise any issues or allegations to Westerby about a breach of Westerby's duties and obligations.
- Abana's actions were more serious than any alleged failures by Westerby.
- It's important that this service doesn't overlook the gravity of Abana's wrongdoing, when considering this complaint against Westerby and the issue of apportionment.
- Abana has now ceased to trade and it seems that the insolvency of Abana (and possibly the lack of insurance cover) has influenced the conclusion that Westerby should compensate Mr C fully for his losses.
- In a previous decision, a different ombudsman did deal with the apportionment issue where the complaint was against an EEA firm that had acted outside its permissions. The decision made an apportionment between the SIPP provider and the advisor on a 50/50 basis.
- It has requested a copy of the details of the outcome of this service's investigation of Mr C's complaint against Abana.
- Any complaint against Abana ought to be decided first, or at the same time, as the complaint against Westerby.
- Abana's clients, including Mr C, were offered redress by Abana and Mr C isn't entitled to be compensated for his losses twice.
- Had it uncovered that Abana didn't have the relevant permissions, it would have declined all business from Abana from the outset, and would never have received Mr C's application or have been in a position to highlight Abana's lack of permissions.
- It wouldn't have been at liberty to contact investors directly to tell them why their application was refused.

- If it had rejected Mr C's application, Abana would have re-applied on behalf of Mr C to another SIPP provider that Abana was using and that SIPP provider would have accepted the application.
- This service needs to give true weighting to the fact that Abana's clients trusted its advice.
- Having been ordered by the FCA to pay full redress to its client, Abana then refused to do so. Little/nothing was done to enforce awards made against Abana for redress to investors on similar complaints before Abana ceased to trade. Losses caused by the apparent failings of other authorities shouldn't rest with Westerby.
- Following its November 2014 letter, any investor would have sought independent financial advice or made some reasonable enquiries.
- Mr C's 14 November 2014 instruction to retain his funds, re-confirmed his acceptance of the risk of the loss of his funds which has now materialised.
- Mr C did not make a redemption request following Westerby's warning in November 2014. Had he done so he would've been able to recover 100% of his pension funds.
- Whether or not there was a reference in Westerby's letter in November 2014 to Mr C to seek advice from Abana is an irrelevant point and had no bearing on the outcome as Mr C would have reverted to his existing advisor, regardless of the reference to Abana in Westerby's letter.
- The investigator's view fails to take proper account of Mr C's failure to mitigate his losses.
- By concluding that it wasn't reasonable for Mr C 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 C to mitigate his losses.
- Westerby ought to be provided with a copy of the relevant information that the investigator has relied upon in reaching their view.
- The application form for the SIPP would have been downloaded by Abana and completed by it with Mr C. Only after this was it sent to Westerby and processed in January 2014. Westerby had no contact with Mr C.
- Originally, Abana put its clients into the Kijani and SAMAIF funds directly.
- Later on, Mr F of Abana made arrangements (without Westerby's authority) for the funds to be placed into the *"EPS Managed Fund"* – a Special Purpose Vehicle ('SPV') which essentially acted as a *"fund of funds"*, comprised of the Kijani, SAMAIF and the TCA Global funds.
- When ePortfolio Solutions started trading again, they split the funds into two portfolios – Managed Portfolio S containing the Kijani Fund, and Managed Portfolio L containing SAMAIF and TCA Global funds ("S" standing for "Suspended", and "L" for "Liquid")
- SAMAIF was included in Portfolio L as it was expected to begin trading again.
- Redemptions from this fund were made by the managers selling TCA Global – hence they were able to make redemptions initially, but TCA Global was ultimately depleted (it had effectively been used to subsidise the early redemption requests in the expectation that SAMAIF would begin trading again – a decision by the SPV managers that Westerby had no control over).
- Westerby does not accept that the proposed investments were an unusual proposition. The AMI investments were trading on a recognised exchange, were redeemable within 30 days and were regulated by the Mauritius Financial Services Register. They qualified as 'standard' investments according to FCA definitions.

<u>Other submissions from Westerby</u>

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 advisors.
- In the published decision the ombudsman failed to follow DISP 3.6.3G, which provides: *"Where a complainant makes a complaint against more than one respondent in respect of connected circumstances, the Ombudsman may determine that the respondents must contribute towards the overall award in the proportion that the Ombudsman considers appropriate."*
- The ombudsman failed to assess apportionment and causation.
- Despite a related complaint about the actions of Abana, in the published decision the ombudsman decided that Westerby should compensate the consumer for the full extent of his financial losses.
- Abana has ceased trading and closed, as such any indemnity from Abana and/or assignment of any action against it would now be worthless.
- Complaints made against Abana to this service ought to have been decided first, or at least at the same time as complaints against Westerby. This service dealing with the complaint against Westerby first has led to the failure to address the issue of apportionment.

- This service has found against Abana in a number of complaints involving a different SIPP operator, and ordered Abana to pay redress yet we haven't pursued, or invited the complainants to pursue, the SIPP operator.

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

- GEN 4 Annex 1 states that an incoming (EEA) firm must make details of the extent of its permissions clear on request. This shows that the FCA directs that the firm should confirm its permissions. Its Terms of Business provided for such a request and effectively formalised this disclosure through a signed agreement.
- The FSMA acknowledges that there's a general principle that consumers should take responsibility for their decisions, a principle which the FCA should have regard to when considering consumer protection. This service is part of the consumer protection provisions under the FSMA; it follows that we must similarly have regard to this principle. There's a clear intention in law that consumers have a level of responsibility. And this service has issued other decisions which take account of a consumer's failure to take action to mitigate their losses.
- Its due diligence wasn't simply a check of the Register. Its Chairman and Compliance Oversight was present at several face to face meetings with Abana's advisor and Compliance Director. And he was thorough in his *"testing"* of their processes and due diligence.
- This culminated in Westerby establishing a legal document – the Terms of Business – in which Abana warranted that it had the required permissions to introduce the SIPP. Abana therefore effectively *"defrauded"* it.
- It's able to accept applications from non-regulated introducers. This isn't something it has done, but it's acceptable to the FCA.
- It doesn't hold a copy of the *"Permission"* page for Abana.
- It's been able to retrieve archived copies of the page for other passported firms from the relevant time period. In every case the *"Permission"* page simply shows *"No matches found".*
- The *"Basic Details"* page of Abana's Register entry included a field labelled *"Undertakes Insurance Mediation",* but the field was left blank; for UK firms it was always completed.
- Westerby's argument isn't that there weren't other sections of the Register, rather it's that Abana's permissions couldn't be determined from the Register due to the limited information available. In other words, Westerby doesn't accept that, at the relevant time (when the online Register was viewed in 2013), that there was information regarding permissions available or accessible by an online user.

I issued a provisional decision on the complaint on 9 October 2023 and I concluded Mr C's complaint should be upheld. In summary, I said that:

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

business. These were further factors relevant to Westerby's acceptance of Mr C'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 C's application from Abana.
- 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 C fairly. And it's appropriate and fair in the circumstances for Westerby to compensate Mr C to the full extent of the financial losses he's suffered due to Westerby's failings.

Westerby didn't accept my provisional findings and said, amongst other things, that:

- It was disappointed with my proposed findings in respect of the Financial Ombudsman Service's jurisdiction to consider the complaint and it considered that I had misdirected myself and had failed to have sufficient regard to S14A of the Limitation Act 1980.
- I was rightly of the view that Mr C ought reasonably to have become aware there was a problem that had caused him some loss or damage on receipt of Westerby's letter of 17 July 2015. But my conclusion that Mr C would not have realised that Westerby had a causative role in the loss was inconsistent with S14A(10).
- S14A(10) provides that 'knowledge' includes knowledge Mr C might reasonably be expected to acquire from the facts observable or ascertainable by him and from the facts ascertainable with the help of appropriate expert advice which it would be reasonable for him to seek.
- There is no good reason why Mr C didn't seek expert advice in the circumstances.
- Mr C engaged with a new financial adviser, Firm J, in February 2017 and Westerby wrote to Firm J providing a full update on the position of Mr C's pension and investments. Westerby assumes that armed with this information, and what was available in the public domain, that Firm J would've advised Mr C of the position and any steps he could take to protect himself, including consideration of the involvement of Westerby. This was not a point that should be ignored.
- It isn't clear what changed between 2015 and April 2020 which caused Mr C to consider that Westerby may be at fault.
- Mr C ought reasonably to have made his complaint well before April 2020. And as such, it should be time-barred.
- Despite repeated requests, it has not been provided with the information it had requested about the enquiries made of the FCA and response provided (in relation to Abana's permissions on the FSA register). This should be provided in the interests of transparency.

I asked Mr C and Firm J for information in order to consider Westerby's jurisdiction arguments further.

Firm J responded providing details of the contact it had with Mr C in 2017. It explained Mr C had approached it after he became aware that he may be receiving compensation as a result of CCS's investigation into the advice he'd received from Abana. Firm J explained it had made some enquiries about whether Mr C could transfer any proposed compensation out of the SIPP but ultimately Mr C didn't engage with it further, beyond providing it with his initial authority to contact Westerby and CCS for information. Firm J confirmed it didn't provide Mr C with any advice or recommendations; its contact with Mr C was brief.

Mr C explained he didn't recall any discussions with Firm J. And he'd been prompted to complain about Westerby after a phone call he had with it in 2017. Mr C said he thought that there was around £5,000 left available in his SIPP. So, he asked if this could be reinvested in an alternative fund, but was told this money had since 'disappeared'. Mr C says he was unhappy with this, asking why Westerby had allowed this to happen given what had happened to the rest of his funds. He said Westerby told him it wasn't its role to look after the investment, that was his financial adviser's responsibility. Mr C said this prompted him to complain about Westerby as he felt they also owed him a duty of care and had fallen short.

I asked Westerby for records of any contact it had with Mr C about his SIPP from 2015 to 2020. Westerby responded, providing a copy of a telephone call record which gave details of a call Mr C had made to it in November 2017. The call note refers to Mr C's belief that he had around £4,500 available in his SIPP. However, the Westerby agent told him that the funds were all suspended and all he had left was around £325 in the SIPP bank account.

As both sides have responded to my provisional decision and my additional queries, I'm now providing my final decision on the matter.

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.

Jurisdiction

I've reconsidered whether we can consider Mr C's complaint. The time limits for bringing a complaint to the Financial Ombudsman Service are set out in the Dispute Resolution ('DISP') section of the FCA Handbook, and I make this decision having full regard to Westerby's submission in regard to S.14A of the Limitation Act 1980.

Six-and-three year rule

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 C 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 C's complaint was raised outside of these time limits and it doesn't consent to us considering it. Westerby says that Mr C made his complaint, via the Financial Ombudsman Service, in April 2020. Mr C had previously made a complaint about the advice he received from Abana, but his later complaint about Westerby was that it didn't undertake sufficient due diligence on the introducer, Abana, or the Kijani and SAMAIF investments he made through his Westerby SIPP. This complaint was communicated to us by Mr C on 1 April 2020.

Mr C applied for the SIPP on 14 January 2014 and it was established on 24 January 2014. Although the monies were transferred into the Westerby SIPP from Mr C's existing pension provider on 11 April 2014 and invested in the Kijani and SAMAIF funds after this, I think that the event Mr C complains of took place in January 2014. That's because he says that

Westerby should have conducted further checks on Abana, and had it done so, it wouldn't have gone on to accept his application for the SIPP or made the investments. This took place more than six years before Mr C had referred his complaint to either Westerby or us in April 2020.

So, I've also gone on to consider whether Mr C 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 C at several points during 2014, 2015 and 2016. Westerby asserts that it is the contents of these letters, when taken together, that mean Mr C 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.

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 "<u>that</u> *respondent*" or firm (my emphasis).

Accordingly, the material points required for Mr C 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 C 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."*

There are a number of points that Westerby has raised and which I think are relevant to this discussion:

- 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 C needs to be aware, or should reasonably be aware, that there's a problem which has caused, or may cause, him loss and that Westerby is responsible.

- Mr C transferred a little over £55,000 into his SIPP in April 2014 and a little over £51,000 was invested into the Kijani and SAMAIF funds shortly after.

- Mr C says he was told the investments were in line with his 'medium' attitude to risk, which I think means that he understood there was some risk attached, but he did believe them to be high-risk investments.

- Westerby wrote to Mr C on 11 November 2014 highlighting that regulatory enforcement actions were being taken against the two funds he'd invested in.

- Westerby wrote to Mr C on 23 June 2015 notifying him of an investigation into the Kijani fund.

- Westerby wrote to Mr C on 17 July 2015 to notify him of the suspension of the funds.

- CCS carried out an independent audit of Abana's advice and found it to be unsuitable. CCS wrote to Mr C in 2016 confirming that the advice he received from Abana was unsuitable.

- Westerby wrote to Mr C on 17 February 2017 confirming that the Kijani fund remained in liquidation and it was likely to be a number of years before liquidation was completed. It also told Mr C it was unaware of the timescale involved for the liquidation of the SAMAIF fund.

- Mr C engaged an independent financial adviser, Firm J, in 2017 as he was expecting to receive redress from Abana and wanted assistance with how it should be invested.

- Mr C called Westerby on 10 November 2017 as he believed he still had around £4,500 of liquid funds remaining in his SIPP, but he was told by Westerby all he had left was around £325.

Having considered the above facts, I think that by the time Mr C received Westerby's letter of 17 July 2015 he was aware, or ought reasonably to have become aware, that there was a problem that had caused him some loss or damage. I say this because at this point he'd been told about the suspension of the funds and investigations into them, and that only around half of the funds he invested were liquid. While Mr C most likely had a medium attitude to risk, I don't think he would've expected to lose access to half of his invested funds so soon after making the investment. This was more than three years before he complained to Westerby. But, I'm not satisfied that the content of the letters would have, or ought to have, made Mr C aware that Westerby had any responsibility for the position he was in.

To be clear, while I'm satisfied it was known by Mr C that the Kijani and SAMAIF investment was held within his Westerby SIPP wrapper, there's nothing I've seen that was sent to Mr C that would have caused Mr C, or a reasonable retail investor in his position, to link Westerby to the losses his pension monies had suffered. That's particularly the case given that Mr C 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 might have given poor advice. That belief would've been cemented following contact from CCS in 2016 that Abana's advice wasn't suitable for him and that Abana would be compensating him for his loss.

The relationship between Westerby and Mr C is different to an adviser/client relationship. Westerby didn't give Mr C advice; Abana appears to have given Mr C advice 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 C would reasonably have considered Abana to have been responsible.

It's not obvious why Mr C should, initially at least, consider Westerby to be responsible if the problem was disappointing investments within the SIPP. Mr C 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 C 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 C. 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.

In December 2017 Mr C ultimately made a complaint to Abana about the advice he received and he subsequently made a complaint to Westerby in April 2020.

I don't think Mr C would have needed to understand the details of a SIPP provider's obligations to have awareness (or be in a position whereby he ought reasonably to have been aware) of his cause for complaint. But I think Mr C would have needed to have actual or constructive awareness that an act or omission of Westerby had a causative role in the

loss. However, I've seen no evidence that Mr C had been told by any party more than three years prior to his raising a complaint with Westerby in April 2020, that Westerby may have done something wrong and might be wholly or partly responsible for the position he was in.

Mr C was asked what prompted him to complain about Westerby's role in the transaction and he pointed to the phone call he had with Westerby in 2017 regarding the remaining funds in his SIPP. Mr C said that when he was told it was essentially all gone, he thought Westerby was at fault and owed him some sort of duty of care.

Based on the evidence provided by Mr C and Westerby, it appears that this call took place on 10 November 2017. And overall, I think this is likely the first point at which Mr C considered Westerby could have had some responsibility for his loss. That's because he was aware of the problems with the investments, and thought Westerby could've done more to prevent him from losing funds. As Mr C complained about Westerby within three years of this date, I think he made his complaint in time.

Westerby argues that Mr C ought reasonably to have been aware of his cause for complaint about Westerby following his appointment of Firm J. Westerby says that Firm J was fully appraised of the situation with Mr C's investments following its letter of 7 March 2017. And as a financial adviser it was reasonable to believe that Firm J would've advised Mr C of his position and any steps he could've taken to protect it, including consideration being given to the involvement of Westerby. Westerby says this is consistent with s14A(10) of the Limitation Act 1980, which provides that 'knowledge' includes knowledge Mr C might reasonably be expected to acquire from the facts observable or ascertainable by him and from the facts ascertainable with the help of appropriate expert advice which it is reasonable for him to seek (i.e. making clear that there is an objective as well as a subjective test involved; the claimant may therefore have actual (subjective) or 'constructive' (objective) knowledge).

We asked Firm J to provide copies of all correspondence and records it had of its dealings with Mr C. We also asked Mr C for his recollections of any meetings or discussions with Firm J. Mr C said he had very little contact with Firm J, a friend had put him in touch with it but there was no agreement for him to be his financial adviser. Firm J also said that its dealings with Mr C were brief, that Mr C had given them authority to approach Westerby for information, but no advice was given. It said it was aware that Mr C was expecting to receive redress from Abana and was exploring how this might be invested. It had asked Mr C for more information so it could advise him on his position but ultimately he didn't respond.

I've thought about Westerby's argument carefully but I don't think Mr C's appointment of Firm J means that he ought reasonably to have been aware of his complaint about Westerby before April 2017– that being three years before he did in fact complain. It seems to me that Firm J was not appointed as Mr C's financial adviser in the way that Westerby describes; that is, considering his pension provisions overall. Rather it appears that, hopeful that he would soon receive compensation from Abana, Mr C sought to engage Firm J to look at how he might invest those funds.

Westerby's letter of 7 March 2017 to Firm J explained that Mr C had received advice from Abana to invest £51,329.56 (out of a total of £55,257.90 transferred from an existing pension) in the Kijani and SAMAIF funds. Westerby explained what had happened with the investments and added that CCS had concluded the advice Mr C received from Abana was unsuitable. Westerby said Mr C was due to receive redress but it didn't know when that would be paid. There was nothing within the letter that alluded to any wrongdoing on Westerby's part in accepting the investments or the introduction from Abana. And having reviewed the correspondence between Mr C and Firm J, I also haven't seen any evidence to

persuade me that Firm J made Mr C aware he had any cause for complaint against Westerby.

Westerby has argued that had Mr C engaged with Firm J further, he could have been in a position to make his complaint before 1 April 2017. But I'm not persuaded that's a reasonable conclusion in the circumstances. At the point Mr C contacted Firm J, he was expecting to be compensated for his loss through Abana. And I don't think it was unreasonable that he didn't engage further with Firm J about things given he had no funds to invest until such time that he received his compensation. And as I've said above, when the funds didn't materialise I think he took the reasonable next step in complaining about Abana.

Overall then, given the problem with the investments Mr C had been advised to make, the obvious party for Mr C to think had caused the loss was the party who recommended he make those investments – Abana. I'm not aware of anything that Westerby said or did at the outset of its relationship with Mr C 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 C to think it was responsible once the problem had occurred. In the circumstances I consider that Mr C 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 don't think Mr C was obliged to seek expert advice from, for example, solicitors in relation to the loss he suffered. And I don't think it's reasonable to expect Mr C 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 C'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. So, for the reasons given above, I don't think that Mr C 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 it in April 2020. Accordingly, I'm satisfied this complaint has been brought in time and that it's one we can consider.

Merits of the complaint

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

When considering what's fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

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

According to the complaint Mr C registered with the Financial Ombudsman Service, Mr C has complained that Westerby did not carry out sufficient due diligence on either the financial introducer, or the recommended investments before accepting them into his SIPP. Westerby, however, says that Mr C's initial complaint with made against Abana, and that his complaint about Westerby was effectively directed by our Service. I accept that Mr C initially

complained about Abana, but from what Mr C has said I think he felt Westerby was also at fault and owed him a duty of care. And in any event, DISP 3.5.2G provides that this service, *"may inform the complainant that it might be appropriate to complain against some other respondent"*.

It appears from the content of Westerby's final response letter that Westerby understood Mr C's complaint to encompass the adequacy of checks it undertook as a SIPP provider when accepting his business and on investments made after it had accepted his business. I say that because, in responding to Mr C's complaint, Westerby sought to clarify to Mr C some of its duties as his SIPP provider. Westerby said that it undertook due diligence on Mr C's investments that was in accordance with the standards detailed in the FCA's July 2014 *"Dear CEO"* letter. Westerby also referenced some steps it had taken when it became aware of issues with the investments. And Westerby explained that it had carried out due diligence on Abana before accepting business from it, including infomation about some of those checks.

Given the general nature of Mr C's complaint, 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 C 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 C's complaint is whether it was fair and reasonable for Westerby to have accepted Mr C's SIPP application in the first place. So, I need to consider whether Westerby carried out appropriate due diligence checks on Abana before deciding to accept Mr C'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 C'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 C'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 C'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 C's cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Mr C's case. And I need to construe the duties Westerby owed to Mr C under COBS 2.1.1R in light of the specific facts of Mr C'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 C and Westerby in this complaint proceeded on the footing that Mr C was being advised by an authorised advisor. Again, I make this point simply to highlight that there are factual differences between *Adams v Options SIPP* and Mr C's case.

So, I've considered COBS 2.1.1R – alongside the remainder of the relevant considerations, and within the factual context of Mr C'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 C on the SIPP and/or the underlying investments. Refusing to accept an application because it came about as a result of advice given by a firm which didn't have the required permissions to be giving that advice, and had been introduced by that same firm, isn't the same thing as advising Mr C 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 C'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."*

<u>The later publications</u>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*"**Due diligence***

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

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

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

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

    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

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

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

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

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

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

- *correctly establishing and understanding the nature of an investment*

- *ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*

- *ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*

- *ensuring that an investment can be independently valued, both at point of purchase and subsequently, and*

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

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

I acknowledge that the 2009 and 2012 reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 finalised guidance is). However, the fact that the reports and *"Dear CEO"* letter didn't constitute formal guidance doesn't mean their importance should be

underestimated. They provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it's treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take them into account.

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

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

Like the Ombudsman in the *BBSAL* case, I don't think the fact the Dear CEO letter of July 2014 post-dates the events that took place in relation to Mr C's complaint, mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although the Dear CEO letter was published after the events subject to this complaint, the Principles that underpin it existed throughout, as did the obligation to act in accordance with the Principles.

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

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

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

I've carefully considered Westerby's submissions, and the contents of s20 and s27 of the FSMA. But, to be clear, with regards to the contents of s20, it's not my role to determine whether an offence has occurred or if there's something that gives rise to a right to take legal action and I'm not making a finding here on whether Mr C'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 C'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 C'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 C's application from it.

The regulatory position

Abana is based in Portugal and is authorised and regulated in Portugal by Autoridade de Supervisao de Seguros e Fundos de Pensoes ('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 C'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 C'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 C's application for the SIPP explains that an EEA firm wishing to carry on activities in the UK which are outside the scope of its EEA rights (i.e. its passporting rights) will require a *"top-up"* permission under Part 4A of the Act (the Act being the FSMA). In other words, it needs *"top-up"* permissions from the regulator to carry on regulated activities which aren't covered by its IMD passport rights.

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

"If a person established in the EEA:

1) *does not have an EEA right;*

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

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

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

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

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

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

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

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

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

arrangements in relation to personal pensions in the UK. And that *"top-up"* permissions had to be granted by the UK regulator, the FCA.

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

Westerby's checks on Abana's permissions

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

The Register

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

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

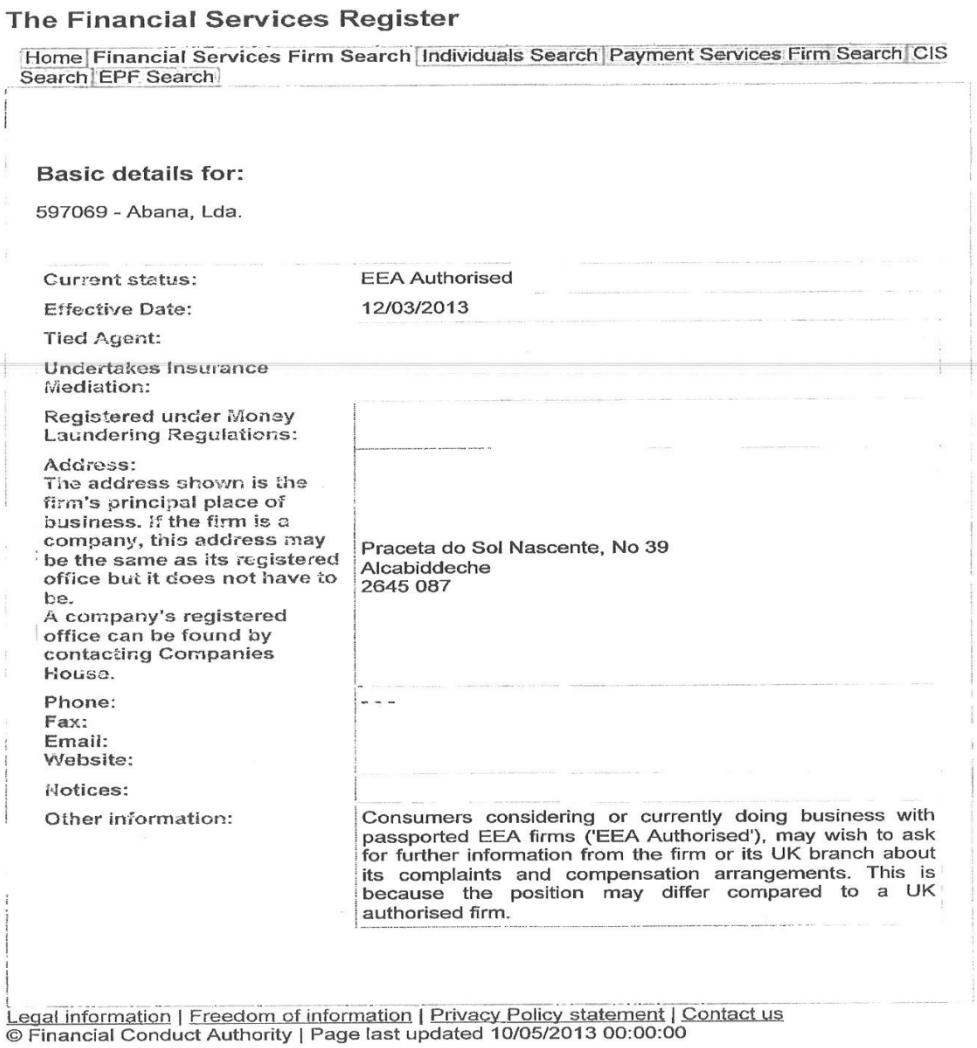
Westerby says that, at the time of Mr C's SIPP application, there wasn't information available or accessible on the FCA Register that would have shown Abana's permissions position. It says that screenshots show that the Register at that time didn't include a *"Passports"* section, or make any mention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

I've carefully considered everything Westerby's said about the format of the Register in or around 2014, when Mr C'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 in support of this:



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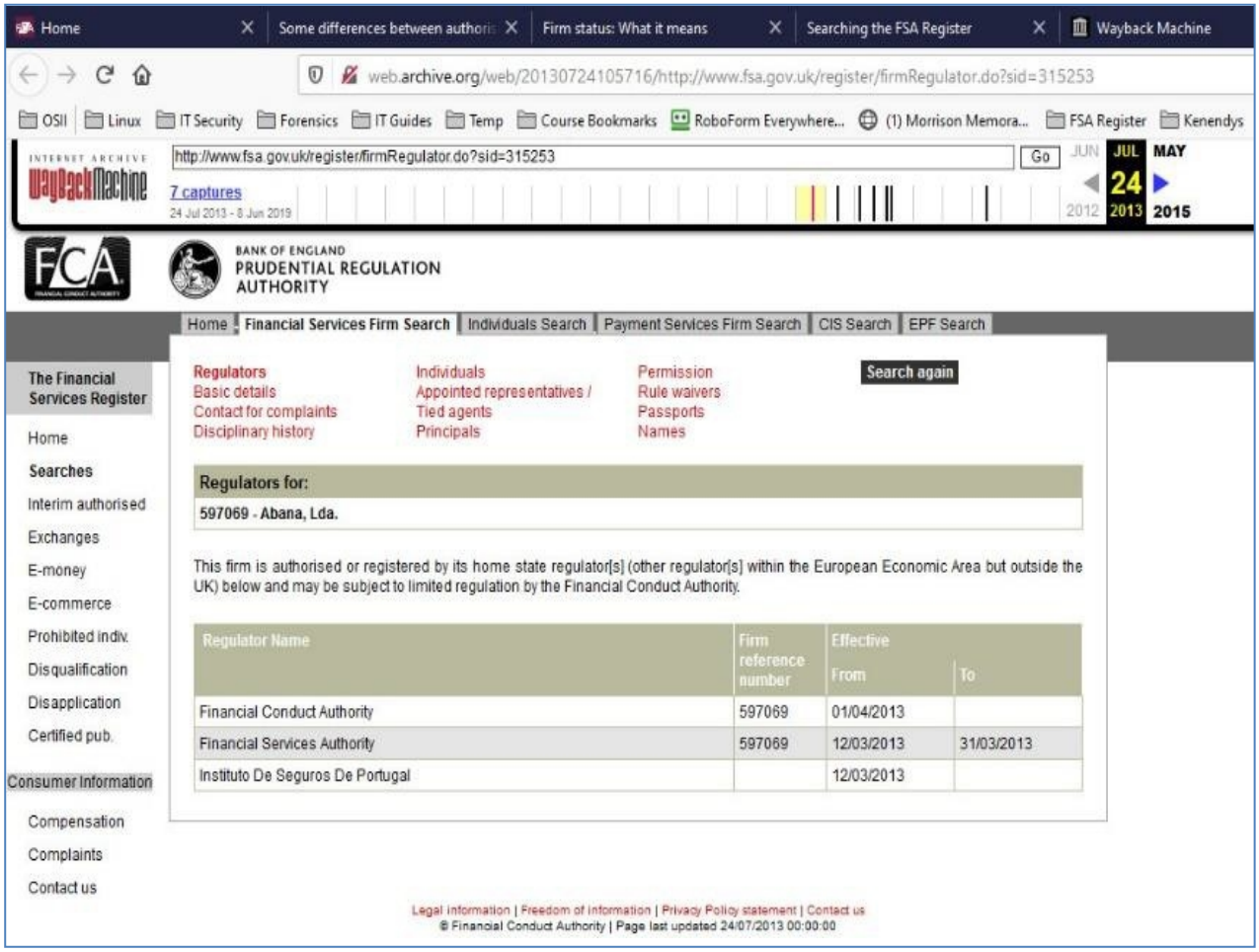
The third-party report on the Register, provided by Westerby during the investigation of the complaint which was the subject of the published decision, is helpful to discussions about the format of the Register at the time of Mr C's SIPP application. The report included the following screenshot of the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



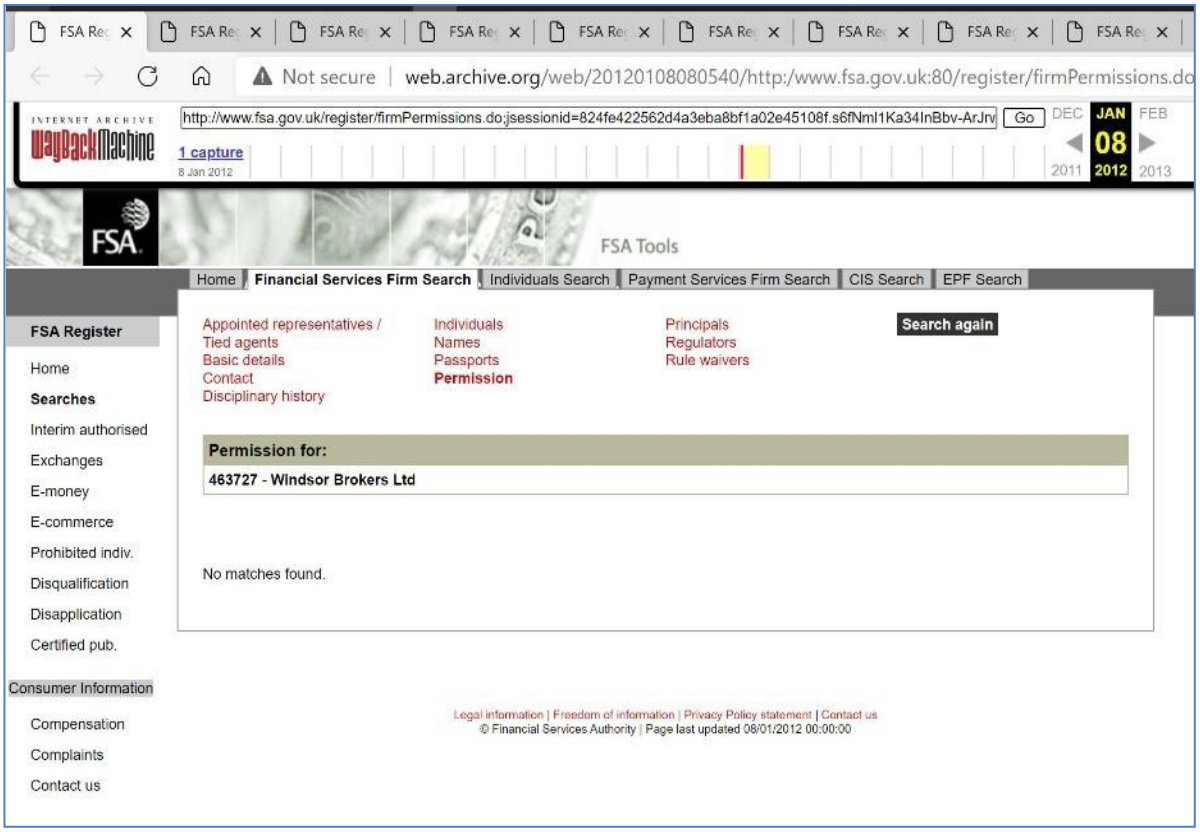
Each of the red titles at the top of the entry for Abana (Regulators, Basic details, Contact for complaints, Disciplinary History and so on) is a hyperlink to another page of Abana's entry on the Register. So, this screenshot shows that Abana's 2013 entry on the Register would have included, amongst 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 C'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 at the relevant time 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 July 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 C'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 C's application was received by Westerby, the format of the FCA Register contained a page labelled *"Permission"* where a firm's permissions would be set out on the Register. And, where a firm didn't have any FCA permissions at the time of the search, the *"Permission"* page on their Register entry would simply state "*No matches found*" (as there were no permissions to display).

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

Westerby has said in the interests of transparency we should provide, amongst other things, evidence of the enquiries made to the FCA and the response received. 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 C'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 C's SIPP application from it. But even if it did check the *"Permission"* page for Abana at the relevant time, Westerby appears to have failed to have kept a record of this check and, unfortunately, the 2013 record of the *"Permission"* page for Abana hasn't been archived. So, we've no evidence of what specific information was available on the *"Permission"* page for Abana at the relevant time.

However, in light of the evidence I've set out above, I'm satisfied that there would have been a *"Permission"* page available on Abana's Register entry. And, if this page had erroneously failed to contain any information on whether or not Abana held the relevant permissions, (for example, if the *"Permission"* page had erroneously been left blank), Westerby ought to have taken further steps to ascertain what the correct position was. So, I don't agree with Westerby's submission that information about a firm's permissions wasn't available for an online user in 2014. 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 C's application from Abana before carrying out further enquiries to clarify the correct position on Abana's permissions.

Westerby says that the FCA won't confirm details about a firm that aren't available on its public register, I accept that. However, and for all the reasons I've given above, I'm satisfied that *"top-up"* permissions are something that are recorded on the FCA's public register, and that this was also the case at the date Westerby accepted Mr C'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 2013/2014. However, this was information that ought to have been publicly available on the Register, so I'm satisfied that whether Abana had *"top-up"* permissions was a matter of public record. And, if the *"Permission"* page had erroneously been left blank, I think it's fair and reasonable to conclude that, if asked, the FCA would have been able to confirm the position that Abana didn't have the required permissions.

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

To be clear, even if there was an issue with Abana's Register entry, or if I'm wrong in my finding that Abana's entry on the Register at the relevant time included a *"Permission"* page, (and the *"Basic details"* page was the totality of the Register entry for Abana in 2014), 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 C'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:

"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 also reviewed the contents of the Terms of Business Agreement of a different SIPP provider that Westerby has provided to us.

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

The Agreement provides as follows:

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

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

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

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

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

So, for the reasons I've set out above, I don't think COBS 2.4.6R (2) applies to either the meetings Westerby had with Abana or the Agreement the parties entered into. However, I've also given careful thought to whether it was reasonable for Westerby to rely on these things generally.

Westerby has referred, in previous submissions, to the FCA's Thematic Review TR16/1 and to Gen 4 Annex 1 of the FCA Handbook, and I've considered this question with those details in mind. However, I'm not satisfied there was any other basis on which it was reasonable for Westerby to rely on the meetings and Agreement, and for much the same reasons as I've given above in relation to COBS 2.4.6R (2).

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

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

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

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

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

Anomalous features

In my view, Westerby ought to have identified a risk of consumer detriment here. Mr C was taking advice on his pension from a business based in Portugal. That advice was to transfer the monies from an existing personal pension plan into a SIPP, and then to send the majority of the money transferred into the SIPP to investments based in Mauritius (with one later moving to the Cayman Islands). The investments involved were unusual, and specialised. And the chances of them being suitable investments for a significant portion of a retail investor's pension were very small. So, given the relevant factors, Westerby ought to have viewed the application from Mr C as carrying a significant risk of consumer detriment. And it

should have been aware that the role of the advisor was likely to be a very important one in the circumstances – emphasising the need for adequate due diligence to be carried out on Abana to independently ensure it had the correct permissions to be giving advice on personal pensions in the UK.

I don't expect Westerby to have assessed the suitability of such a course of action for Mr C – and I accept it couldn't do that. But, in order to meet the obligations set by the Principles (and COBS 2.1.1R), I think it ought to have recognised this as an unusual proposition, which carried a significant risk of consumer detriment. So, it ought to have taken particular care in its due diligence – it had to do so to treat Mr C 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, 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 C's application from Abana, a factor in its decision to do so was that it had been reporting the previous business it had been doing with Abana to the regulator, and that the regulator hadn't raised any concerns with it about this business. In any event, I'm of the view that this is irrelevant, because if Westerby had acted in compliance with its regulatory obligations, it wouldn't have accepted business from Abana *at all* and Abana would therefore not have featured in its reporting to the regulator.

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

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

Westerby has submitted that where complaints have been received by this service against both Abana and Westerby, that we should decide the complaint against Abana before, or at

the same time as, the complaint against Westerby. Later in this decision, I've addressed the question of whether it's fair to ask Westerby to pay Mr C 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 C previously made a complaint about Abana to us, but that case was subsequently closed after Abana had ceased trading. And our records show that a decision hadn't been issued on the complaint by an Ombudsman before the case was closed.

Conclusion

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

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

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

Additionally, Westerby ought to have considered the anomalous features of this business I've outlined above. These were further factors relevant to Westerby's acceptance of Mr C'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 C's application from Abana.

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

the same course of action. I think it's reasonable to assume 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 C and that if Mr C's application was refused it wouldn't have been at liberty to, or had reason to, contact Mr C. But Westerby *did* receive Mr C's application, so I'm considering what it ought to have done having received Mr C's application. And for the reasons I've explained at length above I'm satisfied that, having received Mr C's application from Abana, it shouldn't then have accepted Mr C's SIPP application.

Mr C 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 C would have wanted to find out why from Abana and Westerby.

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

So, I think it's fair to conclude that one or more of the parties involved would have explained to Mr C that his application hadn't been accepted as Abana didn't have the necessary *"top-up"* permissions it needed to provide the advice, or alternatively as Westerby hadn't been able to independently verify that Abana had the necessary *"top-up"* permissions to provide the advice. And that Mr C wouldn't then 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 C 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. And if Mr C had sought advice from a different advisor, 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 C might have simply decided not to seek pensions advice elsewhere from a different advisor 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."

But, in this case, I've seen no evidence to show Mr C 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 C was paid a cash incentive. It therefore cannot be said he was incentivised to enter into the transaction. So, in my opinion, this case is very different from that of Mr Adams.

Westerby has contended that Mr C would likely have proceeded with the transfer and subsequent investments regardless of the actions it took. It's highlighted that other SIPP providers were accepting such investments at the time, and says the transactions would have been effected with another provider.

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

Further, and in any eventuality, even if another SIPP provider had been willing to accept Mr C's application from Abana, that process would still have needed Mr C to be willing to continue to do business with Abana after Westerby had rejected his application for another application to proceed. And, for the reasons I've given above, I'm not satisfied that Mr C 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 C'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 C for the full measure of his loss.

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

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

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

I'm also satisfied that if Mr C 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 C fairly.

The starting point, therefore, is that it would be fair to require Westerby to pay Mr C 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 C 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 C 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 C to enter into a SIPP, is responsible for initiating the course of action that led to Mr C'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 C 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 C has against Abana before compensation is paid. And the compensation could be made contingent upon Mr C'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 C 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 C 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 C 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 advisor on a 50/50 basis.

The circumstances and facts of the other complaint Westerby has mentioned appear to be very different to Mr C'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 C 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 C 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 C.

Mr C 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 C 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 C's actions mean he should bear the loss arising as a result of Westerby's failings.

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

Opportunity to mitigate losses

Westerby says it wrote to Mr C in November 2014 to highlight issues with the funds his SIPP invested in and to inform him of an opportunity to realise some of his investment value. It says Mr C had a responsibility to take appropriate action to safeguard his funds and so should be responsible for the losses he's suffered. Westerby feels Mr C should've been able to recover the entire amount invested had he submitted a redemption request following its letter of November 2014.

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 C to mitigate his loss.

I don't think it would be fair to say Mr C should have made a redemption request when Westerby wrote to him in November 2014. The November 2014 letter required Mr C to seek advice, and urged him to contact his financial advisor, Abana. It seems Mr C did this, and he was advised to keep the investments. Mr C wasn't alone in this, based on other cases we've seen, Abana generally seems to have advised its clients to retain the holdings in question. In these circumstances, I'm of the view that it's not fair to say Mr C ought to have acted differently.

Westerby has told us that its process was to check an advisory firm's permissions every time it received an application to open a SIPP, and every time an advisor's remuneration was to be paid. Westerby had received a number of introductions from Abana before November 2014. So, by the time Westerby wrote to Mr C 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 C seek advice from Abana once problems with the funds he'd invested in had come to light, is a further failing of Westerby in relation to its regulatory obligations and the requirement to treat Mr C fairly.

In its June 2015 letter to Mr C, 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 C 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 C's SIPP.

Westerby also urged Mr C 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 C back to Abana.

While I've not seen a copy of it on this case, as I understand it, Westerby wrote to some consumers in September 2015 and in the letter it explained that trading on the ePortfolio Solutions platform was suspended pending the appointment of new management and reconciliation of funds. This letter also stated that the Kijani Fund was suspended, the SAMAIF was suspended, the International Money Market Fund was suspended and that the TCA Global Fund could not be accessed due to the suspension of the ePortfolio Solutions platform pending appointment of new management. Regarding the Kijani Fund the letter also explained that there remained a high degree of uncertainty about the return of funds to investors and that it could take a number of years for matters to be dealt with completely.

I think it's likely that Westerby would also have sent Mr C a copy of this letter. So, for completeness, I've also given consideration to any steps Mr C ought to have taken if he did receive such a letter in September 2015.

Mr C doesn't appear to have taken much action following these letters. In the June 2015 letter Mr C 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 from 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 C 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 C 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 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 C 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 C has contributed to his loss by not ordering its redemption.

In the December 2015 letter, Westerby referred to there being liquid funds of about £28,000 available, but I don't think this was accurate as the majority of this was the SAMAIF holding which was suspended, and there was no independent verification of this value. And I see Westerby itself noted in its letter there was *"uncertainty around these funds".* So, I don't think it fair to say there was (around) £28,000 available to Mr C at this time, or that he ought to have concluded that was the case.

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 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 redemption request submitted after July 2015 would have been successful. 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 C.

Fair compensation

Westerby says that responsibility for Mr C's loss should lie with Abana.

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

However, the complaint against Westerby is the complaint I'm considering here. And for the reasons I've set out earlier in this decision, I consider that Westerby has failed to comply with its own distinct regulatory obligations under the Principles. It's therefore my view that it's fair and reasonable for Westerby to compensate Mr C 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 C's application.

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

In addition to the financial loss that Mr C has suffered as a result of the problems with his pension, I think that the losses suffered to Mr C's pension provisions have caused Mr C distress as he is approaching his retirement and it is having an impact on his retirement planning. So, I think that it's fair for Westerby to compensate Mr C for this as well.

Putting things right

My aim is to return Mr C 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 C's SIPP application from it.

As I've already mentioned above – if Mr C had sought advice from a different advisor, 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 plan. I think it's unlikely that another advisor, acting properly, would have advised Mr C to transfer away from his existing pension plan. Alternatively, Mr C might have simply decided not to seek pensions advice elsewhere from a different advisor 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 C would be in if he hadn't transferred from his existing pension plan. In summary, Westerby should:

1) Obtain the current notional value, as at the date of this decision, of Mr C's previous pension plan, if it hadn't been transferred to the SIPP.

2) Obtain the actual current value of Mr C'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 C's share in any investments that cannot currently be redeemed.

5) Pay an amount into Mr C'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 C £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 C assigning any claim he may have against Abana to Westerby – but only in so far as Mr C is compensated here. The terms of the assignment should require Westerby to account to Mr C for any amount it subsequently recovers against Abana that exceeds the loss paid to Mr C. Westerby would need to meet any costs in drawing up the assignment.

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 this decision, of Mr C's previous pension plan, if it hadn't been transferred to the SIPP.*

   To date, we've received nothing to suggest Mr C's previous pension was anything other than a defined contribution plan without any guarantees attached, so I've proceeded on that basis.

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

   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 C.

   If there are any difficulties in obtaining a notional valuation from the operator of Mr C's previous pension plan, Westerby should instead calculate a notional valuation by ascertaining what the monies transferred away from the plan 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 C has contributed to, or withdrawn from, his Westerby SIPP since the outset.

2) *Obtain the actual current value of Mr C's SIPP, as at the date of this 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 C's pension provisions.

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

   I'm satisfied that Mr C's Westerby SIPP only still exists because of the illiquid investments that are held within it. And that but for these investments Mr C'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 C's SIPP in step 2).

   If Westerby doesn't purchase the investments, it may ask Mr C 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 C 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 C'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 C'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 C's actual or expected marginal rate of tax in retirement at his selected retirement age.

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

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

   In addition to the financial loss that Mr C has suffered as a result of the problems with his pension, I think that the loss suffered to Mr C's pension provisions has caused Mr C 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 C to have to continue to pay annual SIPP fees to keep the SIPP open. As such, Westerby should pay an amount into Mr C'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 C's SIPP.

Interest

The compensation resulting from this loss assessment must be paid to Mr C or into his SIPP within 28 days of the date Westerby receives notification of Mr C'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.

Where I uphold a complaint, I can make an award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend that Westerby Trustee Services Limited pays the balance.

My final decision

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above.

My final decision is that Westerby Trustee Services Limited must pay the amount produced by that calculation up to the maximum of £160,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Westerby Trustee Services Limited pay Mr C the balance plus any interest on the balance as set out above.

If the loss does not exceed £160,000, or if Westerby Trustee Services Limited accepts the recommendation to pay the full loss as calculated above, Westerby Trustee Services Limited should have the option of taking an assignment of Mr C's rights in relation to any claim he may have against Abana, including the right to any future payment Abana may make to Mr C as part of the settlement agreed following the third-party review.

If the loss exceeds £160,000 and Westerby Trustee Services Limited does not accept the recommendation to pay the full amount, any assignment of Mr C's rights should allow him to retain all rights to the difference between £160,000 and the full loss as calculated 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 C for his consideration and agreement. Any expenses incurred for the drafting of the assignment should be met by Westerby Trustee Services Limited.

The recommendation isn't part of my determination or award Westerby Trustee Services Limited doesn't have to do what I recommend. It's unlikely that Mr C could accept the decision and go to court to ask for the balance and Mr C may want to get independent legal advice before deciding whether to accept the decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 16 January 2024.

Hannah Wise
Ombudsman