DRN-4736434

The complaint

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

What happened

Westerby has a professional representative. For simplicity, I have referred to Westerby throughout, whether the submissions came directly from Westerby or were made on its behalf.

As Westerby hasn't provided its file, my decision has been based on the limited information that's been provided on Mr S's complaint. And where appropriate, I've also considered information provided on other complaints this service has seen involving the same introducer and investments.

The SIPP and investment applications

Mr S held an income drawdown plan. Acting of the advice of a Mr F , Mr S switched the cash value of that plan into a SIPP with Westerby.

Mr S signed an application for a Westerby SIPP on 3 October 2012. On the application form, in the section titled "Independent Financial Advisor", the name of the advisor was given as "[Mr F's full name]" and the name of the firm as "*Joseph Oliver*".

In correspondence to Mr S, Westerby said it understood Mr F was, at the time of the application, an appointed representative of Joseph Oliver – Mediacao de Seguros LDA ("Joseph Oliver LDA"), a financial advisory firm based in Portugal.

At the relevant time Joseph Oliver LDA passported into the UK under the Insurance Mediation Directive ("IMD"). This means that during those dates, Joseph Oliver LDA was an EEA authorised firm and permitted to carry out some regulated activities in the UK.

An application form for an investment platform called E-Portfolio solutions was also signed by Mr S on the same day as the SIPP application form (i.e. 3 October 2012). This recorded the financial advisor's name as "*[Mr F's full name]*" and the financial advice firm as "*Joseph Oliver*". And a 'Confirmation of Verification of Identity' form was signed by "*[Mr F's full name]*" as the adviser, with '*Joseph Oliver'* as the regulated firm under FSA reference '*521370*'.

The investment platform application form was signed by Westerby, as trustees of Mr S's SIPP, on 22 October 2012. The application form did not contain any details of where Mr S's money was to be invested. But correspondence from Westerby suggests that shortly after 13 November 2012, funds within the SIPP were invested in the Kijani Commodity Fund ('the Kijani Fund') and the Swiss Asset Micro Assist Income Fund ("SAMAIF") which were both based in Mauritius. However, I also note in its final response letter that Westerby said Mr S invested solely in the Kijani fund.

The SIPP application form shows that commission of 2% of the transfer value was to be paid to Mr F. The SIPP transaction statement shows that £979.43 in commission was paid on 2 November 2012. This appears to have been in accordance with an instruction from a Mr G, who was the Managing Director of Joseph Oliver LDA.

Abana Unipessoal Lda

I'm aware from other complaints this service has seen that Joseph Oliver LDA wrote to Westerby on 17 May 2013, to say Mr F had terminated his agreement with it and, under that agreement, clients would return to Mr F. On the same day Abana Unipessoal Lda ("Abana") – another financial advisory firm based in Portugal – wrote to Westerby to say all of Mr F's clients were to be transferred to it. So, as I understand it, Abana was the financial advice firm associated with Mr S's SIPP after this date.

Updates on the investments

Westerby wrote to investors in the Kijani fund and SAMAIF, including Mr S, on 11 November 2014. I've seen a copy of this letter on another complaint this service has considered. It explained that these 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 investors originally considered. The 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'.

The letter "*strongly urged*" investors to contact their "*regulated financial advisor*", In Mr S's cases that would have been Abana, and asked them to confirm whether they wanted to continue to hold the investments or for Westerby to attempt to sell them. Mr S confirmed to Westerby that wished to continue to hold his investment in the funds. It's not clear at this stage whether he made this decision following advice from Mr F of Abana.

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

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

Again Westerby "*strongly urged*" investors to contact their "*regulated financial advisor*", and it provided Abana FS Ltd's details. It did not however ask investors to confirm whether they wanted to continue to hold the investments on this occasion.

Westerby says it sent a further letter about the funds to Mr S on 17 July 2015. As I understand it from a copy of this letter I have seen on another complaint, this explained that the administrator of the E-Portfolio platform had had its licence suspended by the Mauritius Financial Services Commission. It further explained that efforts were underway to trace where the Kijani fund had been invested and the fund was suspended. The letter said a further update would follow. At its conclusion the letter said:

"In the meantime, we recommend that you seek financial advice from an independent financial adviser who is authorised by the Financial Conduct Authority. Please be aware that

as detailed in our accompanying letter, Abana FS Limited are not deemed to be suitably independent."

Mr S appointed Ms B of KB Wealth Limited as his financial adviser in December 2015.

Westerby says that it sent further update letters to Mr S on 10 September 2015, 19 October 2015, 6 November 2015 and 23 December 2015. I've seen a copy of the letter Westerby sent to Mr S on the 23 December 2015. It 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: £1,813.81 (SAMAIF expected to trade again in February)

Illiquid Funds: £55,048.55 (this is not a true value - please see below)…

…

A redemption request was submitted to EPS in respect of your SIPP portfolio on 10/09/2015 and we will confirm to you once funds are received."

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 has been verified, and that the fund is expected to begin trading again in February 2016."

In its 6 June 2016 submissions to us on another 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. A copy of their latest update is enclosed."

I have also seen a copy of a 24 April 2016 update from SAMAIF, which suggests work to begin trading is still ongoing.

Events leading up to Mr S's complaint to Westerby

Mr S called Westerby in September 2015. The call note provided says that it was explained to Mr S that the Kijani fund was suspended and that it could be several years before resolution. It also notes that Mr S said that he thought the policy was mis-sold and that Westerby's call handler said they couldn't comment and referred Mr S back to Abana as the financial advisers. Mr S said he was considering legal action.

Westerby has provided a further call note from 10 May 2017. This states that Mr S explained to the call handler that he'd dealt with a couple of advisers in the past – Mr F who was no longer contactable and Ms B. Ms B had recently contacted Mr S to tell him he needs to deal with the situation himself.

The note also says that Mr S said it had been suggested that he speak to Westerby as his "agent". The call handler clarified that Westerby was not his "agent"; it's the trustee and scheme administrator of his pension arrangement. The note says that Mr S went on to say that someone had mentioned that there was an insurance company involved and the call handler asked if the insurer was related to Abana's redress. Mr S confirmed it was and the call handler explained that as Mr S had been introduced by Joseph Oliver he wasn't covered by the redress. The call handler suggested Mr S contact Joseph Oliver.

Mr S says that in around 2020 that he was contacted by a group of investors in a similar position to him.

On 8 June 2020, Mr S called our Service to complain about Westerby. This service no longer has a recording of this call but after speaking with Mr S an email was sent to Westerby confirming that Mr S had made a complaint. The email confirmed Mr S had complained that he "*was given advice to take out SIPP 2014/2015. This was sold by [Mr F]. He has concerns about the suitability of the advice and the potential mis-sale of it. [Mr S] says he has received limited information about his pension. He doesn't know the value, where its invested and how to access it. He believes it been invested overseas. He hasn't received an income from the pension. He wants these concerns looked into*".

Westerby contacted our Service the same day, saying that the complaint needed to be redirected to Joseph Oliver. One of our case handlers responded to Westerby. They confirmed they would redirect Mr S's concerns about the sale of his plan to Joseph Oliver but they asked Westerby to consider the concerns Mr S had raised about the management of his SIPP.

Westerby issued a final response letter to Mr S on 2 July 2020. This letter confirmed that Joseph Oliver had provided Mr S with advice and it went on to set out the background to Mr S's pension. Westerby also confirmed that it thought Mr S's complaint had been made out of time as what he was complaining about had happened more than six year ago. And he had been aware of a problem with his investments more than three years before he complained.

On 4 July 2020, Mr S contacted our Service, providing a copy of Westerby's letter dated 2 July 2020. Mr S asked for our Service's help as he was going round in circles.

The investigator that was allocated Mr S's complaint to consider, contacted him on 21 May 2021 to clarify what his complaint was about. The call note states that the investigator explained to Mr S that Westerby wasn't responsible for the advice he had received. And that he wouldn't be upholding Mr S's then current complaint about Westerby's management of his SIPP (this was also confirmed in writing on 10 August 2021). Mr S confirmed during this call that he also wished to raise a complaint about Westerby's due diligence when accepting his SIPP application and the investments he subsequently made.

Our Service wrote to Westerby to notify it of this due diligence complaint on 8 June 2021. Westerby didn't issue a final response letter until 14 February 2022, when it confirmed its position that the complaint hadn't been made within time under the relevant rules. By this time, Mr S had already been back in contact with our Service to ask us to consider the complaint, having contacted us in August 2021.

Our investigator's view and Westerby's response

Having considered the information provided, one of our investigators concluded that Mr S's complaint was one this service could consider. The investigator set out her findings in an email to Westerby on 14 December 2022.

Westerby didn't accept the investigator's view that the complaint was one this service could consider. It provided detailed submissions which I've summarised below:

- Mr S first raised a complaint against Westerby on 8 June 2020 via your service and then a second complaint via your service on 8 June 2021. The earlier complaint related to Westerby's management of the SIPP.

- Mr S established his SIPP on 12 October 2012 with investments placed shortly after on 13 November 2012 – both events were more than 6 years before either complaint was made to the Financial Ombudsman Service, the earliest of which was 8 June 2020.

- Mr S had the requisite knowledge under s14a of the Limitation Act 1980 (DISP 2.8.2) more than 3 years before he made his complaint to our Service in June 2020. Westerby believes the triggers in Mr S's case for the date of knowledge are:

    - Mr S's general unhappiness with the advice received, coupled with active consideration of the need to take independent advice on whether the original advice was correct.

    - Knowledge that the pension may well be significantly impaired in value in a very short time after having entered into the SIPP despite Mr S having specified (presumably) that he only wanted "low risk" investments.

    - Awareness from public knowledge i.e. media reports, the internet, newspapers and other news outlet websites.

    - Westerby wrote to Mr S on 11 November 2014 highlighting the regulatory enforcement actions being taken against the Kijani fund.

    - Westerby wrote again on 23 June 2015 notifying Mr S of the investigation into the Kijani Fund.

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

    - Westerby received a change of agency from Mr S in October 2015. The new financial adviser, Ms B of KB Wealth Management Ltd was familiar with the issues surrounding Abana. So Westerby assumes that she would have reviewed the position in which Mr S found himself and would have provided appropriate advice as to his position and any actions he could/should take to protect his position. Westerby believes Ms B may have formed a group of complainants who had previously been advised by Joseph Oliver/Abana and

offered to help progress any claims they may have against these firms.

    - On 15 February 2017 Westerby wrote to Mr S confirming that the Kijani fund remained in liquidation, with the liquidators attempting to recover as much as possible for investors, though it would be a number of years before the liquidation was completed.

    - Mr S made a complaint about Joseph Oliver in 2020.

- Westerby says, in view of the above, a further issue is whether Mr S knew or should reasonably have known that Westerby was arguably at fault in relation to the checks it either carried out, or failed to carry out, on Joseph Oliver. It's Westerby's view that Mr S, with his new adviser's help, could and should have become aware of any potential complaint that Westerby should not have accepted his SIPP application more than three years before he complained. There was no additional information which Mr S would have needed to have become aware of since November 2014, in order to make his complaint about Westerby. There isn't anything that Mr S has only reasonably become aware of since November 2014 that makes a material difference.

- It's clear Mr S had, from late 2014 onwards, actual or constructive knowledge in that he ought to have been questioning the wisdom of the original advice provided by his adviser and any actions on Westerby's part to invest in the SIPP.

- Westerby has also referenced the following case law which it considers supports its position that Mr S has complained too late: *Haward v Fawcetts* [2006] UKHL 9; *Williams v Lishman Sidwell Campbell & Prices Limited* [2009] EWHC 1322 (QB); and *Jacobs v Sesame Limited* [2014] EWCA Civ 1410.

The complaint was passed to me to determine if it was one this Service could consider.

I issued a provisional decision in March 2024, explaining why I was satisfied the complaint had been made in time and therefore was within the jurisdiction of this service. I also set out my provisional thoughts on the merits of the complaint and said that I was minded to conclude it should be upheld.

I explained that in considering the merits of the complaint, as Westerby hadn't provided its file for Mr S, I'd taken account of the submissions made on other cases against Westerby involving Abana and Joseph Oliver. And I explained that I'd also taken account of 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 also explained that, although that decision related to Abana, rather than Joseph Oliver LDA, the complaint features the same key point – namely the permissions held and required by an incoming EEA firm dealing with personal pensions in the UK, and Westerby's knowledge of this.

Mr S responded to my provisional decision. He said it gives a true picture of what has taken place with his pension fund. And he said he feels let down by Westerby.

Despite being chased, Westerby hasn't provided any further comments for me to consider.

What I've decided – and why

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

In the absence of any further submissions in response to my provisional decision, I consider this complaint should be upheld for the same reasons set out in my provisional decision. As such, I've largely repeated what I said in my provisional decision as to the reasons I am upholding this complaint.

When considering what is fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time. This goes wider than the rules and guidance that come under the remit of the FCA. Ultimately, I'm required to make a decision that I consider to be fair and reasonable in all the circumstances of the case.

Relevant considerations

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

At the time of the events complained about the regulator was the Financial Services Authority (FSA) and it later became the FCA but for simplicity I've referred to FCA throughout.

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what is fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in BBSAL. I am 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 have taken account of both these judgments when making this decision on Mr S's case.

I note that the Principles for Businesses did not form part of Mr Adams' pleadings in his initial case against Options SIPP. And, HHJ Dight did not 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 do not say this means Adams is not a relevant consideration *at all.* As noted above, I have taken account of both judgments when making this decision on Mr S'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 did not 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 the High Court judgement 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."*

Westerby, may say I have made a "*material error*" by finding Joseph Oliver LDA's contractually defined role impacts upon the scope of duty owed by Westerby under COBS 2.1.1R.

I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr S's complaint. The breaches alleged by Mr Adams were summarised in paragraph 120 of the Court of Appeal judgment. In particular, as HHJ Dight noted, he was not asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP.

I also note the facts of the case were different, and I need to construe the duties Westerby owed to Mr S under COBS 2.1.1R in light of the specific facts of Mr S's case.

As an example of the factual differences between this complaint and Adams v Options SIPP I highlight that in Adams HHJ Dight accepted that the transaction with Options SIPP proceeded without any advice from the business introducing the SIPP application. And, in contrast to that, the transaction between Mr S and Westerby proceeded on the footing that Mr S was being advised by an authorised advisor. To be clear, I make this point only to illustrate there are factual differences between this complaint and Adams v Options SIPP.

To confirm, I have considered COBS 2.1.1R - alongside the remainder of the relevant considerations, and within the factual context of Mr S's case, including Westerby's role in the transaction.

However, I think it is 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 am required to take into account relevant considerations which include: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in Adams v Options SIPP. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I also want to emphasise here that I do not say that Westerby was under any obligation to advise Mr S 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 did not have the required permissions to be giving that advice, and had been introduced by that same firm, is not the same thing as advising Mr S on the merits of investing and/or transferring to the SIPP.

Overall, 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 S's case.

The regulatory publications

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

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

The 2009 Thematic Review Report

The 2009 report included the following statement:

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

It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes."

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

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

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

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

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

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*

- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*

- *Identifying instances of clients waiving their cancellation rights, and the reasons for this."*

The later publications

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

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

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

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

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

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

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

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

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

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

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

"Due diligence

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

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

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

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

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

- *Correctly establishing and understanding the nature of an investment*
- *Ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*
- *Ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*
- *Ensuring that an investment can be independently valued, both at point of purchase and subsequently*
- *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 have considered them in their entirety.

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

It is 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 Joseph Oliver LDA. So, it clearly thought it was good practice to do so, at the very least.

Like the ombudsman in the BBSAL case, I do not think the fact the publications, (other than the 2009 Thematic Review Report), post-date the events that took place in relation to Mr S's complaint, mean that the examples of good practice they provide were not good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

It is 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 is clear the standards themselves had not changed.

That doesn't mean that in considering what is fair and reasonable, I will 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 did not 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.

Westerby has said on other complaints this service has considered (referring to the Court of Appeal decision in Adams) that s27 of the FSMA is designed to shift the risks of accepting business from unauthorised parties onto providers but s20 FSMA does the opposite – it shields authorised parties from the risks of accepting business from authorised parties acting outside their permissions (such as Joseph Oliver LDA). It says the FCA guidance appears to directly contradict the intention of legislation.

s20 says that acting outside the permission given by the FCA is contravention of the requirements imposed by the FCA, but that:

> *(a)does not, except as provided by section 23(1A), make a person guilty of an offence,*
> *(b)does not, except as provided by section 26A, make any transaction void or unenforceable, and*
> *(c)does not, except as provided by subsection (3), give rise to any right of action for breach of statutory duty*

However, I am not making a finding here on whether Mr S's application is void or unenforceable and it is not my role to determine whether an offence has taken place or if there is something which gives rise to a right to take legal action. I am making a decision on what is fair and reasonable in the circumstances of this case – and for all the reasons I have set out I am satisfied the regulatory publications are a relevant consideration to that decision.

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

In this case, the business Westerby was conducting was its operation of SIPPs. I am 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 are providing.

So taking account of the factual context of this case it is 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 Joseph Oliver LDA had the required permissions to give advice on and make arrangements in relation to personal pensions in the UK before accepting Mr S's business from it.

Westerby has told us previously that it did carry out due diligence on Joseph Oliver LDA before accepting business from it. And I accept that it did undertake some checks. However, the question I need to consider in this complaint is whether Westerby ought to have, in compliance with its regulatory obligations, identified that Joseph Oliver LDA did not 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 S's application from it.

In Mr S's case, Westerby seems to have accepted business from Joseph Oliver LDA. However, the SIPP and investment applications simply say "*Joseph Oliver*" is the advising business. I know from other complaints this Service has seen that another Firm – Joseph Oliver Marketing Limited ("JOML") - was also involved. So for completeness, I've considered both possibilities.

Westerby has said on other complaints that JOML was a branch of an authorised firm. I assume it means JOML was a branch of Joseph Oliver LDA. In support of this, it has provided a link to the "contact us" page of the website josepholivermsl.com. That page includes the following:

> **"*Registered Addresses***
>
> *Joseph Oliver Marketing Ltd*
> *65 London Road, St Albans, Herts, AL1 1LJ, United Kingdom*
> *Company number: 4844574*
> *Joseph Oliver Mediaçao de Seguros Lda,*
> *Galerias Navegador, 75, Av. 25 de Abril, 1011-C 2750-515 Cascais*
> *Portugal Company number: 509011411*"

In my view this is not sufficient evidence to show JOML is a branch of Joseph Oliver LDA. It shows JOML as a "registered address" and that information is on Joseph Oliver LDA's website. But it also confirms JOML is a separate entity from Joseph Oliver LDA, by referring to JOML's UK Companies House entry - suggesting JOML might be a subsidiary of Joseph Oliver LDA, but not a branch.

I have considered both possibilities i.e. that the introducing adviser was Joseph Oliver LDA or JOML. I have started with Joseph Oliver LDA.

If the adviser was Joseph Oliver LDA?

The regulatory position

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

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

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

In the FSA's consultation paper 201, entitled *"Implementation of the Insurance Mediation Directive for Long-term insurance business"* it is 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 S's SIPP confirms that a personal pension scheme, for the purpose of regulated activities (PERG 12.2):

> *"…is defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the Regulated Activities Order) as any scheme other than an occupational pension scheme (OPS) or a stakeholder pension scheme that is to provide benefits for people:*
>
> - *on retirement; or*
> - *on reaching a particular age; or*
> - *on termination of service in an employment".*

It goes on to say:

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

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

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

At the time of Mr S'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 are not covered by the Insurance Mediation Directive.

The guidance in SUP 13A.1.2G of the FCA Handbook at the time of Mr S's application for the SIPP explains that an EEA firm wishing to carry on activities in the UK which are outside the scope of its EEA rights (i.e. its passporting rights) will require a "top up" permission under Part 4A of the Act (the Act being FSMA). In other words, it needs "top up" permissions from the FCA to carry on regulated activities which aren't covered by its IMD passport rights. The relevant rules regarding "top up" permissions could be found in the FCA Handbook at SUP 13A.7. SUP 13A.7.1G states (as at October 2012):

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

to carry on a particular regulated activity in the United Kingdom, it must seek Part 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 October 2012) as:

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

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

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

The guidance at SUP App 3 of the FCA Handbook (which I set out above) was readily available in 2012 and clearly illustrated that EEA-authorised firms may only carry out specified regulated activities in the UK if they have the relevant EEA passport rights.

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

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

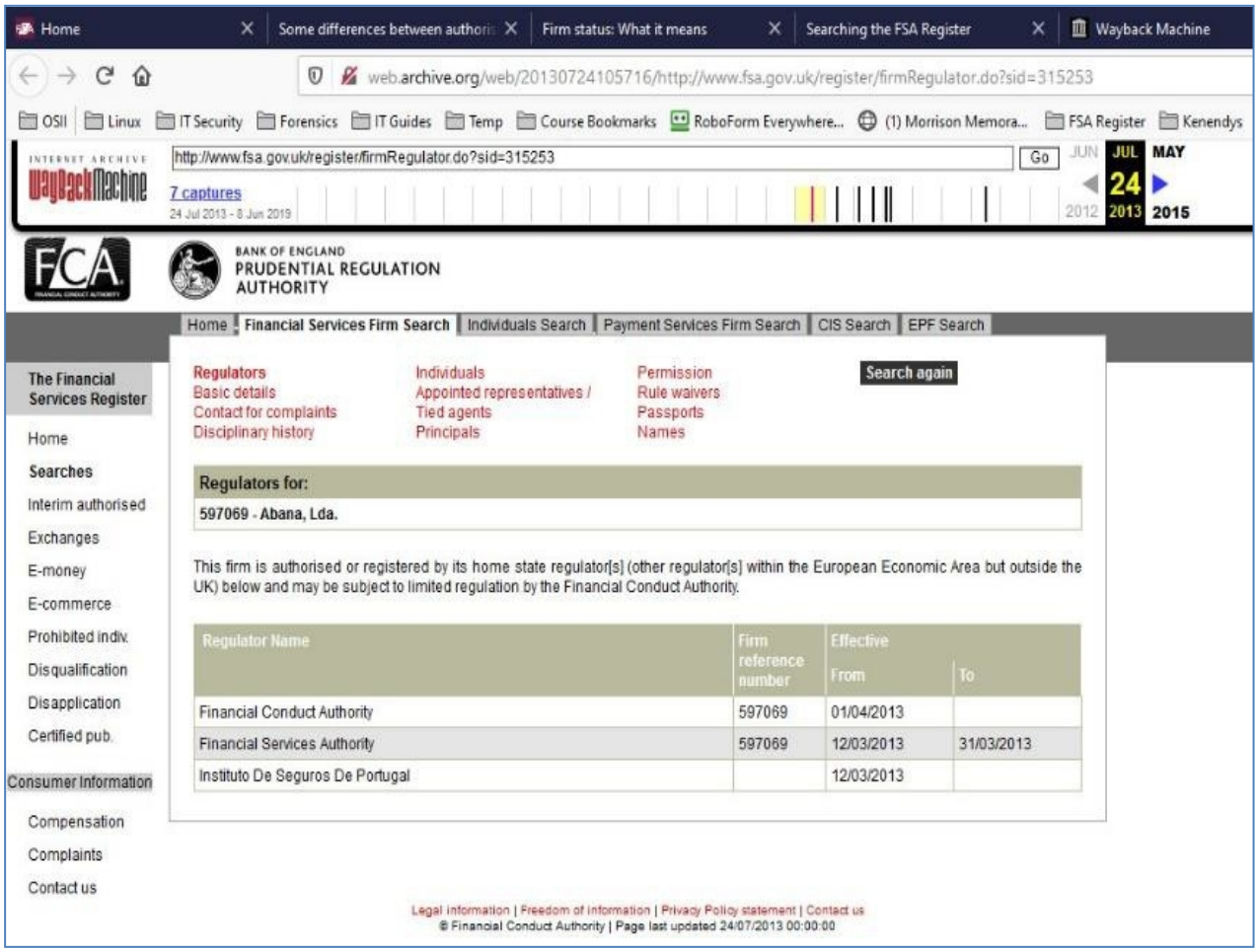
Westerby's checks on Joseph Oliver LDA's permissions

Westerby has said on other complaints that it took appropriate steps to conduct due diligence on Joseph Oliver LDA and it could not and should not reasonably have concluded that Joseph Oliver LDA did not have the required top up permissions.

The Register

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

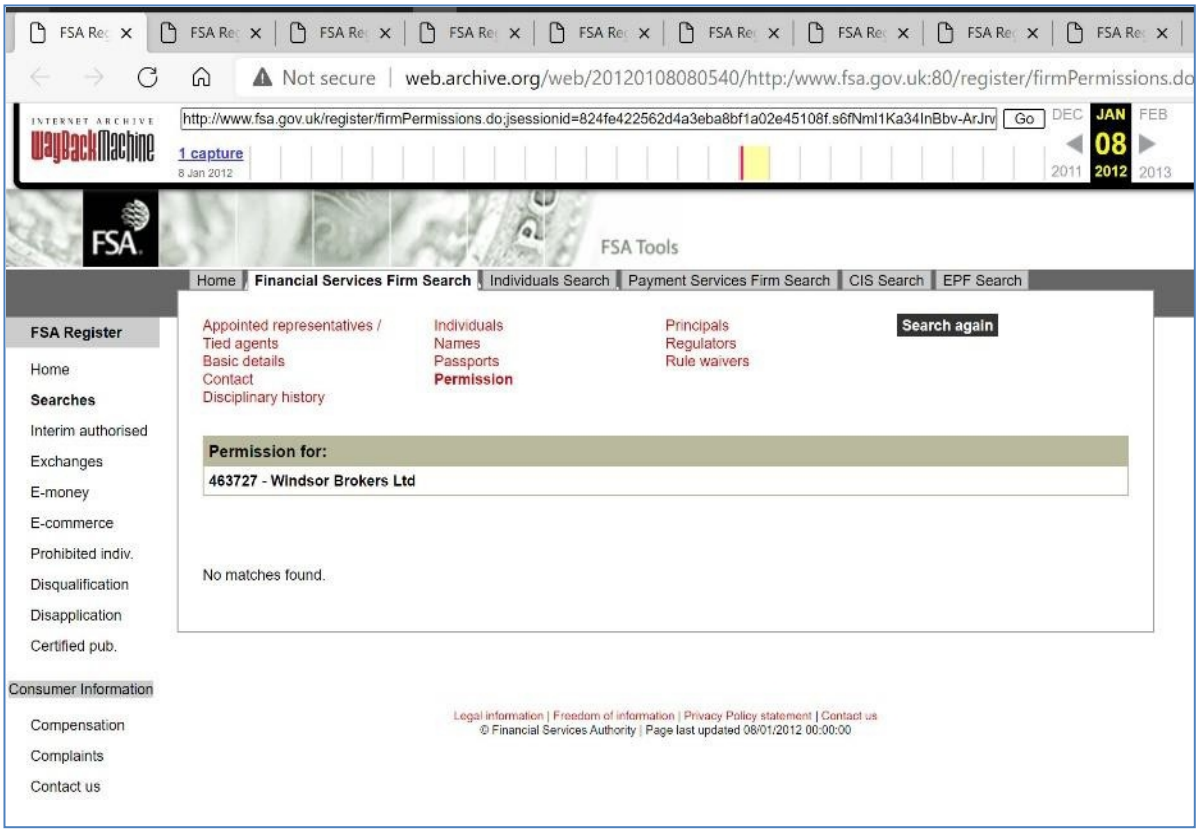
I have carefully considered the format of the Register in or around late 2012 when Mr S's application was submitted by Joseph Oliver LDA. The third-party report on the Register provided by Westerby during the investigation of the complaint which was the subject of the published decision is helpful on the question of the format of the Register at the time of Mr S's SIPP application. The report includes the following screenshot of the archived Register for Abana (dated 24 July 2013):



Each of the red titles at the top of the entry (i.e. Regulators, Basic details, Contact for complaints, etc) is a hyperlink to another page of the entry on the Register. I am satisfied the entry for Joseph Oliver LDA would have followed the same format. So, this screenshot shows that Joseph Oliver LDA's 2012 entry on the Register would have included both "Permission" and "Passports" pages (amongst other pages). It is therefore reasonable to conclude from the above screenshot that the format of the Register in or around the time Mr S's SIPP application was submitted to Westerby in 2012 included pages which provided information in relation to both a firm's passport details and in relation to a firm's permissions. And I note Westerby accepts Joseph Oliver LDA's entry would have included a permissions page at the relevant time.

Westerby's position, in short, is that the permissions page was blank and the register entry could not therefore be used to check a firm's permissions.

The report provided by Westerby on the complaint which was the subject of the published decision, helpfully, provides examples of several Permission pages for other firms which *were* archived, dating from around the time of Mr S's SIPP application or earlier. The below example, dating from 2012, and relating to a Cypriot firm which, like Joseph Oliver LDA, was an incoming EEA firm, is particularly helpful:



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

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

All of this information taken together demonstrates that, when Mr S's application was submitted to Westerby, the format of the Register did contain a page labelled "Permission" and this page is where a firm's permissions would be set out on the Register. And, where a firm did not have any FCA permissions at the time of the search, the Permission page on their Register entry would state "*no matches found*" (as there were no permissions to display).

This is consistent with the information we received from the FCA when we asked it to confirm whether top up permissions appear on the Register, and whether this has changed since 2013. In response to our query, 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.

I note Westerby, (in submissions made on other complaints), has said more information should be provided about the details of the contact with the FCA. But, Westerby has already been provided with the FCA's response to our question. So, I'm satisfied that Westerby has had the opportunity to consider the response, and that it has 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.

I should also make the point that my decision on this complaint would be the same even if I were to disregard the information received from the FCA – as the FCA's response to our question simply confirms what is shown by the available evidence in this case.

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

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

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

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

In previous submissions to us, Westerby seemed to suggest that the "Basic details" page was the totality of the Register entry available for Joseph Oliver 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 Joseph Oliver's passports or permissions.

Westerby has, in previous submissions, referred to reports from the Complaints Commissioner both of which highlighted errors and/or weaknesses of the Register. In its more recent submissions it has said the Register is known to have historically had significant errors, and the FCA itself recognises that there can be errors on the Register – it refers to a disclaimer shown on the Register which says the FCA provided no warranty as to its accuracy. I have considered the submissions Westerby has made on this point.

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

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

Westerby says it does not agree that Joseph Oliver LDA not holding the relevant top up permissions would be a matter of public record – as the FCA was only able to confirm what was on the Register, not what was missing from it. However, I'm satisfied that whether a firm holds permissions with the FCA is a matter of public record.

I accept FCA will not (and would not) confirm details about a firm that are not available on the public register. However, for all the reasons I've given above, I'm satisfied that top up permissions (or the absence of such permissions) are something which are recorded on the FCA's public register, and that this was also the case in 2012 when Westerby accepted Mr S's application from Joseph Oliver LDA. So, although we do not have evidence of exactly what did appear on Joseph Oliver LDA's "Permission" page in 2012, if it had erroneously been left blank I think it is fair and reasonable to conclude the FCA would have been able to confirm the position that Joseph Oliver LDA did not – in fact – have the required permissions, as this was information that ought to have been publicly available, on the Register. So, I'm unpersuaded by Westerby's submissions on this point and I am satisfied contacting the FCA was a sensible and proper route open to it to verify Joseph Oliver LDA's permissions before accepting business from it.

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

To be clear, even if there was an issue with Joseph Oliver LDA's entry on the Register I still do not think it is fair and reasonable to conclude that it was appropriate – or in accordance with its regulatory obligations - for Westerby to have proceeded with Mr S's application from Joseph Oliver LDA in those circumstances. Westerby ought to have independently checked and verified Joseph Oliver LDA's permissions before accepting business from it. If there was no information available or accessible on the Register at the relevant time to reveal the permissions position of Joseph Oliver LDA, then Westerby ought to have either found another way to verify Joseph Oliver LDA's permissions, or it ought to have declined to accept any applications from Joseph Oliver LDA until such a time as it could verify the correct position on Joseph Oliver LDA's permissions.

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

So, to summarise, I'm satisfied:

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

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

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

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

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

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

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

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

And COBS 2.4.8 G says:

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

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

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

The Agreement provides as follows:

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

In my view, this does not amount to a clear statement that Joseph Oliver LDA had the required top up permissions for it to advise on and arrange personal pensions in the UK that Westerby would be entitled to rely on.

The activity of advising on rights under personal pension schemes is not mentioned; rather, the authorisation is said to relate to "*the sale of the SIPP*" which is an ambiguous term. And the warranty that "*he/she is suitably authorised*" is generic and does not refer specifically to top up FCA permissions being required and Joseph Oliver LDA warranting that it has top up permissions to conduct personal pensions business in the UK.

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

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

So, for all the reasons I've set out above, I do not think COBS 2.4.6R (2) applies to the Agreement the parties entered into. However, I've also given careful thought to whether it, was reasonable for Westerby to rely on it generally. I note 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 have considered this question with those details in mind. However, I am not satisfied there was any other basis on which it was reasonable for Westerby to rely on the meetings and Agreement, for much the same reasons as I have 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 do not 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 has told us it checked the Register. It has also told us its procedure was to check the Register every time a SIPP application is received from an introducer, and every time adviser fees are paid from the SIPP. It says that, in its view, this demonstrates good practice, as per the FSA's 2009 thematic review report. That is a view I share.

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

If the adviser was instead JOML?

As noted earlier in my decision, for completeness, I've also considered the possibility that Westerby may have accepted the application from JOML. As set out above, on the SIPP and investment application forms the name of the firm was simply given as "*Joseph Oliver*".

In previous submissions, Westerby has said the decision in *Adams v Options* confirmed that whilst establishing a SIPP is a regulated activity (so needs to be done via an authorised firm) advice on the underlying assets is not. However, this overlooks the nature of the asset in question. In *Adams* the decision Westerby mentions was based on the underlying asset not being an investment specified in the Regulated Activities Order (RAO). In this case the investments were ones of a type specified in the RAO, so giving advice on them would amount to a regulated activity, irrespective of the SIPP.

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

However, I have only briefly covered this point as there is evidence to show Mr F was representing Joseph Oliver LDA at the time and Westerby says the provider of the E-Portfolio platform has confirmed its relationship was with Joseph Oliver LDA, not JOML. So I think the likely outcome, had Westerby either assumed the application(s) were advised on by JOML and rejected it/them on that basis, or have queried on the basis the application(s) had to be advised on by an authorised business, would have been that the application(s) was/were then submitted through Joseph Oliver LDA. However, as I set out in the next section, I think any potential involvement of JOML should reasonably have been viewed as an anomalous feature.

Anomalous features

I'm of the view Westerby ought to have identified a risk of consumer detriment here. Mr S was taking advice on his pension from a business based in Portugal. That advice was to transfer from an income drawdown plan with a large life assurance business into a SIPP, and then to send the majority of the money transferred into the SIPP to investments based in Mauritius. The investments involved were unusual, and specialised. And the chances of them being suitable investments for a significant portion of a retail investor's pension were very small. So, given the relevant factors, Westerby ought to have viewed the application from Mr S 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 Joseph Oliver LDA to independently ensure it had the correct permissions to be giving advice on personal pensions in the UK.

I do not expect Westerby to have assessed the suitability of such a course of action for Mr S – and I accept it could not 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 S fairly and act in his best interests.
Another feature of concern in this case is that the investment application – which Westerby signed – does not specify what investments are to be made on the E-Portfolio platform.

I think these should reasonably have been viewed by Westerby as risks of consumer detriment. And are therefore further reasons why it ought to have taken particular care in its due diligence, to treat Mr S fairly and act in his best interests.

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

In conclusion

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

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

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

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

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

I am therefore satisfied the fair and reasonable conclusion in this complaint is that Westerby should not have accepted Mr S's SIPP application from Joseph Oliver LDA.

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

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

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

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 have seen no evidence to show Mr S proceeded in the knowledge that the investment he was making was high risk and speculative, and that he was determined to move forward with the transaction in order to take advantage of a cash incentive offered by Joseph Oliver LDA. Mr S says he was a low risk investor and there is no evidence to show he understood he was making a high risk investment.

Mr S was also not paid a cash incentive. It therefore cannot be said he was "incentivised" to enter into the transaction. I am satisfied that Mr S, unlike Mr Adams, was not eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams.

Westerby may say that if it had rejected Mr S's application, Joseph Oliver LDA would simply have re-applied on behalf of Mr S to another SIPP operator, which Joseph Oliver LDA was using, and that SIPP operator would have accepted the application.

However, Mr S would still have had to be willing to do business with Joseph Oliver LDA after Westerby had rejected his application for another application to proceed. And, for the reasons given, I am not persuaded Mr S would have continued to accept or act on pensions advice provided by Joseph Oliver LDA in those circumstances. And it wouldn't be fair and reasonable to not uphold the complaint on the basis of an assumption that another business would have made the same mistakes as I've found Westerby made.

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

The involvement of Joseph Oliver LDA

Mr S has told us previously that he has not submitted a claim to the FSCS against Joseph Oliver LDA.

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

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

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

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

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

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

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

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

I note that the document that sets out the terms of business between Westerby and Joseph Oliver LDA includes a section where the intermediary - Joseph Oliver LDA - agreed to indemnify Westerby for any loss it may suffer as a result of the intermediary acting beyond its authority. So this gives Westerby a form of recourse if it thinks Joseph Oliver LDA has breached the terms of this agreement. In addition, Westerby can have the option to take an assignment of any rights of action Mr S has against Joseph Oliver LDA before compensation is paid.

Westerby may say that as Joseph Oliver LDA has ceased to trade then any indemnity from Joseph Oliver LDA and/or assignment of any action against it is effectively worthless. And I accept that may be true. However, the key point here is that but for Westerby's failings, Mr S wouldn't have suffered the loss he's suffered. As a result, the trading/financial position of Joseph Oliver LDA, and the fact that Westerby may not be able to rely on an indemnity from Joseph Oliver LDA and/or the fact that any assignment of any action against Joseph Oliver LDA from Mr S 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 S to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by Joseph Oliver LDA.

Opportunity to mitigate losses

On other cases, Westerby has argued that "*various people*" were raising alarms over the Kijani investment and it is not clear why consumers were content with Mr F's word that the investment update letters being sent were "*scaremongering*". It says the concerns about the investments would have led an unsophisticated investor to make some reasonable lines of enquiries, regardless of Mr F's advice.

However, I'm conscious that Westerby "*strongly urged*" Mr S to contact his "*regulated financial advisor*" in its letters. At the time of the November 2014 letter, the "*regulated financial advisor"* was Mr F, by that time working for Abana rather than Joseph Oliver LDA. So I think it was reasonable for Mr S to take the action Westerby had "*strongly urged*" him to take i.e. to seek advice from Mr F.

I know in response to the November 2014 letter, Mr S confirmed to Westerby that wished to continue to hold his investment in the Kijani fund. I have assumed Mr S made this decision, having sought advice from Mr F. So I'm of the view it is not fair to say Mr S should have made a redemption request when Westerby wrote to him in November 2014. I asked Westerby to confirm if this wasn't, and Mr S didn't seek advice from Mr F at that time, but it's not provided anything to dispute my finding here.

I am also of the view that Westerby did not act in accordance with its regulatory obligations in sending this letter. On the complaints about introductions from Abana, Westerby says its process was to check an advisory firm's permissions every time it received an application to open a SIPP, and every time an advisor's renumeration was to be paid. So, by the time Westerby wrote to Mr S in November 2014, it would have had many opportunities to discover that Abana did not have the top up permissions it needed to give advice or make arrangements on personal pensions in the UK.

For Westerby to have suggested that Mr S seek advice from Abana once problems with the funds he had invested in had come to light, is a further failing of its regulatory obligations and the requirement to treat Mr S fairly. In fact, it should have alerted Mr S to the fact that Abana did not have the required permissions and have suggested he seek independent advice from a regulated advisor with the required permissions as a matter of urgency.

By the time of the June and July 2015 letters to Mr S from Westerby, Abana FS – a UK based firm authorised by the FCA, had replaced Abana. I note Westerby concludes in the July 2015 letter that Abana FS Ltd was not sufficiently independent (I assume because of its links to Abana). And it recommends Mr S seek advice from an advisor authorised by the FCA. I'm of the view 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 S back to Abana. And I note Mr F did appoint a new financial adviser in December 2015.

Westerby has previously said that, in the complaint which was the subject of the published final decision the complainant was able to redeem his funds in May 2016. So it may say it's likely that Mr S could have mitigated his losses with a timely redemption request. Although I note in its letter to Mr S in December 2015, Westerby said that a redemption request was submitted to EPS in respect of Mr S's SIPP portfolio on 10 September 2015. So it may well be the case that Mr S did request a redemption.

But even if he didn't, given what I say above, I think this is a secondary point as my view is that is not fair to say Mr S should have taken any action (save for seeking the advice from Mr F which he was "*strongly urged*" to seek in November 2014), following the receipt of the letters. I'm of the view that, notwithstanding my above finding, that it is unlikely a redemption request would have been successful, in any event.

In relation to the Kijani fund, liquidators were appointed on 19 June 2015. Westerby's June 2015 letter notes that some investors had, at that time, made redemption requests over 90 days ago but not received any money. And I note that in the complaint which was the subject of the published decision Westerby summarised the situation with the Kijani fund in October 2015 as "*suspended, in liquidation. Likely to take a number of years. Unclear as to what will come back".*

So I think there is insufficient evidence to show any redemption request made in relation to the Kijani fund after issues with the fund were first highlighted in late 2014 would have been successful.

I note Westerby's December 2015 letter – which shows the SAMAIF was suspended at that time - 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 is still suspended). I further note the 24 April 2016 update from SAMAIF suggests work to begin trading is still ongoing. And I again note that in June 2016 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. A copy of their latest update is enclosed."*

Which suggests SAMAIF was still suspended at this time. So I have also not seen sufficient evidence to show a redemption request made in relation to the SAMAIF would have been successful either – it seems the SAMAIF was suspended for a considerable period of time, and it is not clear if that suspension was ever lifted.

This is consistent with the published decision, which notes 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.

Putting things right

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

If Mr S had sought advice from a different advisor I think it's more likely than not that the advice would have been to stay in his existing pension. I think it is unlikely that another advisor, acting properly, would have advised Mr S to transfer away from his existing pension.

In light of the above, Westerby should calculate fair compensation by comparing the current position to the position Mr S would be in if he had not transferred from his existing drawdown plan. In summary, Westerby should:

1. Calculate the loss Mr S has suffered as a result of making the transfer.

2. Pay a commercial value to buy Mr S's share in any investments that cannot currently be redeemed.

3. Pay an amount into Mr S's SIPP so that the transfer value is increased to equal the loss calculated in (1). This payment should take account of any available tax relief and the effect of charges. It should also take account of interest as set out below.

4. Pay to Mr S an amount £500 to compensate him for the distress and inconvenience he's been caused.

Westerby should have the option of payment of this redress being contingent upon Mr S assigning any claim he may have against Joseph Oliver LDA, to Westerby. The terms of the assignment should require Westerby to account to Mr S for any amount it subsequently recovers against Joseph Oliver LDA that exceeds the loss paid to Mr S. Westerby may say that it considers such an assignment to likely be worthless. But I think it fair to leave this option available to Westerby, if it wishes to take it – so Mr S should provide an assignment, if Westerby requests it.

I have explained how Westerby should carry out the calculation set out at 1-3 above in further detail below:

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

To do this, Westerby should work out the likely value of Mr S's drawdown plan as at the date of my final decision, had he left it where it was instead of transferring to the SIPP.

Westerby should ask Mr S's former drawdown provider to calculate the current notional transfer value had he not transferred his pension. If there are any difficulties in obtaining a notional valuation then the FTSE UK Private Investors Income Total Return index should be used to calculate the value. That is likely to be a reasonable proxy for the type of return that could have been achieved.

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

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

The calculation should take account of the value of any cash held in the SIPP currently. Any existing value of the investment should be covered by the next step.

Pay a commercial value to buy any investments which cannot currently be redeemed.

The SIPP only exists because of the investments made in 2012. In order for the SIPP to be closed and further SIPP fees to be prevented, any investments need to be removed from the SIPP.

To do this Westerby should reach an amount it is 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 the value of them should be assumed to be nil for the purposes of the loss calculation.

Westerby may ask Mr S to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the investments. That undertaking should allow for the effect of any tax and charges on the amount Mr S 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.

Pay an amount into Mr S's SIPP so that the transfer value is increased to equal the loss calculated in (1).

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

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

SIPP fees

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

Interest

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

Distress & inconvenience

I think the loss of the pension provision that is the subject of this complaint caused Mr S significant distress. Mr S has explained that he's retired with a financially dependent child living at home and the loss of his pension has had a significant impact on his family. So Westerby should pay him £500 to compensate him for this.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 9 May 2024.

Lorna Goulding
Ombudsman