DRN-5204965

The complaint

Mr E complains that Westerby Trustee Services Limited ('Westerby') failed to carry out sufficient due diligence into the introducer before accepting business from it and on the investment before accepting it into his Self-Invested Personal Pension ('SIPP'), causing him a financial loss. Mr E says it should compensate him for his loss.

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

What happened

I've outlined some of the key parties involved in Mr E's complaint below.

Involved parties

Westerby

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

Firm B

As I understand it, Firm B was a regulated adviser.

German Property Group companies

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

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

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

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

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

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

<u>The transaction</u>

In February 2011, Mr E consulted Firm B for advice on his pension. And, on 1 October 2012, Westerby received Mr E's completed SIPP application form, signed by him on 3 September 2012, and associated documents from Firm B. Mr E's SIPP application was for a Family Group SIPP, which I understand meant individual SIPP assets within this could be pooled for investment purposes, although it seems Mr E was the sole member.

Mr E's SIPP application form said he was self-employed and under 'Investment Strategy' it said 'TBC', which I understand meant 'to be confirmed'. And when asked 'Do you have an Independent Financial Adviser', 'yes' was ticked and Firm B's details were provided. This also set out that Firm B would receive an initial payment of £1,500 from Mr E's pension fund, along with an ongoing 1% of the total value. Alongside this, Mr E signed a form waiving his 30-day cancellation period in respect of the establishment of his SIPP, noting that the reason was 'to proceed as quickly as possible'.

It seems Mr E's SIPP application was formally accepted by Westerby at the start of October 2012, although his SIPP account transaction history shows this was opened with a zero balance from April 2012.

Between October 2012 and February 2013, just over £161,000 was switched into Mr E's Westerby SIPP from his existing schemes, including a SSAS. In October 2012, Mr E applied to set up a Charles Stanley account via his Westerby SIPP. And Westerby has said that, in April 2013, just under £89,000 was transferred in specie to his Westerby SIPP from an existing Charles Stanley portfolio held within his SSAS.

Between October 2012 and prior to making his first Dolphin investment in 2014, which I'll come to below, Mr E made investments into a hotel room investment and then unlisted shares in November 2013, for example, via his Westerby SIPP.

Mr E's SIPP account transaction history statements show that Firm B's annual adviser fee paid in May 2013 was returned the following month and no further adviser fees were paid to it from Mr E's SIPP. This was seemingly as Mr E had told it he no longer required its services, as he was now satisfying himself as to the merits of unregulated investments.

On 23 July 2014, Mr E received an email from a Mr M seemingly of Elite Wealth Limited which said '*please find attached the loan doc . Please sign and return at your earliest convenience.*' in reference to the Dolphin Loan Note Offer document, which Mr E signed on 26 August 2014. This document had Mr E's name, address and investment details (the amount of £30,000, that the beneficiary of the investment payment was the German law firm, that the loan note term was 3 years with interest payments of an average of 13% per annum with 6 monthly interest payments) pre-typed. And on this Mr E confirmed that he had fully read and understood the terms and conditions detailed in the Loan Note Instrument Documentation that had been provided to him and that he understood a first legal charge would be registered to secure the loan note amount and interest.

At the bottom of the Loan Note Offer document it said in small writing, amongst other things, that the document should be read in association with the Information Memorandum and Loan Note Instrument, which is a detailed legal document explaining how the loan notes worked. And that once it received this signed Loan Note Offer Letter and the investment money had been banked by the German law firm then Mr E would receive the Loan Note Certificate.

On 1 September 2014, Mr E received another email from a Mr M which provided him with an address in Ireland – which I understand to be a correspondence address used by Dolphin – and told Mr E to '*send via email a copy of the Loan Agreement signed and post the original to the…address*'. This was seemingly the Loan Note Instrument, dated 31 August 2013.

On 5 September 2014, Westerby and Mr E instructed in writing that £30,000 be paid from his SIPP bank account to an account with Lloyds TSB under the name of the German law firm. And, on or around 8 September 2014, £30,000 of Mr E's SIPP pension monies was invested into a three-year Dolphin loan note.

On 25 September 2014, Westerby received a letter from Dolphin dated 15 September 2014 confirming Mr E's funds had arrived with the German law firm, applied to the investment and it said that it included his Loan Note Certificate. This certified that Westerby and Mr E were the registered holders of 'Average 13% FIXED RATE 6 Monthly Payment' secured convertible loan notes. And that these were subject to the provisions contained in the Instrument.

Mr E went on to receive a return of around £11,700 from the 2014 Dolphin investment into his SIPP. And when this loan note matured and Mr E received a return of his capital back into his SIPP on 22 September 2017, he sought to he reinvest this into a new Dolphin loan note via it.

It seems Mr E was provided with a new Dolphin Loan Note offer document to reinvest the £30,000 into a new Dolphin loan note. This provided details for a different bank to Mr E's 2014 Loan Note Offer and now said the account was in the name of 'TTT Moneycorp Ltd GBP Client Safeguarding Account'. It set out that the loan note term was 2 years with interest payments of an average of 10% per annum. This had a space for the customer to confirm he'd fully read and understood the terms and conditions detailed in the Loan Note Instrument Documentation provided to him. In small writing at the bottom of the Loan Note Offer document it said, amongst other things, that it should be read in association with the Information Memorandum and Loan Note Instrument, a detailed legal document explaining how the loan notes worked. And that once it received this signed Loan Note Offer Letter and the investment money had been banked by Moneycorp then Mr E would receive the Loan Note Certificate.

On 20 October 2017, Westerby received Mr E's completed 'Non-Standard Asset Questionnaire', which he signed on 19 October 2017. Amongst other things, this said that:

- Mr E was aged 67 and intended to retire at age 70+.
- When asked whether he had received advice specifically relating to the Dolphin investment, he ticked 'No'.
- His annual income was between £100,000-£150,000.
- His total assets (including cash, investments, investment property and other assets),

less liabilities, gave him a total net worth just under £3 million.
- His only other pension arrangement was state pension. And he had experience of investing in listed equities (30 transactions) and unlisted shares (six transactions) in the past 24 months, along with previous experience investing in residential property, outside of the last two years. No further details were provided.
- He directed and owned companies.

On the fifth page of the questionnaire, Mr E went on to declare that, amongst other things:

- He understood the risk associated with non-standard investments and was comfortable that his attitude to risk was appropriate. And he was prepared for the total loss of his investment.
- He hadn't received any advice from Westerby and wouldn't hold it responsible for the loss of his investments.
- He understood non-standard investments can be difficult to value, can take time to sell and may affect his ability to draw pension benefits.
- He understood that these aren't regulated by the FCA or covered by the Financial Services Compensation Scheme ('FSCS') in order to claim if something goes wrong.
- He confirmed he'd taken financial advice specific to the investment specified in the questionnaire or that he met the criteria for a high net worth/sophisticated or elected professional investor and agreed to provide such proof as Westerby requires to evidence this.

Before signing the fifth page, it said '*I elect to be treated as a* ***HIGH NET WORTH/SOPHISTICATED/ELECTIVE PROFESSIONAL INVESTOR***' (no emphasis added). Mr E was asked to delete as appropriate to select which one he was, but made no selection/deletion. Mr E was also asked to the complete the appropriate self-certification certificate overleaf, on page six of the questionnaire, certifying that he was a high net worth and/or self-certified sophisticated investor, and he completed and signed the section which said he was a high-net worth investor.

On 31 October 2017, Westerby received Mr E's Dolphin expression of interest form which set out that Mr E wanted to invest £30,000 of his SIPP pension monies in Dolphin for two years. Along with this form Westerby also received an Appropriateness and Client Categorisation Questionnaire, that had a self-certified sophisticated investor statement attached as an appendix.

The Appropriateness and Client Categorisation Questionnaire noted that Mr E was a retail investor who also fell into the 'Certified or Self-Certified Sophisticated Investor' category. Underneath this it said that based on the category the customer's certification should be supplied and that the party submitting the questionnaire should confirm they'd reviewed the appropriateness of the proposed investment and complied with COBS 10 of the FCA Handbook. Mr M of Elite Wealth Limited filled this out and signed to confirm he'd '*assessed the suitability of the Investor…in respect of their proposed investment in the Bonds*' and satisfied COBS 10. And, on the self-certified sophisticated investor statement, signed by Mr E on 17 October 2017, he declared he was a self-certified sophisticated investor for the purposes of the restriction on promotion of non-readily realisable securities. And that this meant:

- He could receive promotional communications made *by a person authorised* by the FCA which related to investment activity in such securities.
- The investments to which the promotions may relate may expose him to a significant risk of losing all the property invested.

And Mr E signed to confirm that he was a self-certified sophisticated investor, he accepted that the investment may expose him to a significant risk of losing it and he was aware it was open to him to seek advice from someone specialising in non-readily realisable securities.

On 31 October 2017, Westerby instructed in writing that £30,000 be paid from Mr E's SIPP bank account to an account with Barclays under the account name of 'TTT Moneycorp Ltd GBP Client Safeguarding Account'. And, at the start of December 2017, £30,000 of Mr E's SIPP pension monies was reinvested into a new Dolphin loan note.

On 5 December 2017, a Dolphin loan note was issued certifying that Westerby and Mr E were the registered holders of £30,000 of the £3500000 with 6 monthly payments of 10% fixed rate per annum secured convertible loan notes 2020. And that these were subject to the provisions contained in the Instrument.

It seems Mr E received returns on his 2017 investment in Dolphin Capital of around £4,500, but nothing further beyond mid-2019. And his investment in Dolphin is seemingly now valued at nil.

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

Mr E first complained, via his representatives, to Westerby in October 2020. He said, in summary, that it didn't do enough due diligence on Firm B or the Dolphin investment, which was unregulated and high-risk, and it shouldn't have accepted his applications. He said he was a retail customer, who is by no means a sophisticated or high net worth individual. And that this has caused him to lose out.

Westerby replied in December 2020 and, unhappy with this response, Mr E referred his complaint to our Service in April 2021.

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

- The SIPP was clearly established for the purpose of utilising non-standard assets, so Firm B must have considered the suitability of such assets for Mr E when recommending the SIPP to him.
- While the Dolphin investment was recognised as a high risk, non-standard asset, this was not in itself a reason to deem it unacceptable as a SIPP investment, in line with the FCA's statements on this matter.
- Mr E's initial Dolphin investment benefited from 13% growth per year in interest to maturity. And he chose to reinvest the proceeds, receiving £4,500 in interest to date.
- While Dolphin has been placed into administration this is due to investment risk and not authenticity, as the investment was genuine.
- Westerby did, however, restrict investments into SIPPs to cases where either (a) the SIPP member met the FCA's definition of a high net worth or sophisticated investor, who could reasonably be expected to understand the risks, or (b) where the SIPP member had been advised to make the investment by a regulated financial adviser.
- Amongst other things the non-standard asset questionnaires Mr E completed in order for Westerby to permit the reinvestment of maturity funds into Dolphin in 2017 confirmed that he held assets in excess of £2.6 million, including other assets worth £600,000, property portfolio worth £2.7 million and other assets (including his Westerby SIPP) worth £900,000. Mr E owned two companies and had completed six purchases of unlisted shares in the proceeding 24 months. So Mr E wasn't of relatively modest means as suggested by him. And it is a misrepresentation to say

that he didn't meet the FCA definition of a high net worth individual and sophisticated investor.

- Mr E's SIPP application confirmed that Firm B, a regulated party, was his financial adviser. While he stopped using Firm B in May 2013, it was responsible for considering the suitability of the SIPP and expected investments.
- Westerby carried out due diligence on Firm B before accepting any business from it, including verifying at the point of acceptance of each SIPP that it remained authorised by the FCA and had the requisite permissions. Clients introduced by Firm B often invested in non-standard assets but selected from a variety of investments. And they invested part of their funds into non-standard assets with the remainder into a 'wrap' portfolio made up of standard assets, as in Mr E's case. And investors introduced by Firm B were often high net worth or had significant investment experience.
- *Adams v Options SIPP* [2020] EWHC 1229 (Ch) held that the SIPP provider hadn't breached its statutory or common law duties to the claimant and that their losses flowed solely from his decision to proceed with a high risk, speculative investment. And, amongst other things, that: '*A duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed in my judgment as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed.*'.
- It acted on an execution only basis. It didn't and wasn't responsible for providing advice or assessing suitability. And Mr E's losses flow from his decision to proceed with a high-risk investment. Mr E should take responsibility for his own decisions in the circumstances.
- High risk investments are not manifestly unsuitable for inclusion within a SIPP. These can be appropriate under certain circumstances.
- There has been limited formal FCA guidance as to the extent of due diligence a SIPP provider is expected to undertake. Westerby's due diligence processes are based on the FCA's July 2014 *"Dear CEO"* letter. It met this criteria in respect of Mr E's investments. Such investments that are speculative in nature aren't manifestly unsuitable as a SIPP asset.
- The publications are not determinative of what constitutes good practice. Adams confirms there is no provision in law for a claim based on an alleged breach of the guidance, as opposed to the FCA rules. This set out that the Reviews do not provide "*guidance*" and even if they were considered statutory guidance made under FSMA s.139A, any breach would not give rise to a claim for damages under FSMA s.138D.
- It carried out extensive checks on Dolphin prior to Mr E's initial investment in 2014. And, in the absence of evidence this wasn't genuine or inappropriate as a SIPP asset, it concluded it was acceptable.
- It completed a review of its due diligence shortly before maturity of Mr E's 2014 Dolphin loan note and found that interest and capital repayments were being made as these fell due and the security trustee confirmed land charges were in place. The fact that Mr E's 2014 investment had paid interest and then repaid the capital in 2017 was evidence this was operating as expected and not impaired. So it permitted Mr E's £30,000 reinvestment into a new Dolphin loan note in 2017.
- The investment documents were clear that Dolphin loan notes were high risk, with the second page of the brochure clearing stating that this was a promotion that hadn't been approved by an authorised person and that relying on it could lead to a risk of an investor losing all assets invested. It also told investors to read the Information Memorandum prepared during 2017 and to consult an adviser.
- The Information Memorandum explained that loan notes involve a high degree of risk and investors should consider if this investment is suitable for them. It then went on to list specific factors that could lead to a loss of funds, such as unforeseen costs and

development problems, valuations being less than anticipated and that it said in bold that investors wouldn't be able to claim to the FSCS.
- The Loan Note offer directed Mr E to read the Information Memorandum and Loan Note Instrument, so it's unlikely he wouldn't have seen this information.
- It would have been clear to any reasonable investor, in particular one with Mr E's knowledge and experience, that this investment carried a risk of total loss of funds which was commensurate with the potential return. As directed/declared in his applications, Mr E fully understood the risk.
- The SIPP was introduced by a regulated adviser who could be expected to have assessed the suitability of the Dolphin investment. This investment met HMRC and FCA criteria for consideration as to whether it was a permissible investment. So it had no reason to conclude there was a risk of consumer detriment.
- Only part of the just under £250,000 Mr E transferred to his SIPP, and the just over £197,000 that he's also contributed to the SIPP, was invested in Dolphin. So Mr E's allegation that he would have otherwise kept the monies invested in his existing schemes does not bear scrutiny.
- Mr E used his SIPP to make a number of investments into non-standard assets, including a hotel room, unlisted shares and the Dolphin investments. By 2017 Mr E had already made high risk investments in the form of a Dolphin loan note which bore significant returns. So if Westerby had refused to accept the investment within his SIPP then he would have sought out alternative high risk investments.
- Due to the general principle that customer's should take responsibility for their own investment decisions, if compensation is awarded against it this should be reduced due to contributory negligence.
- If Westerby had refused to accept the Dolphin investment within Mr E's SIPP then he would have found an alternative provider – it's aware of a number of SIPP providers who were permitting investments when Mr E's 2014 and 2017 Dolphin investments were made.

During the course of Mr E's complaint he's said, amongst other things, that:

- He was unsuitably advised to transfer to the Westerby SIPP and invest in Dolphin.
- Firm B suggested to Mr E when it visited a property development he was involved with, and that it often spoke about pensions at, that he might be better off with a SIPP than a SSAS as it would be more straightforward, which Mr E agreed with. Firm B advised on and facilitated the establishment of his Westerby SIPP.
- While Mr E had other reasons for transferring to the SIPP, Firm B heavily promoted the Dolphin investment to him at the time. Firm B was also involved with and put him in touch with a Mr B of a firm I will refer to as Firm C.
- While Mr E stopped using Firm B in April 2013 and didn't go end up going through it and Firm C to make the 2014 Dolphin investment – he went through another third party, Mr M of Elite Wealth Limited – he'd had long conversations with Firm C who advised him to invest in Dolphin. He was told by Mr B that this was a good place to invest, Mr B had visited the investment and invested in this himself.
- At the time Mr E believed Firm C and Firm B were connected/part of the same entity. And if they'd advised him not to invest in Dolphin then he wouldn't have insisted on going ahead with this in any event.
- While Mr E told Firm B in April 2013 that he no longer wanted its services, as it told him it couldn't advise on unregulated investments and he said that he was satisfying himself as to the merits of these in any case, in reality Mr E stopped using Firm B as there was a lack of real advice from it on what investments he should make. Its approach always seemed to be to ask what he wanted to invest in, rather than to make recommendations to him itself.

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

- As a SIPP provider, Westerby's responsibilities in respect of due diligence were limited to conducting due diligence in line with FCA guidance and to ensuring the investment was allowable in line with HMRC rules. Westerby has evidenced the comprehensive due diligence undertaken and that it met standards set by the FCA.
- Loan notes as an investment class are allowable by HMRC within a pension scheme. It identified as part of its due diligence that the investment was structured appropriately as expected of a loan note and that there were real and secured assets against the Dolphin project. Based on this, it reasonably concluded that the investment was real and secure at the time.
- At the time of investing there were no apparent warning signs that indicated fraud. Our Service has drawn factually incorrect conclusions using the benefit of hindsight based on information that has come to light only after Dolphin's business entered into administration proceedings and after an independent insolvency practitioner has had an opportunity to access all information in relation to the business, including information that could never have been accessed by Westerby.
- There was no evidence at any point before 2018 of any issues surrounding Dolphin that would have been reasonably found in the public domain. As potential issues came to light, Westerby took appropriate and reasonable steps in relation to Dolphin including but not limited to stopping the payment of any new monies into Dolphin and not allowing any roll-over of investments.
- Westerby at each review obtained and reviewed appropriate accounts in relation to Dolphin. For example, the balance sheets as at 31 December 2014 and 2015 filed at the German Company Register, together with copies of the December 2016 draft management accounts being the most recent accounting period for both companies. It is, therefore, simply not correct to say that the annual financial statements had not been prepared for a number of years or that financial information was not readily available and not asked for by it. And there is nothing in the accounts that would reasonably have given Westerby any cause for concern as to whether this was a legitimate investment. On the contrary, these confirm that the investment was operating as it should, with substantial assets held by Dolphin.
- The Investigator said Westerby should have asked for the way in which cash flows were being managed. This would involve a forensic analysis of the accounts which went beyond the scope of the due diligence required by a SIPP operator, whose role is simply to determine if the investment is suitable to be allowed into a SIPP wrapper, not to advise on the commercial merits of it. There was nothing to put Westerby on notice that there was any reason to be concerned about the cashflows, this is only known with the benefit of hindsight.
- In reference to comments around the legal charges, it is incorrect to say that Westerby relied entirely on a list of properties provided to it by the security trustee against which security had been registered in favour of noteholders. It was provided with copies of legal charges, relevant planning permission and listed building certificates, which it has provided to us.
- There was no reason for it to doubt the validity of the information and documents which were provided to it by appropriately registered and regulated legal and other firms in the UK and overseas.
- It was entitled to rely on the documentation it received, including confirmation from the German law firm of its role, unless or until it was told that the arrangements had changed (at which point it would have carried out further due diligence regarding the new arrangements). It carried out appropriate due diligence on the German law firm involved and had no reason to suspect the truth of what it was told.

- It is incorrect to say that the marketing material was "guaranteeing" returns of at least 12%. The brochure correctly and accurately stated that returns were "fixed", but it also included specific reference to risk factors and Westerby doesn't believe that any investor reading the brochure could reasonably believe the investment was low risk.
- It was made clear to Mr E in the documents he received that the investment was high risk and, had he thought this was not acceptable he ought to have spoken to a financial adviser. Whilst it is noted that some of the marketing literature indicates the investment is low risk, the conflict between the marketing literature and the legal instrument of the investment that the client had to agree to would not have been reason to prevent the investment from being held in a SIPP wrapper.
- There is no question of Westerby having failed to carry out its own obligations properly and then looking to excuse its failures by relying on a disclaimer. Rather, as explained in *Adams*, the disclaimers set out the scope of its obligations and confirm that responsibility for assessing the suitability of the investment remains with Mr E, rather than the SIPP provider. Any complaint in relation to this investment ought not be upheld against Westerby, as the client had to take responsibility for her own investment decisions.
- It is reasonable to conclude that if it had not accepted Mr E's application, he would have sought another SIPP provider who would have allowed the investment, of which there were many. Following his initial (successful) investment in Dolphin, which produced a return over a three-year period, the only reasonable conclusion on the balance of probabilities is that Mr E would have been very keen to invest again in Dolphin and would have actively looked for a way to be able to do so. As such he would have been exposed to the investment regardless.
- All of Mr E's losses are the result of his own decision to invest into a high- risk investment which ultimately, and regrettably failed. If Mr E did in fact receive financial advice from a third party, he ought to redirect her claim to that firm, and if appropriate seek a legal claim against them.
- If we find that Westerby should not have accepted the Dolphin investment into the SIPP, then any compensation ought to be calculated on the basis that neither of the Dolphin investments were made, so that Mr E should be required to give credit for the gains that he made on the initial investment in 2014.

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

I issued a provisional decision on Mr E's complaint and said that it should be upheld. Mr E let us know he accepted my provisional decision with no further comments to add, while Westerby added – both in response to Mr E's complaint and in its responses on other similar complaints with us against it concerning the same investment and Firm B – in summary, that:

- It's not unusual that high net worth and/or sophisticated customers wanted to go into high risk non-standard investments via a SIPP.
- Commenting on Firm B's template advice report, rather than an actual copy given to Mr E, is unsuitable and should be limited to a complaint against Firm B only. In referencing the template report and Mr E's circumstances we're making an inference that Westerby should be assessing the suitability of advice, which we've already confirmed isn't something it is able to do.
- When commenting on Firm B's business model and third party involvement we're again inferring that Westerby is required to assess the suitability of advice and that it should have some control in the operations of a regulated financial adviser.
- We've placed significant weight on Dolphin's marketing material not explicitly stating the investment wasn't regulated and had no FSCS recourse. Westerby agrees some information isn't on the marketing literature, but this is why the investment was limited

to high net worth and/or sophisticated investors or to those who'd received regulated financial advice.
- It has had sight of Dolphin of literature which explicitly confirmed that Dolphin wasn't regulated by the FCA nor covered by the FSCS. And while it recognises the concerns about some of the investment literature, Westerby took a cautious approach and didn't allow ordinary retail customers to access the investment, only high net worth or sophisticated customers, or those who'd been assessed and advised by a regulated financial adviser. And such clients ought reasonably to know there are risks and should undertake their own due diligence (or have receive advice) to assess the suitability of the investment.
- It's likely that Mr E would have found another SIPP provider and eventually invested in Dolphin elsewhere. It strongly refutes that another provider would have acted differently and not permitted Mr E's investment application.
- Mr E also intended to make other investments, such as in a 'wrap' and as such a SIPP might not have been unsuitable for him in its entirety. And we've recognised that Mr E always intended to transfer his pension. So undertaking a full notional transfer value redress calculation is excessive and should be limited to any loss Mr E incurred as a result of making the Dolphin investment alone.
- It doesn't agree that it is reasonable to assume Mr E is likely to be a basic rate taxpayer. It thinks it's more likely that he is a higher rater taxpayer given the level of assets he declared when he made the 2017 Dolphin investment.

In respect of requests made in my provisional decision for Westerby to provide particular documents and information, Westerby said that it had already provided us with all relevant due diligence obtained by it and that it would do so again. Our Investigator chased this and asked Westerby to provide anything further – that is, on top of what it had already submitted to us on Mr E's case, and on top of that which it recently submitted to us in respect of another similar case against it concerning Firm B and the same investment – by 2 December 2024, after which he said we'd assume it had nothing additional to provide. But Westerby didn't respond.

What I've decided – and why

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

Having done so, I remain of the view that we can consider Mr E's complaint, and that it should be upheld, for largely the same reasons as those set out in my provisional decision, which I've largely repeated below.

When deciding what's fair and reasonable in all the circumstances of this complaint, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I think was good industry practice at the relevant time.

While I've considered the entirety of the detailed submissions the parties have provided, my decision focuses on what I consider to be the central issues. The purpose of my decision isn't to comment on every point or question made, rather it's to set out my decision and reasons for reaching it.

Preliminary point – jurisdiction

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

While Westerby doesn't seem to have disputed that Mr E's complaint has been referred to us in time for us to be able to consider it, I can't see that Westerby has consented to us considering this if it was made outside our time limits set out in the Dispute Resolution ('DISP') Rules – found in the Financial Conduct Authority's handbook – and DISP 2.8.2R in particular. So, for completeness, I've briefly considered the timescales in which Mr E made his complaint.

Having done so, even if Mr E's complaint was made more than six years after some of the events he complained of, I haven't seen anything that makes me think Mr E knew, or ought reasonably to have become aware, that he had cause for complaint **and** that Westerby was or might be responsible for this more than three years before he complained to it. So I'm satisfied Mr E's complaint was referred within the time limits and I've gone on to consider the merits of his complaint.

Relevant considerations

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

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

I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Westerby SIPP. And, HHJ Dight didn't consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither judgment said anything about how the Principles apply to an Ombudsman's consideration of a complaint. But, to be clear, I don't say this means *Adams* isn't a relevant consideration at all. As noted above, I've taken account of both judgments when making this decision on Mr E'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 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 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 he was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal didn't so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

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

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

I note there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams (summarised in paragraph 120 of the Court of Appeal judgment) and the issues in Mr E's complaint. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened after the contract was entered into. And he wasn't asked to consider the question of due diligence before Options SIPP agreed to accept the investment into its SIPP.

In Mr E's complaint, amongst other things, I'm considering whether Westerby ought to have identified that the business introduced by Firm B and the Dolphin investment involved a significant risk of consumer detriment. And, if so, whether it ought to have declined to accept Mr E's applications.

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

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

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

I also want to emphasise that I don't say that Westerby was under any obligation to advise Mr E on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mr E on the merits of the SIPP and/or the underlying investments. But I am satisfied Westerby's obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions from particular businesses.

The regulatory publications

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

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

I've considered the relevance of these publications. And I've set out material parts of the publications here, although I've considered them in their entirety.

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 Businesses ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

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

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

- *Having Terms of Business agreements governing relationships, and clarifying* *respective responsibilities, with intermediaries introducing SIPP business.*

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

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

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

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

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

The later publications

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

> *"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*
>
> *All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a 'client' for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."*

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

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

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

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

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

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

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

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

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

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

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

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

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

*"**Due diligence***

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

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

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

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

    - *ensuring that introducers have the appropriate permissions, qualifications and*

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

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

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

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

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

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

- correctly establishing and understanding the nature of an investment

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

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

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

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

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

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

It's relevant that when deciding what amounted to 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.

At its introduction the 2009 Thematic Review Report says:

> "*In this report, we describe the findings of this thematic review, and make clear what we expect of SIPP operator firms in the areas we reviewed. It also provides examples of good practices we found*."

And, as referenced above, the report goes on to provide "…*examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms*."

So, I'm satisfied that the 2009 Report is a reminder that the Principles apply and it gives 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. The Report set out the regulator's expectations of what SIPP operators should be doing and therefore indicates what I consider amounts to good industry practice at the relevant time. So I remain satisfied it's relevant and therefore appropriate to take it into account.

In Westerby's submissions on other cases with our Service involving SIPP due diligence, including when making its points about regulatory publications, it has referenced the *R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017] EWHC 352 (Admin) case. While the judge in that case made some observations about the application of our statutory remit, that remit remains unchanged. And, as noted above, in considering what's fair and reasonable in all the circumstances of a case, I'm required to take into account (where appropriate) what I consider to have been good industry practice at the relevant time.

I think the Report is also directed at firms like Westerby acting purely as SIPP operators, rather than just those providing advisory services. The Report says that "*We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses*…" And it's noted prior to the good practice examples quoted above that "*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*."

The remainder of the publications also provide a *reminder* that the Principles apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and to produce the outcomes envisaged by the Principles. In that respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I therefore remain satisfied it's appropriate to take them into account too.

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

I note Westerby's point that the judge in the *Adams* case didn't consider the 2012 Thematic

Review Report, 2013 SIPP operator guidance and 2014 "*Dear CEO*" letter to be of relevance to their consideration of Mr Adams' claim. But it doesn't follow that those publications are irrelevant to my consideration of what's fair and reasonable in the circumstances of this complaint. I'm required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider to amount to good industry practice at the relevant time.

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

The regulator also issued an alert in 2013 about advisers giving advice to consumers on SIPPs without consideration of the underlying investment to be held in the SIPP. The alert ("Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP") set out that this type of restricted advice didn't meet regulatory requirements. It said:

> *"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes).*
> *…*
> *Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.*
>
> *The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes."*

The alert didn't set new standards. It highlighted that advisers using the restricted advice model discussed in the alert generally weren't meeting existing regulatory requirements and set out the regulator's concerns about industry practices at the time.

To be clear, I don't say the Principles or the publications obliged Westerby to ensure the transactions were suitable for Mr E. It's accepted Westerby wasn't required to give advice to Mr E, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But as I've said above these are evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles. And, as per the FCA's Enforcement Guide, publications of this type "*illustrate ways (but not the only ways) in which a person can comply with the relevant rules*". So it's fair and reasonable for me to take them into account when deciding this complaint.

I find that the 2009 Report together with the Principles provide a very clear indication of what Westerby could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting Mr E's applications.

It's important to keep in mind the judge in *Adams v Options* didn't consider the regulatory publications in the context of considering what's fair and reasonable in all the circumstances, bearing in mind various matters including the Principles (as part of the regulator's rules) or good industry practice.

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

Submissions have been made about breaches of the Principles not giving rise to any cause of action at law, and breaches of guidance not giving rise to a claim for damages under the Financial Services and Markets Act. I've carefully considered these but, to be clear, it's not my role to determine whether something that's taken place gives rise to a right to take legal action. I'm deciding what's fair and reasonable in the circumstances of this complaint – and for all the reasons I've set out above I'm satisfied that the Principles and the publications listed above are relevant considerations to that decision.

And taking account of the factual context of this case, I think that in order for Westerby to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into Firm B/the business it was introducing and the Dolphin investments *before* deciding to accept Mr E's applications.

Ultimately, what I'll be looking at here is whether Westerby took reasonable care, acted with due diligence and treated Mr E fairly, in accordance with her best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mr E's complaint is whether it was fair and reasonable for Westerby to have accepted his SIPP application and Dolphin investment applications in the first place. So, I need to consider whether Westerby carried out appropriate due diligence checks before deciding to do so.

And the questions I need to consider include whether Westerby ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by Firm B and/or investing in Dolphin were being put at significant risk of detriment. And, if so, whether Westerby should therefore not have accepted Mr E's applications.

The contract between Westerby and Mr E

Westerby made some submissions about its contract with Mr E and I've carefully considered what it has said about this.

My decision is made on the understanding that Westerby acted purely as a SIPP operator. I don't say Westerby should (or could) have given advice to Mr E or otherwise have ensured the suitability of the SIPP or investments for him. I accept that Westerby made it clear to Mr E that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investments. And that the form Mr E signed confirmed, amongst other things, that losses arising as a result of Westerby acting on his instructions were his responsibility.

I've not overlooked or discounted the basis on which Westerby was appointed. And my decision on what's fair and reasonable in the circumstances of Mr E's case is made with all of this in mind. So, I've proceeded on the understanding that Westerby wasn't obliged – and wasn't able – to give advice to Mr E on the suitability of the SIPP or investments.

What did Westerby's obligations mean in practice?

In this case, the business Westerby was conducting was its operation of SIPPs. And I remain satisfied that, to meet its regulatory obligations, when conducting its operation of SIPPs business, Westerby had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind. To be clear, I don't agree that it couldn't have rejected applications without contravening its regulatory permissions by giving investment advice.

The regulators' reports and guidance provided some examples of good practice observed by the FCA during its work with SIPP operators. This included being satisfied that an introducer is appropriate to deal with and that a particular investment is appropriate to accept. That involves conducting due diligence checks to make informed decisions about accepting business. This obligation was a continuing one.

All in all I am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Westerby should have carried out due diligence which was consistent with good industry practice and its regulatory obligations at the time. And in my opinion, Westerby should have used the knowledge it gained from this to decide whether to accept or reject business or a particular investment.

Westerby's due diligence on Firm B

As I've said, Westerby had a duty to conduct due diligence and give thought as to whether to accept business from third parties arranging or advising on investments. That's consistent with the Principles and the regulators' publications as set out earlier in this decision. And this is also seemingly consistent with Westerby's own understanding of its obligations at the relevant time.

Westerby has said that it carried out due diligence on Firm B before accepting any business from it, including verifying at the point of acceptance of each SIPP that it remained authorised by the FCA and had the requisite permissions, for example.

These steps go some way towards meeting Westerby's regulatory obligations and good industry practice. But Westerby hasn't provided us with sufficient information when asked to persuade me that it conducted sufficient due diligence on Firm B before accepting business from it, or that it didn't fail to draw fair and reasonable conclusions from what it did know about Firm B.

<u>*The volume and type of business*</u>

An example of good practice identified in the FCA's 2009 review was:

> "*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*."

Given all that I've said above, I don't think simply keeping records without scrutinising the information would be consistent with good industry practice and Westerby's regulatory obligations. As highlighted in the 2009 review, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

While Westerby has provided us with some information – showing that it had access to information about the type and nature of introductions Firm B made to it – Westerby doesn't seem to have told us when exactly it received its first introduction from Firm B, what number introduction Mr E was to it or when exactly it received its last introduction from Firm B. Westerby also doesn't appear to have told us what percentage of the customers introduced by Firm B were proposing to transfer at least one pension with safeguarded benefits or from defined benefit occupational schemes. Nor what percentage these introductions accounted for of Westerby's new business over that period.

Looking at the information Westerby has provided though, it appears to have received a number of introductions – around 50 to 60 – from Firm B over the course of accepting business from it, which seems to have amounted to millions of pounds worth of business.

In addition, I can see that Westerby completed a one-page document titled '*Introducing IFA's to WTS*' around September 2012. And next to 'Type of Business Introduced' and 'Volume of Schemes in the last 12 months' in this, Westerby said it had received 'c40 SIPPs…' – which I understand to mean circa 40 SIPP applications – from Firm B during that time. So, of the 60 total introductions that Westerby received from Firm B, it seems to have received 40 of these between September 2011 and September 2012. As such, this shows that Westerby had received a significant amount of business from Firm B prior to receiving Mr E's introduction from it in October 2012.

I can also see from the information provided that a significant number of the Firm B introduced customers invested in non-standard investments with Westerby. And this is supported by Westerby having told us that clients introduced by Firm B often invested in non-standard assets selecting from a variety of investments, and then went on to invest the remainder of their SIPP pension monies into a 'wrap' portfolio made up of standard assets.

High risk non-standard investments are only suitable for a small proportion of the population – sophisticated/experienced and/or high net worth investors – and in small proportions though. Westerby has said that investors introduced by Firm B often had significant investment experience. As I've said though, high net worth and/or sophisticated investors make up a small proportion of the population. And I think Westerby should've been concerned that such a volume of introductions, which related almost exclusively to consumers investing in high risk non-standard investments, was unusual and ought to have given Westerby cause for concern.

So I think Westerby either was therefore aware, or ought reasonably to have been aware, that the type of business Firm B was introducing was high risk and therefore carried a potential risk of significant consumer detriment.

The availability of advice

Westerby has suggested that it took comfort from the fact that Firm B was a regulated adviser. But, in my experience, Firm B provided customers with restricted advice. And in similar complaints with our Service against Westerby involving Firm B, I've seen that customers might have been given some general investment information and introduced to the idea of non-standard investments by Firm B, but without it providing them with investment advice in respect of their particular circumstances.

Added to this, Firm B provided our Service with a template suitability report that it told us it used as a basis for SIPP transfer advice. And, looking at this template, the default wording was that the client was a moderately adventurous investor who wanted to utilise more alternative investment options and make loans to unconnected parties, invest in businesses and purchase shares, for example. While the template set out a recommendation to transfer existing pensions to a SIPP, it didn't set out that the adviser should also detail investment recommendations particular to a client's circumstances. Instead, while general risks of non-standard investments were set out, the template said that the client was free to give investment instructions to the adviser once they (the client) had decided on the amount of investments they wished to make into third party loans, for example. And that Firm B would then later advise them on a fund portfolio to balance their holdings – seemingly the 'wrap' portfolio made up of standard assets that Westerby has said that Firm B introduced customers often went on to make within their Westerby SIPPs.

So I think the template clearly allowed for Firm B to point the customer in the direction of non-standard investments, without making a recommendation on the underlying investments based on the customers circumstances.

And I think Mr E's correspondence with Firm B is a further example that it wasn't doing things in a conventional way, for the following reasons.

I note that Mr E told Firm B in August 2012 that he'd like it to find him a SIPP on an execution only basis, to allow him to invest in unlisted shares, third party loans and property, as well as listed shares. And that Mr E signed Firm B's pre-typed letter confirming he only wanted it to transact the SIPP creation, he hadn't sought advice on the transaction and contract, nor its suitability, and that once the SIPP was created it would advise Mr E on how he should invest the funds.

But, prior to this, in March 2011, Mr E had already confirmed to Firm B that a main objective of his was to know if a SIPP would be better for him than his SSAS. And I can see Mr E formally instructed Firm B in March 2012 based on his March 2011 objectives. In addition, in July and August 2011, Firm B had already told Mr E that Westerby could do a SSAS takeover and that '*once the SIPP is set up*' then it could review again the fund strategy and decide '*which baskets and which eggs are right for* [Mr E]'. And, while Mr E's SIPP application wasn't made and accepted by Westerby until around October 2012, Firm B's notes show it was in touch with Westerby about a SIPP for Mr E from as early as August 2011. So the evidence shows that, from the outset, Firm B laid a clear path for Mr E to switch to a Westerby SIPP. And this is in line with Mr E's testimony that he understood that Firm B had advised him to do so.

However, there's nothing to suggest Firm B provided Mr E with any formal advice particular to his circumstances in respect of the intended investments. That is other than some very general information during one of its first emails with him. Instead, as set out above, I can see Mr E was told in writing by Firm B on a few occasions that it would review the investment strategy and decide which investments were right for him once the Westerby SIPP was set up.

In which case, as I've said, Firm B wasn't doing things in a conventional way. It's likely Firm B wasn't advising customers, like Mr E, on the suitability of the investments, including the risks and issues associated with this in respect of their particular circumstances, when advising them to transfer/switch to a Westerby SIPP. Firm B wasn't undertaking to proffer full regulated advice on the suitability of the overall proposition, despite being a regulated business that seemingly had permissions to do so. And the possibility full regulated advice hadn't been given or made available to customers was a clear and obvious potential risk of consumer detriment here.

Third party involvement

I don’t think it’s credible in the circumstances that Mr E independently and proactively determined to switch to a Westerby SIPP in order to invest his pension monies in high risk non-standard investments, like Dolphin, by himself.

And, in Mr E’s case, I think it’s unusual that the pension objectives he and Firm B set out around March 2011 significantly changed in August 2012. Mr E’s March 2011 objectives were to consolidate his pensions, to know if a SIPP would be better than his SSAS and to use his pensions to help further his property plans (noted as raising funds for HMO/property investments). Whereas Mr E’s August 2012 objectives changed – shortly before his switch to the Westerby SIPP in October 2012 – to largely reflect a desire to switch his pensions monies to invest in, such as third-party loans. Mr E has consistently said that Firm C heavily promoted high-risk non-standard investments, including Dolphin, to him. And it’s reasonable to think that Firm C’s involvement is likely what impacted on the significant change in Mr E’s pension objectives.

In addition, in similar cases with our Service against Westerby involving Firm B and similar investments, customers, including Mr E, have said they were advised by Firm B on the transfer to the Westerby SIPP and then referred by it (Firm B) to a Mr B of Firm C shortly after, which promoted and/or facilitated the non-standard investments. I note Mr B was previously a director of Firm B and that, at one point, he’d been an investment adviser for it, such that I think it’s fair to say Firm B and Firm C were closely associated. And it seems most customers remained in some contact with Firm B during this time, with it later recommending that some customers also invest in a portfolio of funds to rebalance some of the risk taken with the non-standard investments made (through Firm C’s involvement) following the transfer.

While I recognise Mr E has said he didn’t choose to invest in Dolphin via Firm C in the end – he ultimately invested in this in 2014 via Elite Wealth Limited instead – the above is in line with Mr E’s testimony that he had lengthy conversations with Mr B of Firm C about Dolphin. And that Firm C promoted/advised him to invest in Dolphin, where Mr B also explained that he’d visited the investment and invested in it himself.

I’ve also seen evidence that Firm C, and therefore likely Firm B, was aware that certain providers, including Westerby, were accepting certain high risk non-standard investments, supporting that this was part of the intended business model in recommending customers switch to a Westerby SIPP without having been provided with advice on the investments. For example, in a similar complaint with our Service involving Firm B and similar investments, I can see that Firm C emailed a customer in July 2013 setting out a list of such investments that it said were approved by Westerby.

So it seems that Firm B’s business model was set up in a way that it didn’t provide customers, including Mr E, with full regulated advice on the overall proposition. And that their pension monies were likely transferred to a Westerby SIPP with the intention of enabling high risk non-standard investments with Firm C’s involvement. And I think this was a potential risk of consumer detriment.

In addition, while Firm C seemingly wasn’t authorised to provide advice at the time, as supported by its website in September 2012 which said this in small print, in similar cases with our Service concerning Firm B and similar investments I’ve seen that Mr B of Firm C still told customers in May 2013 in respect of alternative investments, for example, that:

> 'To help put them into context with your other investments, I would suggest they would be classed as **'less risky' than the third party loans you have already made**.' (my emphasis).

And, in July 2013, Mr B said in respect of a visit he'd made to Dolphin that:

> '…I was genuinely blown away with what I saw. So much so, that quite unexpectedly, it dawned on me during the flight home that it's **not just people like you who should take advantage of this opportunity. I should do so to**.' (my emphasis).

What should Westerby reasonably have done?

Westerby could simply have concluded that, given the potential risks of consumer detriment – which I think were clear and obvious at the time – it shouldn't have continued accepting applications from Firm B and before it received Mr E's application. That would have been a fair and reasonable step to take, in the circumstances. Alternatively, Westerby could have taken fair and reasonable steps to try to address the potential risks of consumer detriment in the first instance.

Requesting information directly from Firm B

As part of its due diligence on Firm B, I think it's fair and reasonable to expect Westerby, in line with its regulatory obligations, to have made some specific enquiries and obtained information about Firm B's business model at the outset. Westerby ought to have found out more about how Firm B was operating *before* it accepted business from it.

As set out above, the 2009 Thematic Review explained that the regulator would expect SIPP operators to have procedures and controls, and for management information to be gathered and analysed, so as to enable the identification of, amongst other things, '*consumer detriment such as unsuitable SIPPs*'. Further, that this could then be addressed in an appropriate manner '…*for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification'*.

The October 2013 finalised SIPP guidance gave an example of good practice as:

> *'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.'*

I think that Westerby, prior to accepting business from Firm B, should've checked with it about things like: how it came into contact with potential clients and the types of clients it dealt with, what agreements it had in place with them, whether all of the clients it was introducing were being offered full regulated advice, what its arrangements with any unregulated businesses or third parties were, how and why clients were interested in making these esoteric investments, whether it was aware of anyone else providing information to clients and what material was being provided to clients by it. And it was also open to Westerby to mention to Firm B any requirements it had before doing so, such as for full regulated advice to be made available to applicants.

While Westerby has said that it had TOB in place with Firm B, the only evidence I can see that Westerby has sent in support of this is a document labelled 'IFA TOB' that Firm B completed. This dates from March 2022 though and was a 'know your introducer' questionnaire, rather than a TOB. This questionnaire said at the top that it was for Westerby to understand Firm B's organisation better prior to it considering issuing TOB, I think also suggesting Westerby hadn't previously sought to gather this type of information from Firm B or considered putting TOB in place with it. I haven't seen anything to suggest that Westerby had previously put TOB in place with Firm B. And while Firm B said on this questionnaire that it provided full advice in respect of pension transfers and the underlying investments including on non-standard investments, for example, this was completed many years after Firm B had been introducing business to Westerby.

I can see from the document mentioned above, titled 'Introducing IFA's to WTS', that Westerby said it had contact with Firm B in September 2012 and that half yearly meetings had been proposed on top of the usual daily contact. I haven't seen any evidence to show whether these half yearly meetings did in fact take place and what was discussed at these though. Westerby provided evidence of an agenda for a meeting with Firm B in March 2013, but I can't see that Westerby has provided us with evidence of what was discussed. And, in any event, Westerby hasn't suggested or provided evidence to show that it discussed Firm B business model with it *before* accepting introductions from it.

Westerby has said that Firm B provided assurance it had controls to ensure only clients for whom higher risk non-standard assets might be suitable would be introduced to Westerby. As I've said though, I've seen no evidence that Westerby obtained the type of information I've set out above from Firm B before accepting business from it.

And, in any event, I think it's more likely than not that if Westerby had asked Firm B for the type of information I've set out then it would have provided a full response to the information sought. And Westerby would therefore have become aware of the type of information I've set out above, including Firm B's restricted advice and likely business model, for example, and the resulting significant potential risk of consumer detriment. Either from those initial discussions with it or more detailed discussions this ought to have led to.

As I've said, Firm B told us that it used the SIPP transfer suitability template that I've mentioned above – it was open with our Service about that – and I've no reason to think that it wouldn't have provided Westerby with this type of information or a copy of this, for example, as part of answering enquiries.

In the alternative, if Firm B had been unwilling to answer such questions if put to it by Westerby, I think it should simply then have declined to accept introductions from Firm B.

Westerby might say that it didn't have to obtain this information from Firm B. But I think this was a fair and reasonable step to take, in the circumstances, to meet its regulatory obligations and good industry practice. And, in that case, I think Westerby should have concluded, and before it accepted Mr E's business from Firm B, that it shouldn't accept introductions from it.

Making independent checks

In light of what I've said above about the potential risks of consumer detriment from the pattern of business being introduced to it by Firm B introduced customers, for example, I think it would also have been fair and reasonable for Westerby, to meet its regulatory obligations and good industry practice, to have taken independent steps to enhance its understanding of the introductions it was receiving from Firm B.

The 2009 Thematic Review Report said:

> *'…we would expect* [SIPP operators] *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.'.

The 2009 Thematic Review Report also said that an example of good practice was:

'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.'

So I think it would've been fair and reasonable for Westerby to speak to some applicants directly, to seek clarification on whether they'd been offered full regulated advice on their transactions and/or seek copies of the suitability reports, for example.

To be clear, I accept Westerby couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps included addressing a potential risk of consumer detriment by seeking clarification from Firm B, speaking to applicants and/or having sight of advice letters. This could have provided Westerby with further insight into Firm B's business model and helped to clarify to Westerby whether full regulated advice on the overall proposition was being offered/given. I think these were fair and reasonable steps to take in reaction to the risks of consumer detriment I've mentioned.

If Westerby had undertaken the type of due diligence I've mentioned above, then I think it ought reasonably to have identified, and before it accepted Mr E's application, that Firm B's business carried a significant risk of consumer detriment, there were anomalous features, Firm B had a disregard for its consumers' best interests and wasn't meeting many regulatory obligations.

As I've said, it seems that Firm B (and Firm C, an unregulated firm which I think was closely associated with Firm B for reasons given above) was seeking to transfer consumers pension monies to Westerby SIPPs with the intention of these being invested in higher-risk esoteric investments without having offered or provided such customers, including Mr E, with full regulated advice. This is an unusual role for an advisory firm to take and against regulatory requirements. And I think Westerby either was aware, or ought reasonably to have been aware, that the type of business Firm B was introducing was high risk and therefore carried a potential risk of consumer detriment, which could result in customers losing their pension savings.

In summary

I think Westerby should have identified that the business it was receiving from Firm B raised serious questions about its motivation and competency. And I think Westerby should have concluded, and before it received Mr E's business from Firm B, that it shouldn't accept introductions from Firm B. I therefore conclude that it's fair and reasonable in the circumstances to say that Westerby shouldn't have accepted Mr E's SIPP application from Firm B.

Westerby didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr E fairly by accepting his application from Firm B. To my mind, Westerby didn't meet its regulatory obligations or good industry practice at the relevant time, and allowed Mr E to be put at significant risk of detriment as a result.

As I've explained above, Westerby shouldn't have accepted Mr E's introduction from Firm B in first place. I think it is fair and reasonable to uphold this complaint on that basis alone. Even if I thought differently, I've also considered the due diligence that Westerby carried out on the Dolphin investment and I've decided to uphold Mr E's complaint, for the reasons given below. When doing so, I have taken the same approach to considering this as I did to considering the due diligence undertaken on Firm B.

Westerby's due diligence on the Dolphin investment

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

This shows that prior to permitting the Dolphin investment into its SIPPs seemingly around or prior to August 2013 (and therefore prior to accepting Mr E's 2014 and 2017 applications to invest in this) Westerby reviewed, amongst other things, the following, which was seemingly provided to it by Dolphin as part of a due diligence pack:

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

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

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

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

- It had been asked to assist in Westerby's review process on a proposed investment to assess its capability of being held within a pension arrangement.
- While internet searches on the parties involved, including Dolphin and the German

law firm for example, didn't highlight any adverse history, information was limited due to the overseas domicile of some parties.
- Investors are granted legal charge over the property, which is registered to the SPV. Although it was seemingly later clarified by the German law firm that investors weren't granted this, as the trustee held the legal charge.
- The structure of the investment and that annual interest is paid half yearly under the Income Option, although no documentation seen indicates when the payment dates are.
- There's no exit strategy, as each project is tied into a SPV established for the particular listed building. The project dictates when the SPV closes and the process is meant to be automatic.
- All investment monies will be held in a protected solicitors account with the German law firm.
- Valuations reports will be provided on an annual basis, but there doesn't appear to be anything within the documentation that states where the valuations will be published.
- As the investment is in Germany, no FSCS protection is offered. Only claims against an FCA regulated adviser, where advice is given, may be covered in the event of default.
- The review was based on the following documents:
    - Undated Dolphin Information Sheet – I can't see that Westerby has provided us with a copy of this from the time, despite being asked to do so by the deadline to respond to my provisional decision. I've only been provided with a copy dated much later, from 2017.
    - Frequently Asked Questions sheet undated – I can't see that Westerby has provided us with a copy of this, despite being asked to do so by the deadline to respond to my provisional decision.
    - Information Memorandum dated September 2013 – I can't see that Westerby has provided us with a copy of this, despite being asked to do so by the deadline to respond to my provisional decision. The earliest copy provided is dated September 2014.
    - Sample Loan Note Offer unsigned and undated.
    - Further Opinion Note signed and dated 18th September 2013.
    - QC Opinion Note signed and dated 11th April 2013.
- In conclusion, under '*Any other comments*', it suggested that SIPP operators obtain an acknowledgement from members of the high risk, illiquid nature of this investment. It also went on to confirm that the investment was capable of being held in a SIPP.

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

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

<u>Third party report</u>

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

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

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

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

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

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

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

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

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

- '*FIXED RETURN OF 12% per annum on capital invested*' (no emphasis added).
- Another UK SIPP provider had already approved the investment, '*thoroughly assessed it and described it as a **Low Risk** investment opportunity*' (emphasis added).
- '*A **simple** and totally transparent process*' (emphasis added).
- A UK based law firm had assessed that the investment as compliant with UK company, regulatory and pension legislation.
- It said in bold type that an exclusive agreement had been reached with Four Gates, a major German Fund Provider, who had agreed to purchase at least €100m worth of property from Dolphin, per annum, over the next five years.
- Investment funds are sent directly to the German law firm, who hold the funds in a

secure account until the purchase of the property takes place and security documentation is issued.
- That '*UK Investors are* ***investing into the Dolphin structure, which simply uses German Listed Buildings as the underlying asset class. UK Investors do not have to consider the usual risks, legal responsibilities or on-going costs that are often associated with buying or owning property abroad.***' (no emphasis added).

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

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

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

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

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

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

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

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

- It wasn't authorised or regulated by Germany's financial regulation authority, or that in Ireland or any other jurisdiction.
- Particular regard should be given to the risks page.
- Investors must understand that the risks associated with unregulated investments, including real estate investment, such as economic factors which can positively and negatively affect market values.
- Investors are recommended to take tax, legal and other advice they may consider necessary to consider the benefits and risks.
- It reserved the right to require potential investors to sign a consent that they are either high net worth or sophisticated and that they have taken authorised advice before entering into any investment opportunity.
- Prospective investors are required to sign a notice confirming that independent financial advice has been taken.

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

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

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

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

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

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

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

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

<u>Dolphin's accounts</u>

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

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

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

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

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

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

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

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

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

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

> *'150. The tests for a commingling of assets in the relationship between the insolvency debtor* [DC80] *and its limited partner, AS German Property Group GmbH, are met.*
>
> *151. There are no properly prepared, approved and published annual financial statements for the insolvency debtor. Documents were only able to be identified at all for the years 2011, 2012, 2014, 2015 and 2018; these suggest that annual financial statements should have been prepared. However…these documents do not comply with commercial law regulations…*
>
> …
>
> *153. With regard to proper accounting in accordance with § 238 HGB* [HGB seemingly being Germany's commercial code and accounting standards for how companies must prepare and report financial statements]*, it is not readily possible for an expert third party to obtain an overview of the business transactions and the situation of the business.*
>
> *…*
>
> *161. The breach of the obligation to keep accounts in the qualified case of the absence of proper and comprehensible accounts as a whole is demonstrable in the present case…'*

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

<u>The investment structure</u>

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

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

German law firm was the contact person in respect of the trust, rather than the security trustee itself.

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

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

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

  Westerby has provided a significant number of documents in written in German, seemingly containing development plans, drawings, district approvals and registry documents, for example, dating from 2012 to 2014. And while some do appear to include documents discussing granting of security to the security trustee, I can't see that these set out which loan note holders the particular charges were in favour of. If Westerby thinks otherwise, it should point us to the particular documents it feels support its position and provide these in English translation.

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

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

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

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

And that:

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

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

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

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

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

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

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

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

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

  'As already indicated, the business/advertising model of the insolvency debtor was

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

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

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

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

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

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

Investment due diligence summary

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

- There was no investor protection associated with this investment – investors didn't have recourse to our Service or the FSCS.
- It was illiquid – there was no exit strategy, the customer couldn't sell their interest in the investment and realising it was project dependent.
- It was being targeted for investment by pension investors, it was a speculative overseas based investment with inherent high risks that made it very obviously unsuitable for all but a small category of investors and even then, only a small part of such an investor's portfolio.
- The high projected and fixed returns set out should have been questioned. I don't expect Westerby to have been able to say the investment would have been successful. But such high projected returns without any apparent basis should have given Westerby cause to question its credibility.
- The investment didn't operate as it was marketed: invested monies weren't held in escrow then allocated to a specific property, for years (if not from the outset) it was operated as a Ponzi scheme with repayments funded by incoming investments and the German law firm hadn't been on retainer since 2014.

- The lack of properly prepared and approved annual financial statements should have been questioned.
- The marketing material either didn't contain, or was unclear, as to the risks associated with the investment. So, Westerby should have been concerned that consumers may have been misled or did not properly understand the investment they intended to make.
- It misled investors in relation to the security of their investment.
- While the loan notes were seemingly governed by UK law, the properties these were in respect of were based overseas and would be subject to the domestic laws and regulations that apply in respect of the sale and purchase of these. That created additional risk.

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

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

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

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

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

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

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

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

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

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

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

Mr E's 2017 Dolphin application and surrounding documentation

Westerby's due diligence obligations were ongoing, so it also had a duty to give thought to Mr E's 2017 Dolphin investment application and surrounding documentation and whether to whether to accept this. That's consistent with the Principles and the regulators' publications as set out earlier in this decision.

As already noted, Westerby has said that it restricted investments into SIPPs to cases where either (a) the SIPP member met the FCA's definition of a high net worth or sophisticated investor, who could reasonably be expected to understand the risks, or (b) where the SIPP member had been advised to make the investment by a regulated financial adviser.

Mr E ticked to say he was acting on a 'non-advised' basis on Westerby's 2017 non-standard asset questionnaire. And Westerby has recognised that Mr E had ended his relationship with Firm B by that time. So Westerby was seemingly aware, or put on notice, that a regulated financial adviser wasn't involved in Mr E's 2017 Dolphin investment application.

I recognise Mr E earnt well and had net assets above £250,000. So, while Ms R wasn't *certified* as a high-net worth investor as per COBS 4.12 Restrictions on the promotion of non-mainstream pooled investments (which I understand to be the particular FCA rules that Westerby has referred to), Westerby might have taken comfort that he might be considered high net-worth. However, COBS 4.12.9G set out that 'A *retail client* who meets the criteria for a *certified high net worth investor* but not for a *certified sophisticated investor* may be unable to properly understand and evaluate the risks of the *non-mainstream pooled investment* in question.'.

From what I can see Mr E wasn't a *certified* sophisticated investor under COBS 4.12.7R. At no point had he been assessed by a regulated firm as 'sufficiently knowledgeable to understand the risks associated with engaging in investment activity in *non-mainstream pooled investments*'.

Mr E said he was high net worth on Westerby's October 2017 non-standard asset questionnaire. And I recognise that by this point Mr E seemingly now had some experience of other high-risk non-standard investments and that his 2014 Dolphin investment had produced a return. But he didn't choose to complete the section which said he was a self-certified sophisticated investor. And, while Westerby did receive a completed self-certified sophisticated investor statement from Mr E shortly after it received the October 2017 questionnaire, this was alongside an appropriateness document from Elite Wealth Limited, which said that it had assessed the suitability/appropriateness of the Dolphin investment for Mr E. And I think there was a clear and obvious potential risk of consumer detriment here, considering that Elite Wealth Limited was an unregulated firm that wasn't authorised to assess this for Mr E.

I haven't seen anything to suggest that Westerby carried out checks on the content of the documentation provided to it though, with Elite Wealth Limited or Mr E. Instead Westerby accepted the forms and approved Mr E's further Dolphin investment application shortly after.

In addition, as set out above, it was widely promoted that the funds of those who invested in Dolphin would be paid to the German law firm, held in escrow by it and only made available to the debtor in certain circumstances, I think reassuring investor's as to the security of the investment and that it was again 'low risk'. For example, the UK brochure referenced above said that:

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

However, the Loan Note Offer document that I've seen in respect of Mr E's 2017 Dolphin application said that his funds would be paid to an account in the name of 'TTT Moneycorp Ltd GBP Client Safeguarding Account'. And at the bottom it said that once Dolphin had received this signed Loan Note Offer Letter and the investment money had been banked by Moneycorp – rather than the German law firm – then Mr E would receive the Loan Note Certificate.

I don't think it's necessary for me to consider Westerby's ongoing due diligence into the Dolphin investment, and in respect of Mr E's 2017 Dolphin investment application, any further though. Nor what further steps I think it ought reasonably to have taken (if any). This is due to my conclusion that Westerby failed to comply with its regulatory obligations and good industry practice by accepting business from Firm B and by permitting the Dolphin investment in its SIPPs in the first place.

As explained, I'm satisfied that Westerby didn't treat Mr E fairly or reasonably when it accepted his SIPP application from Firm B, nor when it later accepted his Dolphin applications. And, for reasons already given and which I'll come on to further below, if that had been declined/rejected then I think it's likely Mr E's Westerby SIPP would not have been opened and that the Dolphin investments would not have been made.

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

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

Before considering this point, I think it is important for me to reiterate that, it was not fair and reasonable for Westerby to have accepted Mr E's SIPP application in the first place. So in my opinion, Mr E's SIPP should not have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity should not have arisen at all.

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

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

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

Indemnities

In my view it's fair and reasonable to say that just having Mr E sign declarations wasn't an effective way for Westerby to meet its regulatory obligations to treat him fairly, given the concerns Westerby ought to have had about Firm B, Mr E's introduction by it and then the intended investments. Such forms intended to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on such indemnities when Westerby knew, or ought to have known, Mr E's dealings with Firm B and then the intended investments were putting him at significant risk wasn't the fair and reasonable thing to do. In the circumstances I think very little comfort could have been taken from any declaration stating that Mr E took responsibility for his decisions and understood the risks. Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse to accept Mr E's applications.

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

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

I'm satisfied that Mr E's Westerby SIPP shouldn't have been established and the opportunity to execute investment instructions or proceed in reliance on such indemnities shouldn't have arisen at all. And I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for Westerby to proceed with Mr E's applications.

Is it fair to ask Westerby to compensate Mr E?

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

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

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

For the reasons I've given above, Westerby shouldn't have accepted business from Firm B and prior to Mr E's introduction to it in October 2012. And it should also not have permitted the Dolphin investment within its SIPPs and prior to Mr E's applications to invest in this through his Westerby SIPP in 2014 and then 2017. So thinks shouldn't have gotten beyond that.

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

I recognise Mr E had other reasons transferring his pension, such as consolidating his pensions and moving away from the administration of his SSAS. And that the first Dolphin investment was made in 2014 when the transfer to the Westerby SIPP was made in late 2012. However, for reasons given above, I'm satisfied that it's more likely than not that Mr E's pension monies were transferred to a Westerby SIPP in particular, so as to enable high risk non-standard investments, such as Dolphin, as this was part of the intended business model of the firms involved (Firm B and Firm C).

I recognise Mr E had some investment experience (having previously invested in listed shares and a private company he was a director of, for example) at the time of Firm B's advice and his Westerby SIPP application. But there's nothing to suggest Mr E was otherwise concerned with making high risk non-standard investments, like Dolphin, with his pension monies prior to Firm B and the unregulated third-parties involvement. Instead, as set out above, Mr E's objectives when he first sought advice from Firm B were to consolidate his pensions, change the SSAS to a SIPP and use his pension funds to further his HMO/property investments.

And had Westerby, as a regulated firm, explained to Mr E even in general terms why it would not accept his applications or that it was terminating the transaction, I think Mr E is likely to have lost trust in Firm B. And without the above firm(s) involvement I don't think Mr E would have otherwise had any interest in investing in Dolphin, so I find it very unlikely that Mr E would still have sought to invest in this elsewhere.

In any event, I don't think it's fair and reasonable to say that Westerby shouldn't compensate Mr E for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I think it did. I think it's fair instead to assume that another SIPP provider acting reasonably would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted business from Firm B that was operating a restricted advice model against regulatory requirements. And that another provider would have also complied with its regulatory obligations and good industry practice and therefore wouldn't have permitted the Dolphin investment into its SIPPs, and prior to Mr E's applications to invest in this.

Had Westerby acted fairly and reasonably, and in accordance with its regulatory obligations and good industry practice, it should have concluded that it should not accept business from Firm B and that it shouldn't permit the Dolphin investment to be held in its SIPPs at all, and prior to receiving Mr E's respective applications. In which case, if Westerby hadn't accepted business from Firm B and then later permitted the Dolphin investment within its SIPPs then that should have been the end of the matter. Westerby should have told Mr E that it could not accept the business. And, for the reasons given, I am satisfied that if that had happened Mr E wouldn't have transferred to a Westerby SIPP and then later invested in Dolphin, the arrangement would not have come about in the first place, and the loss he suffered could have been avoided.

So I'm satisfied that Mr E would not have continued with his Westerby SIPP and later Dolphin applications, had it not been for Westerby's failings. And I consider that Westerby failed unreasonably to put a stop to the course of action when it had the opportunity and obligation to do so. And, whilst I accept other parties might have some responsibility for initiating the course of action that led to Mr E's loss, I consider that Westerby failed to comply with its own obligations and didn't put a stop to the transactions proceeding by declining to accept Mr E's applications when it had the opportunity to do so.

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

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

For the reasons I've set out, I'm satisfied that it would not be fair to say Mr E's actions mean he should bear the loss arising as a result of Westerby's failings. I do not say Westerby should not have accepted Mr E's Dolphin application because this was high risk. For the reasons given above, I'm satisfied that Mr E, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. And that, in any event, Mr E's applications should never have been accepted by Westerby.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr E and that he's already received some compensation. But in considering what fair compensation looks like in this case, I think it's reasonable to make an award against Westerby that requires it to compensate Mr E for the full measure of his remaining loss. Westerby accepted Mr E's business. And, but for Westerby's failings, I'm satisfied that Mr E's pension monies wouldn't have been switched to it and then later invested in Dolphin.

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

I am not asking Westerby to account for loss that goes beyond the consequences of its failings. I am satisfied those failings have caused the extent of the loss in question. That other parties might also be responsible for that same loss and that he's already received some compensation from those is a distinct matter. And that should not impact on Mr E's right to fair compensation from Westerby for the full amount of his remaining loss. The key point here is that but for Westerby's failings, Mr E wouldn't have suffered the loss he's suffered. As such, I'm of the opinion that it's appropriate and fair in the circumstances for Westerby compensate Mr E to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by other firms involved in the transactions.

I've carefully considered causation, contributory negligence, and apportionment of damages. But in the circumstances here and for the reasons I've given, I'm still satisfied it's fair and reasonable for Westerby to compensate Mr E for his full loss.

Mr E taking responsibility for his own investment decisions

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

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

So, overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair to say Westerby should compensate Mr E for the losses he's suffered. I don't think it would be fair to say in the circumstances that Mr E should suffer the loss because he ultimately instructed the transfer and investments to be effected.

What would have otherwise happened?

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

While, for the reasons given, I'm satisfied that Mr E wouldn't have otherwise transferred to the Westerby SIPP and then invested in Dolphin, I've also taken into account that Mr E was seeking to amalgamate his pensions and move away from the SSAS for administrative reasons.

I can't state definitively which provider would have been used, or into what holdings, and in what proportions the monies would have otherwise been invested. So, having carefully considered this, and given the lack of certainty on this point (including about the specific provider, holdings, and the specific proportions, monies would have been invested in post-transfer had transfers elsewhere still been effected), for the purposes of quantifying redress in this case I think the fair and reasonable approach is to assume that the pension monies in question would have achieved a return equivalent to the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return index). I'm satisfied that's a fair and reasonable proxy for the type of return that could have been achieved over the period in question.

Putting things right

In summary, Westerby should:

1. Calculate a notional value, as at the date of this decision, of the monies that were

transferred into the Westerby SIPP if they'd not been transferred into this.

2. Obtain the actual current value of Mr E's Westerby SIPP, as at the date of this decision, less any outstanding charges.

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

4. Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).

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

6. Pay Mr E £300 for the distress and inconvenience the problems with his pension have caused him.

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

1. Calculate a current notional value, as at the date of this decision, of the monies that were transferred into the Westerby SIPP if they'd not been transferred into it. To do this, Westerby should calculate what the monies transferred into the SIPP would now be worth had they instead achieved a return equivalent to that of the FTSE UK Private Investors Income Total Return Index from the date they were first switched into the Westerby SIPP through until the date of my final decision. I'm satisfied that's a reasonable proxy for the type of return that could have been achieved over the period in question.

   Westerby must also make a notional allowance in this calculation for any additional sums Mr E has contributed to, or withdrawn from, this SIPP since outset. To be clear this doesn't include SIPP charges or fees paid to third parties like an adviser.

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

2. Obtain the actual current value of Mr E's Westerby SIPP, as at the date of this decision, less any outstanding charges.

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

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

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

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

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

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

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

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

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

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

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

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

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

   I let Westerby and Mr E know that if either of them disputed that this is a reasonable assumption, they must let us know as soon as possible and that it won't be possible for us to amend this once any final decision has been issued on the complaint. And, while Mr E didn't dispute this, Westerby said that it doesn't agree that it is reasonable to assume Mr E is likely to be a basic rate taxpayer. It thinks it's more likely that he is a higher rate taxpayer given the level of assets he declared when he made the 2017 Dolphin investment.

   I've seen nothing to evidence Mr E will be a higher rate tax payer in retirement. And, while I acknowledge that in 2017 it seems Mr E had, and he may well still have, significant assets, I can see that the vast majority of this was tied up in property and investments. At the time Mr E only had cash savings of around £10,000 and it seems his entire personal pension provision (aside from state pension) was that which was transferred to his Westerby SIPP, only totalling around £161,000. So, having considered Westerby's comments, I'm not persuaded Mr E is likely to be a higher rate taxpayer *in retirement* and I'm not minded to change my view.

6. Pay Mr E £300 for the distress and inconvenience the problems with his pension have caused him.

   In addition to the financial loss that Mr E has suffered as a result of the problems with his pension, I think that the loss suffered to Mr E's pension provision has likely caused him distress. Mr E lost a significant proportion of his pension provision, Mr E was also in his late-60's when he lost his investments and I think this is likely to have caused him worry. And I think that it's fair for Westerby to compensate him for this as well.

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

SIPP fees

If the investment/s can't be removed from the SIPP, and because of this it can't be closed once compensation has been paid, then it wouldn't be fair for Mr E to have to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investments and is used only or substantially to hold those assets, 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 E or into his SIPP within 28 days of the date Westerby receives notification of Mr E's acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation isn't paid within 28 days.

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

My final decision

For the reasons given, my final decision is that I uphold Mr E's complaint and Westerby Trustee Services Limited must pay fair redress as set out above.

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

Determination and award: I require Westerby Trustee Services Limited to pay Mr E the compensation amount as set out in the steps above, up to a maximum of £160,000.

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

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

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr E to accept or reject my decision before 10 January 2025.

Holly Jackson
Ombudsman