The complaint

Mr H complains that Westerby Trustee Services Limited ('Westerby') had a duty of care to him when accepting his application for a Self-Invested Personal Pension ('SIPP').

Mr H transferred a pension plan ('PP') he held with the Co-operative into the SIPP he opened with Westerby and the monies were invested in holdings that haven't performed as well as hoped. Mr H asks to be put back into the position he would have been in had he not transferred his PP into the SIPP.

What happened

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

Mr H says that his accountant put him in touch with Mr F, who advised him to transfer his pension plan. He says he wasn't looking to transfer his pension until Mr F advised him it would be a good thing for him to do.

A Westerby SIPP application form was signed by Mr H on 21 May 2013. Section 9 of the application says;

> "*Do you have a financial advisor?*"

This was answered *"yes"* and the details of Mr F of Joseph Oliver were added. It was also instructed that an initial commission of 5% of the total transfer/s should be paid to Joseph Oliver. There was no fee suggested for single contributions.

As I understand it the SIPP was established on 3 June 2013, a complaint was raised by Mr H in July 2018, within 6 years of the event complained about.

It was noted in the application form that pension monies worth around £33,000 in total were to be transferred in from Mr H's PP with the Co-operative. Funds in the sum of £37,883.40 were received into Mr H's SIPP on 26 June 2013.

Westerby says it understood Mr F was, at the time of the application, an appointed representative of Joseph Oliver – Mediacao de Seguros LDA ('Joseph Oliver'), a financial advisory firm based in Portugal. At the relevant time, Joseph Oliver passported into the UK under the Insurance Mediation Directive ('IMD'). This means that Joseph Oliver was an European Economic Area ('EEA')authorised firm and permitted to carry out some regulated activities in the UK.

An application form for an investment platform called ePortfolio Solutions, distributed in the UK by a business called Asset Management International ('AMI'), was also completed. This recorded the financial advisor as Mr F and the advisory firm as Joseph Oliver Marketing Limited ('JOML'). JOML was a UK registered company, which was not authorised by the

Financial Conduct Authority ('FCA'). An investment was made in the sum of £34,789.23 on 2 July 2013. I understand the investments made were in the Kijani and Swiss Asset Micro Assist Income Fund (SAMAIF) funds.

On 17 May 2013, Joseph Oliver wrote to Westerby, to say Mr F had terminated his agreement with it and that, following this, Mr F's clients would return to him. On the same day Abana Unipessoal Lda ('Abana') – another financial advisory firm based in Portugal – wrote to Westerby to explain that Mr F's clients were to be transferred to it. It appears these letters were received by Westerby on 28 May 2013. So, Abana became the financial advisory firm associated with Mr H's SIPP after this date.

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

On 11 November 2014, Westerby wrote to Mr H about his investments in the Kijani and Swiss Asset Micro Assist Income Fund (SAMAIF) funds. It explained that the funds would, following a Policy Statement from the FCA in August 2014, be considered to be non-standard assets. It explained that the funds might be higher risk than Mr H originally considered. Its letter also said the Mauritian Financial Services Commission ('MFSC') had issued enforcement orders against companies under which both the Kijani and the SAMAIF funds were 'cells'.

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

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

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

- The Kijani fund was being investigated by auditors. The fund managers had taken the decision to liquidate all assets and return client investments within 30 to 60 days.
- This information had been given to Westerby by AMI, but it hadn't been able to ascertain who made the statement originally.
- Some investors had made redemption requests over 90 days ago but not received any money.
- The advisor dealing with Abana clients (by this point a Mrs B, not Mr F) had become "*directly authorised with the FCA*" under a new firm – Abana (FS) Ltd.
- Abana customers were in the process of being novated (moved over) to Abana (FS) Ltd.

- Again, it strongly urged Mr H to contact his "*regulated financial advisor*", (referring, I assume, to Abana (FS) Ltd). It didn't however ask Mr H to confirm whether he wanted to continue to hold the investments on this occasion.

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

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

In the accompanying letter Westerby explained that Abana customers weren't, in fact, being novated to Abana (FS) Ltd. Westerby said it understood the reason for this was that Abana didn't consider Abana (FS) Ltd to be suitably independent to provide advice on Mr H's SIPP. Westerby urged Mr H to have his SIPP reviewed immediately by an independent financial advisor with the necessary permissions. It also said if Mr H had any queries about its letter, he should address them to a Mr G of Abana and it provided Mr G's contact details.

In a letter to investors dated 10 September 2015, that I have seen on other complaints, Westerby explains that trading on the ePortfolio Solutions platform was suspended pending the appointment of new management and reconciliation of funds. This letter also stated that the Kijani Fund was suspended, the SAMAIF was suspended, the International Money Market Fund was suspended and that the TCA Global Fund could not be accessed due to the suspension of the ePortfolio Solutions platform pending appointment of new management. Regarding the Kijani Fund the letter also explains that there remains a high degree of uncertainty about the return of funds to investors and that it could take a number of years for matters to be dealt with completely.

Westerby wrote to Mr H again in December 2015, it sets out:

> *"…we now have further information regarding the EPS platform, the Swiss Asset Micro Assist Income Fund (SAMAIF) and the Kijani Fund…*
>
> *…We have been in correspondence with the new managers of the platform and with Asset Management International to confirm details of your redemption (sale) request. We understand that trades in the underlying funds have been placed.*
>
> *The illiquid funds within your portfolio cannot be sold at present, and will remain within the SIPP EPS account for the time being.*
>
> *Based on the information that we have been provided with, the current value of the liquid and illiquid elements of the investment are as follows:*
>
> *Liquid Funds: £20,418.61 (SAMAIF expected to trade again in February)*
> *Illiquid Funds: £20,336.73 (this is not a true value - please see below)"*

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

The letter says the following about SAMAIF:

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

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

Mr H raised a complaint against Joseph Oliver but it wasn't successful. He also raised a complaint against Abana which wasn't successful either. Mr H named both of these firms and Westerby in his original complaint form sent to this service.

On 19 July 2018 Mr H emailed this service he said:

"I am aware that Westerbv Ltd are involved in my investment and can confirm that I wish to make a complaint against them. I would appreciate it if you could contact them on my behalf."

This service wrote to Westerby to notify it of Mr H's complaint.

On 23 October 2018 Westerby provided Mr H with a response to his complaint. It didn't uphold it, Westerby set out that they are not responsible for the advice that Mr H was complaining about.

Following receipt of the final response letter from Westerby, Mr H emailed this service on 1 November 2018. He said:

"I still think that Westerby's had a duty of care to regulate the SIPP Investment, so therefore I am not satisfied they are not culpable."

This service contacted Westerby to let them know we were considering Mr H's complaint and to request its file.

Previous final decision on a complaint against Westerby

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

And I've seen an email on that complaint dated 15 April 2016, in which Westerby emailed a consumer and explained that holdings in the Kijani and SAMAIF fund were illiquid and that:

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

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

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

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

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

On this basis, Westerby was asked to review outstanding complaints and if it wasn’t prepared to change its position after taking account of the detailed reasons set out in the published decision, to explain why that was the case. Westerby didn’t change its position on Mr H’s complaint.

Following the published decision Mr H’s complaint was allocated to an Investigator for review. The Investigator spoke to Mr H on the telephone in July 2022, they introduced themselves and asked Mr H about his complaint.

Westerby’s submissions

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

- Mr H didn’t complain about Westerby – he made a complaint about the suitability of the advice he was given.
- All advice was provided by Joseph Oliver and later Abana and liability for unsuitable advice to make investments should rest with the adviser firm.
- Westerby acts as SIPP Trustee and Scheme Administrator, it doesn’t hold the relevant regulatory permissions to, and can’t provide advice on SIPPs or underlying investments.
- It took all reasonable steps to verify Joseph Oliver’s permissions.
- It carried out due diligence on Joseph Oliver before accepting business from it. And verified that Joseph Oliver was authorised to operate within the UK under an EEA passport.
- Joseph Oliver is authorised and regulated in Portugal by the Autoridade de Supervisao de Seguros e Fundos de Pensoes, formely the Instituto de Seguros de Portugal (‘ISP’).
- It also verified that Joseph Oliver was authorised by the FCA.
- Its standard procedure was to check the Financial Services Register every time a SIPP was established and every time advisor remuneration was paid, to verify that the introducer remained authorised.

- The current version of the Register shows additional information regarding Joseph Oliver's permissions, but this version of the Register only came into effect in September 2015.
- It was reliant on the publically-available Register as it stood at the time.
- At that time, the Register didn't show what permissions were held; it simply stated that the firm was EEA Authorised and that consumers should contact the firm to confirm its complaints and compensation arrangements.
- It disagrees that Joseph Oliver not holding the relevant permissions would have been a matter of public record. The FCA could only confirm what was on the Register, not what was missing from it. And the FCA cannot provide any more information than that which is provided on the Register.
- There have been various criticisms of the FCA Register over the years, and it may on occasion have contained errors.
- It checked the FCA Register and confirmed Joseph Oliver was regulated by both the FCA and Portuguese regulator. It checked the permissions page which was blank and the IMD permission section had been blank. And it checked the Portuguese register which was translated. This explained that Joseph Oliver was authorised to advise on *"life"* and *"non-life"*, the latter Westerby understood meant investments and pensions.
- It doesn't hold a copy of the *"Permission"* page for Joseph Oliver from the time within the FCA Register.
- It's been able to retrieve archived copies of the page for other passported firms from the relevant time period. In every case the *"Permission"* page simply shows *"No matches found".*
- The *"Basic Details"* page of Joseph Oliver 's Register entry included a field labelled *"Undertakes Insurance Mediation",* but the field was left blank; for UK firms it was always completed.
- Its argument isn't that there weren't other sections of the Register, rather it's that Joseph Oliver's permissions couldn't be determined from the Register due to the limited information available. In other words, Westerby doesn't accept that, at the relevant time (when the online Register was viewed in 2013), that there was information regarding permissions available or accessible by an online user.
- If it was impossible to verify the permissions through the FCA Register, and also a regulatory requirement to reject the business on these grounds, it would make it impossible for an EEA-passported firm to do any business other than the default business allowed by their passport regardless of any top-up permissions held. This may be construed as favouring local firms by the back door and might possibly be unlawful under EU law.
- Joseph Oliver was an authorised and regulated entity. It was reasonable to expect that it would be aware of, and act within, its regulatory permissions. Joseph Oliver was adamant that it had the correct permissions, presented itself as knowledgeable and professional and at no time did it present any reason to doubt its credibility. By representing to Westerby both orally and in writing that it held the necessary permissions, Joseph Oliver either deliberately misled it, or wasn't aware of its lack of permissions.
- Its due diligence wasn't simply a check of the Register. Its Chairman and Compliance Oversight was present at several face to face meetings with Joseph Oliver's advisor and Compliance Director. And he was thorough in his *"testing"* of their processes and due diligence.
- This culminated in Westerby establishing a legal document – the Terms of Business – in which Joseph Oliver warranted that it had the required permissions to introduce the SIPP. Joseph Oliver therefore effectively *"defrauded"* it.

- The Terms of Business included a warranty that the introducer holds, and undertakes to maintain, the necessary permissions to advise on SIPPs and the underlying investments.
- GEN 4 Annex 1 states that an incoming (EEA) firm must make details of the extent of its permissions clear on request. This shows that the FCA directs that the firm should confirm its permissions. Its Terms of Business provided for such a request and effectively formalised this disclosure through a signed agreement.
- The FCA's guidance doesn't state how the investor's adviser's permissions should be checked. Westerby established Joseph Oliver's signature and agreement by two of its directors who provided assurance in writing that they had the correct permissions.
- In the absence of information on any registers to confirm permissions at the time, it was reasonable for Westerby to accept Joseph Oliver's representation (via the signed Terms of Business) that it held the necessary regulatory authorisation/permissions to carry on its pensions activities. Further, it doesn't accept that it ought to have been reasonably aware of cause to have questioned the accuracy of the statement in the agreement. It's not reasonable to conclude that Westerby ought to have been aware of a reason to question Joseph Oliver's permissions. And nothing further could have been done.
- It disagrees that the Written Agreement was vague and generic in nature. The term *"permissions"* encompasses *"top-up"* permissions. And it's unrealistic to consider that any change of wording would have caused Joseph Oliver to not provide the undertaking.
- In accordance with COBS 2.4.6R (and COBS 2.4.8 G) it was reasonable for Westerby to rely on what Joseph Oliver told it. The information provided by Joseph Oliver in writing, together with Westerby's meetings with Joseph Oliver and the due diligence performed.
- It's not fair or reasonable to hold Westerby liable for Joseph Oliver's failures.
- It acted in good faith in accepting the introduction of Mr H's SIPP by Joseph Oliver.
- It provided quarterly Product Sales Data reports to the FSA and later the FCA, those organisations were aware through the reports that Joseph Oliver was introducing business to Westerby. And in 2015 Westerby was in contact with the FCA about Joseph Oliver. On these occasions the FCA didn't raise any issues or allegations to Westerby about a breach of Westerby's duties and obligations.
- Section 20 of the Financial Services and Markets Act 2000 ('FSMA') provides that an authorised person acting without permission doesn't make the transaction void or unenforceable, and it doesn't give rise to any right of action for breach of statutory duty (save for in limited circumstances). This is the opposite approach to someone acting without authorisation (as per section 27 of the FSMA).
- That primary legislation allows for the voiding of contracts where a party is acting without authorisation (section 27), but explicitly removes this provision where an authorised party acts outside of their permissions (section 20), demonstrates that Parliament's intention was that an authorised party shouldn't be held liable for losses flowing from another authorised party's breach of their own requirements.
- It was no part of Westerby's contractual obligations and/or legal obligations (as set out in section 20 of the FSMA) to Mr H to investigate the permissions of third-party advisors.
- Had it uncovered that Joseph Oliver didn't have the relevant permissions, it would have declined all business from Joseph Oliver from the outset, and would never have received Mr H's application or have been in a position to highlight Joseph Oliver's lack of permissions.
- As SIPP Trustee and Scheme Administrator, Westerby has a responsibility to assess the acceptability of an investment for inclusion in a SIPP.
- While issued after the events complained about, it considers the due diligence it undertook on Mr H's investment was in accordance with the standards detailed in the

FCA's July 2014 *"Dear CEO"* letter.

- Arrangements under the Westerby SIPP are strictly member-directed.
- The purpose of a SIPP as opposed to a conventional personal pension scheme is to offer members the opportunity to invest in a more adventurous and diverse portfolio. SIPP operators considered this type of investment (unusual/specified) normal.
- At the time Mr H's SIPP investments were made, there was no reason to conclude that they didn't satisfy Westerby's requirements.
- Under the terms of the Trust Deed it couldn't undertake any investment purchases or redemptions without Mr H's authority to do so.
- It does, and had rejected investment propositions and advisers when they have not passed Westerby's rigorous due diligence.
- Originally, Joseph Oliver/Abana put its clients into the Kijani and SAMAIF funds directly.
- Later on, Mr F of Joseph Oliver/Abana made arrangements (without Westerby's authority) for the funds to be placed into the *"EPS Managed Fund"* – a Special Purpose Vehicle ('SPV') which essentially acted as a *"fund of funds"*, comprised of the Kijani, SAMAIF and the TCA Global funds.
- When ePortfolio Solutions started trading again, they split the funds into two portfolios – Managed Portfolio S containing the Kijani Fund, and Managed Portfolio L containing SAMAIF and TCA Global funds ("S" standing for "Suspended", and "L" for "Liquid")
- SAMAIF was included in Portfolio L as it was expected to begin trading again.
- Redemptions from this fund were made by the managers selling TCA Global – hence they were able to make redemptions initially, but TCA Global was ultimately depleted (it had effectively been used to subsidise the early redemption requests in the expectation that SAMAIF would begin trading again – a decision by the SPV managers that Westerby had no control over).
- No amount of due diligence that Westerby undertook would have enabled it to establish that the Kijani Fund was subject to fraud.
- It regularly checked the Register to confirm continuing authorisation and check for warning notices. Maintained checks on the investment funds which were classified as standard investments. Conducted regular reviews of media publications and the Regulator in Mauritius. And notified consumers when the funds classification changed to "non-standard" due to encashment difficulties.
- Following its November 2014 letter, any investor would have sought independent financial advice or made some reasonable enquiries.
- Had Mr H requested a full redemption at this point it's likely he would have received his funds in full.
- Whether or not there was a reference in Westerby's letter in November 2014 to Mr H to seek advice from Abana is an irrelevant point and had no bearing on the outcome as Mr H would have reverted to his existing advisor, regardless of the reference to Abana in Westerby's letter.
- It understands that Mr F and Abana advised Mr H and other investors that Westerby's November 2014 letter was *"scaremongering"*.
- It wrote to Mr H again to inform him that it was possible to make redemptions from part of his account on 23 December 2015.
- It suggested consumers should seek independent advice, and deliberately did not mention the original advisers in its letter of December 2015.
- Westerby say that members that contacted it promptly following receipt of this letter were able to recover at least half of their fund.
- If this service concludes that it wasn't reasonable for Mr H to take some action after its letters, this service is effectively deciding that Westerby was always liable for any subsequent losses irrespective of the duty on Mr H to mitigate his losses.

- Despite clear warnings from Westerby that funds were likely to be high risk, Mr H took no steps to obtain independent financial advice and didn't act to redeem the investments.
- Westerby can't be held liable for Mr H's decision to invest in the funds, or his failure to act on their warnings and return a redemption form to it to arrange a redemption when the opportunity arose.
- The FSMA acknowledges that there's a general principle that consumers should take responsibility for their decisions, a principle which the FCA should have regard to when considering consumer protection. This service is part of the consumer protection provisions under the FSMA, it follows that we must similarly have regard to this principle. There's a clear intention in law that consumers have a level of responsibility. And this service has issued other decisions which take account of a consumer's failure to take action to mitigate their losses.
- Irrespective of the advice from Joseph Oliver, it was Mr H's decision to follow that advice.
- If it had rejected Mr H's application, Joseph Oliver would have re-applied on behalf of Mr H to another SIPP provider that Joseph Oliver was using and that SIPP provider would have accepted the application.
- It wouldn't have been at liberty to contact investors directly to tell them why their application was refused.
- This service needs to give true weighting to the fact that Joseph Oliver's clients trusted its advice.
- Joseph Oliver/Abana has now ceased to trade and it seems that the insolvency of Joseph Oliver/Abana (and possibly the lack of insurance cover) may influence the conclusion reached in this complaint.
- Joseph Oliver's actions were more serious than any alleged failures by Westerby.
- Having been ordered by the FCA to pay full redress to its clients, Abana then refused to do so. Little/nothing was done to enforce awards made against Abana for redress to investors on similar complaints before Joseph Oliver/Abana ceased to trade. Losses caused by the apparent failings of other authorities shouldn't rest with Westerby.
- It's important that this service doesn't overlook the gravity of Joseph Oliver's wrongdoing, when considering this complaint against Westerby and the issue of apportionment.
- The geographical location of Westerby should have no bearing on the determination of liability.

And of the published decision:

- The published decision confirms we contacted the FCA about whether *"top-up"* permissions appear on the FCA Register and that the *"FCA confirmed that top up permissions do appear on the Register under the "Permission" page and that the FCA understands the same information was available on the Register in 2013."*
- There's been no disclosure of: the details of the contact at the FCA with whom this service communicated; records of such communications; file notes or attendance notes; details of the FCA contact's role at the FCA; whether the FCA contact was dealing with the Register in 2013; and what the FCA contact's understanding of the Register in 2013 is based upon. Westerby has highlighted in previous submissions to this service that it's only been provided with the FCA's response that's referred to in the published decision and it's not received the further disclosure it's requested. This service should provide full disclosure of this information. Not to do so is procedurally unfair.
- An understanding of what was on the Register in 2013 isn't proof of what was actually on the Register at the relevant time.

- It was reasonable for Westerby to assume from the Terms of Business agreement that Joseph Oliver had the necessary permissions. Further, it doesn't accept that it ought to have been reasonably aware of cause to have questioned the accuracy of the statement in the agreement.
- The published decision concedes that information which wasn't available on the Register wouldn't have been provided to Westerby by the FCA if it wasn't already on the Register. But the published decision also says that if Westerby had contacted the FCA directly the FCA would have been able to confirm Abana's permissions. No information has been provided about this and the FCA's position generally.
- It made a Freedom of Information request to the FCA. And, in response, the FCA confirmed that in 2013, the Register would have indicated the broad permissions held under IMD by a firm which would have been either insurance mediation or reinsurance mediation and that there was no requirement under the IMD to display more detailed activities. Any further information not displayed on the Register would have been considered confidential information under Section 348 of the FSMA which prohibits disclosure of this information.
- In the published decision the ombudsman sought to distinguish the complaint from the situation in the Adams court case on the basis that Abana was offering an advisory service. It's unclear how Abana's contractually defined role impacts on the scope of duty owed by Westerby under COBS 2.1.1R. It was not part of Westerby's contractual obligations to investigate the permissions of third-party advisors.
- In the published decision the ombudsman attempted to bypass the conclusions of the Adams court case by stating the judge didn't comment on the application of the Principles to SIPP providers. Whilst technically correct, COBS 2.1.1R is reflected in Principle 6.
- In the published decision the ombudsman failed to follow DISP 3.6.3G, which provides: *"Where a complainant makes a complaint against more than one respondent in respect of connected circumstances, the Ombudsman may determine that the respondents must contribute towards the overall award in the proportion that the Ombudsman considers appropriate."*
- The ombudsman failed to assess apportionment and causation. In a previous decision, a different ombudsman did deal with the apportionment issue where the complaint was against an EEA firm that had acted outside its permissions. The decision made an apportionment between the SIPP provider and the advisor on a 50/50 basis.
- Despite a related complaint about the actions of Abana, in the published decision the ombudsman decided that Westerby should compensate the consumer for the full extent of his financial losses.
- Abana has ceased trading and closed, as such any indemnity from Abana and/or assignment of any action against it would now be worthless.
- Complaints made against Joseph Oliver/Abana to this service ought to have been decided first, or at least at the same time as complaints against Westerby. This service dealing with the complaint against Westerby first has led to the failure to address the issue of apportionment.
- This service has found against Abana in a number of complaints involving a different SIPP operator, and ordered Abana to pay redress yet we haven't pursued, or invited the complainants to pursue, the SIPP operator.

The Investigator set out that consumer's don't need to bring a fully formed complaint to this service. And the complaint that was being considered was the due diligence that Westerby carried out when accepting Mr H's SIPP application. They said that:

- FSMA at paragraph 13(3) of schedule 17 highlights that the "substance" of the complaint is what is important. Which means this service must think about what lies at the heart of a complaint. And it wouldn't be fair for a consumer to lose out because their understanding wasn't good enough for them to word their complaint exactly.

- In R (Williams) v Financial Ombudsman Service [2008] EWHC 2142, Irwin J pointed out that: "*The ombudsman is dealing with complaints, not causes of action. His jurisdiction is inquisitorial not adversarial. There is a wide latitude within which the ombudsman can operate*." So this service must look at the whole picture when considering a complaint.
- It was the Investigator's role to listen to Mr H and understand his complaint.
- During the Investigator's call with Mr H he expressed that he didn't think Westerby "*did their homework*". And he said he felt they "*did nothing to verify the transaction*". It was clear from this conversation that Mr H was complaining about Westerby's obligations and responsibilities.
- Mr H submitted this complaint in 2017, long before he spoke to the investigator. And it's clear this complaint is about Westerby's obligations to him.

In response Westerby said that Mr H's complaint had been brought out of time. They said that was because he didn't mention due diligence in 2018 when the complaint was initially raised with them. He only mentioned it during a conversation with the Investigator in 2022.

The Investigator reiterated what they'd set out above, and explained that this complaint had not been brought out of time. That's because Mr H had raised it in 2018, within six years of when Westerby accepted his SIPP application, and within six years of when the investments had been made.

The Investigator reviewed Mr H's complaint and said that Westerby ought to have identified that Joseph Oliver needed *"top-up"* permissions to advise on and make arrangements for personal pensions in the UK, and taken all the steps available to it to independently verify that Joseph Oliver had the required permissions.

And that if Westerby had taken these steps, it would have established Joseph Oliver didn't have the permissions it required to give advice or make arrangements for personal pensions in the UK, or that it was unable to confirm whether Joseph Oliver had the required permissions. In either event, it wasn't in accordance with its regulatory obligations nor good industry practice for Westerby to proceed to accept business from Joseph Oliver. Our investigator concluded that as Westerby shouldn't have accepted Mr H's SIPP application from Joseph Oliver, it was fair and reasonable for Westerby to compensate Mr H for his financial loss.

Westerby didn't agree with the Investigator's view, I've not repeated arguments they made that have been noted above again here. In addition to what's already been mentioned Westerby said in response:

- It maintained that Mr H didn't raise a complaint about the due diligence Westerby carried out.
- It said a new complaint has been formulated out of an old one which was made in 2017 which is likely out of time.
- It asks for copies of all documents this service holds in relation to complaints Mr H made about Joseph Oliver and Abana.
- Heavy reliance has been placed on the communications this service has had with the FCA about the Register. It has made a reasonable disclosure request in relation to this. But it has not received a satisfactory response.
- Westerby ought to be provided with a copy of the relevant information that the Investigator has relied upon in reaching their view.

- The Investigator's view downplays the extent and thoroughness of the due diligence it performed. It met with Joseph Oliver's representatives and obtained information from them. Joseph Oliver's representatives had good technical knowledge and confirmed that Joseph Oliver had the correct permissions.
- The view suggests that Westerby should have contacted the FCA to confirm Joseph Oliver's permissions. But it has explained why that would not have confirmed the position.
- Submissions it's made haven't been fully addressed.
- The view failed to assess apportionment. And ignored the fact that Mr H had made complaints about Joseph Oliver/Abana.
- The investigator's view fails to take proper account of Mr H's failure to mitigate his losses.
- Applications submitted to it by Joseph Oliver were on behalf of clients of Joseph Oliver. That Mr F had left their employment wouldn't change Westerby's continuing to process Joseph Oliver applications.
- Receipt of Mr H's application wouldn't have given rise for Westerby to consider due diligence on Abana – as they are a separate firm.
- JOML were a branch of an authorised firm, its not accepted that their involvement was an anomalous feature of the investment.

Mr H's complaint was passed to me and I issued a provisional decision which Mr H agreed with. No comments were received in response to it from Westerby.

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.

When considering what's fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time. Having done so I remain of the view that we can consider Mr H's complaint and that it should be upheld for largely the same reasons as those set out in my provisional decision. Which I have largely repeated below.

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

Jurisdiction

Westerby have argued that Mr H didn't raise a complaint about its possible due diligence failings in July 2018. Instead, they say Mr H was complaining only about the advice he had received. And that any complaint about its due diligence was therefore raised too late, when Mr H spoke to the Investigator in July 2022.

The section of the rules that applies here is DISP 2.8.2. Which means that, unless Westerby consents (it hasn't), we can't look into this complaint if it's been brought:

- more than six years after the event complained of;

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

Mr H raised his complaint about Westerby, via our service, in July 2018 about their involvement in the investments held within his pension because he had suffered a loss. And following receipt of Westerby's final response Mr H returned to this service and said:

> *"I still think that Westerby's had a duty of care to regulate the SIPP Investment, so therefore I am not satisfied they are not culpable."*

So Mr H raised his complaint within six years of Westerby accepting his SIPP application in June 2013, and investments being made within his SIPP in July 2013. As such it has been brought in time as set out within Chapter 2 (DISP 2) of the FCA's Handbook of Rules and Guidance.

This means I have jurisdiction to consider Mr H's complaint, which I will go on to do, as it has been made in time. And at this point I think it's important to explain that the Financial Ombudsman Service is an informal dispute resolution forum. A complaint made to us need not be, and rarely is, made out with the clarity of formal legal pleadings. Our service deals with complaints, not causes of action.

So I'll be considering whether Westerby took reasonable care, acted with due diligence and treated Mr H fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mr H's complaint is whether it was fair and reasonable for Westerby to have accepted Mr H's SIPP application in the first place. I'm satisfied that is the complaint Mr H referred to Westerby and this service in 2018. So, I need to consider whether Westerby carried out appropriate due diligence checks on Joseph Oliver before deciding to accept Mr H's SIPP application from it.

Relevant considerations

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

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The regulatory publications

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

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

The 2009 Thematic Review Report

The 2009 report included the following statement:

> *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its clients and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.*
>
> *It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.*
> *…*
> *We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then*

be addressed in an appropriate way, for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate SIPPs that are unsuitable or detrimental to clients.

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

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

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

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

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

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

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

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

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

The later publications

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*"**Due diligence***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Like the ombudsman in the BBSAL case, I don't think the fact some of the publications post-dated the events that took place in relation to Mr H's complaint, mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although, for example, the *Dear CEO"* letter was published after the events subject to this complaint, the Principles that underpin existed throughout, as did the obligation to act in accordance with the Principles.

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

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

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

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

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

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

So, taking account of the factual context of this case, it's my view that in order for Westerby to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), it should have undertaken sufficient due diligence checks to ensure Joseph Oliver had the required permissions to give advice on and make arrangements in relation to personal pensions in the UK before accepting Mr H's business from it.

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

It appears to be accepted by Westerby that Mr F of Joseph Oliver was the advisor who advised on this business. But, from the application documents, it's not completely clear which business Westerby was accepting business from – Joseph Oliver or JOML. Mr H's SIPP application simply says "Joseph Oliver" is the advising business – that could refer to Joseph Oliver or JOML – and the ePortfolio Solutions application says JOML is the advising business.

In other, similar complaints, Westerby said JOML was a branch of an authorised firm and provided a link/screenshot for a page on Joseph Oliver's website which it says is evidence of this. It's noted on the page that:

"Registered Addresses
Joseph Oliver Marketing Ltd
65 London Road,
St Albans,
Herts,
AL1 1LJ,
United Kingdom
Company number: 4844574

Joseph Oliver Mediacao de Seguros Lda,
Av Emidlo Navarro, no.81
2750-337 Cascais
Portugal
Company number: 509011411"

In my view this isn't sufficient evidence to show JOML is a branch of Joseph Oliver. The screenshot shows JOML as a registered address on Joseph Oliver's website. But it also shows that JOML is a separate entity from Joseph Oliver, by referring to JOML's UK Companies House company number – suggesting JOML might be a subsidiary of Joseph Oliver, but not a branch.

So, I've considered both possibilities – by which I mean that the introducing advisor was Joseph Oliver or JOML – starting with Joseph Oliver.

The regulatory position

If the advisor was Joseph Oliver?

Joseph Oliver is based in Portugal and is authorised and regulated in Portugal by Autoridade de Supervisao de Seguros e Fundos de Pensoes ('ASF').

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

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

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

> *"We are implementing the IMD for general insurance and pure protection business… from January 2005 (when they will require authorisation).*
>
> *Unlike general insurance and pure protection policies, the sale of life and pensions policies is already regulated. Life and pensions intermediaries must be authorised by us and are subject to our regulation."*

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

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

It goes on to say:

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

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

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

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

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

Table 2B: Insurance Mediation Directive Activities		Part II RAO Activities	Part III RAO Investments
	contracts of insurance, in particular in the event of a claim.		

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

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

The relevant rules regarding *"top-up"* permissions could be found at SUP 13A.7. SUP 13A.7.1G states (as at September 2013):

> *"If a person established in the EEA:*
>
> *(1) does not have an EEA right;*
>
> *(2) does not have permission as a UCITS qualifier; and*
>
> *(3) does not have, or does not wish to exercise, a Treaty right (see SUP 13A.3.4 G to SUP 13A.3.11 G);*
>
> *to carry on a particular regulated activity in the United Kingdom, it must seek Part 4A permission from the appropriate UK regulator to do so (see the appropriate UK regulator's website: http://www.fca.org.uk/firms/about-authorisation/getting-authorised for the FCA and www.bankofengland.co.uk/pra/Pages/authorisations /newfirm/default.aspx for the PRA). This might arise if the activity itself is outside the scope of the Single Market Directives, or where the activity is included in the scope of a Single Market Directive but is not covered by the EEA firm's Home State authorisation. If a person also qualifies for authorisation under Schedules 3, 4 or 5 to the Act as a result of its other activities, the Part 4A permission is referred to in the Handbook as a top-up permission."*

In the glossary section of the FCA Handbook EEA authorisation is defined (as in 2013) as:

> *"(in accordance with paragraph 6 of Schedule 3 to the Act (EEA Passport Rights)):*
>
> > *(a) in relation to an IMD insurance intermediary or an IMD reinsurance intermediary, registration with its Home State regulator under article 3 of the Insurance Mediation Directive;*
> >
> > *(b) in relation to any other EEA firm, authorisation granted to an EEA firm by its Home State regulator for the purpose of the relevant Single Market Directive or the auction regulation"*

The guidance at SUP App 3 of the FCA Handbook (which I've set out above) was readily available in 2013 and clearly illustrated that EEA-authorised firms may only carry out specified regulated activities in the UK if they have the relevant EEA passport rights.

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

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

Westerby's checks on Joseph Oliver's permissions

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

The Register

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

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

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

I've carefully considered everything Westerby's said about the format of the Register both within their submissions in relation to this complaint and others, in or around 2013, when Mr H's application was submitted by Joseph Oliver.

Westerby has previously submitted that:

> "WTS [Westerby] searched Joseph Oliver on the Financial Services register in September 2012 and established that they were EEA authorised. Please refer to the enclosed copy screenshot of the search undertaken by WTS dated 18 September 2012. This shows that the search results did not include a "Passports" section, or any mention in the "notices" or "other information" sections of any restrictions on Joseph Oliver's permission, which would be usual if there had been any restriction. Whilst WTS accept that a present day search includes a "Passports" section, they dispute

that a search in September 2012 did, as illustrated by the enclosed screenshot. As noted previously, the only field which could have indicated their permissions ("Undertakes Insurance Mediation") was blank. Acting reasonably, WTS could not have found details of the passport permission from a search of the Financial Services register at that time."

The following print out from the Register was provided to us (Westerby has also provided us with a later print out of the same page with a "Page last updated" date of 2 May 2013 and this records the same information as below about Joseph Oliver):

Welcome to the FSA Register

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

Basic details for:

521370 - Joseph Oliver - Mediacao de Seguros LDA

Current status	EEA Authorised
Effective Date:	30/03/2010
Tied Agent	
Undertakes Insurance Mediation	
Registered under Money Laundering Regulations	
Address	8 Ladysmith Road St Albans Herts AL3 5QA
Phone	+44 1727 75 24
Fax	
Email	
Website	www.josepholiver.eu
Notices	
Other information	Consumers considering or currently doing business with passported EEA firms ("EEA Authorised"), may wish to ask for further information from the firm or its UK branch about its complaints and compensation arrangements. This is because the position may differ compared to a UK authorised firm

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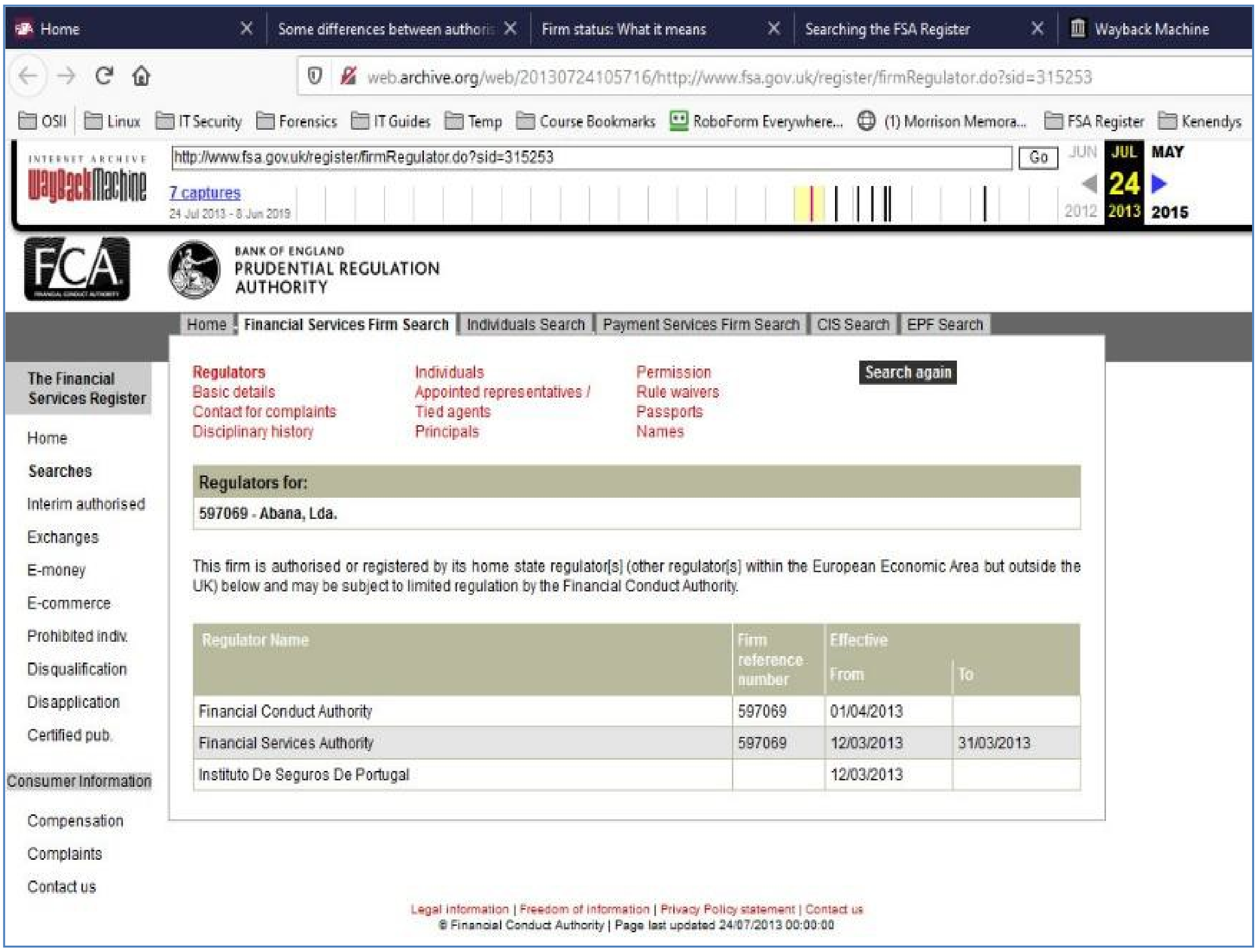
The third-party report on the Register, provided by Westerby during the investigation of the complaint which was the subject of the published decision, is helpful to discussions about the format of the Register at the time of Mr H's SIPP application. The report included the following screenshot of the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



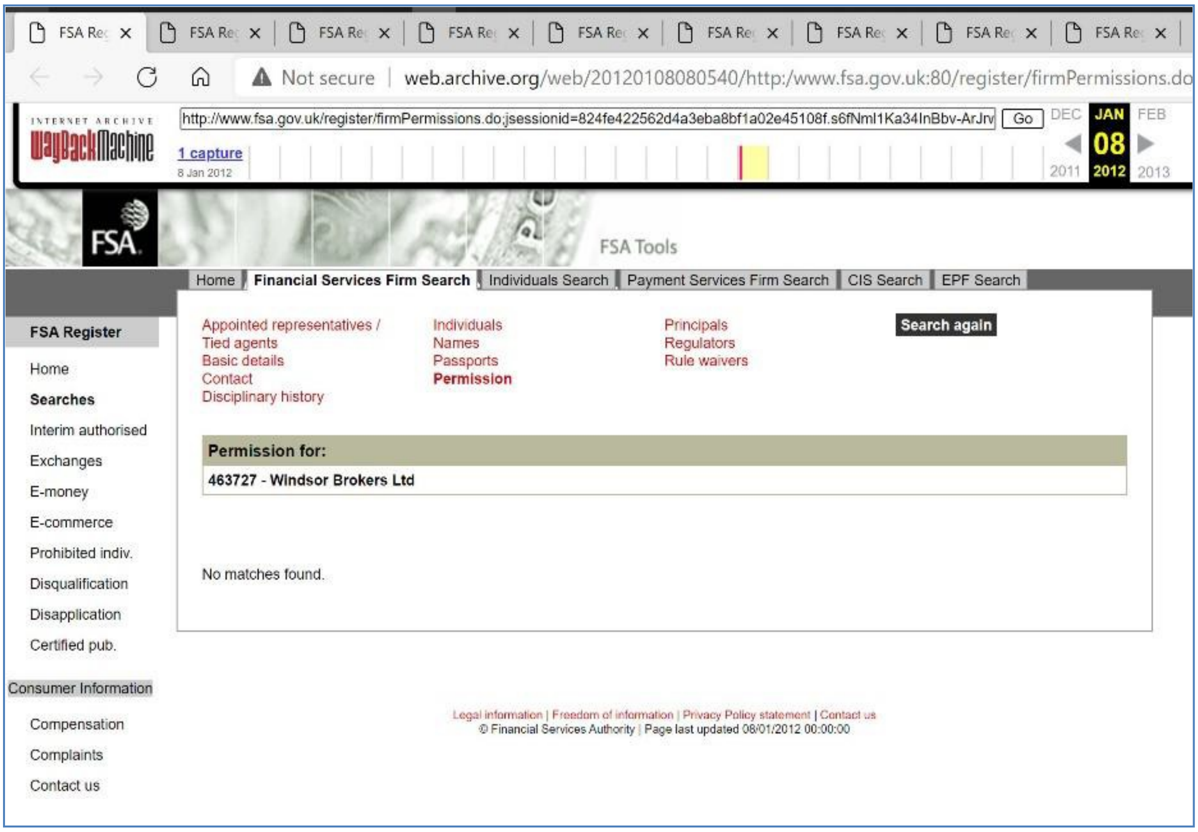
Regulator Name	Firm reference number	Effective From	To
Financial Conduct Authority	597069	01/04/2013	
Financial Services Authority	597069	12/03/2013	31/03/2013
Instituto De Seguros De Portugal		12/03/2013	

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

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

I've carefully reviewed the third-party report. Paragraph 24 only confirms that if the hyperlink to the *"Permission"* page is clicked, there's no archive of that specific *"Permission"* page. In my view, the fact this hyperlink yielded nothing when clicked just speaks to the limitations of the internet archive in question. So, I don't think paragraph 24 shows that no *"Permission"* page for Abana existed in 2013. However, I do think that evidence provided elsewhere in the third-party report strongly suggests a *"Permission"* page *did* exist for Abana and therefore would also have done for Joseph Oliver.

Only the *"Regulators"* page has been archived for Abana's entry on the Register from 2013. But the third-party report provides examples of several *"Permission"* pages for other firms which were archived, dating from around the time of Mr H's SIPP application or earlier. The below example, dating from 2012, and relating to a Cypriot firm which, like Joseph Oliver, was an incoming EEA firm, is particularly helpful:



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

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

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

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

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

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

Accordingly, I'm satisfied that:

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

- The format of the Register in 2013 included a *"Permission"* page. And it follows that the entry for Joseph Oliver on the Register, at the time of Mr H's application, would have included a *"Permission"* page which Westerby ought to have checked.

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

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

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

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

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

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

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

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

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

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

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

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

So, to summarise, I'm satisfied that:

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

- In that case Westerby should have sought confirmation from the FCA as to whether Joseph Oliver held any *"top-up"* permissions. And, as I'm satisfied this would have been a matter of public record, I think the FCA would have been able to confirm whether Joseph Oliver held any permissions.

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

Could Westerby have relied on what Joseph Oliver told it?

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

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

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

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

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

And COBS 2.4.8 G says:

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

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

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

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

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

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

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

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

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

The Agreement provides as follows:

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

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

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

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

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

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

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

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

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

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

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

If the advisor was instead JOML?

It's not completely clear from the application documents which business Westerby was accepting business from – Joseph Oliver or JOML. Mr H's SIPP application simply says "Joseph Oliver" is the advising business – that could refer to Joseph Oliver or JOML – and the ePortfolio Solutions application says JOML is the advising business. Westerby appears to have accepted the business on the basis that it was dealing with Mr F acting for Joseph

Oliver and the evidence points to this being the correct position. However, for completeness, here I've also addressed the possibility of JOML's involvement.

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

However, I've only briefly covered this point as there's evidence to show Mr F was representing Joseph Oliver at the time and Westerby's previously told us that the provider of the ePortfolio Solutions platform confirmed its relationship was with Joseph Oliver, not JOML. And I think the most likely outcome if Westerby had assumed the application(s) were advised on by JOML and rejected it/them on that basis, or else if it had queried the application(s) on the basis it/they had to be advised on by an authorised business, would have been that the application(s) was/were then submitted through Joseph Oliver.

I also think the involvement of JOML should reasonably have been viewed as an anomalous feature.

Anomalous features

In my view, Westerby ought to have identified a risk of consumer detriment here. Mr H was taking advice on his pension from a business based in Portugal. That advice was to open a SIPP, and then to invest the funds deposited into the SIPP into investments based in Mauritius (with one later moving to the Cayman Islands). The investments involved were unusual, and specialised. And the chances of them being suitable investments for a significant portion of a retail investor's pension were very small. So, given the relevant factors, Westerby ought to have viewed the application from Mr H as carrying a significant risk of consumer detriment. And it should have been aware that the role of the advisor was likely to be a very important one in the circumstances – emphasising the need for adequate due diligence to be carried out on Joseph Oliver to independently ensure it had the correct permissions to be giving advice on personal pensions in the UK.

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

Further, as noted above, I also think the involvement of JOML should reasonably have been viewed as an anomalous feature. The ePortfolio Solutions application refers to an unauthorised business, JOML, as the advising business. Westerby has within other complaints, expressed the view that JOML was a branch of Joseph Oliver but, as mentioned, I'm not satisfied that was the case.

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

Further points

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

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

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

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

Westerby has submitted that where complaints have been received by this service against both Joseph Oliver/Abana and Westerby, that we should decide the complaint against Joseph Oliver/Abana before, or at the same time as, the complaint against Westerby. Later in this decision, I've addressed the question of whether it's fair to ask Westerby to pay Mr H compensation in the circumstances of this complaint. We don't have an open complaint from Mr H about Joseph Oliver or Abana. So, Mr H has only got a complaint with us about Westerby. And that's the only complaint from Mr H I'm reviewing.

In conclusion

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

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

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

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

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

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

Due diligence on the underlying investments

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

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

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

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

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

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

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

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

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

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

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

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

But, in this case, I've seen no evidence to show Mr H proceeded in the knowledge that the investments he was making were high risk and speculative, and that he was determined to move forward with the transaction in order to take advantage of a cash incentive offered by Joseph Oliver. I've not seen any evidence to show Mr H was paid a cash incentive. It therefore cannot be said he was *"incentivised"* to enter into the transaction. So, in my opinion, this case is very different from that of Mr Adams.

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

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

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

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

The involvement of Joseph Oliver

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

In this decision I'm considering Mr H's complaint about Westerby. While it may be the case that Joseph Oliver gave unsuitable advice to Mr H to open a SIPP and make unsuitable investments, Westerby had its own distinct set of obligations when considering whether to accept Mr H's application for a SIPP.

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

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

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

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

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

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

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

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

Westerby has previously said that as Joseph Oliver's ceased to trade then any indemnity from Joseph Oliver and/or assignment of any action against it is effectively worthless.

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

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

The circumstances and facts of the other complaint Westerby has mentioned appear to be very different to Mr H's complaint. And it also looks like the SIPP provider in the other complaint had already compensated the consumer for half of their losses before the ombudsman was asked to decide the complaint against the EEA firm.

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

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

Mr H taking responsibility for his own investment decisions

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

Mr H took advice from a regulated advisor (albeit one acting outside the permissions it held – a fact unknown to Mr H) and used the services of a regulated personal pension provider, Westerby. And I'm satisfied that in the circumstances, for all the reasons given, it's fair to say Westerby should compensate Mr H for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr H should suffer the loss because he ultimately instructed the investments to be made.

Opportunity to mitigate losses

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

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

I don't think it would be fair to say Mr H should have made a redemption request when Westerby wrote to him in November 2014. The November 2014 letter required Mr H to seek advice, and urged him to contact his financial advisor, Abana. Based on other cases we've seen, Abana generally seems to have advised its clients to retain the holdings in question.

Westerby has told us that its process was to check an advisory firm's permissions every time it received an application to open a SIPP, and every time an advisor's remuneration was to be paid. Westerby had received a number of introductions from Abana before November 2014. So, by the time Westerby wrote to Mr H in November 2014, it would have had many opportunities to discover that Abana didn't have the *"top-up"* permissions it needed to give advice or make arrangements on personal pensions in the UK. As such, it's my view that for Westerby to have suggested that Mr H seek advice from Abana once problems with the funds he'd invested in had come to light, is a further failing of Westerby's regulatory obligations and the requirement to treat Mr H fairly. In the circumstances, I don't think it would be fair to say Mr H should have made a redemption request when Westerby wrote to him in November 2014.

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

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

Mr H doesn't appear to have taken much action following these letters. In the June 2015 letter Mr H was told of an investigation into the Kijani Fund, but he was told at the same time that he'd be getting his money back. So, I think following the June 2015 update it was reasonable for Mr H to think he didn't need to do anything.

In relation to the Kijani fund, liquidators were appointed on 19 June 2015. And Westerby's June 2015 letter notes that some investors had, at that time, made redemption requests over 90 days ago but not received any money. Further, I've also noted that in the complaint that was the subject of the published decision Westerby has confirmed, in a letter dated 21 December 2015, that it summarised the situation with the Kijani fund to the complainant in that case, in October 2015, as "suspended, in liquidation. Likely to take a number of years. Unclear as to what will come back".

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

There was then the December 2015 letter in which it was explained that a suspension on the SAMAIF might lift.

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

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

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

fair compensation

Westerby says that responsibility for Mr H's loss should lie with Joseph Oliver/Abana.

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

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

I therefore consider that in the circumstances, it's fair and reasonable to direct Westerby to compensate Mr H to the full extent of his losses. In addition to the financial loss that Mr H has suffered as a result of the problems with his pension, I think that the losses suffered to Mr H's pension provisions have caused Mr H distress and I think that it's fair for Westerby to compensate Mr H for this as well.

Putting things right

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

If advice had been sought from a different advisor, who was qualified to give pension advice, I think it's unlikely that another advisor, acting properly, would have advised Mr H to transfer away from his existing pension plan. Alternatively, Mr H might have simply decided not to seek pensions advice elsewhere from a different advisor and still then retained his existing pension plan.

I consider that Westerby failed to comply with its own regulatory obligations and didn't put a stop to the transactions set out above. My aim in awarding fair compensation is to put Mr H back into the position he would likely have been in had it not been for Westerby's failings.

Had Westerby acted appropriately, I think it's *most likely* that Mr H would have retained his existing pension plan.

As such and in order to redress Mr H I direct Westerby to:

- Obtain the notional transfer value of Mr H's previous pension plan (s).
- Obtain the actual transfer value of Mr H's SIPP, including any outstanding charges.
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Pay an amount into Mr H's SIPP so as to increase the transfer value to equal the notional value established. This payment should take account of any available tax relief and the effect of charges.
- If the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- If Mr H has paid any fees or charges from funds outside of his pension arrangements, Westerby should also refund these to Mr H. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Pay to Mr H an amount £500 to compensate him for the distress and inconvenience he's been caused.

I've set out how Westerby should go about calculating compensation in more detail below.

Treatment of the illiquid assets held within the SIPP

I think it would be best if any illiquid assets held could be removed from the SIPP. Mr H would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investment/s may prove difficult, as there is no market for it. For calculating compensation, Westerby should establish an amount it's willing to accept for the investment/s as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment/s.

If Westerby is able to purchase the illiquid investment/s then the price paid to purchase the holding/s will be allowed for in the current transfer value (because it will have been paid into the SIPP to secure the holding/s).

If Westerby is unable, or if there are any difficulties in buying Mr H's illiquid investment/s, it should give the holding/s a nil value for the purposes of calculating compensation. In this instance Westerby may ask Mr H to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding/s. That undertaking should allow for the effect of any tax and charges on the amount Mr H may receive from the investment/s and any eventual sums he would be able to access from the SIPP. Westerby will have to meet the cost of drawing up any such undertaking.

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

Westerby should first contact the provider of the plan/s which was transferred into the SIPP and ask it to provide a notional value for the policy as at the date of calculation. For the purposes of the notional calculation the provider should be told to assume no monies would've been transferred away from the plan, and the monies in the policy would've remained invested in an identical manner to that which existed prior to the actual transfer.

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

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

If there are any difficulties in obtaining a notional valuation from the previous provider, then Westerby should instead arrive at a notional valuation by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index. That is a reasonable proxy for the type of return that could have been achieved over the period in question.

The notional value of Mr H's existing plan if monies hadn't been transferred (established in line with the above) less the current value of the SIPP (as at date of calculation) is Mr H's loss.

Pay an amount into Mr H's SIPP so that the transfer value is increased by the loss calculated above.

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

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

SIPP fees

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

Interest

The compensation resulting from this loss assessment must be paid to Mr H or into his SIPP within 28 days of the date of this final decision. The calculation should be carried out as at the date of this final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of this final decision to the date of settlement if the compensation is not paid within 28 days.

Distress & inconvenience

In addition to the financial loss that Mr H has suffered as a result of the problems with his pension, I think that the loss suffered to Mr H's pension provisions has caused Mr H distress. This was a significant portion of Mr H's pension provision. And due to Mr H's age he is unlikely to be able to afford such a loss. This will have caused Mr H significant distress. And I think that it's fair for Westerby to compensate him for this as well. Westerby should pay Mr H £500 to compensate him for this.

Assignment of rights

In order to be fair to Westerby, it should have the option of payment of the redress being contingent upon Mr H assigning any claim he may have against Joseph Oliver and/or Abana to Westerby – but only in so far as Mr H is compensated here. The terms of the assignment should require Westerby to account to Mr H for any amount it subsequently recovers against Joseph Oliver and/or Abana that exceeds the loss paid to Mr H. Westerby would need to meet any costs in drawing up the assignment.

My final decision

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

Where I uphold a complaint, I can make an award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend that Westerby Trustee Services Limited pays the balance.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My final decision is that Westerby Trustee Services Limited must pay the amount produced by that calculation up to the maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Westerby Trustee Services Limited pay Mr H the balance plus any interest on the balance as set out above.

If the loss does not exceed £150,000, or if Westerby Trustee Services Limited accepts the recommendation to pay the full loss as calculated above, Westerby Trustee Services Limited should have the option of taking an assignment of Mr H's rights in relation to any claim he may have against Joseph Oliver, and an assignment of the right to any future payment Joseph Oliver may make to Mr H as part of the settlement agreed following the third-party review.

If the loss exceeds £150,000 and Westerby Trustee Services Limited does not accept the recommendation to pay the full amount, any assignment of Mr H's rights should allow him to retain all rights to the difference between £150,000 and the full loss as calculated above.

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

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 9 January 2025.

Cassie Lauder
Ombudsman