DRN-5287849

The complaint

Miss M is unhappy with the service that she received from Westerby Trustee Services Limited (Westerby) when it accepted her application to open a self-invested personal pension (SIPP) with them.

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.

A Westerby SIPP application form was signed on 1 December 2013. Section 9 of the application says;

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

This was answered *"yes"* and the details of Mr F of Abana Unipessoal Lda ('Abana') were added. It was also instructed that an initial commission of 5% of the total transfers should be paid to Abana. There was no fee suggested for single contributions.

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

It was noted in the application form that pension monies worth around £44,600 in total were to be transferred in from two pensions Miss M held with Zurich and Skandia.

Westerby say that Miss M established a SIPP with it on 9 December 2013. And her pension transfers were received into the SIPP on 15 and 23 January 2014. Westerby say that investments were placed via an investment platform within the SIPP called ePortfolio Solutions, distributed in the UK by Asset Management International ('AMI'). And some monies were invested into the Kijani and Swiss Asset Micro Assist Income Fund (SAMAIF) funds.

In November 2014, Westerby wrote to investors about their investments in the Kijani and SAMAIF funds. It explained that the funds would, following a Policy Statement from the Financial Conduct Authority ('FCA') in August 2014, be considered to be non-standard assets. It explained that the funds might be higher risk than Miss M originally considered. Their letter also said the Mauritian Financial Services Commission ('MFSC') had issued enforcement orders against companies under which both the Kijani and the SAMAIF funds were 'cells'.

The correspondence 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 investors originally considered, and it was therefore imperative that she discuss this with her financial advisor.

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

In June 2015, Westerby wrote to Miss M providing an update on the Kijani Fund. The letter reminded her 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 Miss M to contact her "*regulated financial advisor*", (referring, I assume, to Abana (FS) Ltd). It didn't however ask investors to confirm whether they wanted to continue to hold the investments on this occasion.

I'm aware from other complaints that it's likely Westerby also wrote to Miss M in September and December 2015. I've not seen letters that were addressed to Miss M on these dates. But the updates provided stated:

In September 2015, Westerby explained that trading on the ePortfolio Solutions platform was suspended pending the appointment of new management and reconciliation of funds. This letter also stated that the Kijani Fund was suspended, the SAMAIF was suspended, the International Money Market Fund was suspended and that the TCA Global Fund could not be accessed due to the suspension of the ePortfolio Solutions platform pending appointment of new management. Regarding the Kijani Fund the letter also 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.

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: [amount dependant on the investor] (SAMAIF expected to trade again in February)
Illiquid Funds: [amount dependant on the investor] (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."

On 16 April 2020 Miss M called this service to raise a complaint about Westerby. She said she wanted to raise a complaint against Westerby. She explained that her SIPP was now worthless.

On 11 June 2020 Westerby provided their final response letter. It didn't uphold Miss G's complaint and it said the complaint had been raised out of time. I will set out Westerby's submissions below.

On 16 July 2020 Miss M called this service following receipt of Westerby's final response letter. She said she wanted to proceed with the complaint against them.

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 Miss M's complaint.

Following the published decision Miss M's complaint was allocated to an Investigator for review. The Investigator issued their view. They said that the complaint had been brought in time and so it was one this service could consider.

Westerby didn't agree with the Investigator's view and asked for an Ombudsman to consider it. The complaint was passed to me and I issued a Jurisdiction Decision. I won't repeat what was decided here in full, but to say that this service has Jurisdiction to consider the merits of this complaint because it has been raised in time, and so I have gone on to do so.

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:

- All advice was provided by Abana and liability for unsuitable advice to make investments should rest with Abana.
- It checked the information on the application form was correct. That there was no money laundering.
- 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 Abana's permissions.
- It carried out due diligence on Abana before accepting business from it. And verified that Abana was authorised to operate within the UK under an EEA passport.
- Abana is authorised and regulated in Portugal by the Autoridade de Supervisao de Seguros e Fundos de Pensoes, formely the Instituto de Seguros de Portugal ('ISP').
- It verified on the ISP's Register that Abana held passported authorisations into the UK for both life (insurance) and non-life activities. It also verified that Abana was authorised by the FCA.
- It checked Companies House records and in Portugal to verify the directors of Abana.
- 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 Abana'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 Abana not holding the relevant permissions would have been a matter of public record. The FCA could only confirm what was on the Register, not what was missing from it. And the FCA cannot provide any more information than that which is provided on the Register.
- There have been various criticisms of the FCA Register over the years, and it may on occasion have contained errors.
- It checked the FCA Register and confirmed Abana 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 Abana was authorised to advise on *"life"* and *"non-life"*, the latter Westerby understood meant investments and pensions.
- Much later, independent consultants appointed by the FCA also spoke to the Portuguese Regulator and were told that Abana was authorised to advise on pension products. If Westerby had contacted the Portuguese regulator, it would have been told the same.
- It doesn't hold a copy of the *"Permission"* page for Abana 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 Abana'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 Abana's permissions couldn't be determined from the Register due to the limited information available. In other words, Westerby doesn't accept that, at the relevant time (when the online Register was viewed in 2013), that there was information regarding permissions available or accessible by an online user.
- 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.
- Abana was an authorised and regulated entity. It was reasonable to expect that it would be aware of, and act within, its regulatory permissions. Abana was adamant that it had the correct permissions, presented itself as knowledgeable and professional and at no time did it present any reason to doubt its credibility. By representing to Westerby both orally and in writing that it held the necessary permissions, Abana 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 Abana's advisor and Compliance Director. And he was thorough in his *"testing"* of their processes and due diligence.

- This culminated in Westerby establishing a legal document – the Terms of Business – in which Abana warranted that it had the required permissions to introduce the SIPP. Abana therefore effectively *"defrauded"* it.
- 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 Abana'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 Abana'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 Abana'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 Abana 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 Abana told it. The information provided by Abana in writing, together with Westerby's meetings with Abana and the due diligence performed.
- It's not fair or reasonable to hold Westerby liable for Abana's failures.
- It acted in good faith in accepting the introduction of Miss M's SIPP by Abana.
- It provided quarterly Product Sales Data reports to the FSA and later the FCA, those organisations were aware through the reports that Abana was introducing business to Westerby. And in 2015 Westerby was in contact with the FCA about Abana. On these occasions the FCA didn't raise any issues or allegations to Westerby about a breach of Westerby's duties and obligations.
- 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 Miss M to investigate the permissions of third-party advisors.
- Had it uncovered that Abana didn't have the relevant permissions, it would have declined all business from Abana from the outset, and would never have received Miss M's application or have been in a position to highlight Abana's lack of permissions.
- The advice provided to Miss M by Abana has been subject to an independent compliance review, carried out by Complete Compliance Support Limited ('CCS') who concluded that the advice was unsuitable.

- Abana had accepted that it's liable for the losses suffered as a result of its advice and CCS carried out redress calculations.
- Abana's offer of redress should be enforced, rather than Miss M seeking redress from Westerby. Miss M isn't entitled to be compensated for her losses twice.
- 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 Miss M'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 Miss M'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 Miss M'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, Abana put its clients into the Kijani and SAMAIF funds directly.
- Later on, Mr F of Abana made arrangements (without Westerby's authority) for the funds to be placed into the *"EPS Managed Fund"* – a Special Purpose Vehicle ('SPV') which essentially acted as a *"fund of funds"*, comprised of the Kijani, SAMAIF and the TCA Global funds.
- When ePortfolio Solutions started trading again, they split the funds into two portfolios – Managed Portfolio S containing the Kijani Fund, and Managed Portfolio L containing SAMAIF and TCA Global funds ("S" standing for "Suspended", and "L" for "Liquid")
- SAMAIF was included in Portfolio L as it was expected to begin trading again.
- Redemptions from this fund were made by the managers selling TCA Global – hence they were able to make redemptions initially, but TCA Global was ultimately depleted (it had effectively been used to subsidise the early redemption requests in the expectation that SAMAIF would begin trading again – a decision by the SPV managers that Westerby had no control over).
- 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 Miss M requested a full redemption at this point it's likely she would have received her funds in full.
- Whether or not there was a reference in Westerby's letter in November 2014 to Miss M to seek advice from Abana is an irrelevant point and had no bearing on the outcome as Miss M 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 Miss M and other investors that Westerby's November 2014 letter was *"scaremongering"*.
- It wrote to Miss M again to inform her that it was possible to make redemptions from part of her 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 Miss M 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 Miss M to mitigate her losses.
- Despite clear warnings from Westerby that funds were likely to be high risk, Miss M took no steps to obtain independent financial advice and didn't act straight away redeem the investments.
- Westerby can't be held liable for Miss M's decision to invest in the funds, or her failure to act on their warnings and return a redemption form to it to arrange a redemption when the opportunity arose in good time.
- 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 Abana, it was Miss M's decision to follow that advice.
- If it had rejected Miss M's application, Abana would have re-applied on behalf of Miss M to another SIPP provider that Abana 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 Abana's clients trusted its advice.
- Abana has now ceased to trade and it seems that the insolvency of Abana (and possibly the lack of insurance cover) may influence the conclusion reached in this complaint.
- Abana's actions were more serious than any alleged failures by Westerby.
- Having been ordered by the FCA to pay full redress to its client, Abana then refused to do so. Little/nothing was done to enforce awards made against Abana for redress to investors on similar complaints before Abana ceased to trade. Losses caused by the apparent failings of other authorities shouldn't rest with Westerby.
- It's important that this service doesn't overlook the gravity of Abana's wrongdoing, when considering this complaint against Westerby and the issue of apportionment.
- 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 Abana had the necessary permissions. Further, it doesn't accept that it ought to have been reasonably aware of cause to have questioned the accuracy of the statement in the agreement.
- The published decision concedes that information which wasn't available on the Register wouldn't have been provided to Westerby by the FCA if it wasn't already on the Register. But the published decision also says that if Westerby had contacted the FCA directly the FCA would have been able to confirm Abana's permissions. No information has been provided about this and the FCA's position generally.
- 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 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.

No agreement could be reached and so the complaint was passed to me for consideration. I

issued a decision setting out that this complaint was one this Service could consider. And then issued a Provisional Decision on the merit's of Miss M's complaint.

In response Westerby again questioned this Service's jurisdiction to consider the complaint, as they said it had been raised out of time. No further evidence was provided for me to consider. This complaint is one this Service can consider, for the reasons set out within the Jurisdiction Decision. I won't repeat those findings in full here but in summary:

- Miss M's SIPP was opened in December 2013 and investments made with the transferred monies in February 2014.
- Miss M referred this complaint to Westerby in April 2020.
- The referral of the complaint was longer than six years from the event complained of.
- Miss M was not aware, and ought not to have reasonably been aware that she had this complaint against this firm – Westerby longer than three years from when the complaint was referred to them.
- As such this complaint was brought in time and this Service has Jurisdiction to consider it.

Miss M provided some additional information following my Provisional Decision, she said that she had been advised by Abana that she was moving her pension monies into a low risk fund.

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.

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 Miss M's complaint. I will go on to explain why below.

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 Miss M'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 Miss M'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 her 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 Miss M'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 Miss M's cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Miss M's case. And I

need to construe the duties Westerby owed to Miss M under COBS 2.1.1R in light of the specific facts of Miss M'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 Miss M and Westerby in this complaint proceeded on the footing that Miss M 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 Miss M's case.

So, I've considered COBS 2.1.1R – alongside the remainder of the relevant considerations, and within the factual context of Miss M'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 Miss M 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 Miss M 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 Miss M'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 Abana. So, it clearly thought it was good practice to do so, at the very least.

Like the Ombudsman in the BBSAL case, I don't think the fact some of the publications post-dated the events that took place in relation to Miss M'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 Miss M'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 Miss M's SIPP application from Abana, Westerby complied with its regulatory obligations: to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and treat them fairly; and to act honestly, fairly and professionally. And, in doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Westerby could have done to comply with its regulatory obligations and duties.

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

So, taking account of the factual context of this case, it's my view that in order for Westerby to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), it should have undertaken sufficient due diligence checks to ensure Abana had the required permissions to

give advice on and make arrangements in relation to personal pensions in the UK before accepting Miss M's business from it.

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

The regulatory position

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

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

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

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

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

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

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

It goes on to say:

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

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

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

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

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

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

The guidance in SUP 13A.1.2G of the FCA Handbook at the time of Miss M'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 at September 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 Abana, which was an EEA firm passporting into the UK. It should therefore have known – or have checked and discovered – that a business based in Portugal that was EEA-authorised needed to have *"top-up"* permissions to give advice and make arrangements in relation to personal pensions in the UK. And that *"top-up"* permissions had to be granted by the UK regulator, the FCA.

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

Westerby's checks on Abana's permissions

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

The Register

I'm satisfied that, in order to meet its regulatory obligations, Westerby ought to have independently checked and verified Abana's permissions before accepting business from it. I think it's fair and reasonable to expect Westerby to have checked the Register entry for Abana in the circumstances. And I think it's fair and reasonable to say that the checks

Westerby ought to have conducted on Abana's Register entry should have included a review of all the relevant information available.

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

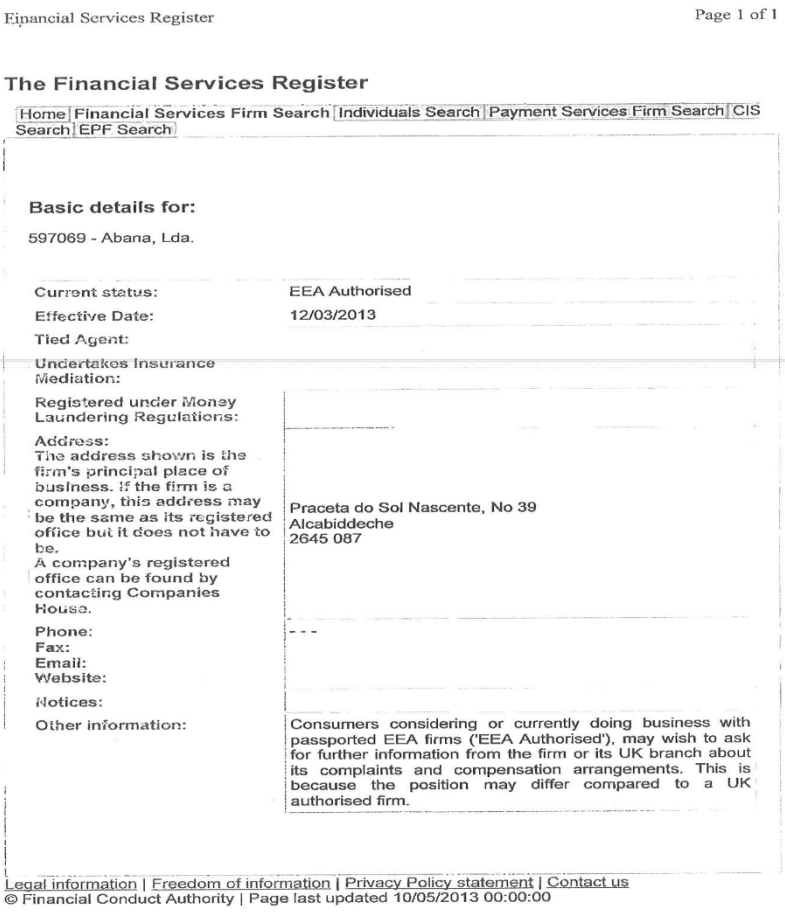
Westerby says that, at the time of Miss M's SIPP application, there wasn't information available or accessible on the FCA Register that would have shown Abana's permissions position. It says that screenshots show that the Register at that time didn't include a *"Passports"* section, or make any mention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

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

Westerby has previously submitted that:

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

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



Financial Services Register Page 1 of 1

The Financial Services Register

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

Basic details for:

597069 - Abana, Lda.

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

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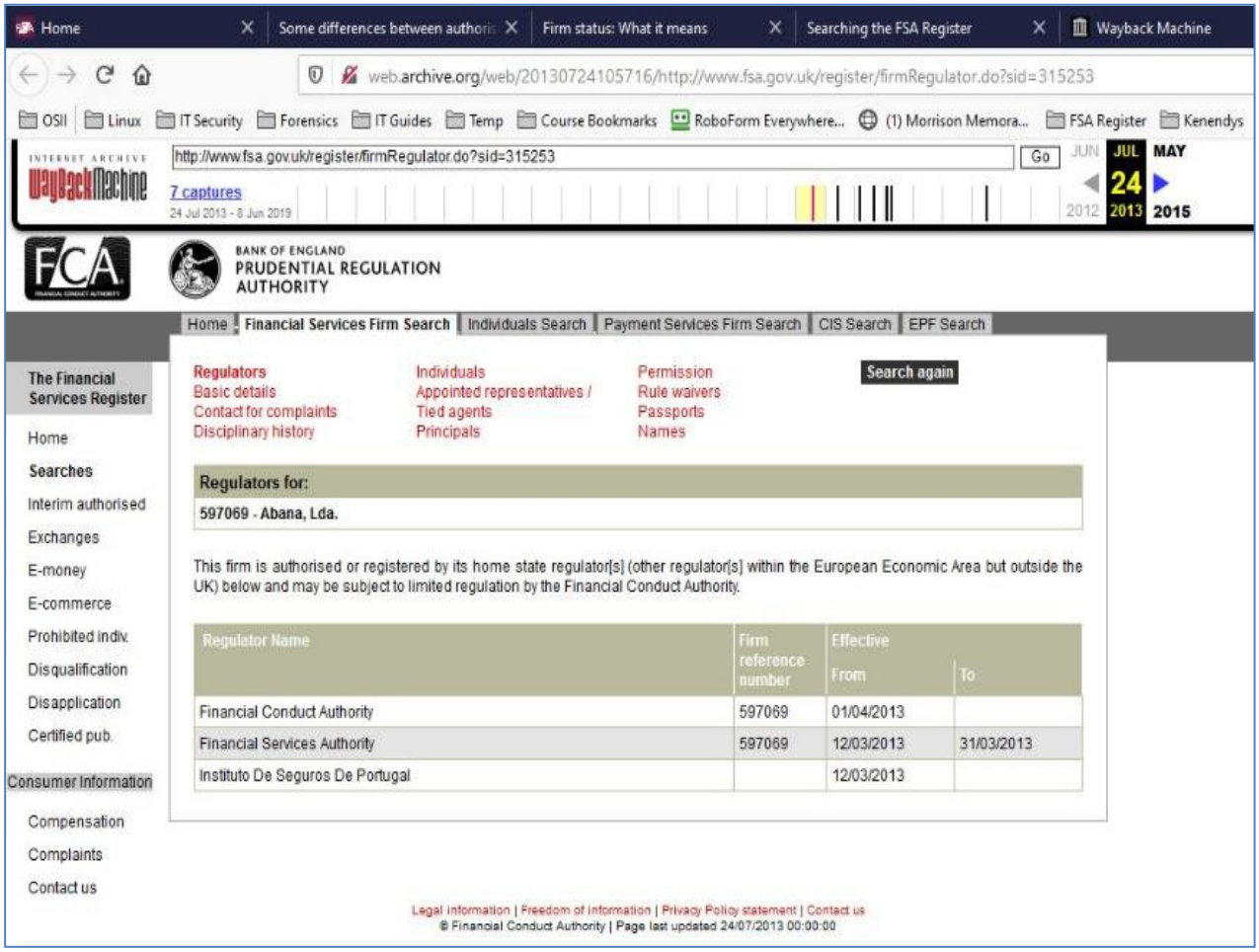
The third-party report on the Register, provided by Westerby during the investigation of the complaint which was the subject of the published decision, is helpful to discussions about the format of the Register at the time of Miss M's SIPP application. The report included the following screenshot of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



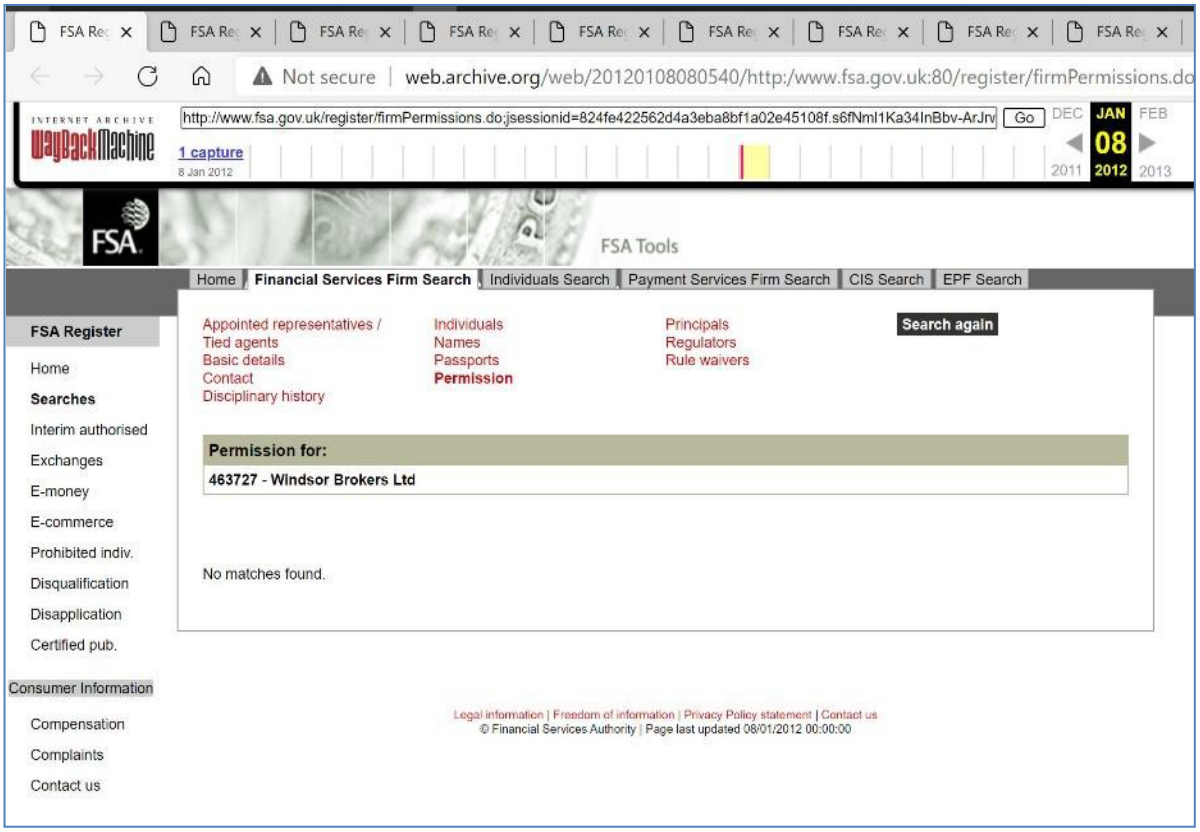
Each of the red titles at the top of the entry for Abana (Regulators, Basic details, Contact for complaints, Disciplinary History and so on) is a hyperlink to another page of Abana's entry on the Register. So, this screenshot shows that Abana's 2013 entry on the Register would have included, amongst other things, both *"Permission"* and *"Passports"* pages. And it's reasonable to conclude from the above screenshot that the format of the Register, in or around the time Miss M'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.

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 Miss M's SIPP application or earlier.

The below example, dating from 2012, and relating to a Cypriot firm which, like Abana, was an incoming EEA firm, is particularly helpful:



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

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

I'm satisfied that all of this information taken together demonstrates that, when Miss M'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 Abana's permissions before accepting business from it. And it's fair and reasonable to expect Westerby to have checked the *totality* of Abana's Register entry in the circumstances.

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

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

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

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

Westerby has previously referred to a Complaints Commissioner's report that highlights some issues with the Register. I appreciate that there have been criticisms of the Register and that it may, on occasion, have contained errors. However, I'm satisfied that a regulated market participant such as Westerby, acting in accordance with its regulatory obligations, ought to have understood that Abana needed permission from the FCA to give advice on and make arrangements for personal pensions in the UK. Therefore, before accepting business from Abana, Westerby needed to confirm that Abana held the required permissions. And, for the reasons I've detailed above, I'm satisfied that Abana's entry on the Register at the relevant time would have included a *"Permission"* page. And, if this page hadn't set out any information (for example, if the *"Permission"* page had erroneously been

left blank) Westerby, in accordance with its regulatory obligations, shouldn't have accepted Miss M's application from Abana before carrying out further enquiries to clarify the correct position on Abana's permissions.

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

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

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

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

To be clear, even if there was an issue with Abana's Register entry, or if I'm wrong in my finding that Abana's entry on the Register at the relevant time included a *"Permission"* page, (and the *"Basic details"* page was the totality of the Register entry for Abana in 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 Miss M's application from Abana in those circumstances.

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

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

So, to summarise, I'm satisfied that:

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

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

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

Could Westerby have relied on what Abana told it?

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

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

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

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

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

And COBS 2.4.8 G says:

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

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

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

However, Westerby now seeks to rely on these meetings to evidence that it did take steps to ascertain Abana's permissions and that Abana had confirmed to Westerby that it had the required *"top-up"* permissions. In my opinion, if these meetings were the way Westerby was intending to evidence Abana's permissions, in order to comply with its regulatory obligations, in particular Principle 2, (to conduct its business with due skill, care and diligence), and Principle 3, (to take reasonable care to organise and control its affairs responsibly and effectively), Westerby should have had processes in place to ensure that it was able to evidence the due diligence it had carried out on Abana, including the steps taken to confirm Abana's permissions.

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

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

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

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

The Agreement provides as follows:

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

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

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

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

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

So, for the reasons I've set out above, I don't think COBS 2.4.6R (2) applies to either the meetings Westerby had with Abana or the Agreement the parties entered into. However, I've

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

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

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

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

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

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

Anomalous features

In my view, Westerby ought to have identified a risk of consumer detriment here. Miss M was taking advice on her 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 Miss M as carrying a significant risk of consumer detriment. And it should have been aware that the role of the advisor was likely to be a very important one in the circumstances – emphasising the need for adequate due diligence to be carried out on Abana to independently ensure it had the correct permissions to be giving advice on personal pensions in the UK.

I don't expect Westerby to have assessed the suitability of such a course of action for Miss M – 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 Miss M fairly and act in her best interests.

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

Further points

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

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

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

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

Westerby has submitted that where complaints have been received by this service against both Abana and Westerby, that we should decide the complaint against Abana before, or at the same time as, the complaint against Westerby. Later in this decision, I've addressed the question of whether it's fair to ask Westerby to pay Miss M compensation in the circumstances of this complaint.

In conclusion

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

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

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

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

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

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

Due diligence on the underlying investments

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

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

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

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

Miss M went through a process with Abana that culminated in her completing paperwork to set up a new Westerby SIPP and with the expectancy that monies from her 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 her pension monies weren't then transferred to Westerby, that Miss M would have wanted to find out why from Abana and Westerby.

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

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

Further, I think it's very unlikely that advice from a business that did have the necessary permissions would have resulted in Miss M 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 Miss M proceeded in the knowledge that the investments she was making were high risk and speculative, and that she was determined to move forward with the transaction in order to take advantage of a cash incentive offered by Abana. I've not seen any evidence to show Miss M 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 Miss M 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 Miss M's application, had it declined it. But I don't think it's fair and reasonable to say that Westerby shouldn't compensate Miss M for her 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 Miss M's application from Abana.

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

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

The involvement of Abana

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

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

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

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

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

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

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

The starting point therefore, is that it would be fair to require Westerby to pay Miss M compensation for the loss 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 Miss M for the 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 Miss M to the full extent of the financial losses suffered due to its failings.

I accept that it may be the case that Abana, in advising Miss M to enter into a SIPP, is responsible for initiating the course of action that led to Miss M'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 Miss M wouldn't have come about in the first place, and the loss she suffered could have been avoided.

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

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

I accept that may be true. However, the key point here is that but for Westerby's failings, Miss M wouldn't have suffered the loss she has suffered. As a result, the trading/financial position of Abana, and the fact that Westerby may not be able to rely on an indemnity from Abana and/or the fact that any assignment of any action against Abana from Miss M 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 Miss M to the full extent of the financial losses suffered due to its failings, and notwithstanding any failings by Abana.

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

The circumstances and facts of the other complaint Westerby has mentioned appear to be very different to Miss M'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 Miss M to the full extent of the financial losses 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 Miss M to the full extent of the financial losses 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 Miss M.

Miss M taking responsibility for her 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 Miss M 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 Miss M's actions mean she should bear the loss arising as a result of Westerby's failings.

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

Opportunity to mitigate losses

Westerby says it wrote to Miss M to highlight issues with the funds her SIPP invested in and to inform her of an opportunity to realise some of his investment value. It says Miss M had a responsibility to take appropriate action to safeguard his funds and so should be responsible for the losses she'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 Miss M to mitigate her loss.

I don't think it would be fair to say Miss M should have made a redemption request when Westerby wrote to her in November 2014. The November 2014 letter required Miss M to seek advice, and urged her 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 Miss M 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 Miss M 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 Miss M fairly. In the circumstances, I don't think it would be fair to say Miss M should have made a redemption request when Westerby wrote to her in November 2014.

In its June 2015 letter to Miss M, 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 Miss M 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 Miss M's SIPP.

Westerby also urged Miss M to have her 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 Miss M back to Abana.

There was then the letter of 10 September 2015, that explained that trading in the ePortfolio Solutions platform had been suspended pending the completion of a buy-out.

In the June 2015 letter Miss M was told of an investigation into the Kijani Fund. And the letter of 10 September 2015 then explained that all trading on the ePortfolio Solutions platform had

been suspended. So, I don't think it fair to say Miss M could, or should, have done anything further at that time. That's because I think following the June 2015 update it was reasonable for Miss M to think she didn't need to do anything, and following the September 2015 update it was reasonable for her to conclude she couldn't do anything.

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

So I think there's insufficient evidence to show any redemption request made in relation to the Kijani fund after Westerby's July 2015 letter (and before Miss M did submit his redemption request in January 2016) would have been successful.

There was then the December 2015 letter, in which it was explained that a suspension on the SAMAIF might lift, but I think it's fair to consider that by that point there was a lot of uncertainty surrounding the status of the fund and it wasn't at all clear what level of loss Miss M might be crystallising if he were to sell his investment. So, even if the suspension was lifted as envisaged, I don't think it's fair to say Miss M has contributed to his loss by not ordering its redemption sooner than he did.

And I also think the December 2015 letter is somewhat contradictory as it says the suspension of SAMAIF has been lifted but then says that the lift of the suspension is "*not yet active"* (i.e. it's still suspended).

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

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

So, there's insufficient evidence to show a redemption request submitted after July 2015 would have been successful, even if Westerby did receive a redemption form from Miss M. 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 Miss M.

fair compensation

Westerby says that responsibility for Miss M's loss should lie with Abana.

As set out above, I accept that it may be the case that Abana, in advising Miss M to enter into a SIPP, could be responsible for initiating the course of action that led to Miss M'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 Miss M for the full measure of the losses –

as Westerby could have put a stop to things if it had acted fairly and reasonably by rejecting Miss M's application.

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

In addition to the financial loss that Miss M has suffered as a result of the problems with her pension, I think that the losses suffered to Miss M's pension provisions have caused Miss M distress and I think that it's fair for Westerby to compensate Miss M for this as well.

Putting things right

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

As I've already mentioned above – 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 Miss M to transfer away from her existing pension plans.

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 Miss M back into the position she would likely have been in had it not been for Westerby's failings. Had Westerby acted appropriately, I think it's *most likely* that Miss M would've remained a member of the pension plans she transferred into the SIPP.

In light of the above, Westerby should:

- Obtain the notional transfer value of Miss M's previous pension plan/s.
- Obtain the actual transfer value of Miss M'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 Miss M'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 Miss M has paid any fees or charges from funds outside of her pension arrangements, Westerby should also refund these to Miss M. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Pay to Miss M an amount of £500 to compensate her for the distress and inconvenience she'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. Miss M would then be able to close the SIPP, if she wishes. That would then allow her 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 Miss M'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 Miss M 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 Miss M 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 Miss M has suffered as a result of making the transfer

Westerby should first contact the provider of the plans which were 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 Miss M 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 Miss M'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 Miss M's loss.

Pay an amount into Miss M'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 Miss M'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 Miss M 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 her 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 Miss M 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 Miss M or into his SIPP within 28 days 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

I think the loss of the pension provision that is the subject of this complaint caused Miss M significant distress. The funds complained about were a large part of Miss M's pension provision. It's understandable that thinking she had lost the whole fund was distressing for her. So, Westerby should pay her £500 to compensate her for this.

My final decision

For the reasons given I uphold this complaint and direct Westerby Trustee Services Limited to calculate and pay fair compensation to Miss M 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 Miss M 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 Miss M's rights in relation to any claim he may have against Abana, and an assignment of the right to any future payment Abana may make to Miss M 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 Miss M's rights should allow her 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 Miss M 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 Miss M could accept a decision and go to court to ask for the balance and Miss M 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 Miss M to accept or reject my decision before 24 February 2025.

Cassie Lauder
Ombudsman