## The complaint

Miss C complains that Westerby Trustee Services Limited ('Westerby') failed to carry out sufficient due diligence on the Ethical Forestry investment the late Ms R made through her Westerby Self-Invested Personal Pension ('SIPP') and on the firm who introduced Ms R's business to it, causing a financial loss.

Miss C is the beneficiary of the late Ms R's Westerby SIPP.

For simplicity, I refer to Miss C and Ms R throughout, even where the submissions I'm referring to were made by the representative.

## What happened – the parties

I will first set out my understanding of what I think were some of the key parties involved, their roles, and a brief overview of the investment in this complaint.

<u>Involved parties</u>

*Westerby*

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

*Firm B*

As I understand it, Ms R was contacted by someone I'll refer to as Mr M of Firm B, which was an unregulated introducer. As I'll come on to later, Ms R said that Mr M introduced her to Westerby and advised her that both investments were suitable/excellent investment opportunities for her.

*German Property Group companies*

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

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

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

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

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

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

*Beech Holdings (Manchester) Limited ('Beech Holdings'), now known as the Manchester Property Development Holdings Limited*

The loan notes issued by Beech Holdings, offered a 'Growth' option, accruing simple interest at 8% per annum, payable at maturity with a 10% bonus, or an 'Income' option, which accrued interest at 8% per annum and paid the accrued interest every six months. The assets underlying the loan notes were property developments in Manchester. And it was facilitated using a security trustee via a security trust deed.

It appears Beech Holdings has since failed to pay interest due to investors, despite the redemption date being pushed back from 2021 to 2024.

**What happened – the late Ms R's dealings with Westerby**

On 2 October 2014, Ms R signed a 'Non-Standard Asset Questionnaire'. Amongst other things, she said on this that:

- She intended to retire age 70.
- When asked whether she had received advice, 'advised' was crossed out, leaving 'non-advised'.
- Her annual income was between £75,000-100,000.
- Her total assets excluding her primary residence and pension arrangements were in excess of 1 million.
- She had no other pension arrangements, except for her state pension.
- She had experience of investing in listed equities and residential property (six transactions in the past 24 months). She noted, amongst other things, that she was a property investor/developer with a portfolio of £2.1 million and had ran her own businesses.

And Ms R went on to declare that:

- The information contained in the questionnaire was true and complete.
- Westerby reserved the right to request evidence of information disclosed in it.
- Westerby wouldn't be held responsible for decisions made or losses arising as a result of the information in it being incomplete or incorrect.

In October 2014 – on 14 October according to Westerby – Ms R met with Mr S, an employee of Westerby's, at her home to assist her with the completion of her SIPP application documents.

Ms R's SIPP application form, dated 14 October 2014, detailed under 'Investment Strategy' that she wanted to invest in Dolphin loan notes. And when asked 'Do you have a Financial Adviser', 'no' was ticked. Just under a week later, Ms R signed a form waiving her 30-day cancellation period in respect of the establishment of her SIPP, noting that this was because she wanted 'To invest ASAP'.

It seems Ms R's Westerby SIPP was formally opened on 16 October 2014. In November 2014, just over £97,000 was switched into this from her existing SIPP with another provider. And, on 28 November 2014, £95,000 of this was invested into a three-year Dolphin loan note. Prior to doing so, it seems Ms R would have had to sign a Dolphin Loan Note offer document, although we don't appear to have been provided with a copy of that which Ms R signed in 2014 – that's despite Westerby being asked to do so by the deadline to respond to my provisional decision.

It appears Ms R went on to receive a return of around £37,000 from the 2014 Dolphin investment into her SIPP. And, in November 2017, seemingly in advance of the 2014 Dolphin loan note maturing, Ms R signed a new Dolphin Loan Note offer document for an investment of £50,000. She confirmed she wished to accept the Loan Note offer and that she'd fully understood the terms and conditions detailed in the Loan Note Instrument documentation provided to her.

When the 2014 Dolphin loan note matured and it seems Ms R received the £95,000 back into her SIPP on 6 December 2017, she reinvested £50,000 of this into a new five-year Dolphin loan note via her SIPP the same day, as well as £45,000 into Beech Holdings with a maturity date of September 2021 on a growth basis.

Ms R had also filled out another 'Non-Standard Asset Questionnaire'. And, amongst other things, she said on this that:

- She was 69 and intended to retire the following year, age 70.
- When asked whether she had received advice specifically relating to the Dolphin and Beech investments, she didn't tick either of the 'Yes/No' options.
- Her annual income was between £50,000-£75,000.
- Her total assets (also including cash and investments totalling £285,000) less liabilities gave her a total net worth just under £1.2 million.
- She had experience of investing in listed equities (12 transactions) and residential property (three transactions) in the past 24 months, along with previous experience investing in commercial property, although no further details were provided.
- She worked in property development and management and ran her own businesses.

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

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

Before signing the fifth page, it said '*I elect to be treated as a **HIGH NET WORTH/SOPHISTICATED/ECLECTIVE PROFESSIONAL INVESTOR***' (no emphasis added). Ms R was asked to delete as appropriate to select which one she was, but made no selection/deletion. And she was asked to the complete the appropriate self-certification certificate overleaf, on page six of the questionnaire, certifying that she was either a high net worth or self-certified sophisticated investor, neither of which Ms R completed.

On 12 December 2017, Westerby received confirmation from Beech Holdings that the investment funds had been received by the trustee. This confirmed:

- That Ms R would have been provided with an Information Memorandum and Growth Loan Note Instrument at the time of making her investment.
- The trustee, as per the trust deed, hold on behalf of loan note holders their original investment funds, the first legal charge on development sites and a personal guarantee from the sole shareholder and director.
- The Loan Note Certificate was enclosed, which set out, amongst other things, that the Note was subject to the provisions in the Instrument and Certificate.

The same day, a Dolphin loan note was issued certifying that Westerby and Ms R were the registered holders of secured convertible loan notes. And that these are subject to the provisions contained in the Loan Note Instrument and Loan Note itself.

It seems Ms R received returns on her further investment in Dolphin Capital of around £7,500, but nothing further from it beyond late 2018. And both her investments in Dolphin and Beech Holdings are now valued at nil.

**What happened – Ms R and Miss C's complaint**

Ms R first complained, via her representatives, to Westerby in July 2020. She said, in summary, that it didn't do enough due diligence on Firm B or the investments, which were unregulated and high-risk, and it shouldn't have accepted her applications. She said she was a retail customer, who is by no means a sophisticated or high net worth individual, of relatively modest means. She said this has caused her to lose out.

Westerby replied in October 2020 and, unhappy with this response, Ms R referred her complaint to our Service.

Westerby said in its responses in respect of the complaint, amongst other things, that:

- There's no evidence that an unregulated introducer provided Ms R with advice. And she confirmed in the SIPP application and other documents that she hadn't received any advice.

- Ms R was referred to it by a Mr M of Firm B. Westerby didn't have an agreement with Firm B to accept referrals from it, and so far as Westerby was aware Firm B wasn't providing advice and it simply introduced Ms R to Westerby.
- One of Westerby's sales executive's, a Mr S, met with Ms R at her home on 14 October 2014 to assist her with the SIPP application documents. Mr M of Firm B wasn't present. So Ms R completed the documents without Mr M.
- Westerby denies that it was in receipt of 'frequent' applications from customers that were introduced to it by Firm B.
- It understands that Firm B received referrals from existing clients or professional connections and that it only dealt with high net worth and sophisticated investors, such as Ms R.
- Mr M of Firm B's email signature included a statement that he didn't provide advice, only information and that the value of investments could rise or fall and that customers should only invest what they can afford to lose.
- While Firm B wasn't authorised, this wasn't a reason to reject any business referred by it. It's acceptable for Westerby to accept referrals and introductions from unregulated introducers. This is supposed by FCA guidance, which references additional risk controls for referrals from unregulated introducers.
- The assets underlying the loan notes were all property developments. And Ms R had a background in and extensive knowledge of property development.
- The answers Ms R gave in the non-standard asset questionnaires that she completed in order for Westerby to permit her investment in Dolphin, show that she wasn't of 'relatively modest means' and it's a misrepresentation of the facts to say that she wasn't a sophisticated investor nor a high net worth individual.
- While the investment was recognised as a high risk, non-standard asset, this was not in itself a reason to deem it unacceptable as a SIPP investment, in line with the FCA's statements on this matter.
- Westerby did, however, restrict investments into SIPPs to cases where either (a) the SIPP member met the FCA's definition of a high net worth or sophisticated investor, who could reasonably be expected to understand the risks (as in Ms R's case), or (b) where the SIPP member had been advised to make the investment by a regulated financial adviser.
- The investments were only permitted due to Ms R's representation that she had sufficient assets to meet the FCA definition of a high net worth individual and on the basis she had sufficient knowledge and experience to understand the risks involved with high risk, non-standard, investments.
- *Adams v Options SIPP* [2020] EWHC 1229 (Ch) held that the SIPP provider hadn't breached its statutory or common law duties to the claimant and that their losses flowed solely from his decision to proceed with a high risk, speculative investment. And, amongst other things, that: '*A duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed in my judgment as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed.*'.
- It acted on an execution only basis and Ms R's losses flow from her decision to proceed with a high-risk investment. Ms R should take responsibility for her own decisions in the circumstances.
- It took steps to ensure Ms R understood her instructions were on an execution only basis and that she was solely responsible for her decisions. Ms R signed declarations confirming she understood this. And it recommended she seek financial advice. It had to act in accordance with such instructions, unless there was a specific reason why the investment couldn't be held in a SIPP.

- There has been limited formal FCA guidance as to the extent of due diligence a SIPP provider is expected to undertake. Westerby's due diligence processes are based on the FCA's July 2014 *"Dear CEO"* letter. It met this criteria in respect of Ms R's investments. Such investments that are speculative in nature aren't manifestly unsuitable as a SIPP asset.
- It carried out extensive checks on Dolphin prior to Ms R's initial investment in 2014. And, in the absence of evidence this wasn't genuine or inappropriate as a SIPP asset, it concluded it was acceptable.
- It completed a review of its due diligence shortly before maturity of Ms R's 2014 Dolphin loan note and found that interest and capital repayments were being made as these fell due and the security trustee confirmed land charges were in place. The fact that Ms R's 2014 investment had paid the interest and then the capital in 2017 was evidence this was operating as expected and not impaired. So it permitted Ms R's reinvestment into a new Dolphin loan note in 2017.
- The investment documents were clear that Dolphin loan notes were high risk, with the second page of the brochure clearing stating that this was a promotion that hadn't been approved by an authorised person and that relying on it could lead to a risk of an investor losing all assets invested. It also told investors to read the Information Memorandum prepared during 2017 and to consult an adviser.
- The Information Memorandum explained that loan notes involve a high degree of risk and investors should consider if this investment is suitable for them. It then went on to list specific factors that could lead to a loss of funds, such as unforeseen costs and development problems, valuations being less than anticipated and that it said in bold that investors wouldn't be able to claim to the FSCS.
- The Loan Note offer directed Ms R to read the Information Memorandum and Loan Note Instrument, so it's unlikely she wouldn't have seen this information.
- It would have been clear to any reasonable investor, in particular one with Ms R's knowledge and experience, that this investment carried a risk of total loss of funds which was commensurate with the potential return.
- In respect of Beech Holdings, it established the investment structure and verified that a security trust deed was in place. It looked at information on directors and shareholders, for example, on Companies House. And was provided with letters from a chartered accountant in respect of the sole director and shareholders net asset value and likely ongoing profitability of his property portfolio, as well as a copy of accounts prepared by it. A personal guarantee was also in place in respect of the investment. And the documentation included an extensive list of risk factors.
- Ms R switched from an existing SIPP in which she would have been exposed to investment risk. By 2017 she'd already made high risk investments in the form of a Dolphin loan note which bore significant returns. So if Westerby had refused to accept the investments within her SIPP then she would have sought out alternative high risk investments. She chose the 'Growth' rather than 'Income' option on the Beech loan note, which supports that she was seeking high risk investments with the potential for a higher reward, due to the potential return of a 10% bonus on maturity. Or alternatively, Ms R would have made these investments via another SIPP provider.
- Due to the general principle that customer's should take responsibility for their own investment decisions, if compensation is awarded against it this should be reduced due to contributory negligence.

During the course of Ms R's complaint she said, amongst other things, that:

- She was first referred to Westerby by Mr M of Firm B. She trusted Mr M as he seemed extremely knowledge about investments and advised that both investments were suitable/excellent investment opportunities for her.

- Ms R was also attracted by the fact Mr M personally recommended Westerby. He suggested she discuss her investment/switch with a Mr S at Westerby, the latter of which then made arrangements to visit her at her home to assist her completion of the SIPP application documentation.
- Mr M suggested she invest in Dolphin and Mr S at Westerby dealt with all the paperwork.
- Ms R was promised a 10% return and was told that the Dolphin investment had sufficient security/protection in place. She was also interested in Beech Holdings because the proposed developments were in the UK and because she was investing into property which was also supposed to be safe and secure.
- In respect of the risks, Ms R was told and understood that were various securities in place / charges over the properties as a form of security. And the investments were safe and secure.
- At the time of being contacted by Firm B, Ms R was interested in her options and what she could do with her pension.

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

- As a SIPP provider, Westerby's responsibilities in respect of due diligence were limited to conducting due diligence in line with FCA guidance and to ensuring the investment was allowable in line with HMRC rules. Westerby has evidenced the comprehensive due diligence undertaken and that it met standards set by the FCA.
- Loan notes as an investment class are allowable by HMRC within a pension scheme. It identified as part of its due diligence that the investment was structured appropriately as expected of a loan note and that there were real and secured assets against the Dolphin project. Based on this, it reasonably concluded that the investment was real and secure at the time.
- At the time of investing there were no apparent warning signs that indicated fraud. Our Service has drawn factually incorrect conclusions using the benefit of hindsight based on information that has come to light only after Dolphin's business entered into administration proceedings and after an independent insolvency practitioner has had an opportunity to access all information in relation to the business, including information that could never have been accessed by Westerby.
- There was no evidence at any point before 2018 of any issues surrounding Dolphin that would have been reasonably found in the public domain. As potential issues came to light, Westerby took appropriate and reasonable steps in relation to Dolphin including but not limited to stopping the payment of any new monies into Dolphin and not allowing any roll-over of investments.
- Westerby at each review obtained and reviewed appropriate accounts in relation to Dolphin. For example, the balance sheets as at 31 December 2014 and 2015 which were the most recent accounts filed at the German Company Register at the time of Ms R's investment, together with copies of the December 2016 draft management accounts being the most recent accounting period for both companies. It is, therefore, simply not correct to say that the annual financial statements had not been prepared for a number of years or that financial information was not readily available and not asked for by it. And there is nothing in the accounts that would reasonably have given Westerby any cause for concern as to whether this was a legitimate investment. On the contrary, these confirm that the investment was operating as it should, with substantial assets held by Dolphin.
- The Investigator said Westerby should have asked for the way in which cash flows were being managed. This would involve a forensic analysis of the accounts which went beyond the scope of the due diligence required by a SIPP operator, whose role

is simply to determine if the investment is suitable to be allowed into a SIPP wrapper, not to advise on the commercial merits of it. There was nothing to put Westerby on notice that there was any reason to be concerned about the cashflows from 2015 onwards, this is only known with the benefit of hindsight.

- In reference to comments around the legal charges, it is incorrect to say that Westerby relied entirely on a list of properties provided to it by the security trustee against which security had been registered in favour of noteholders. It was provided with copies of legal charges, relevant planning permission and listed building certificates, which it has provided to us.
- There was no reason for it to doubt the validity of the information and documents which were provided to it by appropriately registered and regulated legal and other firms in the UK and overseas.
- It was entitled to rely on the documentation it received, including confirmation from the German law firm of its role, unless or until it was told that the arrangements had changed (at which point it would have carried out further due diligence regarding the new arrangements). It carried out appropriate due diligence on the German law firm involved and had no reason to suspect the truth of what it was told.
- It is incorrect to say that the marketing material was "guaranteeing" returns of at least 12%. The brochure correctly and accurately stated that returns were "fixed", but it also included specific reference to risk factors and Westerby doesn't believe that any investor reading the brochure could reasonably believe the investment was low risk.
- It was made clear to Ms R in the documents she received that the investment was high risk and, had she thought this was not acceptable she ought to have spoken to a financial adviser. Whilst it is noted that some of the marketing literature indicates the investment is low risk, the conflict between the marketing literature and the legal instrument of the investment that the client had to agree to would not have been reason to prevent the investment from being held in a SIPP wrapper.
- There is no question of Westerby having failed to carry out its own obligations properly and then looking to excuse its failures by relying on a disclaimer. Rather, as explained in *Adams*, the disclaimers set out the scope of its obligations and confirm that responsibility for assessing the suitability of the investment remains with Ms R, rather than the SIPP provider. Any complaint in relation to this investment ought not be upheld against Westerby, as the client had to take responsibility for her own investment decisions.
- It is reasonable to conclude that if it had not accepted Ms R's application, she would have sought another SIPP provider who would have allowed the investment, of which there were many. Following her initial (successful) investment in Dolphin, which produced a return of over £37,000 over a three-year period, the only reasonable conclusion on the balance of probabilities is that Ms R would have been very keen to invest again in Dolphin and would have actively looked for a way to be able to do so. As such she would have been exposed to the investment regardless.
- All of Ms R's losses are the result of her own decision to invest into a high- risk investment which ultimately, and regrettably failed. If Ms R did in fact receive financial advice from a third party, she ought to redirect her claim to that firm, and if appropriate seek a legal claim against them.

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

I issued a provisional decision upholding Ms R's complaint. In response, Westerby said in respect of this complaint and on other similar cases with our Service involving the Dolphin investment, in summary, that:

- We've criticised Westerby for accepting Ms R into the SIPP to make the initial 2014 Dolphin investment. However, that investment didn't cause Ms R a loss, as she received interest and a return of it. The loss experienced is instead in respect of the later Dolphin and Beech investments. But there was no breach of duty pertaining to those and no criticism of Westerby in respect of its due diligence into Beech. By the time of the later investments, Dolphin had a track record of returns. And if Westerby had refused to make the 2017 investments (despite having no grounds to do so), Ms R would have been insistent given the return on her initial Dolphin investment.

- It is incorrect to say that the marketing material was "guaranteeing" returns of at least 12%. The brochure correctly and accurately stated that returns were "fixed", but it also included specific reference to risk factors and Westerby doesn't believe that any investor reading the brochure could reasonably believe the investment was low risk.
- The Dolphin brochures we've placed weight on and said was misleading is only part of a suite of documents a client is expected to read and consider before investing. And one misleading statement in a document suite wouldn't be enough to prevent an allowance investment within a pension scheme.
- It was made clear to Ms R in the documents he received that the investment was high risk and, had she thought this was not acceptable she ought to have spoken to a financial adviser. Whilst it is noted that some of the marketing literature indicates the investment is low risk, the conflict between the marketing literature and the legal instrument of the investment that the client had to agree to would not have been reason to prevent the investment from being held in a SIPP wrapper.
- There is no question of Westerby having failed to carry out its own obligations properly and then looking to excuse its failures by relying on a disclaimer. Rather, as explained in *Adams*, the disclaimers set out the scope of its obligations and confirm that responsibility for assessing the suitability of the investment remained with Ms R, rather than the SIPP provider. Any complaint in relation to this investment ought not be upheld against Westerby, as the client had to take responsibility for her own investment decisions.
- Thirteen other SIPP providers who'd also undertaken due diligence into Dolphin didn't come to any other conclusion than that it was an allowable investment within a SIPP wrapper and this was therefore how the industry viewed the investment.
- We've considered the complaint with the benefit of hindsight and with the knowledge of the insolvency administrator's expect opinion, which far exceeds what a reasonable person or an execution only SIPP provider may reasonably have undertaken and amounts to a forensic analysis.
- Ms R said on her SIPP application that she didn't have an aadviser, but then we've referred to her having been advised by Firm B.
- Westerby was not required to conduct due diligence on Firm B.
- Firm B signposted Ms R to Westerby. It doesn't agree with the inference that a Westerby staff member was encouraging Ms R to invest in Dolphin and it doesn't agree that it is unusual for a staff member to visit a customer's home. They'd do this within a reasonable distance to ensure the introducer wasn't involved in the application process and to help determine the level of the customer's sophistication. And, in that event, Westerby only provided guidance. It was for the customer to select their investment choice.
- Ms R was a professional person with significant wealth and financial expertise and we shouldn't give weight to Ms R having failed to strike through a small part of the non-standard asset questionnaire.

Ms R sadly passed away though, so Miss C – who Westerby confirmed was the beneficiary of the late Ms R's Westerby SIPP – took over the complaint against it with our Service.

After some further correspondence I let the parties know that, while my current thoughts in respect of the merits of the complaint remained unchanged, the redress I intended to recommend was different to that previously set out in my provisional decision, due to the change in circumstances since it had been issued.

Miss C accepted my provisional finding and amended redress. Although she added, in summary, that as the SIPP shouldn't have been set up in the first place no cost should be incurred in connection with the closure/transfer of the SIPP and into a new/current one elsewhere.

While Westerby asked for, and was given, a further extension of two weeks on the initial deadline until 18 February 2025 at the latest to provide a response to my amended thoughts, it didn't go on to respond.

**What I've decided – and why**

Having considered all the available evidence and arguments, I remain of the view that we can consider this complaint, and that it should be upheld, for largely the same reasons as those set out in my provisional decision, which I've largely repeated below, along with the updated redress that was communicated to both parties.

**Preliminary point – jurisdiction**

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

I can't see that Westerby has consented to us considering the complaint if it was made outside our time limits set out in the Dispute Resolution ('DISP') Rules – found in the Financial Conduct Authority's handbook – and DISP 2.8.2R in particular. It appears the complaint was made within six years of the events complained of though. And, in any event, I haven't seen anything that makes me think the late Ms R knew, or ought reasonably to have known, that she had cause for complaint and that Westerby was or might be responsible for this more than three years before she complained to it. So I'm satisfied this complaint was referred within our time limits and I've gone on to consider the merits of the complaint.

**The merits of the complaint**

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

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

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

**Relevant considerations**

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

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

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

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

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

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

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

The facts in this case are different from those in Mr Adams'. And I need to construe the duties Westerby owed to Ms R under COBS 2.1.1R in light of the specific facts of his case. I note there are also 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 this complaint. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened after the contract was entered into. And he wasn't asked to consider the question of due diligence before Options SIPP agreed to accept the investment into its SIPP.

In Miss C's complaint, amongst other things, I'm considering whether Westerby ought to have identified that the Dolphin investment involved a significant risk of consumer detriment. And, if so, whether it ought to have declined to accept Ms R's applications.

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 Ms R's case.

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

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

**The regulatory publications**

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

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

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

**The 2009 Thematic Review Report**

The 2009 report included the following statement:

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

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

…

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

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

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

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

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

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

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

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

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

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

**The later publications**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*"**Due diligence***

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

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

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

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

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

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

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

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

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

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

- correctly establishing and understanding the nature of an investment

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

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

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

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

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

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

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

At its introduction the 2009 Thematic Review Report says:

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

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

So, I'm satisfied that the 2009 Report is a reminder that the Principles apply and it gives an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. The Report set out the regulator's expectations of what SIPP operators should be doing and therefore indicates what I consider amounts to good industry practice at the relevant time. So I remain satisfied it's relevant and therefore appropriate to take it into account.

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

I think the Report is also directed at firms like Westerby acting purely as SIPP operators, rather than just those providing advisory services. The Report says that "*We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses*…" And it's noted prior to the good practice examples quoted above that "*We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs*."

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

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

I note Westerby's point that the judge in the *Adams c*ase didn't consider the 2012 Thematic Review Report, 2013 SIPP operator guidance and 2014 "*Dear CEO*" letter to be of relevance to their consideration of Mr Adams' claim. But it doesn't follow that those publications are irrelevant to my consideration of what's fair and reasonable in the circumstances of this complaint. I'm required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider to amount to good industry practice at the relevant time.

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

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

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

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

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

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

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

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

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

**The contract between Westerby and Ms R**

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

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

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

**What did Westerby's obligations mean in practice?**

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

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

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

**Ms R's particular applications**

<u>The non-standard asset questionnaires</u>

As set out above, the FCA guidance says that:

> *'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.'*

Westerby itself has specifically said that:

> *'The investments were only permitted due to Ms R's representation that she had sufficient assets to meet the FCA definition of a high net worth individual and on the basis she had sufficient knowledge and experience to understand the risks involved with high risk, non-standard, investments.'*

So I think it's clear that the above was one of Westerby's benchmarks. And that it wouldn't permit the investments within its SIPPs unless certain circumstances, such as those detailed above, were present as a minimum standard for it to be able to do so.

Looking at the non-standard asset questionnaires Ms R completed and signed at the start of October 2014, I recognise she earnt well, although seemingly not more than £100,000 per annum, and that in any case it appears she had net assets significantly above £250,000. So, while Ms R wasn't *certified* as a high-net worth investor as per COBS 4.12 Restrictions on the promotion of non-mainstream pooled investments (which I understand to be the particular FCA rules that Westerby has referred to), it seems Westerby took comfort that she might be considered high net-worth.

However, COBS 4.12.9G set out that 'A *retail client* who meets the criteria for a *certified high net worth investor* but not for a *certified sophisticated investor* may be unable to properly understand and evaluate the risks of the *non-mainstream pooled investment* in question.'.

From what I can see Ms R wasn't a *certified* sophisticated investor under COBS 4.12.7R. She hadn't been assessed by a regulated firm as 'sufficiently knowledgeable to understand the risks associated with engaging in investment activity in *non-mainstream pooled investments*'.

Westerby might say that Ms R held herself out as a *self-certified* sophisticated investor in 2014. And I recognise both the 2014 and 2017 questionnaires noted that Ms R was a property investor/developer with a significant portfolio and ran her own businesses. But I can't see anything to suggest she met the *self-certified* sophisticated investor criteria in COBS 4.12.8R.

I recognise that by 2017 Ms R had previous experience investing in loan notes by virtue of her 2014 investment. But I don't think that experience of something that Ms R wasn't knowledgeable enough to understand in the first place necessarily leads to sufficient knowledge to understand and evaluate the risks when making the same investment again.

Ms R's 2014 questionnaire only set out that she had experience of investing in listed equities (although not in the past 24 months) and residential property. There was nothing to suggest she'd previously invested or had experience in investments of this nature. And the 2017 questionnaire – which, to be clear, I only mention here as a further reference to Ms R's likely knowledge in 2014 – only set out that Ms R had experience of investing in listed equities (within the past 24 months) and residential property. Along with previous experience investing in commercial property, although not within the past 24 months and no further details were provided.

Westerby was made aware from Ms R's questionnaires that she intended to retire within a few years of her 2014 application and the year after her 2017 application, at age 70. And, while it seems Ms R had other significant net assets, she said on her forms that her SIPP pension monies were her only existing pension scheme arrangement, aside from state pension. And it seems unlikely to me in the particular circumstances that Ms R would knowingly put almost her entire SIPP monies at such a high risk so close to her intended retirement age, even if she had significant other assets.

Having considered the available information, I don't think Ms R understood or had the knowledge to be able to assess the risks involved. Westerby was aware Ms R hadn't had any regulated advice. And it seems Ms R had a limited knowledge and experience of these types of investments and/or investments generally. While Ms R worked in property development, the investments were in loan notes. And were a high risk and complex investment only suitable for certain types of investor.

I think Ms R's 2017 – which, again, I only mention as a reference to Ms R's likely knowledge in 2014 – non-standard asset questionnaire is further evidence of the position. While she signed the declaration which said '*I elect to be treated as a* ***HIGH NET WORTH/SOPHISTICATED/ELECTIVE PROFESSIONAL INVESTOR*** *(delete as appropriate and complete the appropriate self certification certificate overleaf)*' (no emphasis added), Ms R didn't 'delete as appropriate' to select which she felt applied to her. And she didn't complete the self-certification form overleaf either, specifying whether she was a high-net worth investor or a self-certified sophisticated investor, despite also being asked at the top of that page to complete the statement which applied to her. This suggests to me that Ms R again didn't fully understand what she was being asked to do and whether or not this applied to her.

<u>Third-party involvement</u>

Westerby said in its final response letter that Ms R was referred to it by Mr M of Firm B. And that although it didn't have an introducer agreement in place with Firm B, it understood Firm B had simply signposted Ms R to it and wasn't providing advice. However, Westerby has since said that Firm B wasn't an introducer of business to it and that reference to Firm B has come from Ms R and her representative.

I think it's interesting though that Westerby has recognised that a particular sales executive of its – Mr S – met with Ms R at her home in mid-October 2014 to assist her completion of the SIPP application documents. And that Ms R herself separately told us that Firm B personally recommended Westerby and gave her the name of Mr S who visited her at home. So both Westerby and Ms R have each said this employee of Westerby's came to her home and helped her with the paperwork. It strikes me as unlikely that Ms R would have gotten directly in touch with one particular individual at Westerby, rather than going through the usual customer contact channels and process of sending in a completion application, without that individual being aware of where her introduction to it resulted from. Especially given Westerby's employee met with Ms R at her home, which doesn't appear to be a common occurrence in my experience. I'm also aware from other complaints with our Service against Westerby concerning the same investment and unregulated introducer, that Westerby was aware Firm B was introducing customers to it.

So it seems likely to me Westerby was aware, or that it ought reasonably to have been aware, that it was receiving business from this unregulated introducer. And, in that case, I think that it ought reasonably to have sought to, for example, clarify responsibilities with Firm B and satisfy itself that it was appropriate to deal with. By, for example, seeking to understand 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 and whether they use other SIPP operators.

Westerby has said that it understands Firm B received referrals from existing clients, for example, and that it only dealt with high net worth and sophisticated investors, such as Ms R. So it seems this is something Westerby is likely to have found out about Firm B's business model if had it made enquiries with it, that is if Westerby didn't already know this at the time. Westerby ought reasonably to have known that an unregulated introducer wasn't authorised to assess and certify customers as high net worth and sophisticated. And questioned why an unregulated introducer would have existing clients if it wasn't providing any service other than introducing. So I think Westerby ought to have made further enquiries into how and why Firm B came to consider its customers as such, for example. And, in addition, Westerby ought to have sought to identify potentially unsuitable SIPPs by, for example, seeking appropriate clarification from the customer if it was concerned, in the way I think it should have been in Ms R's particular case for the reasons I've given.

Westerby has said there's no evidence Firm B provided Ms R with advice. But Ms R didn't appear to work in finance or pensions. And, for the reasons I've given, the details in her application forms and supporting documents don't support that she'd be independently deciding to switch her pension, while waiving her cancellation rights, to make high risk illiquid investments which are only suitable for a small number of clients and while understanding the implications of this, without the input of a third party. This is consistent with Ms R's clear testimony that Mr M of Firm B advised her that the investments were suitable and excellent opportunities for her.

I recognise Westerby was provided with a copy of Dolphin's 'Clarity on Marketing Rules & Practices' document for example, which said, amongst other things, that its introducers should '*tell and not to sell*'. So I understand Westerby might have taken some comfort from this on receipt of Ms R's introduction to it from Firm B to invest in Dolphin. But this document was from September 2013, over a year before Ms R's applications and Westerby's due diligence obligations were ongoing.

In summary, for the reasons I've given, I think there was a clear and obvious potential risk of consumer detriment here. Westerby should have been alive to the risk that an unregulated firm, that wasn't subject to regulatory controls, had been involved in promoting and/or advising on the switch to invest in loan notes in Ms R's case, which were unlikely to be suitable for the vast majority of retail clients.

I appreciate Westerby identified the investments were high risk, but the examples of good practice say that doing so would enable it to seek clarification from the prospective member if it had any concerns. And that SIPP providers should identify instances of clients waiving their cancellation rights and the reasons for this. While Westerby asked for forms and declarations to be completed, if it had contacted Ms R to query matters and confirm the position, I think it's likely to have found out that Ms R understood she'd been advised by Firm B to switch to make the investments and that she wasn't a sophisticated investor, but a retail one, in light of her knowledge and experience.

In which case, Westerby should neither have accepted Ms R's introduction nor proceeded with her particular applications to make the investments.

And, even if I thought otherwise, I'd still consider it fair and reasonable to uphold Ms R's complaint on the basis that Westerby didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Ms R fairly, by permitting the Dolphin investment within its SIPPs and accepting her Dolphin applications in the circumstances, for the reasons given below.

**Westerby's due diligence on the Dolphin investment**

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

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

- Investment brochures and completed project brochures. Including, for example, pictures and a summary listing completed projects.

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

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

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

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

- It had been asked to assist in Westerby's review process on a proposed investment to assess its capability of being held within a pension arrangement.
- While internet searches on the parties involved, including Dolphin and the German law firm for example, didn't highlight any adverse history, information was limited due to the overseas domicile of some parties.
- Investors are granted legal charge over the property, which is registered to the SPV. Although it was seemingly later clarified by the German law firm that investors weren't granted this, as the trustee held the legal charge.
- The structure of the investment and that annual interest is paid half yearly under the Income Option, although no documentation seen indicates when the payment dates are.
- There's no exit strategy, as each project is tied into a SPV established for the particular listed building. The project dictates when the SPV closes and the process is meant to be automatic.
- All investment monies will be held in a protected solicitors account with the German law firm.
- Valuations reports will be provided on an annual basis, but there doesn't appear to be anything within the documentation that states where the valuations will be published.
- As the investment is in Germany, no FSCS protection is offered. Only claims against an FCA regulated adviser, where advice is given, may be covered in the event of default.
- The review was based on the following documents:
    - Undated Dolphin Information Sheet – I can't see that Westerby has

provided us with a copy of this from the time, despite being asked to do so by the deadline to respond to my provisional decision. I've only been provided with a copy dated much later, from 2017.
  - Frequently Asked Questions sheet undated – I can't see that Westerby has provided us with a copy of this, despite being asked to do so by the deadline to respond to my provisional decision.
  - Information Memorandum dated September 2013 – I can't see that Westerby has provided us with a copy of this, despite being asked to do so by the deadline to respond to my provisional decision. The earliest copy provided is dated September 2014.
  - Sample Loan Note Offer unsigned and undated.
  - Further Opinion Note signed and dated 18th September 2013.
  - QC Opinion Note signed and dated 11th April 2013.

- In conclusion, under '*Any other comments*', it suggested that SIPP operators obtain an acknowledgement from members of the high risk, illiquid nature of this investment. It also went on to confirm that the investment was capable of being held in a SIPP.

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

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

Third party report

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

Dolphin's marketing material

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

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

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

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

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

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

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

- '*FIXED RETURN OF 12% per annum on capital invested*' (no emphasis added).
- Another UK SIPP provider had already approved the investment, '*thoroughly assessed it and described it as a **Low Risk** investment opportunity*' (emphasis added).
- '*A **simple** and totally transparent process*' (emphasis added).
- A UK based law firm had assessed that the investment as compliant with UK company, regulatory and pension legislation.
- It said in bold type that an exclusive agreement had been reached with Four Gates, a major German Fund Provider, who had agreed to purchase at least €100m worth of property from Dolphin, per annum, over the next five years.
- Investment funds are sent directly to the German law firm, who hold the funds in a secure account until the purchase of the property takes place and security documentation is issued.
- That '*UK Investors are **investing into the Dolphin structure, which simply uses German Listed Buildings as the underlying asset class. UK Investors do not have to consider the usual risks, legal responsibilities or on-going costs that are often associated with buying or owning property abroad.***' (no emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<u>Dolphin's accounts</u>

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

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

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

- Dolphin's accounts:
    - Dolphin Capital GmbH annual financial statement for the period from January to December 2012, including details for 2011, wasn't ascertained until more than a year later, on 3 March 2014.
    - Dolphin Capital GmbH credit reports contained financial information for the

period January to December 2011 and 2012 respectively, including details for 2009, 2010 and 2011, but with 2013 marked as 'unknown'. These reports were provided to or pulled by Westerby in March, August and October 2014.

- Dolphin Trust GmbH annual financial statement for the period January to December 2014, including details for 2013, wasn't created until nearly two years later, in September 2016. And this information was seemingly pulled by Westerby in June 2017.

- Dolphin Trust GmbH annual financial statement for the period January to December 2015, including details for 2014, was deposited a year and half later, in June 2017.

- Dolphin Trust GmbH annual financial statement for the period January to December 2016, including details for 2015, was dated as of 31 December 2016 but marked as a 'draft'.

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

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

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

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

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

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

> *'150. The tests for a commingling of assets in the relationship between the insolvency debtor* [DC80] *and its limited partner, AS German Property Group GmbH, are met.*
>
> *151. There are no properly prepared, approved and published annual financial statements for the insolvency debtor. Documents were only able to be identified at all for the years 2011, 2012, 2014, 2015 and 2018; these suggest that annual financial statements should have been prepared. However…these documents do not comply with commercial law regulations…*
>
> …

*153. With regard to proper accounting in accordance with § 238 HGB* [HGB seemingly being Germany's commercial code and accounting standards for how companies must prepare and report financial statements]*, it is not readily possible for an expert third party to obtain an overview of the business transactions and the situation of the business.*

*…*

*161. The breach of the obligation to keep accounts in the qualified case of the absence of proper and comprehensible accounts as a whole is demonstrable in the present case…*'

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

<u>The investment structure</u>

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

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

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

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

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

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

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

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

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

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

And that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Investment due diligence summary**

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

- There was no investor protection associated with this investment – investors didn't have recourse to our Service or the FSCS.
- It was illiquid – there was no exit strategy, the customer couldn't sell their interest in the investment and realising it was project dependent.
- It was being targeted for investment by pension investors, it was a speculative overseas based investment with inherent high risks that made it very obviously unsuitable for all but a small category of investors and even then, only a small part of such an investor's portfolio.
- The high projected and fixed returns set out should have been questioned. I don't expect Westerby to have been able to say the investment would have been successful. But such high projected returns without any apparent basis should have given Westerby cause to question its credibility.
- The investment didn't operate as it was marketed: invested monies weren't held in escrow then allocated to a specific property, for years (if not from the outset) it was operated as a Ponzi scheme with repayments funded by incoming investments and the German law firm hadn't been on retainer since 2014.
- The lack of properly prepared and approved annual financial statements should have been questioned.
- The marketing material either didn't contain, or was unclear, as to the risks associated with the investment. So, Westerby should have been concerned that consumers may have been misled or did not properly understand the investment they intended to make.
- It misled investors in relation to the security of their investment.
- While the loan notes were seemingly governed by UK law, the properties these were in respect of were based overseas and would be subject to the domestic laws and regulations that apply in respect of the sale and purchase of these. That created additional risk.

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

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

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

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

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

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

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

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

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

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

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

Given the above, I haven't felt it necessary to consider Westerby's due diligence in respect of Ms R's 2017 applications to invest in a new Dolphin loan note and Beech Holdings and what further steps I think it ought reasonably to have taken (if any) at those times. This is due to my conclusion that Westerby failed to comply with its regulatory obligations and good industry practice by permitting the Dolphin investment in its SIPPs in the first place. And because, as mentioned on Ms R's SIPP application form, I think it's clear that she opened her Westerby SIPP in 2014 with the intention of investing in Dolphin.

In which case, and for reasons I'll come on to further below, I'm satisfied that if Westerby hadn't permitted the Dolphin investment within its SIPPs that it's likely Ms R's Westerby SIPP wouldn't have been opened in the first place and that it's unlikely her Dolphin and Beech Holdings investments would have been made. So I'm satisfied that Westerby didn't treat Ms R fairly or reasonably in the circumstances.

**Did Westerby act fairly and reasonably in proceeding with Ms R's instructions?**

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

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

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

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

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

***The indemnity***

The declarations Ms R signed sought to confirm that she was aware the investment was high risk, had taken her own advice, and would not hold Westerby responsible for any liability resulting from the investment.

The FSA's 2009 report said that SIPP operators should, as an example of good practice, be:

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

With this in mind, I think Westerby ought to have been cautious about accepting Ms R's applications even though she had signed an indemnity. There was no evidence of any other regulated party (other than Westerby) being involved in this transaction. In these circumstances I think very little comfort could have been taken from the declaration stating that Ms R had taken her own advice and understood the investment risks.

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

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

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

**Is it fair and reasonable to ask Westerby to pay compensation in the circumstances?**

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

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

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

For the reasons I've given above, Westerby should not have permitted the Dolphin investment within its SIPPs and prior to Ms R's applications to invest in this through her Westerby SIPP. So things shouldn't have gotten beyond that.

Westerby has said that Ms R would have proceeded with the transactions elsewhere with another provider regardless of its involvement. But I'm not persuaded by this. I don't think there is any persuasive evidence Ms R would have tried to find another SIPP operator to accept the business and gone ahead with the switch if Westerby had refused her application.

While Ms R has said she was interested in her options and what she could do with her pension, I'm not persuaded she would have exposed her existing SIPP pensions monies to such a high risk so close to her intended retirement age. If Westerby had explained to Ms R even in general terms why it would not accept her applications or that it was terminating the transaction, I find it very unlikely that he would have tried to find another SIPP operator to invest in Dolphin with.

And, in any event, I don't think it's fair and reasonable to say that Westerby shouldn't compensate Ms R for her loss based on speculation that another SIPP operator would have made the same mistakes as I think it did. While I've considered Westerby's comments in respect of this, 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 permitted the Dolphin investment into its SIPPs.

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

So I'm satisfied that Ms R would not have continued with her Westerby SIPP and to invest in Dolphin, had it not been for Westerby's failings. And I consider that Westerby failed unreasonably to put a stop to the course of action when it had the opportunity and obligation to do so. I consider that Westerby failed to comply with its own obligations and didn't put a stop to the transactions proceeding by declining to accept Ms R's applications when it had the opportunity to do so.

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

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

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

In making these findings, I think it's reasonable to make an award against Westerby that requires it to pay compensation here to the full measure of the loss. Westerby accepted Ms R's business. And, but for Westerby's failings, I'm satisfied that Ms R's pension monies wouldn't have been transferred to it to invest in Dolphin.

So I am satisfied in the circumstances, for all the reasons given, that it is fair and reasonable to conclude that Westerby should pay compensation for the loss suffered here. I am not asking Westerby to account for loss that goes beyond the consequences of its failings. I am satisfied those failings have caused the extent of the loss in question. The key point here is that but for Westerby's failings, the losses here wouldn't have been suffered. As such, I'm of the opinion that it's appropriate and fair in the circumstances for Westerby to pay compensation to the full extent of the financial losses suffered here due to its failings.

I've carefully considered causation, contributory negligence, and apportionment of damages. But in the circumstances here and for the reasons I've given, I'm still satisfied it's fair and reasonable for Westerby to pay compensation here to the full extent of the financial losses due to its 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.

**Ms R's responsibility for her own investment decisions**

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

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

So, overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair to say Westerby should pay compensation here for the full extent of the losses suffered. I don't think it would be fair to say in the circumstances that Westerby shouldn't compensate the loss because Ms R ultimately instructed the transfer and investments to be effected.

**Putting things right**

Westerby has confirmed that after reviewing the late Ms R's expression of wish form any death benefits should be paid to Miss C.

In the counterfactual position I think it's fair and reasonable to conclude that wherever Ms R's pension monies had been held if not transferred to Westerby to invest in Dolphin, it's more likely than not both that Ms R's expression of wish form would have reflected her actual expression of wish form at the point of her death and that her pension provider, like Westerby, after reviewing the form would also have concluded any death benefits should be paid to Miss C. I haven't seen anything to suggest otherwise. So I require Westerby to pay compensation to Miss C.

My aim is to return Miss C as closely as possible to the position she would now be in but for what I consider to be Westerby's due diligence failings, by comparing her current position in respect of the death benefits she's entitled to receive to the position she would have otherwise likely been in if Ms R hadn't switched to the Westerby SIPP to invest in Dolphin.

As I've said, I think it's clear Ms R switched from her existing SIPP to a Westerby SIPP to make the Dolphin investment. I don't know with certainty what Ms R would have done if her existing SIPP monies had not been switched to the Westerby SIPP and invested in Dolphin and the subsequent investments. Nor in what funds, and in what proportions, Ms R's monies would have been invested, for example.

Ms R's actions and testimony didn't support that she would have, for example, purchased an annuity with her existing pension scheme. Ms R didn't suggest that this is what she would have done. And, even though Ms R was about to reach her intended retirement age of 70 at the time of the switch, she was still considering her options and made fixed term investments, while also making some lump sum withdrawals at intervals from her SIPP.

As such, having carefully considered this, for the purposes of quantifying redress in this case I still think the fair and reasonable approach is to assume that the monies in question would have experienced a return from the date they were switched into the Westerby SIPP equivalent to the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index). I'm satisfied that's a reasonable proxy for the type of return that could have been achieved over the period in question.

In light of the above, I think that Westerby should calculate fair compensation by way of the following steps I've set out below.

1) Obtain the actual death benefit value of Ms R's Westerby SIPP monies, including any outstanding charges and allowing for what has been said in step 4), as at the date specified below.

   I am unable to say precisely how long it would have taken for Miss C to have otherwise received the benefits from Ms R's pension following her having passed away. I've not seen anything which would suggest this would have been in any way complex or time-consuming though, as there would likely not have been any issues involving the presence of illiquid assets within this had Ms R not transferred to the Westerby SIPP. So, I'm satisfied it is fair and reasonable in the circumstances to say Miss C would likely have received the death benefits within 28 days of Ms R's death, which took place on 22 June 2024.

   It's not clear whether the SIPP funds would have remained invested between notification of death and payment of death benefits. I think it's reasonable in the circumstances for Westerby to calculate the values (both here and in step 2 below) on the basis that the funds seemingly have, and would have, remained invested until distribution. And I haven't seen anything to suggest any death benefits have been paid yet.

   So Westerby should calculate the death benefits values for Ms R's Westerby SIPP as at 20 July 2024 (i.e. the date Ms R passed away plus 28 days).

2) Calculate the notional death benefit value of Ms R's pension monies that were transferred into the Westerby SIPP as if they'd not been transferred into this, as at the date specified below.

   For the reasons given above, Westerby should calculate the notional death benefits value for Ms R's Westerby SIPP as at 20 July 2024 (i.e. the date Ms R passed away plus 28 days).

   To do this, Westerby should calculate what the monies transferred into the SIPP would be worth on the above date had these instead enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, this was called the FTSE WMA Stock Market Income Total Return Index). I'm satisfied that's a reasonable proxy for the type of return that could have been achieved over the period in question.

   Westerby must also make a notional allowance in this calculation for any additional sums Ms R contributed to, or withdrew from, this SIPP since the outset. To be clear this doesn't include SIPP charges or fees paid to third parties like an adviser. And, if I'm wrong and some death benefits have already been paid but the SIPP has remained open due to illiquid holdings, then Westerby may also make an allowance in the form of a notional withdrawal for any monies that have already been deducted from the SIPP to fund such death benefits. Any notional contributions or notional withdrawals to be allowed for in the calculation should be deemed to have occurred on the date on which monies were actually credited to, or withdrawn from, the Westerby SIPP.

3) The difference between step 1) and step 2) is what the value of the lump sum available to pay death benefits to Miss C would have otherwise been, as at the specified date.

   Westerby should provide Miss C with this figure. And Miss C should then confirm directly to Westerby which of the below options she would likely have selected to take the death benefits if that sum had otherwise been available to her.

   Based on the contents of a letter Westerby previously sent to Miss C, it seems that the options Miss C would have been given are either a lump sum payment or beneficiary flexi access drawdown ('BFAD'). So what I've said here is premised on that being the case. Neither party has disagreed with my understanding, despite being given the opportunity to do so by the deadline provided and despite being made aware that it won't be possible to make any amendments to the redress after a final decision has been issued.

   For clarity, if upon Westerby providing Miss C with the value of the lump sum she then decides to seek advice in respect of which of the below options she's likely to have opted for in that case (I note she's made comments to that effect in submissions to us), Miss C should know that I don't intend to consider such costs given I think she's likely to have incurred these in any event when deciding how to take Ms R's death benefits.

   a) *Lump sum payment option*

      If Miss C chooses this option, then as Ms R passed away over the age of 75 it means death benefits would be payable by the beneficiary, Miss C here, at the latter's marginal rate of income tax. Therefore, the compensation sum should be reduced to notionally allow for any income tax that would otherwise have been paid by Miss C.

      The notional allowance should be calculated using Miss C's current marginal rate of income tax.

      It's reasonable to assume that Miss C is likely to be a basic rate taxpayer, so the reduction would equal 20%. Neither party has disagreed with this assumption in respect of Miss C, despite being given the opportunity to do so by the deadline provided and despite being made aware that it won't be possible to make any amendments to this after a final decision has been issued.

   b) *BFAD option*

      If Miss C chooses this option, then Westerby should credit the sum into a BFAD for her if possible.

      I understand Westerby previously let Miss C know that a BFAD means the existing SIPP would remain active. As I've said though, I don't think Ms R would have switched to the Westerby SIPP but for its failings and this only now exists because of illiquid investments. So to allow the SIPP to be closed as set out below, Westerby should credit the monies into a separate BFAD for Miss C.

I understand Westerby also previously let Miss C know that as Ms R passed away over the age of 75, any income she takes from a BFAD will be taxed at her marginal rate at the time.

To be clear, it's for Westerby to ascertain whether payment of the compensation sum into a BFAD would be permissible under the rules and regulations before crediting any such sum to a BFAD for Miss C. And if it isn't possible or permissible for Westerby to do the above, then it should pay the sum directly to Miss C instead.

In the event of a direct payment of the sum to Miss C, had it been possible to pay into a BFAD this would have provided a taxable income for Miss C in the way I've explained above. Therefore, the compensation sum should be reduced to notionally allow for any income tax that would otherwise have been paid. This should be calculated using the tax assumption I've set out above. When calculating the notional deduction of income tax in respect of payment of the sum to Miss C here though, I think it is fair for Westerby to assume that Miss C wouldn't have drawn down all the money in the same tax year when opting for BFAD, but across a number.

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

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

   If the SIPP is being kept open only because of the illiquid investments and is used only or substantially to hold those assets, then future SIPP fees should be waived until the SIPP can be closed. And Westerby should not deduct any fee which is incurred in arranging for the SIPP to be closed.

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

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

   I think it's unlikely the investments will have any realisable value in the future, but I'm unable to discount the possibility that Miss C could potentially benefit from the investment/s should it become possible to sell it at some point.

   If the total calculated redress in this complaint is less than £160,000, Westerby may choose to ask Miss C to provide an undertaking to account to it for the net amount of any payment she may receive from the investments. That undertaking should allow for the effect of any tax and charges on the amount she may receive from the investment/s. Westerby will have to meet the cost of drawing up any such undertaking.

If the total calculated redress in this complaint is greater than £160,000 and Westerby doesn't pay the recommended amount (set out below), Miss C should retain the rights to any future return from the investment/s until such time as any future benefit that she receives from the investment together with the combined compensation paid by Westerby (excluding any interest) equates to the total calculated redress amount in this complaint. Westerby may ask Miss C to provide an undertaking to account to it for the net amount of any further payment she may receive from the investment/s thereafter. That undertaking should allow for the effect of any tax and charges on the amount Miss C may receive from the investment/s from that point. Westerby will need to meet any costs in drawing up the undertaking.

5) Once Miss C has confirmed directly to Westerby how she likely would have taken the benefits (i.e. which of the two options in step 3 she would likely have selected), then Westerby must pay redress in accordance with that option and what I've set out above, to put her as closely as possible back in the position she would have been in but for Westerby's failings. The amount paid should allow for the effect of charges and any available tax relief.

   This redress should be funded by way of Westerby first applying any liquid monies remaining in Ms R's SIPP to the endeavour and once these monies have been used up it's then for Westerby to make up any shortfall between the death benefits payable from Ms R's SIPP and the death benefits that would have been available to Miss C under step 3) but for Westerby's failings.

Westerby must provide the details of its redress calculations to Miss C in a clear, simple format.

*Interest*

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

Interest on top of an award – As set out above, the loss calculation should be carried out as at the date of 20 July 2024. And because this compensation is to redress monies which Ms R's beneficiary ought to have received at an earlier date, which she has not had use of, interest should also be added. So, I intend to direct Westerby to add simple interest to the compensation amount at the rate of 8% per year from 20 July 2024 to the date of settlement.

Interest for delay in payment of compensation – The compensation resulting from the above loss assessment must be paid within 28 days of the date Westerby receives notification of Miss C's acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement, if the compensation isn't paid within 28 days of receiving Miss C's acceptance.

However, Westerby may add on an additional interest-free allowance for the total number of days between it providing the value of the lump sum available to pay death benefits to Miss C in step 4) and Miss C then confirming to it in response which of the two options above she would have taken in that case as per step 5). For example, if seven days pass between Westerby setting out Miss C's options under step 4) and Miss C confirming which of the above options she would have taken then the total period from the date of final decision until interest becomes payable would instead be 35 days.

*Distress and inconvenience*

I appreciate the late Ms R likely experienced significant upset and frustration at the loss experienced to her pension monies and during a particularly difficult time for her. And that I recommended in my provisional decision that Westerby pay her £1,500 in compensation to make up for this. However, as Ms R has sadly passed away, this means we're considering the complaint in the name of Miss C as the beneficiary and eligible complainant instead now in respect of her particular dealings with Westerby from that point onwards. And I make no award for this.

*Assignment*

If Westerby believes other parties to be wholly or partly responsible for the loss, it is free to pursue those. So, if the loss does not exceed £160,000, or if Westerby accepts my recommendation below that it should pay the full loss as calculated above, the compensation payable to Miss C can be contingent on the assignment by her to Westerby of any rights of action they may have against other parties in relation to Ms R's pension transfer to the SIPP and the investments made if Westerby is to request this.

Westerby should cover the reasonable cost of drawing up, and Miss C taking advice on and approving, any assignment required.

If the loss exceeds £160,000 and Westerby does not accept my recommendation to pay the full amount, any assignment of Miss C's rights should allow her to retain all rights to the difference between £160,000 and the full loss as calculated above.

## My final decision

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

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

**Determination and award:** I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Westerby Trustee Services Limited should pay the amount produced by that calculation up to the maximum of £160,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

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

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 C could accept a decision and go to court to ask for the balance and Miss C may want to get independent legal advice before deciding whether to accept a decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss C to accept or reject my decision before 21 March 2025.

Holly Jackson
**Ombudsman**