DRN-5528463

The complaint

Mr C transferred monies from an occupational defined-benefit ('DB') pension scheme into a Self-Invested Personal Pension ('SIPP') with Westerby Trustee Services Limited ('Westerby'). The transferred monies were then invested in an asset which has since failed, causing a significant loss.

Mr C has complained that Westerby did not carry out sufficient due diligence checks on the investment and if had done so, it ought to have refused to permit it to be held in his SIPP.

What happened

I've outlined the key parties involved in Mr C's complaint below.

Involved parties

Westerby

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

Kathryn Brown Financial Services ('KBFS')

Between 1 May 2015 and 31 July 2019, KBFS was authorised by the Regulator – the Financial Conduct Authority ('FCA') – to advise on regulated products and services including giving pension transfer advice.

London & Capital Finance plc ('LCF')

LCF was the issuer of mini-bonds which it stated it used to make loans to corporate borrowers to provide capital for further investment.

On 10 December 2018 the FCA directed LCF to immediately withdraw its promotional material on the basis that the way in which it was marketing its bonds was misleading, unclear and not fair. The FCA's concerns included the fact that LCF bonds were being marketed as ISA eligible when they were not. The FCA immediately commenced an investigation into the firm's promotions.

The FCA published a second supervisory notice on 17 January 2019, which provided further details of the issues that it had identified.

LCF subsequently entered administration on 30 January 2019.

On 18 March 2019, the Serious Fraud Office ('SFO') announced that they had commenced an investigation into various individuals associated with LCF. And on 1 April 2019 the FCA announced that the Board had taken a decision that there should be an investigation by an independent person into the issues raised by the failure of LCF.

The Financial Services Compensation scheme ('FSCS') declared LCF had failed on 9 January 2020 and began to accept claims for compensation.

On 19 April 2021, the government announced the details of a one-off compensation scheme. This scheme provided compensation to eligible bondholders who the FSCS couldn't compensate.

Ultimately, civil proceedings brought by the Joint Administrators of LCF against the company's executives and others commenced at the High Court. In November 2024, a high court judge ruled that LCF had been operated as a 'Ponzi Scheme'. The high court said former chief executive ('Mr T') and four others had knowingly participated in the fraud, misled investors and misappropriated assets.

The SFO's investigation into LCF is ongoing.

<u>What happened here?</u>

Mr C explains that he made an initial enquiry into investing in LCF as a result of the LCF mini-bonds consistently appearing at the top of various search engines for top-rated fixed rate investments.

Mr C says he then received repeated and regular calls from Mr R on behalf of LCF. Mr R answered all of Mr C's questions and elaborated in great detail about the LCF business model and how the company was growing and thriving.

Mr C says Mr R provided him with a copy of the Information Memorandum and Marketing Brochure. Mr R explained that LCF was involved in providing corporate finance to small businesses. He explained that LCF had hundreds of small businesses on its books so that there was a wide spread of risk. Secondly he advised that each borrowing company was subject to a stringent vetting process and that LCF would obtain secured charges over the assets of the borrowing company. As a specific example of enhanced security, Mr R explained that in most situations LCF would insist on personal Director loan guarantees from the borrowing companies and that the bondholders were protected by a Security Trustee who would look after the bondholders' interests.

Having been an SME business owner and having had to submit to Director loan guarantees, Mr C says he knew the power and attraction of the underlying asset of lending to highly qualified SME businesses, provided proper loan guarantees were in place.

In around early 2018, LCF secured an ISA wrapper for its bonds. Mr C and his wife say they were comforted by this independent verification and Mr C's wife invested £20,000 into the LCF ISA.

During the many phone calls Mr C had with Mr R, Mr R discovered that Mr C had a DB pension that had a significant buyout option. It was at this stage that Mr C says Mr R introduced him to Westerby in order to transfer out of the DB scheme to invest in LCF. Mr C says Mr R explained that the LCF mini-bonds had passed the Westerby due diligence criteria and had therefore been approved as a SIPP investment. The fact that LCF had been approved to provide an ISA wrapper and had also passed Westerby's due diligence criteria gave Mr C comfort.

Mr C called Westerby on 9 August 2018 to discuss opening a SIPP. Mr C said he intended to transfer a pension worth around £150,000 into the SIPP. Mr C described this as a small 'Defined-Contribution' pension that he wasn't previously aware of. Mr C told Westerby that he wanted to invest the funds in a five-year bond offered by LCF, which would provide an annual return of 9%. Although he said he would be taking advice, he wasn't happy with the income that the pension was due to provide him at retirement. Mr C added that he would retain the capital which could be passed on to his family on death.

During the call, Mr C told Westerby he had previously been a Director of a financial services company although he hadn't been a regulated financial adviser. He said he was a high net-worth/sophisticated investor and that he had been a member of an investment club for ten years through which he had access to non-mainstream investments. He also said he'd carried out his own due diligence on LCF, finding that it had not had any loan defaults and had stringent lending criteria. Mr C also explained that his wife had already invested in LCF and he was attracted to the investment because of the fixed return. He acknowledged that all investments carried risk but there was *"nothing without risk."*

Mr C told Westerby he had significant experience of investing, including FOREX trading and property investments he'd made via the investment club. Mr C stated that day trading was a professional hobby. Mr C also said he was interested in investments along the lines of LCF, i.e. those which made loans to companies.

Mr C added that he would like some information about the costs involved in running the SIPP.

Westerby sent Mr C an email on 10 August 2018 saying that if he met the FCA criteria for a high net worth/sophisticated investor then it would permit investment in non-standard assets (subject to satisfactory due diligence). It said LCF was approved for inclusion in its SIPP but, as this was over 12 months ago, it would need to carry out some updated due diligence. Westerby outlined the costs of establishing and running the SIPP. It also included a list of companies who provided lending facilities or corporate bonds which it had previously permitted investments in. It said:

"Note that the inclusion of an investment on this list is not a recommendation and Westerby Trustee Services Ltd is not authorised to provide advice on investments. You should carry out your own due diligence before deciding whether to invest."

Westerby included a non-standard asset questionnaire for Mr C to complete.

Mr C called Westerby on 13 August 2018 as he had some questions about the questionnaire and whether he would qualify as a high net worth/sophisticated investor. Westerby returned Mr C's call and discussed the investments he'd made into private companies and whether that qualified him as a sophisticated investor. Westerby indicated that his experience was likely sufficient but asked Mr C to return the form so it could assess things properly. Mr C explained that he was having to take advice from KBFS as his pension was a DB scheme. Westerby said that it would need to see a copy of the suitability report from KBFS to ensure there was a positive recommendation to transfer.

Mr C returned the non-standard asset questionnaire on 16 August 2018. By signing the declaration, Mr C confirmed, amongst other things, that:

- He understood the risk factors involved with non-standard assets and he was comfortable that his attitude to risk was appropriate and he was prepared to suffer a total loss of his investment.
- He had not received any advice from Westerby with regard to his investments and he would not hold Westerby to be responsible should he suffer a financial loss as a result of his investments.

- He understood that non-standard investments could be difficult to value and may have an impact when calculating his pension benefits and scheme value.
- He understood that non-standard assets could take time to sell and accepted that he may be locked into an investment for the whole specified term.
- He understood that many non-standard assets were not regulated by the FCA or covered by the FSCS.
- He confirmed that he had taken financial advice specific to the investment within this questionnaire or that he met the FCA criteria for a high net-worth/sophisticated or elective professional investor.
- He elected to be treated as a sophisticated investor.

He also signed to confirm his status as a self-certified sophisticated investor on the basis that he'd made two investments in unlisted companies in the last two years.

Westerby confirmed via email on 17 August 2018 that Mr C met the criteria for making the LCF investments, but reiterated the risks:

"Our search on London Capital & Finance Limited (LC&F) returned a credit rating Delphi score of 55/100 "below average risk". This is based on data to April 2017 as the 2018 accounts aren't filed yet, although we are given to understand that they will show continued improvement in the financial position of LC&F.

You have to bear in mind however that:

1. *this is an investment where your capital is at risk if the bond issuer, for whatever reason, cannot afford to make the interest and capital payments due*
2. *the investment is not covered by the Financial Services Compensation Scheme*

Our conclusion however is that we would be happy to continue with the transaction on your instruction at your own risk and on the proviso that the DB transfer advice results in a positive recommendation in favour of transferring."

Mr C engaged with KBFS as the pension he wished to transfer was a DB scheme and he was required to take advice.

On 21 August 2018, Mr C informed Westerby that he signed his member discharge form to start the process of transferring his DB pension, saying he intended to take a Pension Commencement Lump Sum ('PCLS') and invest the remainder in LCF. Mr C said KBFS would liaise directly with Westerby to coordinate the paperwork.

Westerby sent KBFS a copy of its 'Intermediaries Terms of Business' agreement, which KBFS signed on 23 August 2018.

KBFS provided Mr C with a suitability report on 11 September 2018. KBFS recorded that Mr C wanted to take complete control of his pension as he was considered a sophisticated investor and he was not dependent on this pension for his retirement. It further noted that Mr C had a young daughter and he wanted to ensure that upon his death she could inherit any residual pension funds.

KBFS said that Mr C had instructed KBFS to restrict the advice to the pension transfer only; it was Mr C's intention to self-select the investments and he did not require any investment advice from KBFS. It said the critical yield of 16.28% was not achievable and if Mr C was planning to purchase an annuity to match these benefits, then KBFS would be recommending he retain his DB scheme. However, Mr C said he didn't want to take an annuity and overall, KBFS believed the transfer to a Westerby SIPP was suitable based on Mr C's objectives.

Westerby received Mr C's SIPP application form via KBFS on 17 September 2018. The application form noted that Mr C was retired and wished to transfer in an existing pension. In the 'Investment Strategy' section, Mr C noted he wanted to invest in LCF. In the 'Adviser Charges' section, Mr C ticked a box to say he'd received advice from an authorised financial adviser in respect of this application and provided KBFS's details. Mr C signed the application declaration on 12 September 2018.

Mr C completed an application for a three-year LCF bond providing a fixed return of 8% and signed the declaration on 20 September 2018. Within the form, Mr C signed an investor statement confirming he was a sophisticated investor.

Westerby received £147,972 from the DB scheme into the SIPP on 23 October 2018. Mr C took a PCLS of £36.986.59 on 9 November 2018, leaving around £111,000 to invest in LCF.

Westerby sent the funds to LCF on 14 November 2018 and the bond certificate confirming the investment had been placed was issued on 22 November 2018.

As detailed above, LCF was sanctioned by the FCA in December 2018. The SFO also launched an investigation.

Mr C became aware of LCF's troubles and contacted Westerby about his concerns on 7 January 2019. Mr C said Westerby reassured him that the FCA's intervention was not that significant and that the FCA were merely wanting LCF to bolster their risk warnings and rework their marketing literature. He also said that Westerby had completed due diligence of LCF in both 2017 and 2018 and in the past had discussions directly with Mr T, regarding their business model. Mr C said at this point he was not all that concerned and was greatly reassured by Westerby that all was still well.

LCF went into administration on 30 January 2019 and ceased trading. Mr C said he called Westerby on 7 February 2019, to see if the Security Trustee might still be holding his money but Westerby told Mr C that it was struggling to find a contact number for the Trustee.

In March 2019 Mr C complained to Westerby about its role in the transaction which would lead to a significant loss to his pension.

Westerby issued a response to Mr C's complaint on 9 May 2019. Amongst other things, Westerby said that:

- It acts as SIPP Trustee and Scheme Administrator; it doesn't and can't provide advice on SIPPs or underlying investments. Westerby cannot therefore judge the suitability of an investment for a given investor.
- It does not allow SIPP investments into assets that the FCA deems to be "non-standard" unless the member either meets the criteria of a high net worth and/or sophisticated investor, or they have been advised to make the investment by a regulated financial adviser. Mr C confirmed he met the criteria of both a high net-worth individual and a sophisticated investor.
- Westerby also confirmed at the time that Mr C had previously held a variety of controlled functions within financal services firms.
- Westerby received Mr C's SIPP application documents via KBFS. It understood KBFS had provided advice in relation to the transfer from his DB scheme but it understood that no advice had been provided regarding the underlying investment in

LCF. His SIPP was accepted on the basis that he was a sophisticated investor.

- While Westerby could not provide advice or assess the suitability of an investment for an individual, it acknowledged that it has an obligation to carry out due diligence to establish the acceptability of an investment for inclusion within a SIPP.
- Westerby carried out appropriate due diligence on LCF. LCF was authorised and regulated by the FCA, and while the issue of the mini-bonds was not in itself a regulated activity, the approval of the promotional materials forthe bonds was regulated. Given that LCF was a regulated entity it was reasonable for Westerby to expect that it could rely, in good faith, on any information provided by LCF regarding the investments.
- Westerby highlighted the risks of the investment to Mr C and given that he met the criteria of a sophisticated investor, and that he'd carried out his own due diligence on LCF, Westerby considered Mr C would be able to assess whether this level of risk was acceptable.
- Westerby had previously carried out due diligence checks in 2017 but updated those checks in August 2018.
- Westerby was satisfied that:
    - It understood the nature of the investment;
    - The investment was genuine and not a scam, linked to fraudulent activity, money laundering or pension liberation;
    - The investment was safe/secure;
    - The investment could be independently valued and was not impaired.
- In the absence of any specific concerns regarding the bonds, and on the understanding that Mr C understood the nature of the investment and the associated risks, Westerby permitted the investment in his SIPP.
- Westerby acknowledged that the subsequent investigations by the FCA and the SFO suggest that the bonds were not being operated correctly, but there was no indication that this was the case at the time it carried out its due diligence checks. Even the FCA Supervisory Notices only related to the promotional materials of the bonds, and gave no indication that LCF were involved with any potentially fraudulent activity.
- Westerby permitted the investment in good faith, based on the information that was available to it at the time.

Mr C referred his complaint to the Financial Ombudsman Service via a representative ('CMC'). The CMC also wrote to Westerby in response to its letter of 9 May 2019. It made the following points:

- Mr C was encouraged to invest by Mr R, who worked for LCF.
- Mr C's attitude to risk and investment experience had no bearing on Westerby's due diligence obligations – the LCF bonds were not suitable for a pension.
- Simply because a product provider (in this case LCF) is authorised does not mean that a SIPP operator can rely upon the information provided without question. There would be no requirement for due diligence if this was the case.
- Westerby's due diligence checks didn't go far enough. At the very least any reasonably competent SIPP operator would have taken reasonable steps to investigate:
    - the management team of LCF;
    - the identity of the 'borrowing companies' that had been lent to by LCF;
    - the value of each loan made by LCF to the borrowing companies;
    - that the due diligence procedures of LCF in vetting each SME (as set out in the IM and brochure) had been met;
    - review the loan/charge documentation;
    - the identity and viability of the Security Trustee;
    - review the Trust Deed; and

    - ascertain the level of commissions that were paid to introducers.
- Westerby hadn't disclosed evidence of the due diligence checks it had performed on LCF.
- It was not unreasonable or onerous for Westerby to request a copy of the list of borrowers from LCF. If Westerby had requested a list of the borrowers it could not know what the response to this would have been. But it's unclear on what basis LCF could have refused such a request because the charges were required to be registered at Companies House and therefore of public record.
- If LCF had refused to disclose the list, this should have been an automatic red flag. No reasonably competent SIPP operator would have accepted the LCF bond onto its product list without disclosure of the list of borrowers.
- A Security Trustee owes a fiduciary duty to the bondholders. It certainly should have been concerning that at the time that Mr C's SIPP purchased the LCF mini-bonds, that the same individual (Mr T) was the person in control of both LCF and the Security Trustee.
- Any further investigation of Mr T would have revealed that many of the companies that Mr T was involved with shared common directors/shareholders who were also directors/shareholders of borrowers of LCF.
- Westerby placed undue reliance on the LCF's limited authorisation and the filed accounts.
- LCF were paying commissions of 25%. If any reasonably competent SIPP operator had become aware that LCF were paying away 25% of invested funds in commissions, this would be another red flag as high commissions are symptomatic of Ponzi type frauds.

The CMC summarised that had reasonable due diligence been undertaken, no reasonably competent SIPP operator would have approved the LCF bond for inclusion within its SIPP product.

Westerby responded, saying it understood Mr R worked for a business called Surge Financial Limited ('Surge'), which was an unregulated marketing firm appointed by LCF. So, Mr R didn't work for LCF. However, Westerby confirmed it had never had any communication with Surge or Mr R; all communications were with LCF directly. In any event, Westerby said Mr C hadn't indicated that anyone had introduced the investment to him; instead he indicated he'd made an independent decision to invest in LCF. Westerby added that if Mr C had said LCF or Surge had encouraged him to transfer his pension to make the investment, it would not have accepted the SIPP application.

Westerby said Mr C was fully aware of the risk of losing his capital and accepted it. It also referred to the Regulator's general principle that consumers should take responsibility for their own decisions. Westerby maintained that it was reasonable to rely, to some extent, on the integrity of an authorised and regulated firm.

Westerby said that the FCA's supervisory notice of December 2018 only concerned the marketing of the mini-bonds – it didn't highlight any potential fraud or malpractice in LCF. As such, Westerby couldn't have been expected to detect fraudulent activity given the Regulator hadn't been able to detect this. Westerby maintained that it had carried out reasonable due diligence on LCF at the time. The accounts didn't reveal payments of 25% to introducers, and checks on Mr T didn't reveal a connection to borrowers of LCF. It said the level of due diligence suggested by the CMC amounted to a forensic analysis that went beyond what could reasonably be expected and also came with the benefit of hindsight.

Mr C made a claim to the FSCS about LCF. In December 2020, the FSCS awarded Mr C the maximum compensation of £85,000, although it calculated his loss to be in excess of this.

Mr C informed the FSCS that he didn't wish to accept this compensation. Mr C said he'd made a complaint to the Financial Ombudsman Service about Westerby and was aware that our award limit is higher. As Mr C knew he'd have to repay the FSCS up to £85,000 from any money he received from Westerby, he thought it made sense to pursue his complaint against Westerby before accepting any compensation from the FSCS. The FSCS agreed to reissue the cheque at a later date subject to the complaint outcome.

Our Investigator ultimately didn't uphold the complaint. He thought Westerby carried out reasonable due diligence checks on the investment in LCF and had ensured Mr C met the criteria of a sophisticated investor. The Investigator noted that the FCA issued a supervisory notice against LCF very soon after Mr C invested, but he didn't think anything would've been discoverable to Westerby at the time Mr C proposed his investment in LCF.

Mr C didn't agree. He said that the only reason he was interested in investing in LCF was because it guaranteed the capital being invested, it was only the interest payments that were at risk of not being paid. Mr C said he would not have invested if he knew his capital was at risk. He also said that he'd been introduced to Westerby by Mr R of LCF and Westerby ought to have known that. Mr C maintained that adequate due diligence would've uncovered the fraud within LCF; Westerby failed to request appropriate independent documentation and relied on information provided by fraudsters. Mr C asked for the complaint to be referred to an Ombudsman for a final decision.

I issued a provisional decision on 28 March 2025, in which I explained I was inclined to uphold Mr C's complaint. I said I didn't think it was fair or reasonable for Westerby to have accepted Mr C's SIPP application from KBFS or his application to invest in LCF. I thought Mr C would've still most likely gone on to transfer his DB scheme to a SIPP, however, I thought he would have invested differently. As such, I thought Mr C's loss arising from the investment in LCF could've been avoided and it was fair for Westerby to compensate him for this. I recommended that Westerby should compare the performance of Mr C's SIPP with a benchmark and pay him compensation if this showed a loss.

Mr C largely accepted my findings. However, he made some comments about the tax band he'd have likely fallen into in retirement, saying it was always his intention to manage withdrawals from the SIPP to stay within the nil or 20% band. Mr C also queried whether he would be able to recover the legal fees he paid to prepare and bring the complaint against Westerby. He also asked whether he would be compensated for the advice fee he paid to KBFS, as well as ongoing SIPP management fees. Lastly, Mr C queried how the recent stock market collapse could affect calculation of any redress and whether some allowance could be made for this.

Westerby didn't accept my provisional decision although it said it saw no purpose in contesting things further. However, it made the following points:

- It was fair and reasonable to consider the £111,000 invested in LCF rather than the value of the funds transferred to the SIPP, given Mr C immediately took tax-free cash and also received a dividend payment in April 2020.
- It was unfair to require Westerby to calculate loss to the date of the decision given how long the matter had been with our Service. Westerby proposed that it would be reasonable to run the calculation until 28 March 2022, which was just over two years from the date Mr C referred his complaint to us.
- It added that it was unreasonable to require it to pay interest after 28 days if the complaint was not settled as this was too little time for it to complete the calculation, which involved contacting other parties.

As both parties have responded to my provisional decision, I'm now providing my final decision on Mr C's complaint.

What I've decided – and why

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

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

I'm required to determine this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable in the circumstances, I need to take account of relevant law and regulations, Regulators' rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

<u>Relevant considerations</u>

I have taken into account a number of considerations including, but not limited to:

- The agreement between the parties.
- The Financial Services and Markets Act 2000 ("FSMA").
- Court decisions relating to SIPP operators, in particular Options UK Personal Pensions LLP v Financial Ombudsman Service Limited [2024] EWCA Civ 541 (*"Options"*) and the case law referred to in it, including:
    - Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474 ("*Adams"*)
    - R (Berkeley Burke SIPP Administration) v Financial Ombudsman Service [2018] EWHC 2878 (*"BBSAL"*)
    - Adams v Options SIPP UK LLP [2020] EWHC 1229 (Ch) (*"Adams – High Court"*)
- The FCA (previously FSA) rules including the following:
    - PRIN Principles for Businesses
    - COBS Conduct of Business Sourcebook
    - DISP Dispute Resolution Complaints
- Various regulatory publications relating to SIPP operators and good industry practice.

The legal background:

As highlighted in the High Court decision in *Adams,* the factual context is the starting point for considering the obligations the parties were under. And in this case it is not disputed that the contractual relationship between Westerby and Mr T is a non-advisory relationship.

Setting up and operating a SIPP is an activity that is regulated under FSMA. And pensions are subject to HMRC rules. Westerby was therefore subject to various obligations when offering and providing the service it agreed to provide – which in this case was a non-advisory service.

I have considered the obligations on Westerby within the context of the non-advisory relationship agreed between the parties.

The case law

I'm required to determine this complaint by reference to what is in my opinion fair and reasonable in all the circumstances. I am not required to determine the complaint in the same way as a court. A court considers a claim as defined in the formal pleadings and they will be based on legal causes of action. The Financial Ombudsman Service was set up with a wider scope which means complaints might be upheld, and compensation awarded, in circumstances where a court would not do the same.

The approach taken by the Financial Ombudsman Service in two similar (but not identical) complaints was challenged in judicial review proceedings in the *BBSAL* and the *Options* cases. In both cases the approach taken by the Ombudsman concerned was endorsed by the court. A number of different arguments have therefore been considered by the courts and may now reasonably be regarded as resolved. As such, I don't think it is necessary for me to quote extensively from the various court decisions.

The Principles for Businesses

The Principles for Businesses, which are set out in the FCA's Handbook "*are a general statement of the fundamental obligations of firms under the regulatory system"* (see PRIN 1.1.2G). The Principles apply even when the regulated firm provides its services on a non-advisory basis, in a way appropriate to that relationship.

Principles 2, 3 and 6 are of particular relevance here. They 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 am satisfied that I am required to take the Principles into account (see *BBSAL*) even though a breach of the Principles does not give rise to a claim for damages at law (see *Options*).

The regulatory publications and good industry practice

The Regulator issued a number of publications which reminded SIPP operators of their obligations, and which set out how they might achieve the outcomes envisaged by the Principles, namely:

- The 2009 and 2012 Thematic Review Reports.
- The October 2013 Finalised SIPP Operator Guidance.
- The July 2014 *"Dear CEO"* letter.

The 2009 Report included:

"We are concerned by a relatively widespread misunderstanding among SIPP operators that they bear little or no responsibility for the quality of the SIPP business that they administer, because advice is the responsibility of other parties, for example Independent Financial Advisers…

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."

I have considered all of the above publications in their entirety but it isn't necessary for me to quote more fully from the publications here.

The 2009 and 2012 Thematic Review Reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 Finalised Guidance is). However, all of the publications provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the Regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take them into account (as did the Ombudsman whose decision was upheld by the court in *BBSAL*).

Points to note about the SIPP publications include:

- The comments made in the publications apply to SIPP operators that provide a non-advisory service.
- Neither court in the *Adams* cases considered the publications in the context of deciding what was fair and reasonable in all the circumstances. As already mentioned, the court has a different approach and was deciding different issues.
- What should be done by the SIPP operator to meet the regulatory obligations on it will always depend upon the circumstances.

Overall, in determining this complaint I need to consider whether Westerby complied with its regulatory obligations as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regards to the interests of its customers (in this case Mr C), to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Westerby could have done to comply with its regulatory obligations and duties.

<u>Mr C's relationship with Westerby and other connected parties</u>

Westerby provided the SIPP on an execution-only basis. As such, I accept that Westerby didn't provide any advice here, and so it didn't have an obligation to consider the suitability of the investments for Mr C. Nevertheless, I think Westerby was required (in its role as an execution only SIPP provider) to consider whether it was appropriate to accept Mr C's SIPP application and to consider whether the investment he went on to make was acceptable to make within its SIPP. And overall, I think Westerby's duty as a SIPP operator was to treat Mr C fairly and to act in his best interests.

Due diligence checks on the introducer

LCF

Westerby says that Mr C was a direct client so there was no introducer here. As such, it didn't need to carry out introducer due diligence checks. However, Mr C says that he was introduced to Westerby by Mr R, who was working for LCF at the time and that Mr R advised him to make the investment.

Westerby says that Mr R worked for Surge, an unregulated introducer. But Mr C has provided evidence of some emails he received from Mr R, which came from an email address associated with LCF and said he was an account manager at LCF. So, I think Mr R was also working for LCF at the time and acting in that capacity in his dealings with Mr C.

On 10 August 2017, Mr R enquired as to whether Mr C was still interested in LCF's three-year bond, which was paying an annual return of 8%. Mr C responded on 22 October 2017 asking about the nature of the guarantees LCF was holding from the borrowers. Mr R emailed back on 23 October 2017, saying that LCF didn't lend more than 75% loan-to-value; it insisted on a personal guarantee from the company owners and it also took a fixed and floating charge over all other assets of the company. Mr R invited Mr C to call him if he'd like to discuss things in more detail. Mr C says that he and Mr R continued to discuss things over the phone and Mr R explained that Westerby had approved LCF bonds for SIPP investment. Mr C explains that this is what led to him telephoning Westerby in August 2018 to discuss opening a SIPP and investing in LCF.

I've considered this carefully. While I think it's likely that Mr C was introduced to the idea of using Westerby to invest his pension in LCF bonds, I don't think that is something Westerby knew at the time.

I say this having listened to Mr C's calls with Westerby. In Mr C's first call with Westerby on 9 August 2018, he first explains that he is looking to set up a SIPP; that he deals with a company called LCF and he does investment bonds with them. Mr C wanted to know whether LCF was on Westerby's panel of approved investments. Mr C said that he knew the company and his wife already had an ISA with LCF. Mr C said that he had to get financial advice but he knew where he needed to invest his pension because he was in a high net-worth millionaire/billionaire investors club. Mr C said he'd been in this for ten years and he got all sort of things recommended to him through this club. Mr C also said he'd done a lot of due diligence on LCF.

Later in the conversation, Mr C mentioned that he had a small SIPP with another provider but it wouldn't touch anything like LCF. The Westerby agent ('Mr J') mentioned that because of the capital adequacy rules that came in September 2016, if SIPP providers wanted to hold non-standard assets (like LCF) it was onerous and costly to do so. He said he thought there were maybe only eight providers that still did this in the UK. Mr C commented that this is why Westerby had come across his radar. And he would be recommending Westerby to his investors club. Mr J explained that because Westerby had last carried out checks on LCF more than a year ago it would need to do updated checks.

So, from this conversation, I think Westerby would've understood that Mr C had found out about LCF through his investors club and that he'd found Westerby through his own research into the types of providers which would allow non-standard assets within their SIPPs. Mr C didn't mention any dealings with Mr R or other individuals at LCF having introduced the investment or Westerby to him.

Mr C phoned Westerby on 13 August 2018 as he'd received a non-standard investment questionnaire and needed some assistance in working out whether he qualified as a sophisticated investor. During that call, he clarified that the pension he was looking to transfer was a DB scheme, so he'd be appointing an adviser. Mr C said he needed to know whether Westerby would approve LCF for investment before he committed to paying the advice fee. Mr C wanted to speak with Mr J, so Westerby arranged for a call back.

Mr J called Mr C back on the same day to talk about the investments Mr C had made in private businesses and whether this meant he qualified as a sophisticated investor. Mr C wanted to know how long it would take Westerby to re-approve LCF for investment and explained that he'd spoken to a Director of LCF, who'd told him the latest accounts were just being audited and although he couldn't tell him the figures, LCF were delighted and that they'd had their best year yet. Mr C referred to a 'Mr B' but it seems likely to me that Mr C was referring to Mr R, who he'd received emails from and spoken with on the phone.

So, this was the first time Mr C mentioned speaking to someone at LCF. But based on this comment alone I don't think Westerby ought to have believed that LCF had introduced the investment or Westerby to Mr C or advised him to invest his pension in LCF. Mr C had said on a number of occasions that he'd done his own due diligence on LCF and I think this comment was in keeping with that. As such, overall, I haven't seen enough evidence to persuade me that Westerby knew or suspected that LCF had introduced the investment/Westerby to Mr C or that it had influenced his decision to transfer his pension in order to invest in it. So, I don't think that Westerby ought to have had any immediate concerns on this basis about accepting Mr C's SIPP application based on what it knew at the time.

KBFS

Mr C told Westerby that he had to take advice from an IFA who was a pension transfer specialist because he had a DB pension and the rules required him to take advice. Westerby also confirmed in the call Mr J had with Mr C on 13 August 2018 that it would need to see a copy of his IFA's suitability report. Mr J said Westerby was not judging the quality of the advice, instead they were looking to see that there was a positive recommendation in favour of the transfer and that all of the required elements the FCA looked for in a report had been covered off.

So, Westerby understood that Mr C would be taking advice from an adviser (KBFS) before he was able to open his SIPP. As such, even though Mr C wasn't initially introduced to Westerby by KBFS, he would be receiving advice on the merits of transferring his pension to Westerby and his SIPP application was ultimately sent to Westerby by KBFS. Accordingly, Westerby ought to have treated KBFS as an introducer here and carried out due diligence checks on KBFS, to ensure that it was appropriate to accept business from it.

And I think that Westerby understood that it was required to carry out some checks on KBFS. That's because, once it was told by Mr C that he would be taking advice from KBFS, Westerby asked KBFS to agree to its 'Intermediaries Terms of Business' document. This was signed by KBFS on 23 August 2018. I can also see that Westerby checked the FCA register entry for KBFS on 18 September 2018. However, I don't think the checks carried out went far enough – and I think Westerby had information that clearly indicated that there were deficiencies in the advice process carried out by KBFS that increased the risk of consumer detriment. So, given the circumstances involved here, I don't think Westerby took appropriate steps or drew reasonable conclusions from the information that was available to it before accepting Mr C's business.

Restricted advice

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

"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes).
…
Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.

The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes."

A further alert from the Regulator in April 2014 stated:

"Where a financial adviser recommends a SIPP knowing that the customer will (…) transfer (…) to release funds to invest through a SIPP, then the suitability of the underlying investment must form part of the advice given to the customer. If the underlying investment is not suitable (…), then the overall advice is not suitable.

If a firm does not fully understand the underlying investment proposition intended to be held within a SIPP, then it should not offer advice on the pension transfer (…) at all as it will not be able to assess suitability of the transaction as a whole.

The failings outlined in this alert are unacceptable and amount to conduct that falls well short of firms' obligations under our Principles for Businesses and Conduct of Business rules. In particular, we are reminding firms that they must conduct their business with integrity (Principle 1), due skill, care and diligence (Principle 2) and must pay due regard to the interests of their customers and treat them fairly (Principle 6)."

I think that Westerby was aware of the FCA's position on restricted advice. I say this because in Mr C's phone call with Mr J of Westerby on 13 August 2018, Mr C was discussing the advice he was having to take. He said that the IFA might be a bit 'miffed' if she couldn't recommend the investment. Mr C said that his DB scheme didn't care what he did with the money, it just wanted to know he'd taken advice. Mr C said the IFA might 'pull a face' and he'd be back to square one trying to find an adviser that wouldn't be so precious about the fact he wanted to take control of where he invested. Mr J said that the adviser should take the investment strategy into account, but should be impartial. Mr C said that not giving advice on the investment would absolve the IFA of any liability for the investment but Mr J clarified that the adviser would need to take the investment into account in her report. He also said:

“We’re looking for a positive recommendation. We don’t do what’s called insistent customer. This is where effectively the report says don’t transfer but you would say well I’m going to do it anyway.”

So, I think Westerby knew (and wanted to make it clear to Mr C) that his IFA’s advice had to take account of the investment Mr C intended to make in her recommendation. Further, in order for Westerby to proceed with Mr C’s application, that this advice had to result in a positive recommendation to transfer and it would not transact on an insistent customer basis.

Westerby also reiterated this in an email dated 17 August 2018, saying, *“…we would be happy to continue with the transaction on your instruction at your own risk and on the proviso that the DB transfer advice results in a positive recommendation in favour of transferring.”*

Mr C received a suitability report from KBFS detailing its advice on 11 September 2018. KBFS assessed Mr C’s attitude to risk as balanced and ultimately recommended that Mr C should transfer his DB scheme benefits to a Westerby SIPP. KBFS said:

“Although not all the critical yields may not be achievable, I believe a transfer is still suitable for you as you do not need to replicate the benefits of the current Scheme. You want a Personal Pension to ensure your daughter can inherit any residual funds upon your death, this is something that cannot be done under your current scheme. You have stated that you do not rely on these monies and you want full control over where and in what they are invested in as you are a sophisticated adviser in your investment club.”

“The Investment Strategy
[Mr C]*, you consider yourself a sophisticated investor as a long-standing member of an executive investment club designed for High Net Worth Investors. It is your intention to self-select all the funds you wish to invest in and do not require any investment advice from myself. We have agreed that the transfer monies will go into your SIPP cash account with Metro Bank, and you will take full responsibility for all of your investment choices. You have been a member of an investment club for many years and you have been successful in the investments you have made; therefore, you feel more than qualified to make your own investment choices and intend to use London Capital and Finance Bonds for a fixed return.”*

However, as per the extracts above, it is clear that KBFS did not give any consideration as to the suitability of Mr C’s chosen investment as part of her recommendation to transfer out of the DB scheme. So, the advice given was of a restricted nature and as such, was not consistent with the Regulator’s expectations, as set out in the alerts above.

Westerby requested sight of the suitability report as it needed evidence that Mr C had received a positive recommendation to transfer and to check that it covered the Regulator’s requirements. I think that was a reasonable step to take in the circumstances given that Mr C was attempting to transfer out of a DB scheme and bearing in mind that the Regulator at the time provided the following guidance in COBS 19.1.6G(2):

“When a firm is making a personal recommendation for a retail client who is, or is eligible to be, a member of a pension scheme with safeguarded benefits and who is considering whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable.”

I don’t know when Westerby received Mr C’s SIPP application or a copy of KBFS’s suitability report. But for the purpose of this decision, I have assumed it was on or around 18 September 2018, as this was when Westerby checked KBFS’s permissions on the FCA’s register.

On receipt of the suitability report, it ought to have been immediately apparent to Westerby that KBFS's advice did not amount to a positive recommendation taking into account the transaction Mr C intended to undertake in line with its requirements. Given that Westerby required a positive recommendation to transfer, including consideration of the intended investment strategy, and that Westerby did not transact insistent customer business, this ought to have been considered a red flag that meant it shouldn't have accepted Mr C's pension transfer.

I appreciate that it appears to have been Mr C's own decision not to take advice on the investment – indeed, he wasn't particularly happy that he had to take advice at all. However, that doesn't mean that KBFS could choose to restrict the advice it provided to him.

COBS 2.1.2R says:

"A firm must not, in any communication relating to designated investment business seek to:

(1) exclude or restrict; or
(2) rely on any exclusion or restriction of;

any duty or liability it may have to a client under the regulatory system."

So, KBFS saying it was operating under a limited instruction from Mr C didn't absolve it of its duty of care to ensure the advice it was providing was suitable – again, this had to include consideration of how Mr C's funds would be invested.

Having received KBFS's suitability report, I think Westerby ought to have told Mr C that it could not proceed with things as they stood.

What should Westerby have done?

In its response to Mr C's complaint, Westerby said that it knew KBFS had not advised on the suitability of the investment, but it decided to proceed on the basis that Mr C was a self-certified sophisticated investor. However, this contradicts what Westerby told Mr C both on the phone and in email that it would only proceed if Mr C received a positive recommendation to transfer out of the DB scheme. And I think that was an appropriate stance to take in the circumstances given that Mr C intended to transfer out of a DB scheme and invest exclusively in non-standard assets. As noted by Westerby, that positive recommendation to transfer had to take account of Mr C's intended investment in LCF. As such, the recommendation Mr C received was effectively redundant. And I don't think it was fair or reasonable for Westerby to proceed with Mr C's SIPP application on the basis of the advice Mr C received, knowing that it wasn't in line with the Regulator's rules.

Westerby may say that it could have directed Mr C to revert to KBFS and ask it to revisit the advice it gave, taking account of Mr C's intended investment strategy. However, I don't think that would've been reasonable in the circumstances. The fact that KBFS was prepared to provide advice to Mr C of a nature that was clearly not in line with the Regulator's rules casts serious doubt on the competency of KBFS. This posed a high-risk of detriment to Mr C and in the circumstances, I think Westerby ought to have informed Mr C that it could not proceed given the advice he had received from KBFS was not compliant with the Regulator's expectations. Further, I think it ought to have told him he would need to approach a new financial adviser who would need to provide advice on the whole of the transaction before it could reconsider his SIPP application.

What would Mr C have done next?

Based on Mr C's earlier conversations with Westerby I think he would've been extremely frustrated by Westerby's stance here, particularly as he hadn't wanted to take (and as a result, pay a significant fee for) the advice from KBFS in the first place. As such, having been told he would need to take advice that took account of the whole transaction in order to proceed with Westerby, it's possible Mr C may well have decided against pursuing the transfer and investment altogether given the additional costs involved.

However, even if Mr C had decided that he still wanted to pursue things, I don't think that Mr C would've been in a position to invest in LCF via his Westerby SIPP before the FCA issued its first supervisory notice on 10 December 2018. I say this because in the first instance, Mr C would have needed to find a new financial adviser that was prepared to make a positive recommendation to transfer out of his DB scheme in order to invest the vast majority of his funds in LCF. Although Mr C had self-certified as a sophisticated investor, and had some experience of investing in private companies, KBFS had assessed his attitude to risk as balanced. So, I think it's unlikely a financial adviser, bearing in mind the Regulator's guidance and if acting in their client's best interests, would recommend Mr C transfer out his DB scheme in order to invest the majority of funds in a high-risk, illiquid, non-standard investment.

And even if Mr C did find an adviser prepared to make such a recommendation, which I'm not persuaded he would have, I'm very doubtful that this could have been achieved such that his funds were available for investment before 10 December 2018. I say this bearing in mind it took Mr C's DB scheme trustee until 23 October 2018 to release the DB scheme funds to Westerby and until 14 November 2018 to make the investment based on the earlier advice. And I think it could have taken up to eight weeks (or possibly longer) for Mr C to obtain the new advice, particularly as he would've needed to obtain a new transfer value from his DB scheme. Mr C had told Westerby that his transfer value expired on 26 August 2018 and in order for the transfer to go through when it did, he'd had to secure an extension – I don't think it's likely he would've been able to obtain another extension. So, overall, I'm not persuaded Mr C would've been able to secure the necessary advice, release the pension funds to his Westerby SIPP and submit his investment application to LCF before 10 December 2018.

For the avoidance of doubt, I don't think it would've been reasonable for Westerby to allow any further SIPP investments in LCF following the concerns raised by the FCA in its first supervisory notice. I note that Westerby has said that the FCA only raised concerns with the promotional material associated with the bonds, not any suspicion of fraud. However, concerns about the promotional materials alone is significant enough given LCF was only regulated to promote the investments. And irregularities in the promotional material evidently increases the risk of consumer detriment because of the impact this had on consumers' understanding of the investment and the risk it posed.

So, for the reasons given above, I don't think Mr C's investment in LCF would have proceeded if Westerby had done what I have found it ought to have done.

I've thought about whether Mr C would've still likely gone on to transfer out of his DB scheme even if he wasn't able to invest in LCF. And based on the evidence I've seen, I think he most likely would have. It seems to me that, irrespective of the LCF investment, Mr C did not feel the DB scheme was of use to him and given his experience of investing, he was keen to have the funds under his own control so he could invest them and ultimately pass them on to his family in the event of his death. Whilst I think it's unlikely an adviser would have recommended that Mr C transfer out of his DB scheme in order to invest in LCF, I think it's possible he could've received a positive recommendation to transfer out of the scheme in order to invest in regular funds. Alternatively, he could've transferred out of the scheme on an insistent customer basis and I think that's something Mr C would've ultimately pursued. I'm also mindful that Mr C hasn't disputed this in response to my provisional decision.

As such, I think that even though Mr C would not have invested in LCF, he would've most likely transferred out of his DB scheme regardless, particularly as he already held an existing SIPP which could've accepted the funds if he didn't wish to open a SIPP with Westerby.

<u>Due Diligence checks on the investment</u>

In light of my conclusions about how Westerby should've treated Mr C's SIPP application from KBFS, I've not considered Westerby's obligations under the Principles in respect of carrying out sufficient due diligence on the underlying investment in significant detail. It's my view that had Westerby complied with its obligations under the Principles to carry out sufficient due diligence checks on KBFS and acted appropriately on the information it received, then the investment in LCF wouldn't have proceeded. However, I do think that if Westerby had carried out sufficient due diligence checks on LCF it should not have permitted SIPP funds to be invested in it.

Westerby said that it carried out sufficient due diligence checks to ensure:

- it understood the nature of the investment;
- that the investment was genuine and not a scam, linked to fraudulent activity, money laundering or pension liberation;
- that the investment was safe/secure;
- that the investment could be independently valued and was not impaired.

So, while Westerby did undertake some due diligence checks before permitting the investment to be held in its SIPPs, I think it needed to do more to satisfy its obligations under the Principles. And in order to correctly understand the nature of the investment, I think Westerby should have also reviewed how LCF was marketing its bonds to investors.

Westerby has provided a copy of a brochure for the bond Mr C invested in (albeit not a complete copy) so it clearly thought it was important to look at this material at the time too. But I think Westerby ought to have had serious concerns about some of the information within this brochure and drawn different conclusions about accepting the investment to be held in its SIPPs. Furthermore, other information I think it should have obtained, ought to have given Westerby real cause for concern about the risk of consumer detriment associated with this.

I think it's appropriate to highlight what the FCA stated when it issued the First Supervisory Notice dated 10 December 2018. I say this because the information upon which the notice was based was available to Westerby (in particular on LCF's website) and ought to have been reviewed before accepting LCF for investment in its SIPPs.

The FCA directed LCF to immediately:

(a) Withdraw from its website (www.londoncapitalandfinance.co.uk) all communications relating to its "Fixed Rate ISA or Bond";
(b) Withdraw all other communications that relate to its "Fixed Rate ISA or Bond", whether those communications appear on Facebook, Youtube, www.top-isa.rates.co.uk, www.best-savings-rate.co.uk, as a result of Google searches or any other platform or advertising medium;
(c) Refrain from making any communications that in substance replicated the claims

made on the firm's website about the "Fixed Rate ISA or Bond";

(d) Publish on its website the following statement prominently at the top of the homepage "The Financial Conduct Authority has directed London Capital & Finance plc to withdraw all of its existing marketing materials in relation to LCF's Fixed Rate ISA or Bond".

The FCA said that it considered LCF's communications on its website and promotional material in relation to its "Fixed Rate ISA or Bond" were misleading, not fair and not clear, in breach of FCA rule COBS 4.2.1R. This included the following concerns:

- The LCF bonds did not qualify to be held in an ISA account because they were non-transferable but were advertised as such.
- Undue prominence was given to LCF's FCA authorisation despite the bonds not being regulated or having FSCS protection.
- Past performance warnings were insufficiently prominent.
- Inappropriate comparisons were made with cash savings.

In addition to this, I have found other instances of misleading material. For example, the brochure for the bond Mr C invested in described the bond as 'A simple and transparent investment' – but I don't think it could reasonably be described as a simple investment given it was a non-standard illiquid investment that wouldn't be suitable for the vast majority of retail investors. However, Westerby hasn't provided a complete copy of the brochure so it's difficult for me to make a finding on how the risks of the bond were otherwise presented.

On the website 'FAQs' section, no questions related to the risks involved with the investment. In response to the question*, 'Is it really a fixed rate of return?'*, LCF said:

"Yes. The returns are fixed for the duration of your investment period. Furthermore there are no hidden fees or charges so you get a return for 100% of the money you invest."

Overall, I think the material I've seen minimised the risks associated with the investment. I think this ought to have been discoverable to Westerby at the time, and I think it ought to have drawn the same conclusions that consumers were likely to be induced to invest on the basis of this information.

Knowing all this, I don't think it was fair or reasonable for Westerby to have approved the LCF bonds for investment in its SIPPs.

I think it's important I emphasise here that I'm not saying that Westerby should necessarily have discovered everything that later became known (following the FCA's and SFO's investigations) had it undertaken sufficient due diligence before accepting the LCF investment into its SIPPs. But I do think that appropriate checks would have revealed some fundamental issues which were, in and of themselves, sufficient basis for Westerby to have declined to accept the LCF investment in its SIPPs altogether.

<u>Is it fair to ask Westerby to pay Mr C compensation in the circumstances?</u>

The involvement of other parties

In this decision I'm considering Mr C's complaint about Westerby. However, I accept that other parties were involved in the transactions complained about – including KBFS and LCF.

I also accept that Mr C pursued a complaint against LCF with the FSCS. The FSCS upheld Mr C's complaint and offered to pay him the maximum compensation of £85,000, although it had calculated his total loss to be in excess of this at that time. However, as explained above, Mr C hasn't accepted the compensation from the FSCS pending the outcome of his complaint against Westerby.

Westerby may say that it should not be liable for the full extent of Mr C's loss because of the involvement of these other businesses and to make no allowance for this in the redress is neither fair nor reasonable.

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

In my opinion it's fair and reasonable in the circumstances of this case to hold Westerby accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mr C fairly. The starting point, therefore, is that it would be fair to require Westerby to pay Mr C compensation for the loss he's suffered as a result of its failings.

I accept that other parties, including KBFS and LCF, might have some responsibility for initiating the course of action that led to Mr C's loss. However, I'm satisfied that it's also the case that if Westerby had complied with its own distinct regulatory obligations as a SIPP operator, the investment wouldn't have proceeded, and the loss he's suffered could have been avoided.

I've carefully considered causation, contributory negligence and apportionment of damages. And it's my view that it's appropriate and fair in the circumstances for Westerby to compensate Mr C to the full extent of the financial loss he's suffered due to Westerby's failings. And, having carefully considered everything, I don't think it would be fair in the circumstances to reduce the compensation amount that Westerby is liable to pay to Mr C.

Mr C taking responsibility for his own investment decisions

In reaching my conclusions in this case I've thought about section 5(2)(d) of the FSMA (now section 1C). This section requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions.

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

In my view, if Westerby had acted in accordance with its regulatory obligations and in line with its own policies and procedures the investment in LCF wouldn't have proceeded. So, if that had happened, I'm satisfied the loss he's suffered could have been avoided.

As I've made clear, Westerby needed to carry out appropriate due diligence on KBFS and reach reasonable conclusions. I think it failed to do this. And just having Mr C sign forms containing declarations wasn't an effective way of Westerby meeting its obligations, or of escaping liability where it failed to meet its obligations.

KBFS was a regulated firm with the necessary permissions to advise Mr C on his pension provisions and Mr C also then used the services of a regulated personal pension provider in Westerby. I'm satisfied that in his dealings with these parties, Mr C trusted each of them to act in his best interests.

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

Would the transactions complained about here still have been effected elsewhere?

Westerby may say if it hadn't accepted Mr C's SIPP application from KBFS, that the transfer of Mr C's pension and the investment would still have been effected with a different SIPP provider on the basis of KBFS's original advice. Or a SIPP provider who may have been willing to accept his DB transfer and investment in LCF without him having received a positive recommendation to transfer, or one that would transact on an insistent customer basis.

I've thought about this carefully, but I'm not aware of any other SIPP provider at that time who was accepting investment in LCF. Mr C had approached Westerby specifically for this reason; he already had a SIPP with a provider which wouldn't accept this investment. So, I'm not currently persuaded this avenue was open to Mr C. Or, that he would have been able to find such a SIPP provider which was able to complete its own due diligence checks on the adviser and LCF before 10 December 2018. So, I still don't think Mr C's investment in LCF would have gone ahead.

I also don't think it's fair and reasonable to say that Westerby shouldn't compensate Mr C for his loss on the basis of speculation that another SIPP operator would have accepted the transfer on the basis of the original advice provided by KBFS. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr C's application from KBFS given the advice provided was not compliant with the Regulator's rules.

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if Westerby had declined to accept Mr C's application from KBFS, the investment wouldn't still have gone ahead and Mr C's monies wouldn't have been transferred into the Westerby SIPP.

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

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

But I don't think these circumstances apply to Mr C as I have found that Mr C would not have been able to invest in LCF before the FCA issued its first supervisory notice had Westerby acted on the information it possessed and acted in Mr C's best interests. Furthermore, Mr C wasn't driven to invest by an incentive, and he clearly viewed the nature of the investment as important and had taken time to explore things such as the guarantees offered.

Having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if Westerby had refused to accept Mr C's application from KBFS, the investment in LCF wouldn't still have gone ahead.

Summary

Overall, I think it's fair and reasonable to direct Westerby to pay Mr C compensation in the circumstances. While I accept that other parties might have some responsibility for initiating the course of action that's led to Mr C's loss, I consider that Westerby failed to comply with its own distinct regulatory obligations and didn't put a stop to the transactions proceeding by declining to accept Mr C's application to invest in LCF when it had the opportunity to do so. I say this having given careful consideration to the *Adams v Options SIPP* judgments but also bearing in mind that my role is to reach a decision that's fair and reasonable in the circumstances of the case having taken account of all relevant considerations.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr C. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against Westerby that requires it to compensate Mr C for the full measure of his loss. But for Westerby's failings, I'm satisfied that Mr C's pension monies wouldn't have been invested in LCF at all.

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

Mr C's comments on what represents fair compensation in this case

I appreciate Mr C's concerns about the recent stock market fluctuations but I remain satisfied that the index I have set out below is a fair and reasonable measure to base compensation on. That's particularly the case given that I think Mr C's pension monies would've always been transferred to a SIPP, and as such would've been subject to the same market forces.

I have also considered Mr C's request that his legal fees be reimbursed, but I don't think it would be fair or reasonable to require Westerby to compensate Mr C for this expense given that it was his decision to seek professional representation. I don't think that this was an unavoidable cost, attributable Westerby's failings.

Regarding the advice fees paid to KBFS and the SIPP managements fees, I consider that these expenses would've always been incurred because I think Mr C would've always gone on to transfer his DB scheme to a SIPP. In any event, the calculation set out below allows for reasonable fees to be paid.

I have noted Mr C's comments about his tax position. But I think on balance if Mr C had been able to take withdrawals from his SIPP once he'd retired, that he'd have most likely been in the basic tax rate bracket, given he would've been entitled to the state pension.

Overall, I think what I have set out below fairly compensates Mr C for the issues he's complained about.

Westerby's comments on what represents fair compensation in this case

I have carefully considered Westerby's comments about how compensation should be calculated, but I remain persuaded that the redress methodology as set out in my provisional decision (and repeated below) represents fair compensation in this case.

I'm satisfied that the redress calculation allows for Westerby to take account of the tax-free cash lump sum Mr C took when he transferred his pension, as well as any other withdrawals from or additions to the SIPP, including dividends.

I also don't think it would be fair or reasonable to limit the redress calculation to the date proposed by Westerby. The aim of the redress is to put Mr C as far as possible back into the position he would've been in but for Westerby's failings and limiting the calculation to March 2022 does not achieve that.

I have considered Westerby's comments about the interest award, but I haven't been provided with any rationale as to why the compensation payment could not be made within 28 days. As the SIPP provider, Westerby has access to the transactions made so should know the actual value of the SIPP. And as the calculation is to be made using a benchmark, Westerby does not need to contact any third parties to calculate the fair value.

Overall, I think Westerby should put matter right for Mr C as per the below steps.

Putting things right

My aim is to return Mr C to the position he would now be in if Westerby had refused to permit his investment in LCF.

As I've already mentioned above I think Mr C would've still transferred out of his DB scheme to a SIPP, even if he wasn't able to invest in LCF.

If Westerby had declined to accept Mr C's instruction to invest in LCF, I'm satisfied the investment would not have gone ahead and Mr C would've invested his transferred funds differently. It's not possible to say precisely what he would have done, but I'm satisfied that what I've set out below is fair and reasonable given Mr C's circumstances and objectives when he invested.

As I understand it, Mr C's Westerby SIPP remains open and still holds the LCF investment, so my redress methodology below reflects this.

What must Westerby do?

To compensate Mr C fairly, Westerby must:

- Compare the performance of Mr C's investment with that of the benchmark shown below. If the *actual value* is greater than the *fair value*, no compensation is payable.

  If the *fair value* is greater than the *actual value* there is a loss and compensation is payable.

- If there is a loss, Westerby should pay into Mr C's pension plan to increase its value by the amount of the compensation. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If Westerby is unable to pay the compensation into a pension plan for Mr C, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr C won't be able to reclaim any of the reduction after compensation is paid.

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

- It's reasonable to assume that Mr C is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. I understand Mr C took his full tax-free lump sum entitlement when he transferred his pension. However, if Mr C would have been able to take a further tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Westerby SIPP	Some liquid/some illiquid	FTSE UK Private Investors Income Total Return Index	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

This means the actual amount payable from the investment at the end date.

It may be difficult to find the *actual* value of the portfolio. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case.

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

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

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any additional sum that Mr C paid into the investment should be added to the *fair value* calculation at the point it was actually paid in.

Any withdrawal from the portfolio should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Westerby totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr C wanted Capital growth and was willing to accept some investment risk.

- The FTSE UK Private Investors Income ***Total Return*** index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr C's circumstances and risk attitude.

SIPP fees

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

My final decision

For the reasons given, my final decision is that I uphold Mr C's complaint against Westerby Trustee Services Limited.

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

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

Where the compensation amount does not exceed £160,000, I additionally require Westerby Trustee Services Limited to pay Mr C any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I only require Westerby Trustee Services Limited to pay Mr C any interest as set out above on the sum of £160,000.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Westerby Trustee Services Limited pays Mr C the balance. I additionally recommend any interest calculated as set out above on this balance to be paid to Mr C.

If Mr C accepts a final decision, the award is binding on Westerby Trustee Services Limited.

My recommendation is not part of my determination or award.

Westerby Trustee Services Limited doesn't have to do what I recommend. Further, it's unlikely that Mr C can accept my decision and go to Court to ask for the balance. Mr C may want to consider getting independent legal advice before deciding whether to accept my final decision.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 30 May 2025.

Hannah Wise
Ombudsman