DRN-5540367

The complaint

Mr M's complaint is about the due diligence checks Westerby Trustee Services Limited ('Westerby') carried out in relation to his self-invested personal pension ('SIPP').

What happened

Mr M says he was introduced to an independent financial adviser ('IFA') I'll call 'Firm K' by friends who'd been investing with Firm K for some time. He says Firm K told him about the Fortress International Fund ('Fortress') investment and said he should transfer all of his pension into it. That he 'went with the flow' and agreed, as he didn't have much financial knowledge and his friends seemed to trust Firm K. And so he 'signed over his pension' and Firm K became his IFA.

In mid-December 2008, various documents were completed in respect of Mr M, including:

- A Westerby SIPP application form. This recorded that Firm K was his IFA, and his investment choice was a 'wealth management portfolio' with an investment platform I'll call 'Business A'.

- Business A branded investment forms, which recorded that Mr M would invest £85,000 (with 95% of this into Fortress), and that Firm K was his investment adviser/manager.

- A Business A branded 'risk factsheet', which declared that Mr M had taken qualified investment advice, his invested capital could be at significant risk with a zero return, and he may not be able to cash in his fund for a time. It also set out a series of risks associated with 'alternative investment funds and experienced investor funds'.

Firm K sent Mr M's SIPP application to Westerby in late December 2008. Its covering letter said he would be waiving his 30 day 'right to change your mind' cancellation period, and that his investment application would be sent to Westerby once his pensions had transferred into the new SIPP.

Mr M's Westerby SIPP was opened, and in January 2009 a total of about £89,000 was transferred into it from three existing personal pensions – I've seen nothing to suggest these were anything other than defined contribution pensions, so I've proceeded on this basis and neither party has disputed this.

In January 2009, Firm K sent the Business A investment forms to Westerby. Soon after, Westerby transferred Mr M's SIPP monies to Business A and most of this was invested in Fortress with the remainder left as cash in an attached cash account.

Fortress was a traded life policies investment ('TLPI'). The Fortress marketing brochure said *"TLP's are United States issued life insurance policies where the policy owner wishes to sell the future benefits of the policy before the maturity date. The maturity value of the policy is fixed at outset and the Fund will purchase policies at a discount from the value to generate a*

guaranteed profit when the policy pays out. The profit is introduced to the Fund over a period of time based on an actuarial model".

In 2010, the fees Mr M was being charged led his cash account with Business A to start being 'overdrawn'. In April 2012 Mr M applied to withdraw £1,500 from his Fortress investment to pay the overdrawn amount. This withdrawal took place in December 2012 but despite this Mr M's overdrawn amount continued to grow due to ongoing fees and interest.

Westerby says Mr M changed his IFA several times - in 2011, 2013, 2014, 2015 and 2017.

In January 2013, Mr M (via his IFA) requested a 100% redemption of his Fortress investment to invest in new funds. This redemption was chased at later points but wasn't realised.

After being contacted by Mr M's new IFA, Westerby emailed the IFA on 20 April 2015 to provide the requested plan information. Within this email, Westerby said there were *"No complaints; however there is an issue with the underlying fund held within* [Mr M's Business A] *portfolio. They are unable to provide encashments and are still working on a backlog from 2011/12"*. Regarding fees, Westerby said it hadn't been able to pay Mr M's current IFA's fee *"due to a lack of liquidity in the client's SIPP".*

In July 2015 Fortress was officially suspended from trading. And Westerby says that in December 2015 Business A told it all redemptions had been suspended.

On 7 December 2015, Mr M's IFA called Westerby about Business A.

Westerby's note of this call recorded that Mr M was with his IFA and joined the call to give authority for his IFA and Westerby to speak. It also recorded that Westerby told his IFA that Fortress was unable to pay redemptions and had gone into administration, and there was a redemption backlog from 2011 so Mr M wouldn't get the redemption he'd requested in 2013 for some time.

In January 2017, Business A notified investors that it would be giving Fortress a £nil value.

That same month, Business A wrote to Westerby about Mr M. It said that the circumstances meant it wouldn't seek to recover his overdrawn balance, but that in March 2017 it would start the process of fully surrendering his policy in line with the policy conditions, and that the £nil value asset would then be transferred to Business A.

Westerby wrote to Mr M in February 2017 to say that, due to Fortress having a £nil value and his Business A account being overdrawn (then by about £16,000), Business A planned to close his account and transfer his Fortress investment to Business A. Westerby asked Mr M how he'd like to proceed and suggested he speak to an IFA.

In March 2017, Fortress sent an update to investors that there were liquidity issues and that it was consulting with its professional advisers, but it aimed to give maximum value to investors.

In March 2017, Business A again wrote to Westerby about Mr M. It said Mr M's options were to either *"cash-in your bond"* or to *"continue to stay invested and not cash-in your bond*". And that if he decided to cash-in, Mr M would need to sign and return the enclosed letter of acknowledgement.

In around mid-2017 Mr M made a claim to the Financial Services Compensation Scheme ('FSCS') about Firm K. In October 2017, the FSCS upheld Mr M's claim. I've not been provided with a copy of the FSCS calculation. But I've seen that the FSCS assumed Mr M's

Fortress investment had a nil value so it could calculate his loss. And given that Mr M says the FSCS paid him £50,000 compensation, I think it's likely that the FSCS calculated Mr M's financial loss to be more than the FSCS's maximum compensation limit of £50,000 at that time. Later, the FSCS provided Mr M with a reassignment of rights so he could pursue a claim against Westerby.

In February 2018, Mr M called our Service about Westerby. We no longer hold a recording of this call, but our notes of it record that Mr M told us he was unhappy that Westerby wasn't providing him with information about what had happened with his fund. Our Service passed this complaint about the provision of fund information to Westerby.

Westerby didn't uphold this complaint. Its March 2018 final response said, in summary:

- It had received this complaint via our Service, and quoted the complaint summary set out in our complaint notification letter, which was that *"Customer transferred his pension through a financial advisor in 2008. His fund seems to have disappeared (around £100,000) and the pensions provider have failed give him sufficient information about what's happened to his fund."*, and that Mr M wanted Westerby to *"Locate fund"*.

- Mr M's SIPP funds had been lost due to the failure of the Fortress investment.

- His Fortress investment was made on Firm K's advice, then an authorised and regulated IFA.

- Firm K was responsible for the advice provided in respect of the investment.

- All correspondence regarding Mr M's SIPP investment had been with his IFAs.

- Mr M made a successful FSCS claim for funds lost as a result of this investment, and that compensation was paid to him personally.

- Mr M had the right to refer his complaint to the Financial Ombudsman Service but would need to do so within six months of this final response letter.

Unhappy with this, Mr M referred his complaint to our Service. Amongst other things, he told us he couldn't have known there were problems with his Fortress investment if his IFAs didn't pass that information on to him - Firm K always told him Fortress was strong and had no issues. The only information he'd received was Business A's January 2017 letter giving Fortress a £nil value. Westerby had taken its fees from his SIPP, and he was only made aware of any issue once there wasn't enough in his SIPP to pay them. Mr M also provided medical evidence of his health difficulties.

On 18 December 2018, an Investigator at our Service shared his initial thoughts on this complaint with Mr M in a telephone call. We no longer hold a recording of that call, but I'll return to it shortly.

In January 2019, the Investigator issued their written opinion on Mr M's complaint about the provision of fund information. They said Mr M had referred it to our Service too late for us to be able to consider its merits, as he'd referred it to us more than six months after Westerby gave him its final response.

Mr M didn't agree with the Investigator's view. He told us his health had prevented him from referring his complaint about the provision of fund information in time. And that his ceding

pension provider and Westerby *"are big companies that backed this scheme that was sold to me by* [Firm K] *but since then I have had very little help or support regarding what has happened to my investment."*

Our Investigator called Westerby to explain that Mr M's initial complaint was simply about Westerby not providing him with information about what had happened to his investment, it was not about Westerby's due diligence. And in March 2019, the Investigator emailed Westerby with further details on this point, including a description of their December 2018 call with Mr M, which I touched on earlier. The email said, *"The call that I had with* [Mr M] *was on 18 December 2018. In that call I was explaining to him that the complaint was outside of the six month time limit.*

In this call [Mr M] *said that Westerby "really should have had a duty of care to a client to tell them what was going on and know what was going on within this product. They were quite happy to take the fees and be paid on the fees."*

Later in on the call [Mr M] *explained that he wants something from his pension. He said he had received £50,000 from the FSCS but how can he live off that. So it's clear* [Mr M] *is seeking losses from Westerby over and above the* [sic] *awarded by the FSCS (which is capped to a maximum amount of £50,000)*

[Mr M's] *initial complaint was simply a request for information. Now it's clear* [Mr M's] *concerns is to do with Westerby's duty of care to him (i.e. due diligence). He is also seeking compensation over and above what he received from the FSCS for the overall losses he incurred in his pension.*

I'll explain that you will be arranging a reply to his concerns about Westerby's duty of care and his losses over and above what he has already received from the FSCS.

In terms of this complaint, it's still our view we can't look at it. I'll let you know if [Mr M] *wants to now close this complaint…"*

With Mr M's consent, our Service closed his complaint about the provision of fund information and directed his complaint about Westerby's due diligence to Westerby so that it had the opportunity to investigate and respond to this new complaint.

Mr M contacted us in May 2019 because Westerby hadn't provided a final response to his complaint about its due diligence.

Our Service told Westerby that Mr M had asked us to investigate his due diligence complaint and that this complaint was, "*Westerby as the SIPP operator didn't conduct appropriate due diligence in accepting his business from the introducer* [Firm K] *or the investments within the SIPP."* Also, we asked Westerby to provide information and evidence, including about the due diligence it had carried out on introducer Firm K and Fortress, and about the number and type of introductions it received from Firm K.

Westerby's submissions to our Service included some documentary evidence regarding the establishment of Mr M's SIPP and his purchase of the Fortress investment. Westerby also made the following comments:

- Mr M had referred his due diligence complaint too late. It was just a reframing of his first complaint, which our Service had already said had been brought outside the six-month time limit.

- In any case, his due diligence complaint had additionally been referred too late

because it had been brought outside the six-year and three-year time limits. Mr M's Westerby SIPP and Fortress investment were arranged more than six years before he made his due diligence complaint. And in January 2013 Mr M had instructed a full sale of his Fortress investment and was aware of the significant delays in redemption payments, so he ought to have been aware there was a problem with the Fortress fund. Further, in the December 2015 phone call Westerby had told him the Fortress fund was in administration with no timescale for when redemption payments would be made. So Mr M would've been aware then of the potential to complain about Westerby as his SIPP provider in the event of a loss of investment funds, as many investors had already done. In addition, Mr M was fully aware of the issues in 2017 and made an FSCS claim against Firm K.

- Westerby didn't consent to our Service considering the merits of Mr M's complaint.

- Our Service should decide whether the due diligence complaint had been brought in time before Westerby provided a response on its merits.

- There were no exceptional circumstances that had prevented Mr M from complaining in time, as he was able to appoint several new IFAs between 2013 and 2017 and to make an FSCS claim in 2017.

- All the IFA's Mr M appointed had requested information from Westerby, which it provided. The last IFA was appointed in May 2017, after the Fortress fund went into administration, and this IFA was actively assisting Mr M with his FSCS claim.

Our Service explained to Westerby that we would treat Mr M's complaint about Westerby's due diligence separately to his first complaint, because his first complaint was about the provision of information and hadn't addressed Westerby's due diligence.

An Investigator at our Service said Mr M's complaint about Westerby's due diligence had been brought in time. She didn't think there was anything that meant Mr M ought to have connected Westerby to the problem with the Fortress investment within his SIPP, or that ought to have made him aware Westerby had due diligence obligations as a SIPP provider, more than three years before he complained to Westerby about these things.

Our Investigator again asked Westerby for information about the due diligence it had carried out on Firm K and the Fortress investment. In addition, she asked Mr M how his Westerby SIPP came about and about the pensions he'd transferred into it.

Mr M acknowledged receipt of the Investigator's opinion and told us, amongst other things, that at the time of the relevant events:

- Firm K told him 'it was going to be Business A and that it would be also a SIPP'. Mr M had heard of Business A, but he'd not heard of Westerby. Firm K was the only party Mr M was involved with in the transactions.

- He hadn't been interested in changing his pension prior to his contact with Firm K.

- His understanding of the Fortress investment and its risks was that it was to do with death insurance policies. And he'd understood that Business A could be trusted as it was a large and important company, and that Firm K could be trusted as his friends had introduced him to it.

- He didn't receive any payment when he moved his pensions.

- He was made aware there could be a problem with his Fortress investment by one of his friends who'd invested in it. Mr M contacted Firm K several times and was told all the way through that there was nothing to worry about and everything was being sorted out. It was only when Firm K was taken to court in 2017 by one of Mr M's friend's and lost that he realised there was a problem, so he contacted the Financial Ombudsman Service.

- The only other party he'd contacted was the FSCS, which paid him £50,000 compensation.

- He was experiencing financial difficulties, as he'd lost his business and was currently unemployed. And he was struggling with his health issues too.

Westerby disagreed with the Investigator's opinion. It said our Service had recorded Mr M's first complaint as relating to Westerby's due diligence, because the first line of the Investigator's opinion on that first complaint said, *"*[Mr M] *complains Westerby didn't carry out sufficient due diligence checks when they accepted his business and opened a Self-Invested Pension Scheme (SIPP)."* Westerby said this showed Mr M's first complaint was about its due diligence, and our Service had found the first complaint to be out of time. So we shouldn't consider Mr M's complaint about due diligence.

As agreement couldn't be reached, Mr M's complaint about Westerby's due diligence was passed to me to decide whether it was one our Service could consider.

I issued a jurisdiction decision in which I explained that I was satisfied Mr M's complaint about Westerby's due diligence was a different matter to his first complaint about Westerby's provision of information. And that I was satisfied Mr M's due diligence complaint had been brought in time and was a complaint our Service could consider the merits of. Because while Mr M ought to have been aware by December 2015 that he had, or may have, suffered a material loss to his investment, I'd not seen anything to make me think that any of his IFAs told him Westerby may have a responsibility for this problem. I said that I'd not seen anything that meant Mr M ought to have been aware prior to December 2018 that Westerby had a responsibility for this problem. And based on the evidence, it was more likely than not that it was Mr M's December 2018 call with our Service that made him aware Westerby may be responsible for his investment loss. And he'd complained about Westerby's due diligence within three years of this.

As I had decided that Mr M's complaint about Westerby's due diligence was within our Service's jurisdiction, I moved on to looking at the merits of this complaint. At my request, Westerby provided some further information, including the following comments:

- In the December 2018 call, our Service had 'redirected' Mr M's complaint to Westerby. It objected to this redirection and to our 'leading of the client'.

- Mr M's complaint had been brought too late. The December 2015 call between Westerby, Mr M and his IFA ought to have made Mr M aware he had cause for complaint. And Mr M's IFA would've known Mr M could complain about Westerby as a SIPP operator, and advised him of this.

- Given the time passed, it no longer held documentary evidence of the due diligence checks it had carried out on Firm K or Fortress. But it started receiving introductions from Firm K in October 2006. It would have undertaken industry standard due diligence checks on Firm K, including but not limited to checking the Financial

Services Authority's ('FSA', later becoming the Financial Conduct Authority, 'FCA') register for its authorisation, and agreeing terms of business with Firm K. Its agreement with Firm K would have ended when Firm K's FCA authorisation ended in June 2011.

- Firm K introduced three clients to Westerby, and Mr M was the third. All three appeared to involve transfers from personal pensions and were to open an account with Business A. Business A was/is a standard asset and was/is allowable to hold within a SIPP. The three introductions were a negligible proportion of Westerby's total new business in the same period.

- It wasn't industry standard to assess the suitability reports provided by a regulated IFA, and Westerby had never had permissions to provide financial advice so it wouldn't have been able to determine whether any advice was suitable or not.

- Westerby would only have carried out due diligence on Business A, not the underlying investments because the volume of stockbroking/discretionary fund managed accounts and the volume of underlying funds would make this almost impossible. It wouldn't proceed with a new investment or top up an existing investment unless due diligence was carried out, or an annual review completed to ensure previously approved providers remained appropriate to hold in a SIPP. It conducted its own independent reviews of all proposed investments.

- Westerby didn't ask the client to sign any risk warnings or disclaimers, outside of any mandatory wording from the provider or routine disclaimers within its application.

- Mr M's SIPP had no current holdings and a value of £5.06. The current holding and value of his Business A account was nil – Westerby recently became aware that Business A forced a surrender in August 2023 and closed the account, as Fortress was suspended with no returns and the account was increasingly overdrawn due to fees.

I issued a provisional decision, in which I explained that I didn't think there was any new and material evidence that changed the conclusion I had set out in my jurisdiction decision. I went on to explain that I thought Mr M's complaint about Westerby's due diligence should be upheld. In summary, I said Westerby hadn't carried out adequate due diligence and that if it had, it should have decided not to accept the Fortress investment into its SIPPs. And that Mr M wouldn't have established the Westerby SIPP, transferred monies in from existing pensions, or invested in Fortress if not for Westerby's failings. So I said Westerby should calculate Mr M's financial loss to determine whether he been caused a financial loss and if so, compensate him for it. And that it should also pay him a further £600 compensation for the distress it had caused him.

Mr M accepted the provisional decision and said he had nothing to add to it.

Westerby disagreed with the provisional decision and provided further comments, which can be summarised as:

- The provisional decision attempted to draw parallels with previous decisions made by our Service in separate complaints regarding Firm K's advice featuring the Fortress investment. But the circumstances were different, because clients in those separate complaints were advised to invest directly in Fortress, whereas Mr M was advised to invest in Business A. If Firm K had disclosed a direct investment into Fortress, then Westerby would have been expected to undertake due diligence on Fortress and

concluded that it shouldn't allow it. But that wasn't the case in Mr M's complaint; he was advised to invest in Business A. And Westerby's distinct obligations at that time were to assess the investment he'd been advised to go into, i.e. Business A, to ensure it was permitted within a SIPP wrapper.

- The provisional decision attempted to apply current industry standards by suggesting that Westerby in 2008 ought to have asked about underlying investment strategy within a standard asset product such as Business A's. This was not industry standard at the time and is being used with the benefit of hindsight.

- Westerby maintained Mr M's complaint about its due diligence had been brought too late for us to be able to consider its merits. It thought our Service had originally believed Mr M's 2018 complaint was regarding Westerby's due diligence – even if Mr M didn't explicitly state this, our Service would've used its inquisitional powers to infer the complaint was about Westerby's due diligence. And if we hadn't used our inquisitorial powers, Mr M's complaint about Westerby's due diligence was made more than six years after the events complained of and more than three years after he ought to have been aware in December 2015 that there was a problem with his SIPP that may have caused him a loss. And the unsuccessful judicial review challenge in the case of R (*Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) judgment published in October 2018 meant Mr M ought to have linked this problem to Westerby. So in Westerby's view, Mr M had until the end of March 2019 to complain about Westerby's due diligence.

- The provisional decision attempted to suggest that more due diligence on introducer Firm K might have led Westerby to not accept its business. There are no noted cases prior to 2009 (and before Mr M's SIPP was established) which would've led Westerby to be concerned about Firm K's advice to invest into Business A. So the provisional decision used hindsight in its conclusions.

I'm now in a position to make my decision.

What I've decided – and why

Firstly, I'd like to again acknowledge the health and financial difficulties Mr M has told us about. I'm sorry to hear of these and I don't doubt they've caused him a great deal of worry and upset.

I'd also like to acknowledge that, after I issued my jurisdiction decision, Westerby has made further submissions including about jurisdiction. I've considered all of these further submissions carefully, including its view that the Berkeley Burke judgment published in October 2018 meant Mr M had until the end of March 2019 to complain about Westerby's due diligence. However, I still don't think Westerby's further submissions contain any new and material evidence which changes the conclusion I set out in my jurisdiction decision – that Mr M's complaint about Westerby's due diligence has been brought in time. So, my decision remains that Mr M's complaint has been made in time. Therefore, in this decision, I'm considering the merits of Mr M's complaint about Westerby's due diligence.

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

Relevant considerations

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, 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.

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 (*'Berkeley Burke'*)
    - Adams v Options SIPP UK LLP [2020] EWHC 1229 (Ch) ('*Adams – High Court'*)
- The FSA and FCA 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 M is a non-advisory, or execution only, 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 *Berkeley Burke* 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.

It is not 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 *Berkeley Burke*) 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."*
>
> *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."

The Report also included:

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."*

I have considered all of the above publications in their entirety. It is not necessary for me to quote more fully from the publications here.

The 2009 and 2012 Thematic Review Reports and the *"Dear CEO"* letter are not 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 the *Berkeley Burke* case).

Points to note about the SIPP publications include:

- The Principles on which the comments made in the publications are based have existed throughout the period covered by this complaint. Like the Ombudsman in the *Berkeley Burke* case, I don't think the fact the publications post-date the events that took place in relation to Mr M's complaint, mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.
- The comments made in the publications apply to SIPP operators that provide a non-advisory service.
- Neither court in the *Adams* case 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.

What did Westerby's obligations mean in practice?

I'm satisfied that to meet its regulatory obligations when conducting its operation of its non-advisory SIPP business, Westerby was required to consider whether to accept or reject particular investments and/or referrals of business with the Principles in mind. I say this based on the overarching nature of the Principles (as is clear from the case law) and based on good industry practice. I am also satisfied that, bearing in mind the Principles and good industry practice, this obligation was not confined *only* to rejecting an investment on the basis it was not allowed by the SIPP Trust or HMRC regulations.

I am satisfied that to meet its regulatory obligations when conducting its operation of its non-advisory SIPP business a SIPP operator should for example reasonably refuse an investment if the SIPP operator had serious concerns about *"possible instances of financial crime and consumer detriment such as unsuitable SIPPs".* Or, for example if, the SIPP operator had concerns that the investment might not be genuine, or not be secure or might be impaired in some way.

I am satisfied that a non-advisory SIPP operator could decide not to accept a referral of business or a request to make an investment without giving advice. And I am satisfied that in practice many non-advisory SIPP operators did refuse to accept business and/or refuse to make investments without giving advice.

I am satisfied that, in order to comply with its regulatory obligations, a non-advisory SIPP operator should have due diligence processes in place to check any firms introducing business to them and the investments they are asked to make on behalf of members or potential members. And Westerby should have used the knowledge it gained from its due

diligence checks to decide whether to accept such business and/or allow a particular investment.

As set out above, to comply with the Principles, Westerby needed to conduct its business with due skill, care and diligence; organise and control its affairs responsibly and effectively; and pay due regard to the interests of its clients (including Mr M) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

It appears that Westerby understood it was required to carry out some checks on the introducer and the investment proposed before accepting it into the SIPP because it has explained the process that it would have followed. But I think that Westerby also ought to have understood that its obligations meant that it had a responsibility to also carry out appropriate checks on introducers to check the quality of the business it was introducing.

I also think that it's fair and reasonable to expect Westerby to have looked carefully at the investment it was allowing Mr M's pension fund to be invested in.

Due diligence carried out by Westerby on the investment

As I've set out the, the 2009 Report reminded SIPP operators of their obligations and set out how they might achieve the outcomes envisaged by the Principles, including in particular:

- *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.*

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

Westerby argues that the provisional decision attempted to apply current industry standards to events in 2008 with the benefit of hindsight.

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'm satisfied it's relevant and therefore appropriate to take it into account.

The remainder of the publications also 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 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.

Like the Ombudsman in the *BBSAL* case, I don't think the fact the publications post-date the events that took place in relation to Mr M's complaint, mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

It's also clear from the text of the 2009 and 2012 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 the judge in the *Adams* case didn't consider the 2012 Thematic Review Report, 2013 SIPP operator guidance and 2014 *"Dear CEO"* letter to be of relevance to his 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 amounts to good industry practice at the relevant time.

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

Westerby argues that its distinct obligations at that time were to assess the investment Mr M had been advised to go into, which it says was Business A, to ensure it was permitted within a SIPP wrapper. I accept that the SIPP application and covering letter Firm K sent Westerby in late December 2008 said Mr M's intended investment was a 'wealth management portfolio' with Business A. Westerby says that Business A was a 'standard asset'. But Business A is not itself an investment, it is an investment platform that allows investments (both standard and non-standard) to be purchased, held, and managed. And the SIPP application did not specify the name or the type of wealth management portfolio, so I don't think Westerby could reasonably have concluded or took comfort from this that it knew the type and nature of Mr M's intended investment(s). Further, the SIPP application covering letter also said that his investment application would be sent to Westerby once his existing

pensions had transferred into the new SIPP. It also said Mr M would be waiving his cancellation rights.

Bearing in mind the content of the regulator's publications, I think Westerby ought to have been concerned that that there was a potential risk of consumer detriment and/or an unsuitable SIPP if it simply accepted Mr M's SIPP application despite not knowing the type and nature of his intended underlying investment, or why he intended to waive his cancellation rights. I think Westerby ought to have taken fair and reasonable steps to address this potential risk.

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

So I think that Westerby, and before it accepted Mr M's SIPP application, should have contacted Firm K to ask for clarification about, at a minimum, what Mr M's intended underlying investment was, why he was interested in making that investment, and why he intended to waive his cancellation period. I think obtaining this *type* of information from Firm K was a fair and reasonable step for Westerby to take, in the circumstances, to meet its regulatory obligations and good industry practice.

It is possible that, if Westerby *had* checked with Firm K and asked these *type* of questions, Firm K would have provided the information sought. But if Westerby had been unable to obtain the information sought from Firm K, then I think it's fair and reasonable to say that Westerby should have then concluded that it was unsafe to proceed with accepting Mr M's SIPP business from Firm K in those circumstances. In my opinion, it wasn't reasonable, and it wasn't in-line with Westerby's regulatory obligations, for it to proceed with accepting Mr M's introduction of SIPP business from Firm K if the position wasn't clear.

I think, in light of what I've said above, it would also have been fair and reasonable for Westerby, to meet its regulatory obligations and good industry practice, to speak to Mr M directly to enhance its understanding of the SIPP business it was being asked to accept for him.

I think it's more likely than not that if Westerby *had* contacted Mr M to 'confirm the position', Mr M would have told Westerby that he was transferring his pensions to a SIPP in order to invest in Fortress, that he hadn't been interested in changing his pension prior to his contact with Firm K, and that Firm K told him about the Fortress investment and said he should transfer all of his pension into it.

Had Westerby taken these fair and reasonable steps, I think it ought to have identified that Mr M was applying for a SIPP in order to invest most or all of his transferred pension monies into Fortress.

And as I've explained, Westerby had a duty to conduct due diligence and give thought to whether an investment itself is acceptable for inclusion into a SIPP. That's consistent with the Principles and the regulators' publications as set out earlier in this decision. It's also consistent with HMRC rules that govern what investments can be held in a SIPP.

I've asked Westerby for information and evidence about the due diligence checks it undertook on the investment. It says it would only have carried out due diligence on Business A, not the underlying investments because the volume of

stockbroking/discretionary fund managed accounts and the volume of underlying funds would make this almost impossible. It wouldn't proceed with a new investment or top up an existing investment unless due diligence was carried out, or an annual review completed on previously approved providers to ensure they remained appropriate to hold in a SIPP. It conducted its own independent reviews of all proposed investments.

But as I say, I think Westerby ought to have known that Mr M's intended investment was Fortress. And I think it's fair and reasonable to expect Westerby to have looked carefully at the Fortress investment before permitting it into its SIPPs. To be clear, for Westerby to accept the Fortress investment without carrying out a level of due diligence that was consistent with its regulatory obligations wouldn't in my view be fair and reasonable or sufficient. And if Westerby didn't look at the investment in detail, and if such a detailed look would have revealed that potential investors might be being misled, or that the investment might not be secure or might be fraudulent, it wouldn't in my view be fair or reasonable to say Westerby had exercised due skill, care and diligence – or treated its customer fairly – by accepting such an investment into its SIPP.

Importantly, and consistent with its regulatory obligations, I think that when undertaking due diligence into the proposed Fortress investment, Westerby should have had regard to and given careful consideration to the Fortress marketing material.

In a separate complaint brought to our Service featuring Firm K and this Fortress investment (but against a different SIPP provider), we've been provided with a copy of the Fortress International Fund investment brochure that was obtained by that SIPP provider. In that separate complaint, the consumer made several investments in Fortress at around the time Firm K sent Mr M's SIPP application to Westerby. So on balance, I'm satisfied that this marketing brochure, or information very similar to that which it contained, was more likely than not available to Westerby at the time it was considering whether to accept Mr M's introduction of SIPP business.

In my view, the Fortress marketing brochure ought to have given Westerby significant cause for concern. Namely, that there was a significant risk that potential investors were being misled. I've quoted from the brochure below, with bold being my emphasis.

The front page of the brochure is headed:

> *"An Introduction to a **Low Risk**, Uncorrelated Investment Solution."*

On the next page a paragraph reads:

> *"The Fortress International Fund now offers investors the opportunity to diversify away from traditional investment funds by providing a unique opportunity to participate in a completely non-correlated asset class that offers very attractive growth potential with **an extremely low level of volatility**."*

Elsewhere, the brochure reads:

> *"Whilst most investment managers aim to purchase assets that will rise in value to deliver growth for their investors. The Fortress International Fund provides access to an investment class where the assets are purchased at a discount from their maturity value. In all cases the maturity value is fixed at outset, which means that **assets are guaranteed to rise in price**. The assets that we purchase are insurance policies where the seller has elected to exchange the future benefits of the policy for an earlier cash settlement. When the policy matures the Fund will receive a higher cash value, delivering a profit for the investors.*

*It is because of this unique investment strategy that **the Fund carries a much lower level of investment risk that one would normally associate with such a high potential for growth**. The investment is marketed as **a Cash beater Fund**".*

*"Fortress have extensive experience in this market place and employs stringent risk analysis during the underwriting process to deliver **sound and reliable performance** from a carefully constructed portfolio."*

The 'Why Fortress' section included the following statements:

- ***"Low risk, cash beater Fund"***
- *"**Currently achieving targeted return of 8%** net of Annual Management Charges"*

In the 'Frequently Asked Questions' section the first and last questions read:

"Q. What is a Traded Life Policy?
A. This is a US Life Insurance Policy that has been sold by the original policy owner, often being acquired by an investment fund specializing in this asset class."

"Q. Are there any risk factors?
*A. **There will be variability in life expectancy, but this could either dilute or enhance the returns of each policy over time.** However, **the underlying capital and return is fixed**. To reduce risk and maximise returns, Fortress International Fund, will hold a diversified spread of policies, this spreads the life expectancy risk profile. The Offering Memorandum outlines the key risk factors. Any decisions to invest in Fortress International Fund Ltd must be based upon a full understanding of the document."*

I've not seen a copy of the Offering Memorandum. But I think, as Westerby had regard to this brochure, it could not overlook the fact that Fortress appeared to be presenting the investment as a low risk investment that was assured to provide high returns. And Westerby should have been concerned that this was at odds with what I think Westerby itself ought clearly to have understood from the brochure about the nature of the Fortress investment – that it was in fact a complex, non-standard investment that likely involved a high degree of risk, that it was illiquid and unregulated, with no investor protection.

Further, Westerby ought reasonably to have seen that how the brochure presented the Fortress investment was also at odds with how it was presented in the Business A risk factsheet Mr M had signed at the same time as his SIPP application. The brochure only mentioned one risk – that of variability of life expectancy, which it in any case downplayed by adding that this risk might in fact enhance returns over time. In contrast, the Business A risk factsheet set out the following risks, amongst others:

- *"the fund might not meet its stated performance objective and the value of the fund can go down as well as up. In particular, my invested capital could be at significant risk and, in some circumstances, the amount paid out when it's cashed in could be zero."*
- *"some of the techniques the fund manager can use (such as derivative contracts) could make the investment riskier and make it more likely that the investment will*

suffer a loss. In particular, the fund manager's techniques could make the fund's performance more sensitive than funds that only invest in asset classes such as equities and bonds."

- *"the fund manager could stop me from cashing in my fund for a while after notification.* [Business A] *could be entitled to make an in specie transfer of the fund to me in situations where holdings in the fund can't be sold."*

- *"I might not be able to cash in certain assets within the fund on short notice or they might have to be cashed in at less than their quoted market value, particularly where the fund manager is forced to cash them in earlier than expected. In particular, this can happen if I cash a lot in from the fund in a short period of time."*

- *"each fund will be exposed to credit risk from any third parties it trades with, and payment might take longer than expected. My fund's performance is likely to be negatively affected by third party default."*

- *"a number of other factors can affect how the fund performs, including:*
    - *changes in the political or economic climate*
    - *changes in market conditions*
    - *changes in the legal, regulatory or tax environment*
    - *unforeseen circumstances"*

In 2010 the FSA had concerns about TLPI's. It went on to describe them as *"high risk, toxic products that are generally unsuitable for the majority of UK retail investors".* The FSA said this was because, amongst other things:

- TLPI's use complex investment strategies based on calculations about how long people will live. With medical advancements and improved health, people are living longer, so these calculations may prove to be wrong. This means that the strategy may not work as promised and returns may be lower than expected.

- If the investment manager needs to raise extra funds by selling some of the life assurance policies before the death of the original policyholder, they may struggle to do so. It might not be possible to sell them at all or they may only be sold at a significantly reduced value. This might happen at any time because it is important for TLPI's to maintain a certain amount in cash to keep the investment running. Where this becomes a problem, it can place significant strain on the investment and might mean that investors are prevented from withdrawing money for a time or face significant falls in the value of their investment.

- TLPI's often involve several firms in different countries working together and taking responsibility for different aspects of the product. So there may be conflicts of interest, the underlying assets are located offshore and have an exchange rate risk. This makes it difficult for firms to manage the product in a way that ensures customers are treated fairly, and it is generally difficult for investors (and even those selling the products) to fully understand how these products work and what the risks are. And investors will have limited or no recourse to the FSCS and the Financial Ombudsman Service.

- TLPI's can fail entirely and customers can lose a significant amount of money.

So TLPI's, such as the Fortress International Fund, are highly speculative and only suitable to sophisticated investors and high net worth clients, and even to such clients they should be

limited to a small proportion of an overall investment portfolio. And based on the evidence provided, I've seen nothing to make me think Mr M was in fact a sophisticated or high net worth investor.

To be clear, I don't say that Westerby should have identified all the concerns that the FSA later set out. I only say that, based on the information available to Westerby had it undertaken sufficient due diligence when Mr M applied for his SIPP, Westerby should have identified that there was a significant risk of consumer detriment if it permitted the Fortress investment within its SIPP. And it's my fair and reasonable opinion that appropriate checks would have revealed that the marketing material was misleading and was sufficient basis for Westerby to have declined to accept the Fortress investment in its SIPPs *before* it accepted Mr M's SIPP application. And it's the failure of Westerby's due diligence that's resulted in Mr M being treated unfairly and unreasonably. And I think that Westerby failed to act with due skill, organise and control its affairs responsibly, or treat Mr M fairly by accepting his SIPP application.

In light of this, Westerby should have been concerned that Mr M may have been misled or did not properly understand the investment he intended to make. That he could easily have been given the impression that he was assured of high returns with little or no risk and would easily be able to sell his investment when he wished to. Such an impression was clearly misleading.

From the evidence I've seen, I think the information in the Fortress brochure gave rise to a significant risk that potential investors were being misled about the investment. This is a clear point of concern which I think Westerby ought to have identified before accepting Mr M's SIPP application, which I'm satisfied was made in order to invest in Fortress.

In my opinion it's fair and reasonable to say that had Westerby done what it ought to have done and drawn reasonable conclusions from what it knew or ought to have known, I think that it ought to have concluded there was a significant risk of consumer detriment if it accepted Mr M's SIPP application.

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 on Mr M's SIPP business and the Fortress investment. I don't think Westerby met its regulatory obligations and, in accepting Mr M's SIPP application and investment application, it allowed his funds to be put at significant risk.

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

And I'm also not saying that Westerby shouldn't have allowed the Fortress investment into its SIPPs because it was high risk. My finding isn't that Westerby should have concluded that Mr M wasn't a candidate for high risk investments or that an investment in Fortress was unsuitable for him. Instead, it's my fair and reasonable opinion that there were things Westerby knew or ought to have known about the Fortress investment and how it was being marketed 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. And that Westerby failed to act with due skill, organise and control its affairs responsibly, or treat Mr M fairly by

accepting his SIPP application, since this was made with the intention of investing in Fortress.

I think the fair and reasonable conclusion based on the evidence available is that Westerby shouldn't have accepted Mr M's SIPP application. In my opinion, it ought to have concluded that it would not be consistent with its obligations to do so. To my mind, Westerby didn't meet its regulatory obligations or good industry practice at the relevant time, and allowed Mr M to be put at significant risk of detriment as a result.

Acting fairly and reasonably to Mr M, Westerby should have concluded that it wouldn't permit the Fortress investment to be held in its SIPPs at all. And I'm satisfied that Mr M's pension monies were only transferred to Westerby so as to bring about the Fortress investment – given that this was the stated intention in the forms Mr M signed at the same time as his SIPP application was completed. So, I think it's more likely than not that if Westerby hadn't permitted the Fortress investment to be held in its SIPPs at all that Mr M's pension monies wouldn't have been transferred to Westerby. Further, that Mr M wouldn't then have suffered the losses he's suffered as a result of transferring to Westerby and investing in Fortress.

Due diligence carried out by Westerby on introducer Firm K

Westerby says the provisional decision attempts to draw parallels with previous decisions made by our Service in separate complaints regarding Firm K's advice K featuring the Fortress investment, and that it also attempts to suggest that more due diligence on introducer Firm K might have led Westerby to not accept business from Firm K. But to be clear, I've not considered the due diligence Westerby may have carried out on Firm K and whether this was sufficient to meet its regulatory obligations.

In this case, the business Westerby was conducting was its operation of SIPPs. I'm satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular referrals of business. The regulators' reports and guidance provided some examples of good practice observed by the FSA and FCA during its work with SIPP operators. This included being satisfied that a particular introducer is appropriate to deal with. That involves conducting checks – due diligence – on introducers to make informed decisions about accepting business. This obligation was a continuing one.

But having reached the conclusions set out above, the due diligence Westerby may or may not have carried out on Firm K before accepting introductions from it isn't the basis on which I'm upholding Mr M's complaint, or something I've relied on in reaching my conclusions. As I've explained, I think Westerby failed to carry out sufficient due diligence on the Fortress investment and didn't reach the right conclusions based on the information available to it.

So I don't think it's necessary for me to also consider Westerby's due diligence on Firm K. I'm satisfied that Westerby wasn't treating Mr M fairly or reasonably when it accepted his SIPP application (made in order to invest in Fortress), so I've not gone on to consider the due diligence it may have carried out on Firm K and whether this was sufficient to meet its regulatory obligations. And I make no findings about this issue.

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

Westerby may argue that it had to act in accordance with Mr M's instructions - 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.

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 & Anor 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 such an argument Westerby may make on this point is relevant to its obligations under the Principles to decide whether or not to accept an application to open a SIPP or to execute the instruction to make the Fortress investment i.e. to proceed with the application.

The indemnities

The 'risk factsheet' Mr M signed in December 2008, at the same time his SIPP application was completed, contained declarations that sought to confirm Mr M had taken qualified investment advice so he knew all about the risks involved in the investment, that his invested capital could be at significant risk with a zero return, that he may not be able to cash in his fund for a time. It also set out a series of risks associated with 'alternative investment funds and experienced investor funds'. And that he acknowledged Business A wasn't in any way liable for the fund(s) performance.

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."*

While Mr M wasn't an execution-only client, I think Westerby ought to have been cautious about accepting Mr M's applications even though he had signed indemnities. In the circumstances I think very little comfort could have been taken from declarations stating that Mr M 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 Mr M fairly by relying on such indemnities, when it ought to have known that Mr M was being put at significant risk.

I'm satisfied that Westerby ought to have decided that it wouldn't permit Fortress in its SIPP at all. Given this, Mr M's Westerby SIPP shouldn't have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity shouldn't have arisen at all.

Is it fair to ask Westerby to compensate Mr M?

In deciding whether Westerby is responsible for any losses that Mr M has suffered in respect of the transactions he complains about here, I need to consider what would have happened if Westerby had done what it should have done – in other words, had it not accepted or proceeded with Mr M's applications.

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

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

Had Westerby acted fairly and reasonably it should have concluded that it should not accept Mr M's SIPP application. That should have been the end of the matter – it should have told Mr M that it could not accept his business. And I am satisfied, if that had happened, the arrangement for Mr M would not have come about in the first place, and the loss he suffered could have been avoided.

Westerby may argue other SIPP providers were accepting such investments at the time and that the transactions in question would have been effected with another provider. But I'm not persuaded by this.

I don't think there is any persuasive evidence Mr M would have tried to find another SIPP operator to accept the business and gone ahead with the switch if Westerby had refused his SIPP application. So I'm satisfied that Mr M would not have continued with the Westerby SIPP and the Fortress investment had it not been for Westerby's failings. And, whilst I accept other parties may be responsible for initiating the course of action that led to Mr M's loss, I consider that Westerby failed unreasonably to put a stop to that course of action when it had the opportunity and obligation to do so.

I don't think it's fair and reasonable to say that Westerby shouldn't compensate Mr M for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I think it did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have permitted the Fortress investment into its SIPPs, or accepted Mr M's applications.

For all the reasons I've set out, I'm satisfied that it would not be fair to say Mr M'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 the application because the investment was high risk. I acknowledge Mr M declared he understood the investment risks. But, I'm satisfied that Mr M, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself.

So I am satisfied in the circumstances, for all the reasons given, that it is fair and reasonable to conclude that Westerby should compensate Mr M for the loss he has suffered. I am not asking Westerby to account for loss that goes beyond the consequences of its failings. I am satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter. And that fact should not impact on Mr M's right to fair compensation from Westerby for the full amount of his loss.

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if Westerby had refused to accept Mr M's applications, the transactions wouldn't still have gone ahead.

Mr M taking responsibility for his own investment decisions

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

For the reasons given above, I think that if Westerby had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted the Fortress investment into its SIPPs at all. That should have been the end of the matter. If that had happened, I'm satisfied the arrangement for Mr M wouldn't have come about in the first place, and the loss he's suffered could have been avoided - since the purpose of transferring existing pensions into the SIPP was to enable Mr M's investment in Fortress.

As I've made clear, Westerby needed to carry out appropriate due diligence on the Fortress investment and reach the right conclusions. I think it failed to do this. And Mr M signing forms containing declarations and indemnities doesn't change this.

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

The involvement of other parties

In this decision I'm considering Mr M's complaint about Westerby. But I accept other parties were involved in the transactions complained about, including Firm K.

Mr M pursued an FSCS claim against Firm K. The FSCS upheld Mr M's claim and paid him £50,000 in compensation. Following this, the FSCS provided Mr M with a reassignment of rights.

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 M fairly.

The starting point therefore, is that it would be fair to require Westerby to pay Mr M compensation for the loss he's suffered as a result of its failings. I've carefully considered if there's any reason why it wouldn't be fair to ask Westerby to compensate Mr M for his loss.

I accept that other parties, including Firm K, might have some responsibility for initiating the course of action that led to Mr M'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 arrangement for Mr M wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

I want to make clear that I've taken everything Westerby has said into consideration and 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 M to the full extent of the financial losses he's suffered due to Westerby's failings. And, having carefully considered everything, I don't think that it would be appropriate

or fair in the circumstances to reduce the compensation amount that Westerby is liable to pay to Mr M.

Putting things right

I consider that Westerby failed to comply with its own regulatory obligations and didn't put a stop to the transactions. My aim in awarding fair compensation is to put Mr M back into the position he would likely have been in had it not been for Westerby's. Had Westerby acted appropriately, I think it's *most likely* that Mr M would've remained a member of the pension plans he transferred into the SIPP.

In light of the above, Westerby should:

- Obtain the notional transfer value of Mr M's previous pension plans.
- Obtain the actual transfer value of Mr M's SIPP, including any outstanding charges.
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Pay an amount into Mr M's SIPP so as to increase the transfer value to equal the notional value established. This payment should take account of any available tax relief and the effect of charges.
- If the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- If Mr M has paid any fees or charges from funds outside of his pension arrangements, Westerby should also refund these to Mr M. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Pay to Mr M an additional amount of £600 to compensate him for the distress and inconvenience Westerby has caused him.

Treatment of the illiquid assets held within the SIPP

From what Westerby has recently told us, it appears that Business A forced a surrender of Mr M's holding in Fortress and so his SIPP no longer holds this investment. But in the event that isn't the case, I think it would be best if any illiquid assets held could be removed from the SIPP. Mr M would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investment/s may prove difficult, as there is no market for it. For calculating compensation, Westerby should establish an amount it's willing to accept for the investment/s as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment/s.

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

If Westerby is unable, or if there are any difficulties in buying Mr M's illiquid investment/s, it should give the holding/s a nil value for the purposes of calculating compensation. In this

instance Westerby may ask Mr M to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding/s. That undertaking should allow for the effect of any tax and charges on the amount Mr M may receive from the investment/s and any eventual sums he would be able to access from the SIPP. Westerby will have to meet the cost of drawing up any such undertaking.

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

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

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

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

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

I acknowledge that Mr M has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr M's reassignment of rights require him to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required. So, I think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the compensation Mr M received from the FSCS. And it will be for Mr M to make the arrangements to make any repayments he needs to make to the FSCS.

However, I do think it's fair and reasonable to allow for a *temporary* notional deduction equivalent to the payment(s) Mr M actually received from the FSCS for a period of the calculation, so that the payment(s) ceases to accrue any return in the calculation during that period. I say this bearing in mind that this is not in fact a pension withdrawal and contribution, it is simply a means of acknowledging that Mr M has had the use of some money from the FSCS during the period of time that Westerby is being asked to compensate him for. The notional deduction and addition reflects this position and ensures that Mr M isn't compensated for lost growth on that sum during the time that he had enjoyment of those monies.

As such, if it wishes, Westerby may make an allowance in the form of a notional deduction equivalent to the payment(s) Mr M received from the FSCS following the claim about Firm K, and on the date the payment(s) was actually paid to Mr M. Where such a deduction is made there must also be a corresponding notional addition, at the date of my final decision equivalent to all FSCS payment(s) notionally deducted earlier in the calculation.

To do this, Westerby should calculate the proportion of the total FSCS' payment(s) that it's reasonable to apportion to each transfer into the SIPP, this should be proportionate to the

actual sums transferred in. And Westerby should then ask the operators of Mr M's previous pension plans to allow for the relevant notional deduction(s) in the manner specified above. The total notional deductions allowed for shouldn't equate to any more than the actual payment(s) from the FSCS that Mr M received. Westerby must also then allow for a corresponding notional addition as at the date of my final decision, equivalent to the accumulated FSCS payment(s) notionally deducted by the operators of Mr M's previous pension plans.

Where there are any difficulties in obtaining notional valuations from the previous operators, Westerby can instead allow for both the notional deduction(s) and addition(s) in the notional calculation it performs, provided it does so in accordance with the approach set out above.

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

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

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

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr M as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss would ordinarily adequately reflect this. And neither party has disputed the presumed income tax rate.

SIPP fees

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

Interest

The compensation resulting from this loss assessment must be paid to Mr M or into his SIPP within 28 days of the date Westerby receives notification of his acceptance of my final decision. The calculation should be carried out as at the date 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 is not paid within 28 days.

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

Pay Mr M £600 for the distress and inconvenience the problems with his pension have caused him.

In addition to the financial loss that Mr M has suffered as a result of the problems with his pension, I think it's fair and reasonable to say that the possible loss of a significant portion of his pension provision has caused Mr M distress, at a time when he was already having health and financial difficulties. So I think that it's fair for Westerby to compensate him £600 for this as well.

My final decision

For the reasons given, it's my decision that Mr M's complaint should be upheld and that 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 Mr M 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 Mr M could accept a final decision and go to court to ask for the balance and Mr M may want to get independent legal advice before deciding whether to accept a final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 4 June 2025.

Ailsa Wiltshire
Ombudsman