DRN-5615081

The complaint

Mr B complains that Westerby Trustee Services Limited ('Westerby') failed to carry out adequate due diligence on the Prosperity Ivy League Globeworks Limited ('PILGL') investment before accepting his application to invest his self-invested personal pension ('SIPP') monies within this, causing him a financial loss.

For simplicity, I refer to Mr B throughout, even where submissions were made by his representative on his behalf.

What happened

While I've taken everything into account, I haven't named every event or responded to every point made. Instead, I've focused throughout on what I think is key to reaching my decision.

The transaction

It seems Mr B applied for a Westerby SIPP in 2012 after receiving advice to do so from a Mr W of Firm A. Mr B's Westerby SIPP was established in October 2012 and he transferred in monies from existing schemes.

I understand that Mr B went on to make a number of investments via his Westerby SIPP. Including £40,000 into Dolphin around September 2013, but that isn't something I've commented on here, as Westerby's acceptance of Mr B's application to invest in Dolphin is the subject of a separate complaint with our Service.

Instead, I've focused on what I think is the crux of Mr B's complaint here, being his unhappiness that Westerby accepted his application to invest £55,000 of his SIPP pension monies into PILGL in 2017, to be repaid in March 2020. I don't intend to comment on any other investments Mr B made here.

Mr B was asked to complete a Westerby non-standard asset questionnaire which he completed on 5 April 2017. Amongst other things, this detailed that Mr B:

- Understood that he had received financial advice from Firm A.
- Earnt between £75,000-£100,000 per year.
- Had net assets (excluded main residence and pension arrangements) of around £24,000.
- He was a company director, not working within finance or pensions.
- Within the past 24 months he'd invested in unlisted shares twice. And he'd previously invested in residential property, although seemingly not within the time period.

And Mr B went on to declare on the questionnaire that, amongst other things:

- He understood the risk associated with non-standard investments and was comfortable that his attitude to risk was appropriate. And he was prepared for the total loss of his investment.
- He hadn't received any advice from Westerby and wouldn't hold it responsible for the

loss of his investments.
- He understood non-standard investments can be difficult to value, can take time to sell and may affect his ability to draw pension benefits.
- He understood that these aren't regulated by the FCA or covered by the Financial Services Compensation Scheme ('FSCS') to claim if something goes wrong.
- He confirmed he'd taken financial advice specific to the investment specified in the questionnaire or that he met the criteria for a high net worth/sophisticated or elected professional investor and agreed to provide such proof as Westerby requires to evidence this.
- He was a self-certified sophisticated investor, as he'd made more than one investment in an unlisted company in the previous two years.

On 22 August 2017, Mr B emailed Westerby and said that his adviser had proposed investing in PILGL to him and he asked if that investment was permitted within its SIPPs.

The same day, Firm A emailed Westerby and said that it hadn't recommended to Mr B that he invest in PILGL. Firm A said that it understood this was instead done by Firm B – an unregulated form, of which I note that Mr W of Firm A was also seemingly a director of – and that as a regulated firm it never makes recommendations or connections to unregulated activities. To which Mr B responded and said that he understood.

In late 2017 Westerby, PILGL and Mr B corresponded about the due diligence being carried out and the information Westerby required. In December 2017, Mr B confirmed he'd completed his own due diligence into the investment and was looking to proceed. Westerby later went on to permit this within its SIPPs and Mr B made the above investment into PILGL.

In short, I understand PILGL provided funding to the Ivy League DevCo Birmingham Limited (ILDB) in respect of a build to rent investment for student accommodation. And ILDB had been granted a 999 lease over the site, costing £870,000 per year. Investors in the particular investment round, including Mr B, made a loan to PILGL and the funds were used to repay other loans made in funding the build, which was seemingly ongoing at time of Mr B's investment.

Mr B's 2018/2019 statement, dated October 2019, reflected that on 20 December 2018, PILGL paid him what seems to be annual interest totalling £8,250. And, in March 2020, Mr B emailed Westerby and said it looked like this investment should have paid interest in December 2019, which was now late and in default. And that it was also coming up for full repayment in March 2020, which he'd been told may not happen. Then, in January 2021, Mr B emailed Westerby noting that it looked like the investment was "*all going the wrong way*".

While the development was ultimately built, in May 2021 PILGL wrote to customers and said it faced bankruptcy proceedings. And PILGL was dissolved in 2024.

The complaint

On 20 December 2022, Mr B complained to Westerby that it had failed to undertake sufficient due diligence on the PILGL investment and that it shouldn't have permitted this within his SIPP.

In response, in February 2023, Westerby said, in summary, that:

- The SIPP was clearly established for the purpose of utilising non-standard assets, so Mr B's adviser must have considered the suitability of this type of asset for him when

recommending the SIPP. And given the SIPP was introduced by a regulated adviser to invest in such assets, Westerby made the reasonable assumption that the adviser had considered this.
- Mr B's financial adviser wasn't entitled to 'divorce' the advice on the suitability of the pension transfer from considering the suitability of the underlying investments and the adviser is 100% responsible for the suitability of the investments within the SIPP wrapper they advised Mr B on.
- It acted on an execution only basis. It didn't and wasn't responsible for providing advice or assessing suitability. And Mr B's losses flow from his decision to proceed with a high-risk investment. Mr B should take responsibility for his own decisions in the circumstances and he signed declarations confirmed he was responsible for all investment decisions.
- High risk investments are not manifestly unsuitable for inclusion within a SIPP. These can be appropriate under certain circumstances.

In its submissions to our Service, and in other complaints with our Service against Westerby concerning the same adviser, Westerby has said, amongst other things, that:

- As a SIPP provider, Westerby's responsibilities were limited to conducting due diligence in line with FCA guidance and to ensuring the investment was allowable in line with HMRC rules. Due diligence was undertaken in respect of the investment – its conclusions were that PILGL was permissible within a SIPP based on FCA and HMRC guidelines.
- There was clear evidence of properties, title plans and planning permission to evidence legitimate property development asset.
- Property valuations were provided by a RICS approved valuer for the appropriate party.
- As the investment was a loan, set interest and capital repayments were agreed. So valuation of the investment itself was not planned to occur that would require ad hoc valuations as with a share based investment.
- *Adams v Options SIPP* [2020] EWHC 1229 (Ch) held that the SIPP provider hadn't breached its statutory or common law duties to the claimant and that their losses flowed solely from his decision to proceed with a high risk, speculative investment. And, amongst other things, that: '*A duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed in my judgment as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed.*'.
- There has been limited formal FCA guidance as to the extent of due diligence a SIPP provider is expected to undertake. Westerby's due diligence processes are based on the FCA's July 2014 *"Dear CEO"* letter. It met this criteria. Such investments that are speculative in nature aren't manifestly unsuitable as a SIPP asset.
- The publications are not determinative of what constitutes good practice. Adams confirms there is no provision in law for a claim based on an alleged breach of the guidance, as opposed to the FCA rules. This set out that the Reviews do not provide "*guidance*" and even if they were considered statutory guidance made under FSMA s.139A, any breach would not give rise to a claim for damages under FSMA s.138D.
- Due to the general principle that customers should take responsibility for their own investment decisions, if compensation is awarded against it this should be reduced due to contributory negligence.
- There is no question of Westerby having failed to carry out its own obligations properly and then looking to excuse its failures by relying on a disclaimer. Rather, as explained in *Adams*, the disclaimers set out the scope of its obligations and confirm that responsibility for assessing the suitability of the investment remains with Mr B,

rather than the SIPP provider. Any complaint in relation to this investment ought not be upheld against Westerby, as the client had to take responsibility for his own investment decisions.

In Mr B's submissions in respect of this complaint he has said, amongst other things, that:

- Firm A talked to him about the PILGL investment and introduced him to the director. He was told the investment was suitable for him, as it matched his criteria. And his adviser was also at a PILGL event that Mr B attended, giving a SIPP presentation. His adviser and PILGL, along with another firm that promoted the investment that I will call Firm C, appeared closely aligned.
- Mr B had several discussions with PILGL, including an investor day. And it was heavily emphasised by PILGL and Firm C, that the companies involved were FCA regulated. And he was swayed by factors, such as emphasis that loans were back by a first charge and covered by the FSCS.
- He was attracted to PILGL due to the combination of good returns plus high security (low risk), as it was backed by a first charge. There were third party market valuations of the scheme that backed the numbers, and he drove past the site to check it was real and progressing.
- He received an email from the director of PILGL which said "*I don't think that your pension/SIPP provider (Westerby) will allow an unsecured investment. I think it might be better for you to invest in our existing Globe Works development instead. This is a 520 bed development that is already being built with a second charge for security.".* Although Mr B doesn't seem to have provided a copy of the email itself.
- Before the loan was due for renewal, it was rolled over into an extended loan with no set end date but with interest continuing to be payable and which could be terminated by Mr B on six weeks' notice. And, prior to doing so, PILGL confirmed to Mr B in June 2019 that the security remained in place and that the investment was sound.
- No security charge had been granted over the investment. It also looks like the investment was used to service previous loans, without Mr B being notified, rather than for the actual development.
- It became known in January 2021 that the scheme was already in default in January 2017. And it seems investments made after that point didn't go into the development but to repaying earlier investors, which wasn't disclosed and was contrary to loan agreements. PILGL was marketing an investment that was already in default.

One of our Investigators reviewed Mr B's complaint and said that they weren't upholding it. They said that while Westerby ought to have identified points of concern if it had carried out sufficient due diligence into PILGL, it's unlikely that if it had done so that such enquiries would have revealed the problems which led to the investment failure and to the conclusion that the investment shouldn't be permitted within its SIPPs. They also said that Mr B certified himself as sophisticated and told Westerby that he had carried out due diligence and wanted to proceed. It was reasonable for Westerby to accept this on face value. Mr B also continued with the investment after his adviser, Firm B, confirmed it understood it hadn't provided investment advice. And there's no reason Westerby should have identified problems with the investment when Mr B had also carried out due diligence and decided to go ahead.

Mr B didn't agree. He said, in summary, that:

- While he carried out some due diligence into the investment, the due diligence that can be performed – and resources available – to an individual is much more limited than that which can be performed – and is required to be performed – by a SIPP provider.
- Westerby should have done a higher level of due diligence on the investment if he'd

had no advice from Firm A and then reported the concerns to him, recommending he speak to his adviser.
- Westerby has regulatory obligations, and while Mr B had investment experience, it failed in those.
- Mr B wanted to manage some low to medium risk investments himself, which is what he thought this PILGL investment was. And it wasn't made clear that this was high risk by parties, including Westerby.

As no agreement could be reached, Mr B's complaint has been passed to me for a decision. I provided the parties with my provisional thoughts. I said, in summary, that I'd seen nothing to suggest Mr B's complaint had been made too late for us to be able to consider it – I invited Westerby to let me know with evidence if it thought otherwise by the date to respond to my provisional thoughts. And I said that I intend to uphold Mr B's complaint and I explained how I thought this should be put right.

While Mr B accepted my provisional thoughts with no further comments, Westerby didn't agree. It said, in summary, that:

- My provisional thoughts don't make any account for Mr B's accountability for his own due diligence.
- There's no reason to think Mr B wouldn't still have invested in PILGL through another SIPP provider, had Westerby not permitted his investment application.
- It's clear Mr B had decided to invest in this, even though Firm A confirmed it hadn't made any recommendation in respect of the investment and that it wouldn't, which shows Mr B's intent to invest in this in any event, regardless of what a regulated advice firm would say. As such, Westerby should not be fully liable for Mr B's own investment decisions.
- Its records show Mr B had already engaged in due diligence conversations with PILGL prior to speaking to Westerby about investing in this, demonstrating his ability to make investment decisions and carry out his own due diligence.
- We might say that Firm A's email confirming it didn't provide Mr B with advice absolves it of responsibility as the adviser, but Firm A remained Mr B's appointed adviser and was responsible for providing him with ongoing SIPP advice. So Firm A should have assessed the investment to satisfy itself that its regulatory obligations for ongoing suitability of the SIPP for Mr B had been met.
- It feels its liability should be limited to a third of the losses, to take into account Firm A and Mr B's responsibility in the circumstances.
- Mr B should be asked to confirm his current tax status.

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.

I've considered all the points made by the parties. I have not however responded to all of them below; I have concentrated on what I consider to be the main issues.

And, having done so, I'm upholding Mr B's complaint for largely the same reasons as those given in my provisional thoughts, which are set out again below.

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 Financial Services Authority (FSA) and Financial Conduct Authority (FCA) rules including the following:
    - PRIN Principles for Business
    - COBS Conduct of Business Sourcebook
    - DISP Dispute Resolution Complaints
- Various regulatory publications relating to, or relevant 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 the contractual relationship between Westerby and Mr B 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. Our 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 our Service in two similar 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 ("the Principles"), 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 *Berkley 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."*

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."*

The October 2013 finalised guidance for SIPP operators included the following:

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

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un-authorised business warnings.*
- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
- *Identifying instances when prospective members waive their cancellation*

rights and the reasons for this.

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

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*
- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*
- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from non-regulated introducers."*

Although I have not quoted all the above-mentioned publications, I have considered them all in their entirety.

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 ombudsmen whose decisions were upheld by the courts in the *Berkeley Burke* and *Options* cases).

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.
- 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 am satisfied that to meet its regulatory obligations when conducting its operation of SIPPs business, Westerby had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind. I say this based on the overarching nature of the Principles (as is clear from the case law) and based on good industry practice notwithstanding the comments in the *Adams* case in the High Court relating to COBS 2.1.1R

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.

It is my view that a non-advisory SIPP operator should have due diligence processes in place to check those who introduce business to them, and to check 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 or reject a referral of business or a particular investment.

PILGL investment

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

Importantly, and consistent with its regulatory obligations, I think that Westerby should have had regard to, and given careful consideration to, PILGL's marketing material when undertaking due diligence into the proposed investment and before permitting this into its SIPPs. And Westerby should have looked at the different guarantees/security the investment offered and considered whether these were effective and could be relied upon.

Mr B has said, amongst other things, that he was led to understand that his investment was directly financing the build and that it was backed by a legal charge i.e. that he owned tangible property. Mr B has said he wasn't made aware the investment round he invested in was instead paying off previous investors, rather than going into the actual development.

I recognise that a PILGL presentation document marked as November 2017 said that funding was needed to replace existing loans for the development. However, a slightly earlier prospectus dated March 2017 in respect of the Birmingham development section made no reference to how the particular investment would be used, other than explaining forward funding had been used to purchase the site and that the development was ongoing. And I don't think the website for the investment at the time clearly said how this would work, only that the Birmingham accommodation site was currently being developed.

In addition, I don't think the investment loan agreement was clear – it referred to the purchased asset as still to be developed and said that it would be developed, not that the investment was a loan to repay loans. And, importantly I think, on the annex on the schedule to the loan agreement I've been provided with for Mr B, it specifically said the loan purpose was to finance the development project, rather than that this was to repay loans.

So I think this ought to have raised significant concerns with Westerby about the way this investment was being marketed to investors and that it was highly likely they'd been given the false impression they were investing in the development itself.

In addition, the investment was advertised as having security as the loaned funds would be given a second charge on the 999 lease. And, in respect of this, I can see that the loan agreement Mr B signed said, for example, that investors would be given shares in PILGL Security 2 Limited (the security company – a special purpose vehicle ('SPV')) and that the SPV would hold a second charge over the purchased asset to be developed.

I can't see that Westerby sought any evidence in respect of the advertised charges though, such as that these had or were being put in place at the time in respect of this investment, in order to verify the security. Nor have I seen anything to suggest that Westerby sought any information or evidence surrounding the track record of the investment. For example, while this particular investment round was to repay existing loans, I can't see that any information was sought in respect of the status of those existing loans and whether they were up to date.

While there seems to be evidence of a charge created in November 2017, I can see this was in respect of PILGL Security Limited rather than PILGL Security 2 Limited, which were separate companies. In fact, PILGL Security 2 Limited itself wasn't even established until a bit later, in December 2017. I've also seen no evidence that investors, like Mr B, were given shares in PILGL Security 2 Limited, for example, or that it held a second charge over the asset in the way that investors had been led to understand would be the case. And I haven't been provided any further evidence to suggest otherwise in response to my provisional thoughts.

So, while I recognise the investment asset might ultimately have been built, it seems the security didn't exist in the way that had been advertised and that this PILGL investment didn't operate as claimed/advertised. And Westerby wouldn't have then been treating consumers fairly by proceeding to permit (or continuing to permit) the investment in its SIPP without having obtained the requisite information to be satisfied that it understood the nature of the investment/assets were real and secure/the investment scheme operated as claimed.

As such, for the above reasons, had Westerby acted reasonably, I think it ought to have had concerns about the investment. I think the above is the type of information that Westerby ought reasonably to have identified had it carried out sufficient due diligence in line with its obligations. And that it ought to have identified there was a real risk of customer detriment as a result and not permitted the investment within its SIPPs nor accepted Mr B's application to invest in this.

This means that I don't think Westerby undertook appropriate steps or drew reasonable conclusions from the information that I think would have been available to it, had it undertaken adequate due diligence into the PILGL investment. I don't think Westerby met its regulatory obligations and, in accepting Mr B's application to invest in PILGL, allowed his funds to be put at significant risk.

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

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

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

In summary, I don't think Westerby acted with due skill, care and diligence, or treated Mr B fairly, by permitting the PILGL investment within its SIPPs. Westerby didn't meet its

regulatory obligations or the standards of good practice at the time, and it allowed Mr B's pension fund to be put at significant risk as a result.

I'm satisfied that Westerby wasn't treating Mr B fairly or reasonably when it accepted his instructions to invest in PILGL. And, for further reasons I'll come on to below, if it had rejected those investment instructions, I think it's unlikely he would have made the PILGL investment.

Mr B's investment application

As I've said, Westerby had a duty to conduct due diligence and give thought as to whether to accept business from third parties arranging and/or advising on investments. That's consistent with the Principles and the regulators' publications as set out earlier in this decision.

As I've set out, in August 2017, Mr B emailed Westerby and said that his adviser, Firm A, had proposed investing in PILGL to him. I appreciate Firm A responded to Westerby and said, amongst other things, that it hadn't recommended that Mr B invest in PILGL and it understood this was instead done by a third party, Firm B. And that Mr B responded and said he understood. However, I note that Firm B was seemingly unregulated and that Mr W of Firm A was connected to/involved with Firm B. Mr B has told us that Firm A talked to him about the PILGL investment, he was told this was suitable for him as it matched his criteria and Firm A introduced him to the director of PILGL. Mr B also told us that Mr W of Firm A was at a PILGL event that he attended, giving a SIPP presentation. And that he thought that Mr W of Firm A and PILGL were closely aligned.

Westerby is also aware from previous decisions against it from our Service that concerned Firm A, that Firm A wasn't doing things in a conventional way. For example, amongst other things, while some clients were under the understanding that they were receiving full regulated advice from Firm A, it was pointing them in the direction of non-standard investments without making specific recommendations on these based on the client's circumstances. And Firm A was instead referring customers to unregulated third parties in respect of such investments that it was linked with/connected to.

Westerby itself has said that despite Firm A's email to it in August 2017, Firm A remained Mr B's appointed adviser and was responsible for providing him with ongoing SIPP advice. And, in that case, Westerby has said that Firm A should have assessed the investment to satisfy itself that its regulatory obligations for ongoing suitability of the SIPP for Mr B had been met. So, while I make no finding on Westerby's point here, in light of this it's clear Westerby thinks that Firm A wasn't going about things in a conventional way, but I can't see that it made any further enquiries about this at the time with the parties in Mr B's case.

For the above reasons, I think there was a clear and obvious potential risk of consumer detriment here. Westerby should have been alive to the risk that a regulated firm wasn't going about things in a conventional way. And that, while I recognise Mr B had self-certified as a sophisticated investor, there was contradictory information as to whether or not he had been provided with advice on the investment. Mr B had said he understood that he had been. And a third-party unregulated firm, Firm B, which wasn't subject to regulatory controls and that was connected to Firm A, was seemingly involved.

I appreciate Westerby identified the investment was high risk and that it asked for forms and declarations to be completed, but the examples of good practice say that doing so would enable it to seek clarification from the prospective member if it had any concerns.

Given what I've said about Westerby's due diligence on the investments though and my conclusion that it failed to comply with its regulatory obligations and good industry practice at the relevant time, I don't think it's necessary for me to comment in any further detail on what I think Westerby ought to have identified in respect of Mr B's investment application and Firm A's involvement here.

Indemnities

In my view it's fair and reasonable to say that just having Mr B sign declarations wasn't an effective way for Westerby to meet its regulatory obligations to treat him fairly, given the concerns Westerby ought to have had about the intended investments. Such forms intended to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on such indemnities when Westerby knew, or ought to have known, the intended investments were putting him at significant risk wasn't the fair and reasonable thing to do. In the circumstances I think very little comfort could have been taken from any declaration stating that Mr B took responsibility for his decisions and understood the risks. Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse to accept Mr B's applications.

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

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 B fairly by asking him to sign an indemnity absolving it of all responsibility, and relying on such an indemnity, when it ought to have known that Mr B was being put at significant risk.

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

Is it fair to ask Westerby to compensate Mr B?

In deciding whether Westerby is responsible for any losses that Mr B has suffered on his investments I need to consider what would have happened if Westerby had done what it should have done i.e. had it not accepted or proceeded with his 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 B signed the indemnity means that he shouldn't be compensated if it is fair and reasonable to do so.

As I've said, I consider that Westerby failed to comply with its own regulatory obligations and good industry practice and didn't put a stop to the transactions that are the subject of this complaint. More specifically, I don't think Westerby should have permitted the PILGL investment within its SIPPs.

For the above reasons, had Westerby acted fairly and reasonably it should have concluded that it should not permit the investment within its SIPPs and neither should it have accepted Mr B's investment application. That should have been the end of the matter – Westerby should have told Mr B that it could not accept the business. And I am satisfied, if that had happened, the arrangement for Mr B would not have come about in the first place, and the loss he suffered could have been avoided.

Westerby has said that Mr B would have proceeded with the transactions elsewhere with another provider regardless of its involvement. But I'm not persuaded by this.

I've considered the experience Mr B detailed at the time on non-standard asset questionnaires he sent to Westerby. And that Mr B was seemingly eager to invest in PILGL, having made Westerby aware at the time he'd carried out some of his own due diligence into the investment and wanted to proceed, for example. But, while Westerby might have taken some comfort in allowing an individual like Mr B to invest in high risk non-standard investments, given the issues with the PILGL investment it shouldn't have permitted investment into this at all.

If Westerby had explained to Mr B even in general terms why it would not accept his applications or that it was terminating the transaction, I find it very unlikely that he would have tried to find another SIPP operator to invest in PILGL with. And, in any event, I don't think it's fair and reasonable to say that Westerby shouldn't compensate Mr B for his loss based on 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 PILGL investment into its SIPPs.

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

So I'm satisfied that Mr B would not have continued with his PILGL application, had it not been for Westerby's failings. And I consider that Westerby failed unreasonably to put a stop to the course of action when it had the opportunity and obligation to do so. I consider that Westerby failed to comply with its own obligations and didn't put a stop to the transactions proceeding by declining to accept Mr B's application when it had the opportunity to do so.

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

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

For the reasons I've set out, I'm satisfied that it would not be fair to say Mr B'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 Mr B's PILGL application because this was high risk. For the

reasons given above, I'm satisfied that Mr B, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. And that, in any event, Mr B's investment application should never have been accepted by Westerby.

In making these findings, I think it's reasonable to make an award against Westerby that requires it to compensate Mr B for the full measure of his remaining loss. Westerby accepted Mr B's business. And, but for Westerby's failings, I'm satisfied that Mr B's pension monies wouldn't have been invested in PILGL.

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 B 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 extent of the loss in question. The key point here is that but for Westerby's failings, Mr B 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 compensate Mr B to the full extent of the financial losses he's suffered due to its failings.

I've carefully considered causation, contributory negligence, and apportionment of damages. But in the circumstances here and for the reasons I've given, I'm still satisfied it's fair and reasonable for Westerby to compensate Mr B for his full loss.

Mr B 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 B's actions mean he should bear the loss arising as a result of Westerby's failings.

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

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

Putting things right

My aim is to return Mr B as closely as possible to the position he would now be in but for what I consider to be Westerby's due diligence failings.

For the reasons set out above, I think that had Westerby done what it should have and refused to permit this PILGL investment within its SIPPs, I think it's most likely that Mr B wouldn't have invested in this. I take the view that Mr B would have invested 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 way to put things right in the circumstances.

To compensate Mr B, on a fair and reasonable basis, Westerby must:

- Compare the performance of Mr B's PILGL 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.

- Westerby should add interest as set out below.

- Westerby should pay into Mr B's pension plan to increase its value by the total amount of the compensation and any interest. 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 total amount into Mr B's pension plan, 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 total amount 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 B won't be able to reclaim any of the reduction after compensation is paid.

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

  It is reasonable to assume that Mr B is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%. However, if Mr B would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

  In my provisional thoughts I said that if either Westerby or Mr B dispute that this is a reasonable assumption, they must let us know as soon as possible – and by the deadline given – so that the assumption can be clarified and he receives appropriate compensation. And that it won't be possible for us to amend this assumption once any final decision has been issued on the complaint.

  Westerby said that Mr B should be asked to confirm his current tax status. Mr B has told us that he currently expects to be a basic rate taxpayer at retirement. And I've not seen anything which makes me think the above presumption is unreasonable.

- 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.

- Pay to Mr B £200 for the distress and inconvenience caused by the loss of a significant proportion of his pension provision.

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

Income tax may be payable on any interest paid. If Westerby deducts income tax from the interest it should tell Mr B how much has been taken off. Westerby should give Mr B a tax deduction certificate in respect of interest if Mr B 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

The monies invested in PILGL	Still exists but 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 PILGL investment at the end date.

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

If Westerby is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the *actual value*. Westerby may require that Mr B provides an undertaking to pay Westerby any amount he may receive from the illiquid assets in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Westerby will need to meet any costs in drawing up the undertaking.

Fair value

This is what the monies invested in PILGL would have been worth at the end date had they produced a return using the benchmark.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal, income or other distributions paid out of the investment 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.

SIPP fees

If the 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 B to have to pay annual SIPP fees to keep the SIPP open. But, for the sake of completeness, 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.

Distress & inconvenience

I think the loss of part of the pension provision that is the subject of this complaint has likely caused Mr B some distress and frustration. It would understandably have been worrying to have found out he'd lost this. And Westerby should pay Mr B £200 to compensate him for this. I think this is a fair and reasonable amount in the circumstances.

Why is this remedy suitable?

I've decided on this method of compensation because:

- I can't say definitively into what holdings, and in what proportions, Mr B's monies would have been invested had Westerby not accepted his PILGL investment application. However, overall, I consider the benchmark below is a fair and reasonable proxy for the return Mr B's monies might have experienced over the period in question if they hadn't been invested in the manner that they were.

- 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.

- I'm satisfied that the mix and diversification provided by using a benchmark of the FTSE UK Private Investors Income total return index for the investment would be a fair measure for comparison for what Mr B's monies might have been worth if they hadn't been and invested in the manner that they were.

My final decision

My decision is that I uphold Mr B's complaint about Westerby Trustee Services Limited should be upheld and I require it to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 8 July 2025.

Holly Jackson
Ombudsman