DRN-5617070

The complaint

Mr D complains that Westerby Trustee Services Limited ('Westerby') failed to carry out sufficient due diligence into the introducer before accepting business from it and on the investment before accepting it into his Self-Invested Personal Pension ('SIPP'), causing him a financial loss. Mr D says it should compensate him for his loss.

For simplicity, I refer to Mr D throughout, even where the submissions I'm referring to were made by his representative.

What happened

I've outlined what I think were some of the key parties and events involved in Mr D's complaint below.

Involved parties

Westerby

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

German Property Group companies

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

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

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

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

The promotional material advertised that the investment funds would be paid by investors directly to a German law firm, who'd hold the funds in a secure account until the purchase of

the property took place and the security documentation was issued, at which point the funds would be paid to DC80. However, this seemingly changed in or around August 2014 by which time the German law firm no longer received any of the investment monies, albeit some of the documentation continued to reflect this process.

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

The transaction

I understand that, in or around the start of September 2014, Mr D was introduced to a particular sales executive at Westerby by an unregulated introducer I'll call 'Firm B'.

And it seems Mr D then provided Westerby with its non-standard asset questionnaire. While I don't appear to have been provided with a completed copy of Mr D's questionnaire, Westerby said he set out that his net worth was between £500,000 to £1,000,000 and his annual income between £100,000 to £150,000. And that Mr D confirmed he had experience in the financial services industry in programme technology. I'm also aware there was a section for customers to declare on the questionnaire that, amongst other things:

- They understood the risk associated with non-standard investments and was comfortable that their attitude to risk was appropriate. And they were prepared for the total loss of the investment.
- They hadn't received any advice from Westerby and wouldn't hold it responsible for the loss of investments.
- They understood non-standard investments can be difficult to value, can take time to sell and may affect their ability to draw pension benefits.
- They understood that these aren't regulated by the FCA or covered by the Financial Services Compensation Scheme ('FSCS') in order to claim if something goes wrong.
- They confirmed they'd taken financial advice specific to the investment specified in the questionnaire or that they 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.

Westerby has said that it received Mr D's completed SIPP application form on 27 October 2014, which he'd signed on 21 October 2014. This said, amongst other things, that Mr D was unemployed and under 'Investment Strategy', when asked for a description and names of investment providers, he wrote 'Dolphin' and 'Waterman' – the latter of which I understand to be Waterman Bridge Finance Income Fund Second Series' ('Waterman'). And when asked 'Do you have an Independent Financial Adviser', 'no' was ticked.

It seems Mr D's SIPP application was formally accepted by Westerby on 28 October 2014. And, on 31 October 2024, Mr D signed a document which said, in summary, that Westerby wasn't authorised to provide advice. That the SIPP and underlying investments had been arranged at Mr D's explicit request on an 'execution only' basis. And that no advice had been offered, sought or given in respect of the transaction and that Mr D wanted to proceed on that basis.

The next day, on 3 November 2014, Mr D made an employer contribution to his Westerby SIPP of £50,000. And, on 11 December 2014, Mr D made a £20,000 investment into Dolphin with his Westerby SIPP pension monies. The investment was taken on a compound interest basis to be received at the end in 2019, rather than on an ongoing basis, as with all his

investments into Dolphin. And, around a week later, Mr D also invested £25,000 of his SIPP pension monies into Waterman.

I don't appear to have been provided with either of Mr D's Dolphin Loan Note Offer documents – despite having asked Westerby to do so by the deadline to respond to my provisional decision. Although I'm aware there was space for the investor to sign to confirm that they had fully read and understood the terms and conditions detailed in the Loan Note Instrument Documentation that had been provided to them and that they understood a first legal charge would be registered to secure the loan note amount and interest. At the bottom of the Loan Note Offer document it usually said in small writing, amongst other things, that the document should be read in association with the Information Memorandum and Loan Note Instrument, which is a detailed legal document explaining how the loan notes worked. And that once it received this signed Loan Note Offer Letter and the investment money had been banked by the German law firm then the investor would receive the Loan Note Certificate. And Mr D's Loan Note Certificate set out, amongst other things, that he was the holder of a £20,000 average 13.8% fixed rate secured loan note.

Mr D went on to make several other investments with his Westerby SIPP pension monies. For example, he made further investments totalling around £50,000 into Dolphin in 2015 and 2018, to be repaid in 2018 and 2020 respectively. As well as a further £25,000 investment into Waterman in 2017.

Westerby has said that, in January 2018, Mr D's 2015 Dolphin investment matured and he reinvested this with it into the 2018 loan note. Mr D also went on to receive a return into his SIPP from his Waterman investments – Westerby has said the total return in dividends and shares that Mr D received on this into his SIPP is £31,756. And Mr D's remaining Westerby SIPP investments are now seemingly valued at nil or at the cost he bought these for.

Although Mr D doesn't seem to have received a return on his Waterman investment into his Westerby SIPP beyond November 2018, I understand that since then Mr D has received payments/redress in respect of this, possibly in the form of a return of his capital and interest. Although it's unclear whether Mr D received this directly or into another pension, I can't see that this was paid into his Westerby SIPP – I invited both parties to let me know if they disputed my understanding by the deadline to respond to my provisional decision.

Mr D's complaint

Mr D wrote to Westerby, via his representative, with a letter of claim in October 2020. He said, in summary, that it didn't do enough due diligence on the introducer or the Dolphin investments, which was unregulated and high-risk, and it shouldn't have accepted his applications. He said he was a retail customer, who is by no means a sophisticated or high net worth individual. And that this has caused him to lose out.

Mr D approached our Service at the end of October 2020. And, on 11 January 2021, after Mr D had received Westerby's response to his October 2020 letter of claim, he came back to our Service. We let Westerby know, but it didn't provide Mr D with a final response letter with referral rights to our Service.

Westerby has said in its responses in respect of Mr D's complaint and in similar cases with our Service against it concerning the same investment and introducer, amongst other things, that:

- It had three months to respond to Mr D's October 2020 letter before claim. His complaint was referred to our Service within those three months though, which was before he'd received its response and within eight weeks of the complaint being sent

to Westerby. So it isn't a valid complaint referral and Mr D should submit a new complaint.

- Mr D was referred to Westerby by Firm B – Firm B put a sales executive of Westerby's in contact with Mr D. Westerby didn't have an agreement in place with Firm B to accept introductions from it. As far as Westerby was concerned, Firm B wasn't providing advice but simply signposted Mr D to it. Westerby sent the SIPP application pack directly to Mr D. And there's no evidence that Firm B was involved in Mr D's completion of the documents.
- Considering Mr D had experience working in senior positions at financial organisations and in companies engaged in options trading and investment management, for example, it's reasonable to expect him to have been able to recognise if he was being advised by any party, such as Firm B. So the only conclusion is that Mr D knew he wasn't. And Westerby denies that it received frequent applications from individuals introduced by Firm B.
- Considering Mr D's employment and that he would be expected to understand complexities of financial matters and high level due diligence and risk controls required in operating a financial firm, it's reasonable to expect him to have been able to recognise if he was being advised by any party, such as Firm B. So the only conclusion is that Mr D knew he wasn't.
- The SIPP was clearly established for the purpose of utilising non-standard assets.
- While the Dolphin investment was recognised as a high risk, non-standard asset, this was not in itself a reason to deem it unacceptable as a SIPP investment, in line with the FCA's statements on this matter.
- High risk investments are not manifestly unsuitable for inclusion within a SIPP. These can be appropriate under certain circumstances.
- While Dolphin has been placed into administration this is due to investment risk and not authenticity, as the investment was genuine.
- Westerby did, however, restrict investments into SIPPs to cases where either (a) the SIPP member met the FCA's definition of a high net worth or sophisticated investor, who could reasonably be expected to understand the risks, or (b) where the SIPP member had been advised to make the investment by a regulated financial adviser.
- Amongst other things the non-standard asset questionnaires Mr D completed confirmed he met the definition of a high net worth based on his net worth and current income. And based on his employment history, Mr D also had significant financial knowledge and experience and could reasonably be expected to understand the associated risks of any investment selected and to make an informed choice. And it is a misrepresentation to say that Mr D didn't meet the FCA definition of a high net worth individual and sophisticated investor.
- *Adams v Options SIPP* [2020] EWHC 1229 (Ch) held that the SIPP provider hadn't breached its statutory or common law duties to the claimant and that their losses flowed solely from his decision to proceed with a high risk, speculative investment. And, amongst other things, that: '*A duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed in my judgment as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed.*'.
- It acted on an execution only basis. It didn't and wasn't responsible for providing advice or assessing suitability. And Mr D's losses flow from his decision to proceed with a high-risk investment. Mr D should take responsibility for his own decisions in the circumstances and he signed declarations confirmed he was responsible for all investment decisions.
- There has been limited formal FCA guidance as to the extent of due diligence a SIPP provider is expected to undertake. Westerby's due diligence processes are based on the FCA's July 2014 *"Dear CEO"* letter. It met this criteria in respect of Mr D's

investments. 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.
- It carried out extensive checks on Dolphin prior to Mr D's initial investment. And, in the absence of evidence this wasn't genuine or inappropriate as a SIPP asset, it concluded it was acceptable. It also completed ongoing reviews of its due diligence and found that interest and capital repayments were being made as these fell due and the security trustee confirmed land charges were in place. The fact that Mr D's three year loan note investment was fully repaid with interest was evidence this was operating as expected and not impaired.
- The investment documents were clear that Dolphin loan notes were high risk, with the second page of the brochure clearing stating that this was a promotion that hadn't been approved by an authorised person and that relying on it could lead to a risk of an investor losing all assets invested.
- The Information Memorandum explained that loan notes involve a high degree of risk and investors should consider if this investment is suitable for them. It then went on to list specific factors that could lead to a loss of funds, such as unforeseen costs and development problems, valuations being less than anticipated and that it said in bold that investors wouldn't be able to claim to the FSCS.
- The Loan Note offer directed Mr D to read the Information Memorandum and Loan Note Instrument, so it's unlikely he wouldn't have seen this information.
- It would have been clear to any reasonable investor, in particular one with Mr D's knowledge and experience, that this investment carried a risk of total loss of funds which was commensurate with the potential return. As directed/declared in his applications, Mr D fully understood the risk.
- This investment met HMRC and FCA criteria for consideration as to whether it was a permissible investment. So it had no reason to conclude there was a risk of consumer detriment.
- We've placed significant weight on Dolphin's marketing material not explicitly stating the investment wasn't regulated and had no FSCS recourse. Westerby agrees some information isn't on the marketing literature, but this is why the investment was limited to high net worth and/or sophisticated investors or those who received regulated financial advice.
- It has had sight of Dolphin literature which explicitly confirmed that Dolphin wasn't regulated by the FCA nor covered by the FSCS. And while it recognises the concerns about some of the investment literature, Westerby took a cautious approach and didn't allow ordinary retail customers to access the investment, only high net worth or sophisticated customers, or those who'd been assessed and advised by a regulated financial adviser. It's not unusual that high net worth and/or sophisticated customers wanted to go into high risk non-standard investments via a SIPP. And such clients ought reasonably to know there are risks and should undertake their own due diligence (or have receive advice) to assess the suitability of the investment.
- If Westerby had refused to accept the investment within Mr D's SIPP then he would have sought out alternative high risk investments or an alternative SIPP provider that would have accepted the Dolphin investment. It's aware of a number of SIPP providers who were permitting investments when Mr D's Dolphin investments were made. It strongly refutes that another provider would have acted differently and not permitted Mr D's investment application.
- Due to the general principle that customer's should take responsibility for their own investment decisions, if compensation is awarded against it this should be reduced

due to contributory negligence.
- It's clear Mr D would have either remained in the Westerby SIPP to facilitate other non-standard investments or transferred to an alternative provider who would have accepted the Dolphin investment.

Mr D has said in complaint submissions, amongst other things, that Firm B introduced him to the Dolphin investment and the Westerby SIPP in order to make this. And he has lost a significant proportion of his pension provision. The contributions he made to the SIPP were from previous and existing employers at the time.

One of our Investigators said that Mr D's complaint should be upheld. And the redress methodology they set out said that Mr D should be put back into the position as though he hadn't invested in Dolphin via his Westerby SIPP.

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

- In reference to legal charges, it is incorrect to say that Westerby relied entirely on a list of properties provided to it by the security trustee against which security had been registered in favour of noteholders. It was provided with copies of legal charges, relevant planning permission and listed building certificates, which it provided to us.
- There was no reason for it to doubt the validity of the information and documents which were provided to it by appropriately registered and regulated legal and other firms in the UK and overseas.
- It was entitled to rely on the documentation it received, including confirmation from the German law firm of its role, unless or until it was told that the arrangements had changed (at which point it would have carried out further due diligence regarding the new arrangements). It carried out appropriate due diligence on the German law firm involved and had no reason to suspect the truth of what it was told.
- It is incorrect to say that the marketing material was "guaranteeing" returns of at least 12%. The brochure correctly and accurately stated that returns were "fixed", but it also included specific reference to risk factors and Westerby doesn't believe that any investor reading the brochure could reasonably believe the investment was low risk.
- It was made clear to Mr D in the documents he received that the investment was high risk and, had he thought this was not acceptable he ought to have spoken to a financial adviser. Whilst it is noted that some of the marketing literature indicates the investment is low risk, the conflict between the marketing literature and the legal instrument of the investment that the client had to agree to would not have been reason to prevent the investment from being held in a SIPP wrapper.
- There is no question of Westerby having failed to carry out its own obligations properly and then looking to excuse its failures by relying on a disclaimer. Rather, as explained in *Adams*, the disclaimers set out the scope of its obligations and confirm that responsibility for assessing the suitability of the investment remains with Mr D, 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.
- It is reasonable to conclude that if it had not accepted Mr D's application, he would have sought another SIPP provider who would have allowed the investment, of which there were many.
- All of Mr D's losses are the result of his own decision to invest into a high- risk investment which ultimately, and regrettably failed.
- The redress calculation doesn't appear to take into account that Mr D received full repayment plus interest one of his Dolphin loan notes when credit should be given to this.
- There is no evidence to suggest that the SIPP was set up and funds transferred specifically for the purpose of investing in Dolphin.
- It doesn't agree that any compensation for distress and inconvenience is payable.

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

I issued a provisional decision on Mr D's complaint. I said, in summary, that I'd seen nothing to suggest this complaint had been made too late for us to be able to consider it and that, in any event, it no longer seems to be in dispute that it's one we can consider. I also said that Mr D's complaint should be upheld, but for expanded upon reasons and I set out different redress to that given by our Investigator.

Westerby didn't agree. It said, in summary, that:

- For reasons already provided, it disagrees that it failed to meet regulatory obligations and to act fairly and reasonably in the circumstances. But, in view of extension submissions previously made, it sees no purpose in contesting that further.

- If Mr D has received any redress separately for his Waterman investment as suggested, then this indicates that asking Westerby to pay redress for total losses on all investments within the SIPP in respect of this complaint is inappropriate.
- It doesn't agree that redress should be calculated based on a comparison of the value of Mr D's total SIPP compared to what the value of the monies paid into that would have been had these returned in accordance with the benchmark set out. It feels this is illogical, unreasonable and unfair. This is because in requiring compensation for matters beyond just the Dolphin investment, we're asking Westerby to account for losses which go beyond the consequences of its failings, resulting in redress entirely disproportionate to the £70,000 in total that Mr D invested in Dolphin.
- My provisional decision said that it's unlikely Mr D would have tried to find another SIPP operator to invest in Dolphin with, but not that it is unlikely he would not have invested through a SIPP at all. Mr D's investments were largely funded by employer contributions, and he presumably would have set up an alternative SIPP to receive these. So Westerby sees no basis for supposing Mr D would not have invested the same sums in another SIPP and made the same investments that he did (other than Dolphin), even if one assumes (wrongly, in Westerby's view) that another SIPP provider wouldn't have permitted the Dolphin investment. In short, Westerby sees no reason to assume that Mr D wouldn't have made the non-Dolphin investments elsewhere. And the current redress therefore makes Westerby, in effect, the guarantor for all Mr D's investment made via his SIPP, regardless of whether there's any complaint in respect of those.
- Without prejudice to the above, if Mr D has received compensation in respect of Waterman which it is unaware of then it needs to be informed of this before any loss calculation is performed that covers redress for losses in respect of the entire SIPP.
- It doesn't agree that it is reasonable to assume Mr D is likely to be a basic rate taxpayer at his selected retirement age, given the information previously given about his net worth and income. And it thinks Mr D should be asked to confirm his retirement and tax status.

Mr D accepted my provisional thoughts. When doing so, Mr D added that:

- He feels that some points raised by Westerby have no factual basis, such as those it has given about his investment experience.
- In respect of his Waterman investment, Mr D said he'd received a partial interest payment but no payment for the remaining balance. Mr D said he'd started an FSCS claim which involved the Waterman investment, but he confirmed he has not yet reassigned his rights to the FSCS (and I'm aware that such claims have not yet been passed to the FSCS' processing team).
- He intends to file as a basic rate taxpayer for the year 2024/2025. He is several years from retirement, but thinks he is likely to be a basic rate taxpayer at that point due to his income. And that, in any event, if the redress is paid to the SIPP it will be done without any tax deduction.

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 D'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 D 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.

Westerby's due diligence on the Dolphin investment

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

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

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

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

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

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

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

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

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

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

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

<u>Third party report</u>

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

Dolphin's marketing material

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

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

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

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

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

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

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

- '*FIXED RETURN OF 12% per annum on capital invested*' (no emphasis added).
- Another UK SIPP provider had already approved the investment, '*thoroughly assessed it and described it as a **Low Risk** investment opportunity*' (emphasis added).
- '*A **simple** and totally transparent process*' (emphasis added).
- A UK based law firm had assessed that the investment as compliant with UK company, regulatory and pension legislation.
- It said in bold type that an exclusive agreement had been reached with Four Gates, a

major German Fund Provider, who had agreed to purchase at least €100m worth of property from Dolphin, per annum, over the next five years.
- Investment funds are sent directly to the German law firm, who hold the funds in a secure account until the purchase of the property takes place and security documentation is issued.
- That '*UK Investors are* ***investing into the Dolphin structure, which simply uses German Listed Buildings as the underlying asset class. UK Investors do not have to consider the usual risks, legal responsibilities or on-going costs that are often associated with buying or owning property abroad.***' (no emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dolphin's accounts

I recognise that Westerby did obtain and review some accounts in relation to Dolphin and DC80 in particular. So it clearly understood this to be important in meeting its obligations when deciding whether to permit the investment within its SIPPs. And, for ease of reference, I can see that Westerby has provided us with the below in respect of these companies

accounts (in some instances the wording I've referenced below when setting these out has been translated from German). However, I don't think Westerby's actions went far enough, for the reasons given.

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

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

- Dolphin's accounts:
    - Dolphin Capital GmbH annual financial statement for the period from January to December 2012, including details for 2011, wasn't ascertained until more than a year later, on 3 March 2014.
    - Dolphin Capital GmbH credit reports contained financial information for the period January to December 2011 and 2012 respectively, including details for 2009, 2010 and 2011, but with 2013 marked as 'unknown'. These reports were provided to or pulled by Westerby in March, August and October 2014.
    - Dolphin Trust GmbH annual financial statement for the period January to December 2014, including details for 2013, wasn't created until nearly two years later, in September 2016. And this information was seemingly pulled by Westerby in June 2017.
    - Dolphin Trust GmbH annual financial statement for the period January to December 2015, including details for 2014, was deposited a year and half later, in June 2017.
    - Dolphin Trust GmbH annual financial statement for the period January to December 2016, including details for 2015, was dated as of 31 December 2016 but marked as a 'draft'.

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

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

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

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

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

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

> *'150. The tests for a commingling of assets in the relationship between the insolvency debtor* [DC80] *and its limited partner, AS German Property Group GmbH, are met.*
>
> *151. There are no properly prepared, approved and published annual financial statements for the insolvency debtor. Documents were only able to be identified at all for the years 2011, 2012, 2014, 2015 and 2018; these suggest that annual financial statements should have been prepared. However…these documents do not comply with commercial law regulations*…
>
> …
>
> *153. With regard to proper accounting in accordance with § 238 HGB* [HGB seemingly being Germany's commercial code and accounting standards for how companies must prepare and report financial statements]*, it is not readily possible for an expert third party to obtain an overview of the business transactions and the situation of the business.*
>
> *…*
>
> *161. The breach of the obligation to keep accounts in the qualified case of the absence of proper and comprehensible accounts as a whole is demonstrable in the present case*…'

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

<u>The investment structure</u>

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

- Despite the German law firm explaining in a letter dated 9 January 2013 that it and Dolphin were independent from the security trustee, the insolvency administrator's

expert assessment noted that it was the German law firm who agreed to the cancellation of land charges until the end of 2017 – if it was confirmed that the secured loan notes had been satisfied in full – rather than the trustee. And that the German law firm was the contact person in respect of the trust, rather than the security trustee itself.

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

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

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

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

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

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

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

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

And that:

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

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

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

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

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

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

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

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

being the case.

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

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

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

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

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

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

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

Investment due diligence summary

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

- There was no investor protection associated with this investment – investors didn't have recourse to our Service or the FSCS.
- It was illiquid – there was no exit strategy, the customer couldn't sell their interest in the investment and realising it was project dependent.
- It was being targeted for investment by pension investors, it was a speculative overseas based investment with inherent high risks that made it very obviously unsuitable for all but a small category of investors and even then, only a small part of such an investor's portfolio.
- The high projected and fixed returns set out should have been questioned. I don't expect Westerby to have been able to say the investment would have been successful. But such high projected returns without any apparent basis should have

given Westerby cause to question its credibility.

- The investment didn't operate as it was marketed: invested monies weren't held in escrow then allocated to a specific property, for years (if not from the outset) it was operated as a Ponzi scheme with repayments funded by incoming investments and the German law firm hadn't been on retainer since 2014.
- The lack of properly prepared and approved annual financial statements should have been questioned.
- The marketing material either didn't contain, or was unclear, as to the risks associated with the investment. So, Westerby should have been concerned that consumers may have been misled or did not properly understand the investment they intended to make.
- It misled investors in relation to the security of their investment.
- While the loan notes were seemingly governed by UK law, the properties these were in respect of were based overseas and would be subject to the domestic laws and regulations that apply in respect of the sale and purchase of these. That created additional risk.

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

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

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

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

As such, and based on the available evidence, I don't think Westerby undertook appropriate steps or drew reasonable conclusions from the information that I'm satisfied would have been available to it, had it undertaken adequate due diligence into the Dolphin investment before it did so. I don't think Westerby met its regulatory obligations and, in accepting Mr D's application to invest in Dolphin, it 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 D advice on the suitability of the SIPP and/or the investment for him personally. To be clear, I'm not making a finding that Westerby should have assessed this for Mr D. I accept it had no obligation to give him advice, or to otherwise ensure the suitability of an investment for him.

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

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

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

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

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

I'm satisfied that Westerby wasn't treating Mr D fairly or reasonably when it accepted his applications to open the SIPP to invest in Dolphin. I've taken into account that after opening the Westerby SIPP Mr D also went on to make other investments with his SIPP pension monies. But I think Dolphin was likely the main reason why Mr D switched to the Westerby SIPP, for the following reasons.

Dolphin was one of the investments detailed on Mr D's SIPP application form. This was the first investment Mr D made with his Westerby SIPP pension monies. And I understand from similar complaints against Westerby that Firm B was introducing customers, like Mr D, to Westerby in particular as Westerby was accepting the Dolphin investment within its SIPPs. This is supported by Mr D's testimony that Firm B introduced Mr D to Dolphin and then recommended Westerby to him in order for him to invest in this. And I understand that Westerby was aware prior to receipt of Mr D's SIPP application that investing in Dolphin was the reason he was eager to establish a SIPP with it as soon as possible. In which case, and for further reasons I'll come on to below, if Westerby hadn't permitted the Dolphin investment within its SIPPs then I think it's likely that Mr D's application to open a Westerby SIPP would not have gone ahead.

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

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

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

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

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

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

Indemnities

In my view it's fair and reasonable to say that just having Mr D 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 D 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 D's applications.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr D 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 D 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 D was being put at significant risk.

I'm satisfied that Mr D'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 D's applications.

Is it fair to ask Westerby to compensate Mr D?

In deciding whether Westerby is responsible for any losses that Mr D 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 D signed the indemnity means that he shouldn't be compensated if it is fair and reasonable to do so.

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

Westerby has said that Mr D 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 financial experience Westerby has said that Mr D detailed at the time on non-standard asset questionnaires he sent to it. But, while Westerby might have taken some comfort in allowing an individual like Mr D to invest in high risk non-standard investments, given the issues with the Dolphin investment it shouldn't have permitted investment into this at all.

If Westerby had explained to Mr D 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 Dolphin with. And, in any event, I don't think it's fair and reasonable to say that Westerby shouldn't compensate Mr D 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 Dolphin investment into its SIPPs.

Had Westerby acted fairly and reasonably, and in accordance with its regulatory obligations and good industry practice, it should have concluded that it shouldn't permit the Dolphin investment to be held in its SIPPs at all, and prior to receiving Mr D'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 D wouldn't have opened a Westerby SIPP and then invested in Dolphin, 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 D would not have continued with his Westerby SIPP and then invested in Dolphin, had it not been for Westerby's failings. And I consider that Westerby failed unreasonably to put a stop to the course of action when it had the opportunity and obligation to do so. I consider that Westerby failed to comply with its own obligations and didn't put a stop to the transactions proceeding by declining to accept Mr D's applications when it had the opportunity to do so.

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

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

For the reasons I've set out, I'm satisfied that it would not be fair to say Mr D'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 D's Dolphin applications because this was high risk. For the reasons given above, I'm satisfied that Mr D, 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 D's applications should never have been accepted by Westerby.

The DISP rules set out that when an Ombudsman's determination includes a money award, 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 (DISP3.7.2R).

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

So I am satisfied in the circumstances, for all the reasons given, that it is fair and reasonable to conclude that Westerby should compensate Mr D 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 D 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 D 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 D for his full loss.

Mr D 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 D'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 Dolphin investment and reach the right conclusions. I think it failed to do this. And having Mr D 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 D for the losses he's suffered. I don't think it would be fair to say in the circumstances that Mr D should suffer the loss because he ultimately instructed the pension contributions to be made to it and investments to be effected.

Putting things right

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

Westerby has said, in summary, that it doesn't agree that redress should be calculated based on a comparison of the value of Mr D's total SIPP compared to what the value of the monies paid into this would have been had these returned in accordance with the benchmark set out. Westerby thinks this results in disproportionate redress to the total Mr D invested in Dolphin. It said it sees no reason to assume that the non-Dolphin investments wouldn't have been made by Mr D elsewhere. And that the current redress makes Westerby, in effect, the guarantor for all Mr D's other investments made via his SIPP, regardless of whether there's any complaint in respect of those.

Having carefully considered redress and Westerby's comments, for the reasons I've set out above, I think that Mr D opening the Westerby SIPP was driven by the fact it was permitting the Dolphin investment within its SIPPs. Westerby shouldn't have permitted this investment in the first place. And, if it hadn't, given it seems Mr D was interested in making contributions to a pension to invest these at the time, Mr D might have contributed to existing pension schemes, opened a SIPP with another provider or gone down another route entirely – we don't know with certainty. In the circumstances, it isn't reasonable to reconstruct everything that happened in Mr D's Westerby SIPP, including in respect of the other non-Dolphin investments he made, as if he would have acted in the same way that he did if Westerby had done what it should have, as it's likely Mr D would have acted differently, and we don't know with certainty what he would have done.

On this basis, I think it's reasonable for me to tell Westerby to carry out redress as set out below. And given the lack of certainty on this point (including about the specific provider, holdings, the specific proportions and how and what monies would have been invested in post-contribution had these payments elsewhere still been effected), for the purposes of quantifying redress in this case I maintain that I think the fair and reasonable approach is to assume that the pension monies in question would have achieved a return equivalent to the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return index). I'm satisfied that's a fair and reasonable proxy for the type of return that could have been achieved over the period in question.

In summary, on a fair and reasonable basis, Westerby should:

1. Calculate a notional value, as at the date of this decision, of the monies that were paid into the Westerby SIPP had they performed in line with the benchmark set out.

2. Obtain the actual current value of Mr D's Westerby SIPP, as at the date of this decision, less any outstanding charges.

3. Deduct the sum arrived at in step 2) from the sum arrived at in step 1).

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

5. Pay an amount into Mr D's Westerby SIPP, so that the transfer value of this is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

6. Pay Mr D £250 for the distress and inconvenience the problems with his pension have caused him.

I've explained how Westerby should carry out the calculation, set out in steps 1 - 6 above, in further detail below:

1. Mr D made contributions to his Westerby SIPP when he opened it, rather than transferring in existing pension schemes. So Westerby should calculate a current notional value, as at the date of this decision, of the monies that were paid into the Westerby SIPP if they'd not been paid into it. To do this, Westerby should calculate what the monies paid into the SIPP would now be worth had they instead achieved a return equivalent to that of the FTSE UK Private Investors Income Total Return Index from the date they were first paid into the Westerby SIPP through until the date of my final decision. I'm satisfied that's a reasonable proxy for the type of return that could have been achieved over the period in question.

   Westerby must also make a notional allowance in this calculation for any additional sums Mr D has contributed to, or withdrawn from, this SIPP since outset. To be clear this doesn't include SIPP charges or fees paid to third parties like an adviser.

   Any notional contributions or notional withdrawals to be allowed for in the calculation should be deemed to have occurred on the date on which monies were actually credited to, or withdrawn from, the Westerby SIPP by Mr D.

   And account should also be taken of any sums Mr D has already received outside of his Westerby SIPP in compensation in respect of the investments made within this, such as in respect of Waterman – this should be allowed for in the calculation at the date Mr D received such payments, to take into account that he's had the benefit of this. Mr D should provide Westerby with evidence of any and all sums he has recovered from third parties outside his Westerby SIPP, including in respect of Waterman.

2. Obtain the actual current value of Mr D's Westerby SIPP, as at the date of this decision, less any outstanding charges.

   This should be the current value as at the date of my final decision.

3. Deduct the sum arrived at in step 2) from the sum arrived at in step 1).

   The total sum calculated in step 1) minus the sum arrived at in step 2), is the loss to Mr D's pension provisions.

4. Pay a commercial value to buy Mr D's share in any investments that cannot currently be redeemed.

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

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

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

If Westerby doesn't purchase the investments, and if the total calculated redress in this complaint is less than £160,000, Westerby may ask Mr D to provide an undertaking to account to it for the net amount of any future payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Mr D may receive from the investments after the date of my final decision, and any eventual sums he would be able to access from the SIPP in respect of the investments. Westerby will need to meet any costs in drawing up the undertaking.

If Westerby doesn't purchase the investments, and if the total calculated redress in this complaint is greater than £160,000 and Westerby doesn't pay the recommended amount, Mr D should retain the rights to any future return from the investments until such time as any future benefit that he receives from the investments together with the compensation paid by Westerby (excluding any interest) equates to the total calculated redress amount in this complaint. Westerby may ask Mr D to provide an undertaking to account to it for the net amount of any further payment the SIPP may receive from these investments thereafter. That undertaking should allow for the effect of any tax and charges on the amount Mr D may receive from the investments from that point, and any eventual sums he would be able to access from the SIPP in respect of the investments. Westerby will need to meet any costs in drawing up the undertaking.

5. Pay an amount into Mr D's Westerby SIPP, so that the transfer value of this is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

   The amount paid should allow for the effect of charges and any available tax relief. Compensation shouldn't be paid into a pension plan if it would conflict with any existing protections or allowances.

   If Westerby is unable to pay the compensation into Mr D's SIPP, or if doing so would give rise to protection or allowance issues, it should instead pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid.

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

   It's reasonable to assume that Mr D is likely to be a basic rate taxpayer *at his selected retirement age*, so the reduction would equal 20%. However, if Mr D 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 decision I said that if either Mr D or Westerby dispute that this is a reasonable assumption then they should respond with evidence detailing why by the deadline to respond to my provisional decision, as it won't be possible for us to amend this assumption once any final decision has been issued on the complaint.

Westerby said that doesn't agree that it is reasonable to assume Mr D is likely to be a basic rate taxpayer at his selected retirement age, given his net worth and income.

As set out above, Mr D has said that he is several years from retirement, but he intends to file as a basic rate taxpayer for 2024/2025 and that he thinks he is likely to be a basic rate taxpayer in retirement due to his income. So I'm not persuaded that the above presumption is unreasonable.

6. Pay Mr D £250 for the distress and inconvenience the problems with his pension have caused him.

   In addition to the financial loss that Mr D has suffered as a result of the problems with his pension, I think that the loss suffered to Mr D's pension provision has likely caused him distress. Mr D lost what he has said is a significant proportion of his pension provision. Mr D is in his late 50's and I think this is likely to have caused him some worry. And I think that it's fair for Westerby to compensate him for this as well.

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

SIPP fees

If the investment/s can't be removed from the SIPP, and because of this it can't be closed once compensation has been paid, then it wouldn't be fair for Mr D to have to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investments and is used only or substantially to hold those assets, 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 D or into his SIPP within 28 days of the date Westerby receives notification of Mr D's acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation isn't paid within 28 days.

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

My final decision

For the reasons given, it's my decision that Mr D'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 require Westerby Trustee Services Limited to pay Mr D the compensation amount as set out in the steps above, up to a maximum of £160,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Westerby Trustee Services Limited pays Mr D the balance.

My recommendation would not be binding. Further, it's unlikely that Mr D can accept my final decision when issued and go to court to ask for the balance. Mr D may want to consider getting independent legal advice before deciding whether to accept my final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 9 July 2025.

Holly Jackson
Ombudsman