DRN-5664239

The complaint

Mr B complains that Westerby Trustee Services Limited ('Westerby') failed to carry out adequate due diligence prior to accepting his investment instructions in relation to his self-invested personal pension ('SIPP'). He says he's suffered a financial loss because of Westerby's failings.

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

What happened

I've outlined what I think are some of the key parties and events involved in Mr B'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.

Firm K

Firm K is a regulated financial adviser, which Mr B appointed in July 2012.

Firm S

Firm S introduced SIPP members to prospective investment opportunities, including non-standard investments such as those Mr B invested in. It wasn't authorised to provide advice.

German Property Group companies ('Dolphin')

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 investors' 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 investors' 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, which would 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 as 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 and five years and widely promoted with fixed annual returns of 10 to 15% paid every six months, with return of capital at the end of the term. In or around 2021, Dolphin GmbH and DC80 entered administration.

Beech Holdings (Manchester) Limited ('Beech Holdings')

The loan notes issued by Beech Holdings offered a *"growth"* option, accruing simple interest at 10% per year, payable at maturity with a 10% bonus, or an *"income"* option, which accrued interest at 10% per year and paid the accrued interest every three months. The underlying assets of the loan notes were property developments in Manchester. And it was facilitated using a security trustee via a security trust deed.

The transaction

Prior to engaging Firm K, Mr B was dealing with another regulated adviser in relation to transferring defined benefit and defined contribution pensions to a SIPP. The adviser recommended Mr B transfer the defined contribution pension, but not the defined benefit pension.

Mr B still wished to proceed with the transfers in any event, so the adviser contacted a SIPP provider (not Westerby) to arrange these. However, this SIPP provider said it was unable to carry out the transfers given the advice not to transfer the defined benefit scheme.

Unhappy with this, Mr B approached Firm K around July 2012. Following an initial discussion, Firm K said, amongst other things, that *"if you like property but no* [sic] *so keen on pensions, we are definitely the people to know"*. It was agreed that a further discussion would take place once Mr B had collated all his pension details.

In December 2012, Mr B explained to Firm K that he'd agreed to buy an investment property, which he intended to refurbish with a view to making a profit. However, he required around £20,000 to complete the purchase. He wanted to use tax-free cash to meet the shortfall and Mr B said he required the funds by the end of January 2013.

While Firm K said in its later advice report that it was arranging Mr B's transfers on an execution-only basis and that its advice was limited to the receiving provider only and finding *"a suitable trustee that will allow commercial property, possible loans and other property related investments.",* by that point Firm K had gathered details of Mr B's circumstances and objectives to consider his attitude to risk in respect of the transfer, including looking at critical yields. Firm K had also sent Mr B the web address of Firm S. And it had told Mr B it 'liked the sound' of his renovation project and *"look*[ed] *forward to showing* [him] *how to leverage* [his]

SIPP to achieve similar returns". Firm K also said *"who wants to settle for 4% in drawdown or 5% an* [sic] *an annuity when double digits and more are easily achievable in property?"*

As the transfers hadn't completed by around mid-January 2013, Mr B took out a *"£50K loan at a crippling 16%",* paying around £650 per month. He told Firm K *"clearly the sooner I can realise the tax free sum from my pension the sooner I can relieve myself of this ongoing cost."*

Firm K recommended Westerby as a suitable SIPP provider for Mr B. And, in February 2013, he applied for a Westerby SIPP. His SIPP application form provided details of two defined contribution pensions and a pension comprising both defined benefit and defined contribution elements that he wished to transfer to the SIPP. Firm K was recorded as his financial adviser and *"TBC"* was written under the *"Investment Strategy"* section.

Over the next few months, the SIPP received the proceeds – approximately £98,000 – from the transfers of the two defined contribution pensions. Mr B took 25% of this as tax-free cash.

In June 2013, Mr B completed a supplementary form, which confirmed he would be transferring another defined benefit pension to the Westerby SIPP, with Firm K again recorded as his financial adviser. The following month, the SIPP received around £415,000 from this transfer. And Mr B again took 25% tax-free cash.

In February 2014, Mr B signed a *"statement for certified high net worth individual"*. He declared that he was a high-net-worth individual as at least one of the following applied:

- During the preceding financial year, he had an annual income of £100,000 or more.
- Throughout the preceding financial year, he had net assets (excluding his main residence and pension arrangements) of £250,000 or more.

By signing the statement, Mr B accepted:

- He could receive financial promotions that may not have been approved by a person authorised by the FCA and which may not conform to its rules.
- He may lose significant rights.
- He may have no right to approach the FCA, Financial Ombudsman Service or Financial Services Compensation Scheme ('FSCS').
- He could lose assets from making investment decisions based on financial promotions.
- It was open to him to seek advice from an authorised person specialised in advising on investments.
- He hadn't been advised or induced to take part in any regulated or unregulated investment by Firm S.

The same month, Mr B made a £50,000 investment into Dolphin. Firm K said Mr B was introduced to this investment by Firm S. And, in July 2014, he made a further £30,000 investment into this.

I've only been provided with the first of Mr B's Dolphin Loan Note Offers, which set out that he was purchasing a £50,000 secured loan note paying fixed interest of 13.8% per year. Mr B signed to confirm he had fully read and understood the terms and conditions detailed in the Loan Note Instrument – a detailed legal document – which had been provided to him and that he understood a first legal charge would be registered to secure the loan note amount and interest. In small print at the bottom, the offer said it should be read in association with

the Information Memorandum and Loan Note Instrument. And that once Dolphin received the signed Loan Note Offer and the investment money had been banked by the German law firm Mr B would receive a Loan Note Certificate. I haven't been provided with copies of Mr B's Loan Note Certificates.

In March and then September 2014, Mr B respectively invested around £140,000 and then £100,000 into investment wrappers. And, around October 2014, Mr B attempted to make a storage units investment via his SIPP, which was rejected by Westerby *"due to the potential risk of capital loss."*

In March 2015, around £213,000 was transferred into Mr B's SIPP – from a pension comprising both defined benefit and defined contribution elements – and Mr B again took 25% tax-free cash.

In September 2015, Mr B signed a further Westerby *"non-standard asset questionnaire"* in anticipation of an investment into Beech Holdings. In the questionnaire, Mr B said his annual income was between £25,000-£50,000 and that his total net assets were £100,000. Mr B said he was retired and that he'd invested in listed equities twice in the last 24 months. Mr B then self-certified as a sophisticated investor on the basis he had *"made more than one investment in an unlisted company in the two years prior"*. The unlisted company Mr B was referring to was Dolphin.

This questionnaire also referred to compliance emails of Westerby's, dated around 24 September 2015. In these Westerby queried internally whether Mr B could be classed as a sophisticated investor, on the basis he had experience of having made two investments into Dolphin previously, along with him having also invested in preference and ordinary shares. And Westerby went on to say that as the Dolphin loan notes qualified as investments, it could therefore accept Mr B's sophisticated investor certification as long as his questionnaire was amended to include reference to Mr B's Dolphin investments, which it was.

Mr B went on to invest £40,000 into Beech Holdings. He then made another investment into this in March 2016 and a further £45,000 investment into this in March 2018.

Firm K stopped being Mr B's adviser in February 2018.

Both of Mr B's Dolphin investments were due to be redeemed in 2019 but this didn't take place, and Westerby has since valued these at nil. The Beech Holdings investments were due to be redeemed in 2021 but this didn't occur, and Westerby has also valued these at nil.

Mr B's complaint

Mr B complained to Westerby, via his representative, in December 2021. Briefly, he said Westerby had failed to carry out adequate due diligence on the high-risk, illiquid and unregulated Dolphin and Beech Holdings investments, in breach of its regulatory obligations. He felt he shouldn't have been allowed to invest in the assets as he wasn't a sophisticated investor. He asked Westerby to put him back in the position he would have been had it not allowed the investments.

Mr B also complained to Firm K about the suitability of the advice he'd received, which wasn't upheld.

Westerby issued its final response to Mr B's complaint in February 2022. Unhappy with this response, Mr B referred his complaint to our Service in March 2022. And, as part of Mr B's submissions to our Service he has said, amongst other things, that:

- Firm K started the pension transfer process in December 2012 and he only received its suitability report in March 2013.
- The correspondence from the time shows that Firm K was actively involved in the transfer process and in providing Mr B with advice on this.

In its response to Mr B's complaint, and in similar cases with this Service involving Firm K and the same, or similar, investments, Westerby has said, amongst other things, that:

- Mr B's SIPP was clearly established for the purpose of making non-standard investments.
- Mr B self-certified as high net worth in February 2014 and as a sophisticated investor in September 2015. He clearly had an appetite for high-risk investments.
- Firm K, a regulated party, was responsible for considering the suitability of the SIPP and expected investments. It carried out due diligence on Firm K before accepting any business from it, including verifying at the point of acceptance of each SIPP that it remained authorised by the FCA and had the requisite permissions. Clients introduced by Firm K often invested in non-standard assets but selected from a variety of investments. And they invested part of their funds into non-standard assets with the remainder into a 'wrap' portfolio made up of standard assets, as in Mr B's case. Investors introduced by Firm K often had significant investment experience and Firm K provided assurance it had controls to ensure only clients for whom higher-risk, non-standard assets might be suitable would be introduced to Westerby.
- Firm K advised Mr B against transferring his defined benefit pension, yet he chose to proceed against its advice.
- *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 their 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 B's losses flowed from his decision to proceed with higher-risk investments. Mr B should take responsibility for his own decisions in the circumstances.
- High-risk investments aren't manifestly unsuitable for inclusion within a SIPP. They can be appropriate under certain circumstances.
- 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 the criteria in this letter in respect of Mr B's investments.
- The regulator's publications aren't determinative of what constitutes good practice. *Adams* confirmed there is no provision in law for a claim based on an alleged breach of the guidance, as opposed to FCA rules. This set out that the reviews don't provide *"guidance"* and even if they were considered statutory guidance made under the Financial Services & Markets Act 2000 ('FSMA') s.139A, any breach wouldn't give rise to a claim for damages under FSMA s.138D.
- It carried out extensive checks on Dolphin prior to Mr B's 2014 investments. And, in the absence of evidence this wasn't genuine or inappropriate as a SIPP asset, it concluded it was acceptable.
- While the Dolphin investment was recognised as a high-risk, non-standard asset, this wasn't in itself a reason to deem it unacceptable as a SIPP investment, in line with the FCA's statements on the matter.

- 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 investment 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.
- It's difficult to verify land charges on German properties. Such information is only disclosed under very specific circumstances. So, it wasn't possible to independently verify the charges.
- It completed a review 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 interest and capital were being repaid was evidence Dolphin 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 clearly 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, development problems and valuations being less than anticipated. It also said in bold that investors wouldn't be able to make a claim with the FSCS.
- The Loan Note Offer directed Mr B 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 B's knowledge and experience, that this investment carried a risk of total loss of funds which was commensurate with the potential return. As declared in his applications, Mr B fully understood the risk.
- The SIPP was introduced by a regulated adviser who could be expected to have assessed the suitability of the Dolphin investment. This investment met HM Revenue & Customs ('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.
- If Westerby had refused to accept the Dolphin investments within Mr B's SIPP, he would have sought out alternative high-risk investments or an alternative SIPP provider that would have accepted the Dolphin investments. It's aware of a number of SIPP providers which were permitting investments when Mr B's Dolphin investments were made. It strongly refutes that another provider would have acted differently and not accepted Mr B's investment instructions.
- Due to the general principle that consumers should take responsibility for their own investment decisions, if compensation is awarded, this should be reduced due to contributory negligence.
- It established that the Beech Holdings investments were structured as loan notes, secured, and a security trust deed was in place. The sole director and shareholder of Beech Holdings was an experienced property developer and a chartered accountant who had confirmed his net asset value and the likely ongoing profitability of his property portfolio. The director had also personally guaranteed the investment, which carried weight given his net asset value.
- The Beech Holdings Investment Memorandum highlighted that it was high risk and

suggested that if an investor was unsure, they should seek regulated advice.
- In the absence of any evidence that Beech Holdings wasn't an acceptable investment for its SIPPs, it accepted it.

One of our Investigators said that Mr B's complaint should be upheld in part, as while Westerby acted fairly and reasonably in accepting the Beech Holdings investment, it shouldn't have accepted the Dolphin investment.

Neither party accepted the Investigator's findings. Westerby didn't agree it acted unfairly and unreasonably in accepting the Dolphin investment. It made the following points, amongst others:

- As a SIPP provider, Westerby's responsibilities in respect of due diligence were limited to conducting due diligence in line with FCA guidance and 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.
- Firm K was responsible for assessing the suitability of the investments for Mr B and for conducting due diligence on the investments to ensure they were appropriate for him.
- Loan notes as an investment class are allowable by HMRC within a pension scheme. It identified as part of its due diligence that the Dolphin 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 Dolphin investment was real and secure at the time.
- At the time of Mr B's investments there were no apparent warning signs that indicated fraud. Our service had drawn factually incorrect conclusions using the benefit of hindsight based on information that has come to light only after Dolphin's business entered administration proceedings and after an independent insolvency practitioner 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 prior to 2018 of any issues surrounding Dolphin that could have been reasonably found in the public domain. As potential issues came to light, Westerby took appropriate and reasonable steps 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's therefore simply not correct to say that the annual financial statements hadn't been prepared for a number of years or that financial information wasn't readily available and wasn't requested by Westerby. And there was 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.
- A SIPP provider's 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. Westerby checked that Dolphin's cash flow was being managed through regulated solicitors in Germany and that security was in place to protect Mr B's investment. There was no requirement for Westerby to carry out further investigations into Dolphin's cash flow.
- In reference to comments around the legal charges, it's incorrect to say that Westerby relied entirely on a list of properties provided to it by the security trustee against which security had been registered in favour of noteholders. It was provided with copies of legal charges, relevant planning permission and listed building

certificates, which it has provided to us.

- There was no reason for it to doubt the validity of the information and documents which were provided to it by appropriately registered and regulated legal and other firms in the UK and overseas.
- It was entitled to rely on the documentation it received, including confirmation from the German law firm of its role, unless or until it was told that the arrangements had changed (at which point it would have carried out further due diligence regarding the new arrangements). It carried out appropriate due diligence on the German law firm involved and had no reason to suspect the truth of what it was told.
- It's 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 any investor reading the brochure could reasonably believe the investment was low risk.
- It was made clear to Mr B in the documents that the investment was high risk and if he thought this wasn't acceptable, he ought to have raised this with his financial adviser. Whilst it's 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 wouldn't have been reason to prevent the investment from being held in a SIPP wrapper.
- It only accepted investments by individuals who were either sophisticated investors or high net worth, who would be expected to be able to understand the risks involved and who provided signed confirmation that they understood the risks.
- There is no question of Westerby having failed to carry out its own obligations properly and then looking to excuse its failures by relying on a disclaimer. Rather, as explained in *Adams*, the disclaimers set out the scope of its obligations and confirm that responsibility for assessing the suitability of the investment remains with Mr B and his financial adviser, rather than the SIPP provider. Any complaint in relation to Dolphin investment ought therefore to be raised with Mr B's financial adviser rather than Westerby.
- 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 that was presented to customers 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. 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.
- It's reasonable to conclude that if it had refused to accept Mr B's Dolphin investment instruction, his adviser, having concluded the investment was suitable, would have recommended he transfer to an alternative SIPP provider to make the investment. It's likely that Mr B would have found another SIPP provider and eventually invested in Dolphin elsewhere. It strongly refutes that another provider would have acted differently and not permitted Mr B's investment application.
- Mr B's losses are the result of his own decision to invest into a high-risk investment which ultimately, and regrettably failed.

While Mr B accepted the Investigator's findings in respect of the Dolphin investment, he didn't agree that Westerby had acted fairly and reasonably in accepting the Beech Holdings investment.

Because no agreement was reached, the case has been passed to me for a decision.
I issued a provisional decision on Mr B'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 B's complaint should be upheld in full.

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.
- It doesn't agree that redress should be calculated based on a comparison of the value of Mr B'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 £80,000 in total that Mr B invested in Dolphin. Particularly bearing in mind that he also went on to invest more in investment wrappers, showing he didn't open the SIPP for the Dolphin (or Beech) investments alone.
- My provisional decision said that it's unlikely Mr B 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. Westerby sees no basis for supposing Mr B 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. And so the current redress therefore makes Westerby, in effect, the guarantor for all Mr B's investment made via his SIPP, even where there's no finding of failure against it in respect of those.
- It doesn't agree that it is reasonable to assume Mr B is likely to be a basic rate taxpayer at his selected retirement age and it thinks Mr B should be asked to confirm his retirement and tax status.

Mr B accepted my provisional decision, with no further comments, although he added that he doesn't currently pay any income tax, as his income is below the threshold as he only receives basic state pension.

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 looked at everything, including all the points made by the parties, and taken this into account alongside the considerations I've detailed. I have not, however, responded below to all the points made; I have concentrated on what I consider to be the main issues.

And, having done so, I'm upholding Mr B's complaint for largely the same reasons as those given in my provisional decision, which is 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 Conduct Authority ("FCA") (previously Financial Services Authority) ("FSA") rules including the following:
    - PRIN Principles for Businesses
    - COBS Conduct of Business Sourcebook
    - DISP Dispute Resolution Complaints
- Various regulatory publications relating to SIPP operators and good industry practice.

The legal background:

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

Setting up and operating a SIPP is an activity that is regulated under FSMA. And pensions are subject to HM Revenue and Customs 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 (but not identical) complaints was challenged in judicial review proceedings in the *Berkeley Burke* and the *Options* cases. In both cases the approach taken by the ombudsman concerned was endorsed by the court. A number of different arguments have therefore been considered by the courts and may now reasonably be regarded as resolved.

It is not necessary for me to quote extensively from the various court decisions.

The Principles for Businesses:

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

Principles 2, 3 and 6 are of particular relevance here. They provide:

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

I am satisfied that I am required to take the Principles into account (see *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."*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*"**Due diligence***

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

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

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

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

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

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

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

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

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

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

- correctly establishing and understanding the nature of an investment

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

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

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

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

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

The 2009 and 2012 Thematic Review Reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 finalised guidance is). However, all of the publications provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the

regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take them into account (as did the ombudsman whose decision was upheld by the court in the *Berkeley Burke* case).

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

> "*It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes).*
> *…*
> *Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.*
>
> *The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes.*"

The alert didn't set new standards. It highlighted that advisers using the restricted advice model discussed in the alert generally weren't meeting *existing* regulatory requirements and set out the regulator's concerns about industry practices at the time.

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 Firm K

As I've said, Westerby had a duty to conduct due diligence and give thought to whether to accept business from third parties arranging or advising on investments. That's consistent with the Principles and the regulatory publications set out earlier in this decision. And this is also seemingly consistent with Westerby's own understanding of its obligations at the relevant time.

Westerby has said that it carried out due diligence on Firm K before accepting any business from it which included, for example, verifying at the point of acceptance of each SIPP that it remained authorised by the FCA and had the requisite permissions.

These steps go some way towards meeting Westerby's regulatory obligations and good industry practice. But Westerby hasn't provided us with sufficient information when asked to persuade me that it conducted sufficient due diligence on Firm K before accepting business from it, or that it didn't fail to draw fair and reasonable conclusions from what it did know about Firm K.

The volume and type of business

An example of good practice identified in the FCA's 2009 review was:

> *"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."*

Given all that I've said above, I don't think simply keeping records without scrutinising the information would be consistent with good industry practice and Westerby's regulatory obligations. As highlighted in the 2009 review, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

While Westerby has provided us with some information – showing that it had access to information about the type and nature of introductions Firm K made to it – Westerby doesn't seem to have told us when exactly it received its first introduction from Firm K, what number introduction Mr B was to it or when exactly it received its last introduction from Firm K. Westerby also doesn't appear to have told us what percentage of the customers introduced by Firm K were proposing to transfer at least one pension with safeguarded benefits or from defined benefit occupational schemes. Nor what percentage these introductions accounted for of Westerby's new business over that period.

Looking at the information Westerby has provided though, it appears to have received a number of introductions – around 50 to 60 – from Firm K over the course of accepting business from it, which seems to have amounted to millions of pounds worth of business.

In addition, I can see that Westerby completed a one-page document titled *"Introducing IFA's to WTS"* around September 2012. And in this document, next to *"Type of Business Introduced"* and *"Volume of Schemes in the last 12 months"*, Westerby said it had received *"c40 SIPPs…"* – which I understand to mean circa 40 SIPP applications – from Firm K during that time. So, of the 60 total introductions that Westerby received from Firm K, it seems to have received 40 of these between September 2011 and September 2012, therefore suggesting to me that it's likely to have received a number of these prior to receiving Mr B's introduction from Firm K in February 2013.

I can see from the information provided that a significant number of the Firm K introduced customers invested in non-standard investments with Westerby. And this is supported by Westerby having told us that clients introduced by Firm K often invested in non-standard assets selecting from a variety of investments, and then went on to invest the remainder of their SIPP pension monies into a 'wrap' portfolio made up of standard assets.

High-risk non-standard investments are only suitable for a small proportion of the population – sophisticated/experienced and/or high-net-worth investors – and only then as a small proportion of such investors' investment portfolios. Westerby has said that investors introduced by Firm K often had significant investment experience. But as I've said, high-net-worth and/or sophisticated investors only make up a small proportion of the population. And I think Westerby should have been concerned that such a volume of introductions, which related almost exclusively to consumers investing in high-risk non-standard investments, was unusual and ought to have given Westerby cause for concern.

So, I think Westerby was therefore either aware, or ought reasonably to have been aware, that the type of business Firm K was introducing was high risk and therefore carried a potential risk of significant consumer detriment.

The availability of advice

Westerby has suggested that it took comfort from the fact that Firm K was a regulated adviser. But I've seen no evidence that Firm K (or any other regulated party) offered or provided Mr B with full regulated advice on his transfers to the Westerby SIPP. And the correspondence shows Firm K wasn't doing things in a conventional way.

For example, Firm K said in writing that it didn't advise Mr B on the transfer and that its advice was limited to the suitability of a receiving provider only. By that point though Firm K had gathered details of Mr B's circumstances and objectives to consider his attitude to risk in respect of the transfer, including looking at critical yields.

And, while Firm K did set out general risks of non-standard investments to Mr B in its advice report, I can't see that it gave specific investment recommendations beyond that an investment strategy involving alternative investments was suitable as it said that Mr B understood the risks involved and that this was in line with his risk profile, provided that at least 25% of his funds were invested following a more balanced approach.

I also note that Mr B's suitability report has similarities to a template suitability report provided to us by Firm K, which it told us it used as a basis for SIPP transfer advice.

The default wording in the template was that the client, like in Mr B's case, was a moderately adventurous investor. The wording said that the client wanted to utilise more alternative investment options like loans to unconnected parties or commercial property, again similar to Mr B's report. And that Firm K would later advise the client on a fund portfolio to balance their holdings, like Mr B's report. Westerby was also the default SIPP provider in the

template report, suggesting an individual assessment of the most appropriate provider may not have occurred in each case.

So, I think the template, like Mr B's report, pointed Firm K's client in the direction of non-standard investments, without making a specific recommendation on the underlying investments based on the client's circumstances.

This is in line with my general experience that Firm K provided customers with restricted advice. In similar complaints with our service against Westerby involving Firm K, I've also seen customers given some general investment information and introduced to the idea of non-standard investments by Firm K, but without it providing them with full investment advice in respect of their particular circumstances.

In which case, as I've said, Firm K wasn't doing things in a conventional way. It's likely Firm K wasn't advising customers, like Mr B, on the suitability of the investments, including the risks and issues associated with these in respect of their particular circumstances, when advising them to transfer/switch to a Westerby SIPP. Firm K wasn't undertaking to proffer full regulated advice on the suitability of the overall proposition, despite being a regulated business that seemingly had permissions to do so. And the possibility full regulated advice hadn't been given or made available was a clear and obvious potential risk of consumer detriment here.

Third party involvement

I don't think it's credible that Mr B was independently and proactively determining to transfer to a SIPP to invest his pension monies in high-risk non-standard investments, like Dolphin and Beech, by himself. Firm K's March 2013 suitability report noted that Mr B wasn't able to self-certify as a sophisticated investor. And, on Mr B's September 2015 *"Non Standard Asset Questionnaire"* – that was completed for his first Beech Holdings investment and which I refer to only for the purpose of context – the only investments mentioned were his Dolphin investments. And in a section to provide his *"Investment Experience"* he indicated he only had experience of liquid equities, not unlisted shares, derivatives or commercial property.

In addition, in similar cases with our Service against Westerby involving Firm K and similar investments, customers, like Mr B, have said they were advised by Firm K on the transfer to the Westerby SIPP and then referred by it (Firm K) to a Mr R of Firm S – who I note was previously a director of Firm K, such that I think it's fair to say the two firms were closely associated – shortly after, which promoted and/or facilitated the non-standard investments. And I can see from an email exchange that Firm K did indeed refer Mr B to Firm S in December 2012.

I've also seen evidence that Firm S, and therefore likely Firm K, was aware that certain providers, including Westerby, were accepting certain high-risk non-standard investments, supporting that this was part of the intended business model in recommending customers transfer to a Westerby SIPP without having been provided with advice on the investments. For example, in a similar complaint with our service involving Firm K and similar investments, I can see that Firm S emailed a customer in July 2013 setting out a list of investments that it said were approved by Westerby.

So, it seems that Firm K's business model was set up in a way that it didn't provide customers with full regulated advice on the overall proposition. And that their pension monies were transferred to a Westerby SIPP with the intention of enabling high-risk non-standard investments with Firm S' involvement. I think this was a potential risk of consumer detriment.

In addition, while Firm S seemingly wasn't authorised to provide advice at the time – as supported by its website in September 2012, which said this in small print – I note that in similar cases with our service concerning Firm K and similar investments, Mr R of Firm S still told customers in May 2013 in respect of alternative investments, for example, that:

> *"To help put them into context with your other investments, I would suggest they would be classed as* ***'less risky' than the third party loans you have already made."*** [my emphasis]

And, in July 2013, Mr R said in respect of a visit he'd made to Dolphin that:

> *"…I was genuinely blown away with what I saw. So much so, that quite unexpectedly, it dawned on me during the flight home that it's* ***not just people like you who should take advantage of this opportunity. I should do so to."*** [my emphasis]

What should Westerby reasonably have done?

Westerby could simply have concluded that, given the potential risks of consumer detriment – which I think were clear and obvious at the time – it shouldn't have continued accepting applications from Firm K and before it received Mr B's application. That would have been a fair and reasonable step to take, in the circumstances. Alternatively, Westerby could have taken fair and reasonable steps to try to address the potential risks of consumer detriment in the first instance.

Requesting information directly from Firm K

As part of its due diligence on Firm K, I think it's fair and reasonable to expect Westerby, in line with its regulatory obligations, to have made some specific enquiries and obtained information about Firm K's business model at the outset. Westerby ought to have found out more about how Firm K was operating *before* it accepted business from it.

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

The October 2013 finalised SIPP guidance gave an example of good practice as:

> *"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."*

I think that Westerby, prior to accepting business from Firm K, should have checked with it about things like: how it came into contact with potential clients and the types of clients it dealt with, what agreements it had in place with them, whether all of the clients it was introducing were being offered full regulated advice, what its arrangements with any unregulated businesses or third parties were, how and why retail clients were interested in making these esoteric investments, whether it was aware of anyone else providing information to clients and what material was being provided to clients by it. And it was also

open to Westerby to mention to Firm K any requirements it had before doing so, such as for full regulated advice to be made available to applicants.

While Westerby has said that it had Terms of Business ('TOB') in place with Firm K, the only evidence I can see that Westerby has sent in support of this is a document labelled *"IFA TOB"* that Firm K completed. However, this dates from March 2022 and was a *"Know Your Introducer"* questionnaire, rather than a TOB. This questionnaire said at the top that it was for Westerby to understand Firm K's organisation better prior to it considering issuing TOB, I think also suggesting Westerby hadn't previously sought to gather this type of information from Firm K or considered putting TOB in place with it. I haven't seen anything to suggest that Westerby had previously put TOB in place with Firm K. And while Firm K said on this questionnaire that it provided full advice in respect of pension transfers and the underlying investments, including on non-standard investments, this was completed many years after Firm K had started introducing business to Westerby.

I can see from the document mentioned above, titled *"Introducing IFA's to WTS"*, that Westerby said it had contact with Firm K in September 2012 and that half-yearly meetings had been proposed on top of the usual daily contact. I haven't seen any evidence to show whether these half yearly meetings did in fact take place and what was discussed at these though. Westerby has provided evidence of an agenda for a meeting with Firm K in March 2013, but I can't see that Westerby has provided us with evidence of what was discussed. And, in any event, Westerby hasn't suggested or provided evidence to show that it discussed Firm K's business model with it *before* accepting introductions from it.

Westerby has said that Firm K provided assurance it had controls to ensure only clients for whom higher-risk non-standard assets might be suitable would be introduced to Westerby. But as I've said, I've seen no evidence that Westerby obtained the type of information I've set out above from Firm K before accepting business from it.

And, in any event, I think it's more likely than not that if Westerby had asked Firm K for the type of information I've set out then it would have provided a full response to the information sought. And Westerby would therefore have become aware of Firm K's restricted advice and likely business model, for example, and the resulting significant potential risk of consumer detriment. Either from those initial discussions with it or the more detailed discussions this ought to have led to.

As I've said, Firm K has told us that it used the SIPP transfer suitability template that I've mentioned above – it was open with our service about that – and I've no reason to think that it wouldn't have provided Westerby with this type of information or a copy of this, for example, as part of answering enquiries.

In the alternative, if Firm K had been unwilling to answer such questions if put to it by Westerby, I think Westerby should simply then have declined to accept introductions from Firm K.

Westerby might say that it didn't have to obtain this information from Firm K. But I think this was a fair and reasonable step to take, in the circumstances, to meet its regulatory obligations and good industry practice. And, in that case, I think Westerby should have concluded, and before it accepted Mr B's business from Firm K, that it shouldn't accept introductions from it.

Making independent checks

Considering what I've said above about the potential risks of consumer detriment from the pattern of business being introduced to it by Firm K, for example, I think it would also have

been fair and reasonable for Westerby, to meet its regulatory obligations and good industry practice, to have taken independent steps to enhance its understanding of the introductions it was receiving from Firm K.

The 2009 thematic review report said:

> *"…we would expect* [SIPP operators] *to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification."*

So, I think it would have been fair and reasonable for Westerby to speak to some applicants directly and to ask whether they'd been offered full regulated advice on their transactions and/or seek copies of suitability reports, for example.

To be clear, I accept Westerby couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view, such steps included addressing a potential risk of consumer detriment by speaking to applicants and/or having sight of advice letters. This could have provided Westerby with further insight into Firm K's business model and helped to clarify to Westerby whether full regulated advice on the overall proposition was being offered/given. I think these were fair and reasonable steps to take in reaction to the risks of consumer detriment I've mentioned.

If Westerby had undertaken the type of due diligence I've mentioned above, then I think it ought reasonably to have identified, and before it accepted Mr B's application, that Firm K's business carried a significant risk of consumer detriment. There were anomalous features, Firm K had a disregard for its consumers' best interests and wasn't meeting many regulatory obligations.

As I've said, it seems that Firm K (and Firm S, which I think was closely associated with Firm K for reasons given above) was seeking to transfer consumers' pension monies to Westerby SIPPs with the intention of these being invested in higher-risk esoteric investments, like Dolphin, without having offered or provided such customers, including Mr B, with full regulated advice. This is an unusual role for an advisory firm to take and against regulatory requirements. And I think Westerby either was aware, or ought reasonably to have been aware, that the type of business Firm K was introducing was high risk and therefore carried a potential risk of consumer detriment, which could result in customers losing their pension savings.

In summary

I think Westerby should have identified that the business it was receiving from Firm K raised serious questions about its motivation and competency. And I think Westerby should have concluded, and before it received Mr B's business from Firm K, that it shouldn't accept introductions from Firm K. I therefore conclude that it's fair and reasonable in the circumstances to say that Westerby shouldn't have accepted Mr B's SIPP application from Firm K.

Westerby didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr B fairly by accepting his application from Firm K. To my mind, Westerby didn't meet its regulatory obligations or good industry practice at the relevant time and allowed Mr B to be put at significant risk of detriment as a result.

As I've explained above, Westerby shouldn't have accepted Mr B's introduction from Firm K in the first place. I think it's fair and reasonable to uphold this complaint on that basis alone. But for completeness, I've considered the due diligence that Westerby carried out on the Dolphin investment and have also decided to uphold Mr B's complaint in relation to this. When doing so, I've taken the same approach as I did to considering the due diligence undertaken on Firm K.

Westerby's due diligence on the Dolphin investment

I think Westerby's obligations certainly went beyond checking that the Dolphin investment existed and wouldn't result in tax charges and I think it understood this at the time. I say this because Westerby has provided us with some of the information that it's said it considered before accepting the 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 B's 2014 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.
- 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 example, 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.

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

- 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 were granted legal charge over the property, which was 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 was paid half yearly under the Income Option, although no documentation seen indicated when the payment dates were.
- There was no exit strategy, as each project was tied into a SPV established for the

particular listed building. The project dictated when the SPV closed and the process was meant to be automatic.

- All investment monies would be held in a protected solicitors account with the German law firm.
- Valuation reports would be provided on an annual basis, but there didn't appear to be anything within the documentation that stated where the valuations would be published.
- As the investment was in Germany, no FSCS protection was offered. Only claims against an FCA regulated adviser, where advice was given, might 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. We've only been provided with a copy dated much later, from 2017.
    - Undated Frequently Asked Questions Sheet – I can't see that Westerby has provided us with a copy of this.
    - Information Memorandum dated September 2013 – I can't see that Westerby has provided us with a copy of this. 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 the information that's been made available to us to date, I don't think Westerby's actions went far enough. As I explain in more detail below, I'm not satisfied that Westerby undertook sufficient due diligence on the Dolphin investment before it decided to accept this into its SIPPs. Further, based on what it knew or ought to have known had it undertaken sufficient due diligence, I think Westerby failed to draw a reasonable conclusion on accepting the Dolphin investment into its SIPPs at all.

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

Third-party report

In respect of the information about the Dolphin investment compiled for Westerby by a third party, it provided Westerby with what I think was a brief report that was intended to assess whether the investment was capable of being held within a SIPP. It seems that it was based on material provided to Westerby by Dolphin as part of its due diligence pack. And the report made 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 this report was commissioned by Westerby in October 2013, when I can see 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' approach must be to *"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:

> *"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 the 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 the brochure 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 was 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, which had agreed to purchase at least €100m worth of property from Dolphin, per annum, over the next five years.
- Investment funds were sent directly to the German law firm, which held the funds in a secure account until the purchase of the property took place and security documentation was issued.
- *"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 various 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. Therefore, 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 there was no recourse to this service or the FSCS.
- Although this was a short-term secured investment, there could be no guarantee the specified (or any) return would 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 would be required to bear the financial risks of the investment, which they should understand and satisfy themselves was 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 this service or 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 form, declaring 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 the FSCS or recourse to this service. And while it said this was an unregulated investment, it didn't say or clearly explain that it was 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 wasn't 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 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 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's 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 have 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 which 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, 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 had 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 the 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 promotion 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 issued 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 and 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 January to December 2012, including details for 2011, wasn’t acquired 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 issued a year and half later, in June 2017.
    - Dolphin Trust GmbH annual financial statement for the period January to December 2016, including details for 2015, was dated as of 31 December 2016 but marked as a ‘draft’.

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

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

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

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

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

I think 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 wouldn't 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.

The investment structure

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 which 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 annual interest was said to be paid half yearly under the Income Option, no documentation seen indicated when the payment dates were.

- The third-party report noted that valuation reports were meant to be provided on an

annual basis, but that there didn't appear to be anything within the documentation that stated 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 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 addition, a letter from the German law firm dated 31 October 2012 clearly set out that there should be two appendices 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 appendices being completed setting out this information. I haven't been provided with a copy for Mr B and I can't see that Westerby queried the lack of completed appendices 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 we 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:

  "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:

"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 investors as to the security of the investment and that it was again *"low risk"*. For example, the UK brochure referenced above said:

  "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 were 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…"

- In respect of commission, the insolvency administrator 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 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 this 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, when 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 as 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 didn't 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 have 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 Dolphin 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 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, 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, in accepting Mr B's applications to invest in Dolphin, allowed his funds to be put at significant risk.

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

And I'm also not saying that Westerby shouldn't have allowed the Dolphin investment into its SIPPs because it was high risk. Instead, my fair and reasonable opinion 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 B's Dolphin investment instructions, 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.

Therefore, 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 B'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 B applied to invest in this with it. And it's the failure of Westerby's due diligence that's resulted in Mr B being treated unfairly and unreasonably.

In summary, I don't think Westerby acted with due skill, care and diligence, or treated Mr B fairly, by permitting the 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 B's pension fund to be put at significant risk as a result.

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

The **Beech Holdings investments**

Westerby had a duty to conduct due diligence and give thought to whether to accept Mr B's later investment instructions in 2015, 2016 and 2018 to invest in Beech Holdings. That's consistent with the Principles and the regulator's publications set out earlier in this decision.

In respect of Mr B's particular application to initially invest in Beech, given Westerby's compliance team's email correspondence at the time – as set out in 'What happened' above – surrounding his non-standard asset questionnaire, It seems Westerby was only willing to accept Mr B's application on the basis he'd also previously had experience of investing in Dolphin. It's clear Westerby felt that the limited other investment experience Mr B had aside from Dolphin wasn't, from Westerby's point of view, enough by itself to accept his self-certification as a sophisticated investor for him to invest in Beech. As I've said though, Westerby shouldn't have permitted the Dolphin investment within its SIPPs, including Mr B's, in the first place.

I don't think it's necessary for me to also consider Westerby's due diligence on the Beech Holdings investment or the consideration it gave to Mr B's particular Beech applications any further though, given my conclusion that it failed to comply with its regulatory obligations and good industry practice at the outset by accepting Mr B's business from Firm K in the first place and then his initial investment instructions to invest in Dolphin.

I'm satisfied that Westerby wasn't treating Mr B fairly when it did so. And for reasons given and which I'll come on to further below, I think if Westerby had rejected his SIPP application, it's unlikely Mr B would have gone on the make the Dolphin and Beech Holdings investments.

So, I've not gone on to consider the due diligence Westerby has said it carried out on the Beech Holdings investment and whether this was sufficient to meet its regulatory obligations.

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

In similar cases, Westerby has said it had to act in accordance with its client's instructions and that it was obliged to proceed in accordance with COBS 11.2.19 R, as this required it to

execute the specific investment instructions of its client once the SIPP had been established.

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

Having to execute the transaction as a result of COBS 11.2.19 R 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 Westerby's argument on this point is relevant to its obligations under the Principles to decide whether or not to accept an application to open a SIPP or to execute investment instructions i.e. to proceed with the application.

Indemnities

In my view, it's fair and reasonable to say that just having Mr B sign declarations wasn't an effective way for Westerby to meet its regulatory obligations to treat him fairly, given the concerns Westerby ought to have had about the intended investments. Such forms intended to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on such indemnities when Westerby knew, or ought to have known, the intended investments were putting him at significant risk wasn't the fair and reasonable thing to do.

In the circumstances, I think very little comfort could have been taken from any declaration stating that Mr B took responsibility for his decisions and understood the risks. Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse to accept Mr B's SIPP application and instructions to invest in Dolphin.

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

Westerby had to act in a way that was consistent with the regulatory obligations I've set out in this decision. In my view, Westerby was not treating Mr B fairly by asking him to sign indemnities absolving it of all responsibility, and relying on such indemnities, when it

ought to have known that Mr B was being put at significant risk.

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

Is it fair to ask Westerby to compensate Mr B?

In deciding whether Westerby is responsible for any losses that Mr B has suffered I need to consider what would have happened if Westerby had done what it should have done i.e. had it declined his SIPP application and instructions to invest in Dolphin.

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

For the reasons I've given, had Westerby acted fairly and reasonably it should have concluded that it shouldn't accept business from Firm K and prior to Mr B's introduction to it. And it should also not have permitted the Dolphin investment within its SIPPs and prior to Mr B's applications to invest in this through his Westerby SIPP. That should have been the end of the matter – Westerby should have told Mr B that it couldn't accept the business.

And I'm not persuaded by Westerby's argument that Mr B would have proceeded with the same or similar investments elsewhere with another provider regardless of its involvement. I don't think there is any persuasive evidence Mr B would have done so had Westerby declined his applications.

As set out above, Firm K's 2013 suitability report noted that Mr B was not able to self-certify himself as a sophisticated investor. And the financial and investment experience Mr B detailed on the non-standard asset questionnaire for his first Beech Holdings investment suggested his investment experience was limited to his Dolphin investments and potentially a small number of transactions relating to listed shares. The questionnaire didn't indicate that Mr B was someone who frequently sought out high risk non-standard investments, like Dolphin and Beech, prior to dealing with Firm K.

So, if Westerby had explained to Mr B even in general terms why it would not accept his applications or that it was terminating the transaction, I think Mr B is likely to have lost trust in the Firm K. And without the firm(s) involvement I don't think Mr B would have otherwise had any interest in investing in making high risk non-standard investments, such as Dolphin and Beech. As I've said, it was Firm K that referred Mr B to Firm S in respect of Dolphin and I note that Mr B was introduced to the Beech Holdings investment while still a client of Firm K. So I find it very unlikely that Mr B would later still have sought to invest in this elsewhere.

Had Westerby acted fairly and reasonably, and in accordance with its regulatory obligations and good industry practice, it should have concluded that it should not accept business from Firm B and that it shouldn't permit the Dolphin investment to be held in its SIPPs at all, and prior to receiving Mr B's respective applications. In which case, that should have been the end of the matter. Westerby should have told Mr B that it could not accept the business.

And, for the reasons given, I am satisfied that if that had happened Mr B wouldn't have transferred to a Westerby SIPP and then made the high-risk non-standard investments that he did, the arrangement would not have come about in the first place, and the loss he suffered could have been avoided.

And, in any event, I don't think it's fair and reasonable to say that Westerby shouldn't compensate Mr B for his loss based on speculation that another SIPP operator would have made the same mistakes as I think it did. I think it's fair instead to assume that another SIPP provider acting reasonably would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted business from Firm B that was operating a restricted advice model. And that another provider would have also complied with its regulatory obligations and good industry practice and therefore wouldn't have permitted the Dolphin investment into its SIPPs, and prior to Mr B's application to invest in this.

So 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. And, whilst I accept other parties might have some responsibility for initiating the course of action that led to Mr B's loss, I consider that Westerby failed to comply with its own obligations and didn't put a stop to the transactions proceeding by declining to accept Mr B's applications when it had the opportunity to do so.

I've also considered paragraph 154 of the *Adams* 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 it wouldn't be fair to say Mr B's actions mean he should bear the loss arising as a result of Westerby's failings. I'm satisfied that Mr B, unlike Mr Adams, wasn't eager to make the investments for reasons other than securing the best pension for himself. And that, in any event, Mr B's SIPP application and Dolphin investment instructions should never have been accepted by Westerby.

In making these findings, I think it's reasonable to make an award against Westerby that requires it to compensate Mr B for the full amount of his loss. Westerby accepted Mr B's business. And, but for Westerby's failings, I'm satisfied that Mr B wouldn't have made the investments that he did.
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).

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

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

Mr B taking responsibility for his own investment decisions

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

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

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

Putting things right

My aim in awarding fair compensation is to put Mr B as closely as possible back into the position he would likely have been in had it not been for Westerby's 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 B'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 B invested in Dolphin. It said it sees no reason to assume that the non-Dolphin investments wouldn't have been made by Mr B elsewhere. And that the current redress makes Westerby, in effect, the guarantor for all Mr B's other investments made via his SIPP, regardless of whether there's any finding of fault against it in respect of those.

Having carefully considered redress and Westerby's comments, for the reasons I've set out, I think that opening the Westerby SIPP in this case was driven by the fact it was accepting business from Firm K and because it was permitting the Dolphin investment within its SIPPs. Westerby shouldn't have accepted that business nor permitted this investment in the first place. And I think that Mr B wouldn't have otherwise switched to a Westerby SIPP and invested in Dolphin if it had complied with its obligations.

I recognise Mr B wanted to transfer his pensions to take tax-free cash, firstly to go towards completion costs for his investment property purchase and later to pay off a loan. He was motivated to do so such that when another SIPP operator declined to proceed with his application, he explored alternative avenues to achieve this. So, even if Westerby had complied with its obligations, Mr B may well have still proceeded to transfer his pensions elsewhere or he might have gone down another route entirely – we don't know with certainty. I can't state definitively into what holdings, and in what proportions the monies would have otherwise been invested. And, in the circumstances, it isn't reasonable to reconstruct everything that happened in Mr B'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 B 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 light of the above, 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 transferred into the Westerby SIPP if they'd not been transferred into this.

2. Obtain the actual current value of Mr B'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 B'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 B £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. Calculate a current notional value, as at the date of this decision, of the monies that were transferred into the Westerby SIPP if they'd not been transferred into it. To do this, Westerby should calculate what the monies transferred 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 switched 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 B 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 B.

2. Obtain the actual current value of Mr B'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 B's pension provisions.

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

   I'm satisfied that Mr B's Westerby SIPP only still exists because of the illiquid investments that are held within it. And that but for these investments Mr B'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, and if the total calculated redress in this complaint is less than £160,000, Westerby may ask Mr B to provide an undertaking to account to it for the net amount of any future payment the SIPP may receive from the investments. That undertaking should allow for the effect of any tax and charges on the amount Mr B may receive from the investments after the date of my final decision, and any eventual sums she would be able to access from the SIPP in respect of the investment. 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 B 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 B to provide an undertaking to account to it for the net amount of any further payment the SIPP may receive from the investments thereafter. That undertaking should allow for the effect of any tax and charges on the amount Mr B may receive from the investment from that point, and any eventual sums he would be able to access from the SIPP in respect of the investment Westerby will need to meet any costs in drawing up the undertaking.

5. Pay an amount into Mr B'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 B'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 B's actual or expected marginal rate of tax in retirement at his selected retirement age.

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

In my provisional decision I said that if either Mr B 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 B is likely to be a basic rate taxpayer at his selected retirement age.

As set out above, Mr B has said that he doesn't currently pay any income tax, as his income is below the threshold as he only receives basic state pension. Taking into consideration the annual basic state pension amount alongside the compensation that may be payable to Mr B in respect of his Westerby SIPP pension monies and the income tax rates, I'm not persuaded that the above presumption is unreasonable.

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

   In addition to the financial loss that Mr B has suffered as a result of the problems with his pension, I think that the loss suffered to Mr B's pension provision has likely caused him distress. Mr B lost some of his pension provision, Mr B is in his 70's and I think this is likely to have caused him 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 B in a clear, simple format.

SIPP fees

If the investments can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mr B to have to continue to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid 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 B or into his SIPP within 28 days of the date Westerby receives notification of his acceptance of any final decision I make. The calculation should be carried out as at the date of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days.

Assignment of rights

If Westerby believes other parties to be wholly or partly responsible for the loss, it's free to pursue those other parties. So, compensation payable to Mr B can be contingent on the assignment by him to Westerby of any rights of action he may have against other parties in relation to the transfers to the SIPP and the investments if Westerby requests this. The assignment should be given in terms that ensure any amount recovered by Westerby up to the balance due to Mr B is paid to him. Westerby should only benefit from the assignment once Mr B has been fully compensated for his loss (to be clear, this includes any loss that's in excess of our award limit). Westerby should cover the reasonable cost of drawing up, and Mr B's taking advice on and approving, any assignment required.

My final decision

For the reasons given, it's my decision that Mr B'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 B the compensation amount as set out in the steps above, up to the 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 B the balance.

My recommendation would not be binding. Further, it's unlikely that Mr B can accept my final decision when issued and go to court to ask for the balance. Mr B 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 B to accept or reject my decision before 30 July 2025.

Holly Jackson
Ombudsman