Complaint

Mrs W says Abana Unipessoal Lda (Abana) gave her unsuitable advice about switching her personal pension funds into a Self-invested Personal Pension with unregulated investments, which caused her to suffer a loss.

background

Mrs W and her husband were re-mortgaging in 2013 and during the process it was recommended they talk to an adviser about their pension arrangements.

Mrs and Mr W subsequently met Mr F2 in the spring of 2014 to discuss their pension provisions, and he arranged for them to meet Mr F who gave them advice about Self-invested Personal Pensions (SIPPs) and investment matters. Both individuals represented themselves as working on behalf of Abana.

Although meetings between Mrs and Mr W and the advisers took place at the same time, and the documentation was completed together, my decision will focus on Mrs W's pension arrangements. A separate complaint has been set-up to address Mr W's situation.

Mrs W had four personal pension plans, two with Aviva Life and two with Scottish Widows. She'd started making contributions to these when she was 19. The funds were built up over a decade of her early working life with different companies. Her pensions were worth about £22,500.

Over the course of several meetings Mrs W was persuaded to switch her personal pension provisions to a SIPP with Avalon Investment Services Limited (Avalon). Investments were made via a bond with a business called ePortfolio Solutions in two unregulated funds. These were called the Brighton SPC - Kijani Commodity Fund (Kijani); and the Swiss Asset Micro Assist Inc Fund (SAMAIF).

Unfortunately, in July 2015 Mrs W was informed by Avalon that one of her funds had been suspended and that requests from customers for redemption of other funds within the same portfolio were on hold while the platform administrator was trying resolve the issue with the Kijani fund. She was facing substantial losses.

I understand the Financial Conduct Authority (FCA) became involved with Abana when it was made aware the firm may have been operating in the UK outside of its permissions. At the relevant time, Abana was an EEA authorised firm and passported into the UK under the insurance mediation directive (IMD). However, it appeared to be providing services in the UK, namely giving advice and making arrangements in relation to pensions, without the required top-up permissions it required from the FCA.
Abana has told us the FCA directed that an independent third party should review the advice the firm had given UK consumers to determine whether it had been suitable, and if not, to assess any detriment. Abana has said that a consultancy service specialising in regulatory compliance was appointed to carry out this review.

Mrs W was asked by the specialist consultancy to complete a questionnaire related to the switch of her personal pensions in October 2015. It wrote to her on 2 February 2016 with its conclusions. It said the advice she'd been given by Mr F had been unsuitable. And on 2 August 2016 it set out how Mrs W should be put back into the position she'd have been in had the switch not taken place.

Although I note Mrs W wanted a small adjustment to the redress proposed, this doesn't appear to have been at the heart of the lack of substantive progress in her receiving the compensation.

Mrs W brought her complaint to this Service in September 2017. She had various concerns about what had happened. She said she had been given poor advice, the investments made through her SIPP were inappropriate and she wanted redress based on the offer she'd received in August 2016.

Initially, Abana confirmed Mrs W had accepted the offer of redress detailed in the review carried out by the regulatory compliance consultancy. It said the matter was being dealt with by its professional indemnity insurer. But later it changed its position and argued it wasn't responsible for the advice she'd received, so it wouldn't pay her compensation.

Abana submits that the individuals involved in this transaction with Mrs W weren't its appointed representatives (ARs), or its agents. It says the people responsible had entered into business arrangements with Avalon without its approval. So Abana says it's not responsible for the acts or omissions in this case and challenged our jurisdiction to consider Mrs W's complaint against it.

The investigator concluded that we could look into Mrs W's complaint. And after considering the merits of the case he went on to uphold it. Abana disagreed and so this case has been passed to me to consider. Before moving on, I'll deal with a few of the matters raised by Abana in responding to this Service.

Abana has said Avalon, as the SIPP provider, was regulated and allegedly accepted business introductions from an unregulated party and instructions to buy unregulated investments. It says Avalon had a responsibility to carry out due diligence.

Further, Abana suggests the problems identified in Mrs W's case also rest at the door of another SIPP provider which it says had a relationship with Mr F. It also cites a fund management company as having responsibility. And it goes on to question actions taken by the FCA in 2015 which it says could've had a material impact on the losses Mrs W and others suffered.

What Abana asserts may or may not be the case in relation to other regulated firms and individuals. But I'm not considering a complaint against those parties here. Mrs W has brought her complaint against Abana and that's what I need to address.

Abana has also said that in a meeting it held with another SIPP provider and Mr F in May 2013, it was told some SIPP products were insurance based and therefore compliant under IMD permissions. It's not clear to me if Abana is saying it was misled by other parties into thinking it could carry on the activities that are the subject of this complaint. Whatever the case, as a regulated firm it's responsible for its own regulatory compliance and its own acts and omissions.

Abana hasn't provided much information and evidence from the time of the events complained about. But it has offered arguments in support of its position at various points over the past few years. I've not provided a detailed response to all the arguments it has posed. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. While I have taken account and considered all Abana's submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint.

So, I'll now turn to whether this Service has jurisdiction in this case.

my findings

the parties involved in this case

Before I decide whether this Service has jurisdiction to consider Mrs W's complaint against Abana, I thought it would be helpful to set out some of what we know about the parties who may have been involved in the transaction leading to this complaint.

There were several entities and individuals who could potentially have been involved, and the relationships between them aren't entirely clear. Some information is missing. Some firms no longer exist as a going concern. So, in this regard, and given the passage of time, the case is difficult to get to the bottom of.

However, we've been provided with some helpful documents by the organisation which took on the administration of Mrs W's SIPP scheme. And these documents have been used to help us build a picture of the key relationships between the various parties.

Abana Unipessoal Lda

Abana is a Portuguese advisory firm that, at the relevant time, passported into the UK under the IMD on a branch passport. So, at the relevant time, it was an "EEA authorised" firm.

Abana's business model appears to have involved generating fees from advisors conducting activities in the UK. It has previously been attached to several firms and individuals (see tab "Appointed representatives / tied agents / PSD or EMD agents" under Abana's entry on the Financial Services Register (the Register)).

Mr F

Mr F is a central figure in this complaint. He met with Mrs W and advised her to switch her pension pot to a SIPP with Avalon (and to invest in the unregulated Kijani and SAMAIF funds). It appears he also made arrangements for this to happen. One of the matters I will need to establish is whether in conducting these activities, Mr F was acting on behalf of Abana (either as its AR or its agent).

Mr F isn't listed on the FCA register as an AR of Abana. However, this isn't a requirement under section 39(3) of the Financial Services and Markets Act 2000 (FSMA), so it's not determinative of whether or not he was acting as Abana's AR. I will examine the relationship between Abana and Mr F in more detail below.

New Beginnings (Financial Solutions) Limited (New Beginnings)

New Beginnings was listed on the FCA register as an AR of Abana from 11 March 2014 until 6 February 2015. Mr F was a minority shareholder of this firm.

We have been provided with a copy of the AR agreement between Abana and New Beginnings which is dated 7 March 2014. The recitals of the agreement set out the following:

> ***WHEREAS:***
>
> *(1) The Company [Abana] is in the business of international wealth management, life assurance and general insurance mediation and is authorised and regulated by the Instituto de Seguros de Portugal ("ISP") with registration number 412378472. The Company has established a branch in England with company registration FC031241 with limited regulation by the Financial Conduct Authority ("FCA") number 597069 and authorised by the DGSFP In Spain.*
>
> *(2) The Company hereby appoints the AR [New Beginnings] as its appointed representative, subject to the terms of this agreement whereby the Company shall authorise and the AR shall conduct the Activities defined herein.*

The definition section of the agreement sets out:

> *"Activities" means the activities for which the Company is authorised, as agreed between the parties as detailed in the Schedule hereto (as amended from time to time);*
>
> *"AR" means the AR (as set out above) and any employee, officer or agent or any person or persons acting in conjunction with or appointed by or under the control of the AR and any person or persons connected with the AR*

We were not provided with a copy of the Schedule referred to in the agreement.

[Mr F] Associates

[Mr F] Associates isn't a legal entity or company in its own right. It appears to be a trading name Mr F began using for activities he was carrying out from a certain point in time.

At the end of May 2014, Mr F told Avalon that he was in the process of getting his own FCA authorisation (we understand he had previously been submitting business to Avalon using Abana's authorisation number). He made an application for new terms of business and this was acknowledged by Avalon, which noted internally that he was leaving Abana.

In June 2014 Mr F and Avalon were trying to finalise the arrangements for Mr F to be submitting business to them on his own account. For example, the parties discussed ensuring appropriate letters of authority for Mr F's clients were in place and were in the process of agreeing when payments to his "new agency" would be effective from.

Mr F's FCA authorisation hadn't been received by July 2014, so he agreed with Avalon that in the interim, business would be conducted through New Beginnings, with [Mr F] Associates acting as part of that network.

Mr F2

Mr F2 was the advisor who first met with Mrs W and gave her advice about her pension arrangements. He signed the SIPP and ePortfolio Solutions applications. Like Mr F, he was also a minority shareholder of New Beginnings. Given testimony we've had from Mr and Mrs W, it seems likely Mr F2 had a role working for [Mr F] Associates during 2014. MrF2 didn't have his own FCA authorisation.

Avalon Investment Services Limited

Avalon was a UK based SIPP provider and administrator, regulated by the FCA. Amongst other activities, it was authorised to arrange deals in investments and to establish, operate and wind up a pension scheme. Mrs W is unhappy about the SIPP arrangements, including the unregulated investments it facilitated.

Avalon was placed into administration in February 2016 and was dissolved in August 2018. I understand the Financial Services Compensation Scheme (FSCS) is currently considering claims against the firm (see https://www.fscs.org.uk/failed-firms/avalon/).

can our Service consider Mrs W's complaint against Abana?

the jurisdiction of the ombudsman service

The ombudsman service can consider a complaint under our compulsory jurisdiction if it relates to an act or omission by a "firm" in the carrying on of one or more listed activities, including regulated activities (DISP 2.3.1 R). A "firm" includes an incoming EEA firm. Abana was, at the relevant time, an incoming EEA firm.

DISP 2.3.3 G provides further guidance on what acts or omissions can be considered as a complaint (bolding is my emphasis) and sets out that:

*"complaints about acts or omissions include those in respect of activities for which the firm … is responsible (including business of any **appointed representative or agent** for which the firm … has accepted responsibility)".*

So, there are two questions to be determined before I can decide whether this complaint can be considered under the compulsory jurisdiction of this service:

1. Were the acts about which Mrs W complains done in the carrying on of a regulated activity?

2. Was the principal firm, Abana, responsible for those acts?

were the acts Mrs W complained about done in carrying on a regulated activity?

Mrs W has complained about Abana's role in her receiving unsuitable pension and investment advice. And the subsequent arrangements made on her behalf to switch her personal pensions into a SIPP with Avalon and make investments in the unregulated Kijani and SAMAIF funds. Mrs W says she hasn't been compensated despite a regulatory compliance consultancy previously finding that the advice she'd received from Mr F had been unsuitable and that Abana should put things right.

Section 22 of FSMA defines "regulated activities" as follows:

> *"(1) An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and—*
>
> *(a) relates to an investment of a specified kind;…*
>
> *(4) "Investment" includes any asset, right or interest.*
>
> *(5) "Specified" means specified in an order made by the Treasury."*

The relevant Treasury order is the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO). Article 4 provides:

> *"4. – Specified activities: general*
>
> *(1) The following provisions of this Part specify kinds of activity for the purposes of section 22(1) of the Act (and accordingly any activity of one of those kinds, which is carried on by way of business and relates to an investment of a kind specified by any provision of Part III and applicable to that activity, is regulated activity for the purposes of the Act)."*

Article 82 of the RAO provides that rights under a personal pension scheme are a specified investment. A SIPP is a personal pension scheme. So, giving advice about a SIPP is a regulated activity.

Mrs W wanted advice about her personal pension plans. She was put in touch with Mr F2 and Mr F. Both held themselves out as working for Abana. We've not been provided with a fact find, risk appetite assessment, suitability report or recommendation letter – all we have is the testimony from Mrs W about what Mr F told her when they met at her home.

Like the investigator, I've no reason to doubt Mrs W when she says Mr F gave her advice about establishing the SIPP and making the investments. It's highly unlikely she would've embarked on a complicated investment strategy using a significant element her pension provisions without this being recommended to her.

I'm satisfied that Mr F provided advice to Mrs W which led to her switching out of her personal pension plans and investing in a SIPP with Avalon. She says he told her that because the unregulated investments were in commodities these were low risk and that they would deliver a good return.

In addition, under Article 25(1) RAO, making arrangements for another person to buy and sell a specified investment is a regulated activity. And Article 25(2) RAO says making arrangements with a view to a person who participates in the arrangements for buying and selling these types of investments is also a regulated activity.

The FCA's Perimeter Guidance Manual (PERG) says the following about Article 25(1):

"The activity of arranging (bringing about) deals in investments is aimed at arrangements that would have the direct effect that a particular transaction is concluded (that is, arrangements that bring it about)."

It then says the following about Article 25(2):

"The activity of making arrangements with a view to transactions in investments is concerned with arrangements of an ongoing nature whose purpose is to facilitate the entering into of transactions by other parties. This activity has a potentially broad scope and typically applies in one of two scenarios. These are where a person provides arrangements of some kind:

(1) to enable or assist investors to deal with or through a particular firm (such as the arrangements made by introducers); or

(2) to facilitate the entering into of transactions directly by the parties… (such as multilateral trading facilities of any kind …exchanges, clearing houses and service companies (for example, persons who provide communication facilities for the routing of orders or the negotiation of transactions))."

Mr F's details were included on Mrs W's ePortfolio Solutions application. And both this and her SIPP application had Abana's details on. Avalon dealt with him as the key contact in this transaction, for example in investment matters. Mr F led it to believe that he was introducing business with Abana's authority.

PERG 12.3 makes it clear that the circumstances in which rights under a personal pension scheme may be bought or sold include when the member first joins the scheme and acquires all the rights that the scheme provides to its members (since he has bought those rights).

I'm satisfied that this constitutes the regulated activity of arranging the pension scheme with Avalon. And, I'm satisfied that the actions of Mr F constitute making arrangements for another person to buy and sell a specified investment under Article 25(1) of the RAO.

Abana says it's taken advice about the regulations. It asserts that it can rely on certain exclusions in the RAO (which, if applicable, would bring the certain activities outside the scope of Article 25). For example, it says that the exclusion at Article 29 applies because Mr F was an unauthorised arranger.

Even if I was to accept Abana's point about Mr F's status, for the exclusion at article 29 to apply, it's necessary that, in return for making the arrangements, Mr F didn't receive from any person - other than Mrs W – payment or other reward arising out of their making the arrangements.

In a recent submission, Abana said Mr F received payment at the clients request, direct from the assets of the Trust overseeing the pension fund. It also said this wasn't commission. But I think the actual arrangement was supposed to work along the lines set out in the AR agreement between Mr F and Abana. For example, at paragraphs 5 of that document it says

"The Company will pay the AR 100% of the Commission to which the AR becomes entitled as a result of the Activities."

The agreement goes on to make further provision for its control and adjustment of payments made. The commission/introducer fees were meant to flow from the funds injected into the pension fund with Avalon, from it to Abana and then to Mr F. So, the exclusion at article 29 doesn't apply.

In its last submission Abana asked for evidence of the payments it received via Avalon in relation to the arrangement of certain SIPPs. It should have a full record of all the payments it received in relation to Mr F's activities. I can see it requested some of this information on 20 February 2017 when its Director emailed Avalon to say:

"*We are missing all adviser fee statements except for the April 2014 payment of £10278.73 [which included commission payments]. This information has been requested by the FCA as …evidence of the fees that were paid to Abana*."

Avalon responded attaching copies of the statements from March 2014 to September 2014 saying it had no other statements showing payments made to Abana. I've no doubt payment matters were complicated by discussions ongoing from between Mr F and Avalon about payment arrangements from May 2014 – and I refer to these later in this decision.

In any case, in relation to the arguments around article 29, as I'll set out later in this decision, I'm satisfied Mr F was acting as an agent of Abana. So, Abana is the authorised person here. And it's arguments are not telling.

Abana also refers to the exclusion set out at article 33 and says that an independent fund manager was appointed to manage the assets of the SIPP. I disagree. I've seen no evidence that Mr F or Avalon were introducing Mrs W to an appropriate party under this provision.

I can see in a recent submission Abana interprets what I've said here is that I've seen no evidence of the involvement of Asset Management International (AMI). This was a non-regulated fund management organisation that is associated with e-Portfolio Solutions.

To clarify, I think Mr F on behalf of Abana made the introduction to Avalon as an authorised person. But this wasn't for the purpose for it to provide independent advice or the independent exercise of discretion in relation to investments generally or in relation to any class of investments to which the arrangements relate. So, the exclusion at article 33 does not apply.

So, I'm satisfied that this complaint involves regulated activities – giving advice on switching from personal pensions to a SIPP with Avalon and investing in unregulated funds and making arrangements to give effect to these matters.

was Abana responsible for the acts and omissions of Mr F2 and/or Mr F?

The next thing I must consider is whether Abana is responsible for the acts and omissions of Mr F2 and/or Mr F. As mentioned above, the guidance at DISP 2.3.3G says (bolding is my emphasis):

> *"complaints about acts or omissions include those in respect of activities for which the firm…is responsible (including business of any **appointed representative or agent** for which the firm…has accepted responsibility)".*

Appointed representatives

Section 39 FSMA sets out the following:

> *"Exemption of appointed representatives.*
>
> *(1) If a person (other than an authorised person)–*
>
> *(a) is a party to a contract with an authorised person ("his principal") which–*
>
> *(i) permits or requires him to carry on business of a prescribed description, and*

(ii) complies with such requirements as may be prescribed, and

(b) is someone for whose activities in carrying on the whole or part of that business his principal has accepted responsibility in writing, he is exempt from the general prohibition in relation to any regulated activity comprised in the carrying on of that business for which his principal has accepted responsibility.
…

(2) In this Act "appointed representative" means—

(a) a person who is exempt as a result of subsection (1)

(3) The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility.

(4) In determining whether an authorised person has complied with—
(a) a provision contained in or made under this Act, … anything which a relevant person has done or omitted as respects business for which the authorised person has accepted responsibility is to be treated as having been done or omitted by the authorised person.

(5) "Relevant person" means a person who at the material time is or was an appointed representative by virtue of being a party to a contract with the authorised person."

So, a firm is answerable for complaints about the acts or omissions of its AR in relation to the business it has accepted responsibility for in writing. I therefore need to determine whether Abana had accepted responsibility - in writing - for the acts being complained about here i.e. the advice (given by Mr F2 and Mr F) and the arrangements (facilitated by Mr F).

The law of agency

As set out above, a firm may also be responsible for the acts or omissions of its agents (DISP 2.3.3G). So in the alternative, I will need to consider whether either Mr F2 or Mr F were acting as Abana's agents in relation to the acts complained about, and whether it is therefore responsible for Mrs W's complaint on that basis.

Agency is where one party (the principal) allows another party (the agent) to act on its behalf in such a way that affects its legal relationship with third parties. Broadly speaking, there are two types of agency I will need to consider: (1) actual authority, either express or implied, and (2) apparent (also called ostensible) authority.

The textbook *Bowstead & Reynolds on Agency (21st Ed)* sets out the following about actual authority [chapter 3, article 22]:

"Actual authority

Actual authority is the authority which the principal has given the agent wholly or in part by means of words or writing (called here express authority) or is regarded by the law as having given him because of the interpretation put by the law on the relationship and dealings of the two parties. Although founded in the principal's assent, the conferral of authority is judged objectively".

Diplock LJ said in in *Freeman & Lockyer v Buckhurst Properties (Mangal) Ltd* (1964) 2 QB 480 [at paragraph 502]:

> *"An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger: he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the 'actual' authority, it does create contractual rights and liabilities between the principal and the contractor."*

So, actual authority is a legal relationship between the principal and agent created by an agreement to which they alone are parties. It may be *express*, for example a written contract or oral agreement. Or it can be *implied*, where the authority can be concluded from the conduct of the parties or the circumstances of the case that consent has been given for certain acts to be carried out by the agent on behalf of the principal.

And *Bowstead & Reynolds* sets out the following about apparent authority [chapter 8, article 72]:

"Apparent (or Ostensible) Authority

> *Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority."*

For apparent authority to operate, there must be a representation by the principal that the agent has its authority to act. As Diplock LJ said in in *Freeman & Lockyer v Buckhurst Properties (Mangal) Ltd* (1964) 2 QB 480:

> *"The representation which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually "actual" authority to enter into".*

So, the question I must consider here is whether Abana (as principal) allowed Mr F2 and/or Mr F (the agents) to act on its behalf in relation to conducting the activities Mrs W has complained about. And whether this was done with the express or implied agreement of Abana (actual authority), or whether the evidence shows Mrs W relied on a representation made by Abana (or that Abana allowed to be made) that Mr F2 and/or Mr F had its authority to carry out the acts complained about.

The advice given by Mr F2

Mrs W says she thought Mr F2 was working for Abana. She's given us a copy of the business card he left, which had Abana's details on it. I've no reason to doubt her testimony - that Mr F2 held himself out as working for Abana.

But I haven't seen any evidence that there was an AR agreement or any other written agreement between Mr F2 and Abana. And he was never listed as an appointed representative of Abana on the FCA's register. In fact, I've seen no evidence of any direct relationship between Mr F2 and Abana.

Mr F2 was a shareholder of New Beginnings, which was an AR of Abana at the relevant time. So, there may have been a relationship between him and Abana through the entity New Beginnings. But there's no evidence he was acting on behalf of New Beginnings when dealing with Mrs W.

Mrs W didn't mention New Beginnings when bringing her complaint to us. And we've not seen any communications such as emails, business cards or other promotional materials which relate to, or refer to New Beginnings being involved in this transaction.

Mr F2 being a shareholder in New Beginnings is not in itself enough to make Abana responsible for his acts or omissions. Being a shareholder in a firm does not prevent him from conducting activities on his own behalf or through an entirely different entity.

So, after carefully considering all the available evidence, I conclude the following:

- There's no evidence of a contract between Abana and Mr F2 where Abana permits or requires him to carry on business of a prescribed description and accepts responsibility for the same in writing. Mr F2 is therefore not an AR of Abana for the purposes of section 39(3) of FSMA;
- There's no evidence that Mr F2 was acting as an agent of Abana, that is: (1) there's no evidence he had Abana's express or implied authority to carry on any activities on its behalf; and (2) there's no evidence that Abana represented to Mrs W that Mr F2 had authority to act on its behalf and that he relied on this representation. I've thought carefully about the business cards and other materials Mr F2 showed Mrs W bearing Abana's name, but there's no evidence that these documents were provided by Abana for him to use.
- There's not enough evidence for me to conclude that Mr F2 was acting on behalf of New Beginnings in this transaction and Abana can therefore not be held responsible for his acts because of the AR agreement it had with New Beginnings at the relevant time.

As such, we don't have jurisdiction to consider a complaint against Abana about the advice Mr F2 gave to Mrs W.

The advice given and arrangements made by Mr F

The first thing I need to consider is whether Mr F's dealings with Mrs W were either (1) in his capacity as an AR or agent of Abana, (2) in his own unregulated capacity (i.e. as [Mr F] Associates, or (3) as part of the New Beginnings "Network".

I'm satisfied the advice about and arrangements for the switch of Mrs W's personal pension funds into a SIPP with Avalon and her application to ePortfolio Solutions and effecting the investment in unregulated funds, were led by Mr F.

So, having reviewed the evidence, I think advice and arrangements in Mrs W's introduction to Avalon were conducted by Mr F on behalf of Abana because:

- The main advice and arrangements were made by Mr F up until mid-May 2014 and before he told Avalon he was leaving Abana and provided new terms of business at the end of that month. Prior to this we know he'd been submitting business to Avalon in his capacity as an agent of Abana and using that firm's authorisation details.
- Further to the above, where Mrs W's application paperwork required identification of the "Financial Adviser Firm Name", this was identified as "Abana Lda".
- Mrs W's testimony is that Mr F told her and her husband he was working on behalf of Abana, and that he was responsible for arranging the SIPP and investments therein.

I'm satisfied Mr F advised on and arranged Mrs W's SIPP with Avalon while he was still an agent of Abana (and not in his capacity as an unregulated introducer when he was purporting to seek direct authorisation for [Mr F] Associates, or as part of the New Beginnings Network).

Abana says Mrs W's applications for the Avalon SIPP and ePortfolio Solutions weren't signed by Mr F. I can see they were signed by Mr F2, although Mr F's details were included on the ePortfolio Solutions form. I've thought carefully about this this point.

However, from what I've seen in this and other cases, Mr F's role in these pension transactions for the relevant period has been clear. I don't think the switch of Mrs W's funds into the SIPP with Avalon and investment in unregulated funds would've proceeded without him. I say this because Avalon relied on the authority it understood Mr F to have in these matters and it liaised with him as the key contact. I'll now develop this point.

did Abana accept responsibility for these arrangements under section 39(3) FSMA?

I need to consider whether Mr F did in fact have authority to act on behalf of Abana in advising on and arranging Mr W's SIPP with Avalon. We've been provided with an agreement between Abana and Mr F which purports to be an appointed representative agreement. This was provided by Abana when we first became involved in these cases in February 2016. The agreement states the following:

"THIS AGREEMENT is made this 1st day of May 2013

BETWEEN:

(1) ABANA Lda, a company registered in Portugal under number 510205410…("the Company"); and

(2) [Mr F] (a person) of [specified address] ("the Appointed Representative or AR").

WHEREAS:

(1) The Company is in the business of international wealth management, life assurance and general insurance mediation and is authorised and regulated by the Institute de Seguros de Portugal ("ISP") with registration number 412378472. The Company is authorised to conduct business in the UK under the regime of free provision of services within the European Union and has been authorised as such by ISP and the Financial Services Authority ("FSA") with FSA registration number 597069.

(2) The Company hereby appoints the AR as its appointed representative, subject to the terms of this agreement whereby the Company shall authorise and the AR shall conduct the various activities defined herein."

The definition section of the agreement sets out:

> *“"Activities" means the activities agreed and discussed between the parties on execution of this agreement, as amended from time to time, which the parties may further clarify in an annex hereto, in default of which such activities shall include activities defined in FSA Regulations as insurance mediation activities and designated life assurance business;*
>
> *"AR" means the AR (as set out above) and any employee, officer or agent or any person or persons acting in conjunction with or appointed by or under the control of the AR and any person or persons connected with the AR”*

We weren’t provided with a copy of the annex referred to in the agreement, but I note that in default the agreement shall include “activities defined in FSA Regulations as insurance mediation activities and designated life assurance business”, so I’ve taken this into consideration.

The agreement is signed by both parties.

I agree with the conclusion of the investigator here. The arrangements made in connection with the SIPP and the underlying investments for Mrs W didn’t constitute insurance mediation activities or life assurance business – both of which relate to contracts of insurance. So, based on the evidence I’ve seen, I’m satisfied the terms of the AR agreement didn’t authorise Mr F to conduct the arrangements that he carried out for her.

As such, I conclude Abana didn’t accept responsibility in writing under the statutory regime of section 39 (3) FSMA for Mr F to arrange this transaction in his capacity as an AR of Abana. And, so it isn’t responsible for the acts of Mr F in this case on the basis of section 39 FSMA.

In its response to this Service, Abana suggests the AR agreement is a fraud. It noted the font on the final signed page was different from the rest of document. It says the agreement we’ve relied on didn’t have Mr F’s original (wet) signature on it. It says the agreement wasn’t enforceable because it didn’t have all the elements required to be a valid contract. And that because it was void, it wasn’t submitted to the FCA register and therefore Mr F didn’t become a regulated AR of Abana.

I’ve carefully considered Abana’s submission which has some merit. For example, I can see that the last page of the agreement – which contains the signatures of the parties - is in a different font from the rest of the document. And as I’ve already acknowledged Mr F was never listed on the FCA register as an AR of Abana.

However, I’d note it was Abana itself which provided the copy of the agreement to us that it now asserts is a fraud. In an email to this Service in 2016, responding to an enquiry about Mr F’s role with Abana, it told us *“We have not been able to locate a written agreement with [Mr F] as an individual”.* To this it attached the agreement. Later it explained it had meant it couldn’t find a document with his original signature.

In a recent submission, Abana says that when it spoke to one of our adjudicator’s in February 2016, it made clear it could only locate a copy of a terminated AR agreement but that he asked for it to be forwarded anyway.

Abana seems to be acknowledging that there was an agreement, but that it was terminated. In any case, I can't find a recording of the conversation between it and the adjudicator in February 2016. But I've seen an exchange of several emails during the month between Abana's Director and the adjudicator. At no point was a terminated AR agreement mentioned. The exchange was focussed on understanding the nature of the relationship between it and Mr F.

I don't find Abana's arguments persuasive. When it first sent the AR agreement to us, it made no comment on its veracity or that what it was forwarding to us was a fraud. It didn't say the document hadn't been signed by the parties. And it didn't tell us about the agreement being terminated or give any details about that. I would've expected Abana to have provided this important commentary at the time, not four years later.

I'm satisfied that the AR agreement I've seen is genuine and indicative of the relationship between Abana and Mr F. My conclusion is bolstered by what Abana has told us about its connection with him and the emails I've seen between Abana and Mr F, and between Abana and Avalon which I set out in more detail below.

I'll now go on to consider whether Abana may have given Mr F authority to conduct pensions business on its behalf under common law principles of agency. This, as previously set out, is provided for under DISP 2.3.3 G.

was Abana responsible for the arrangements made by Mr F acting as its agent?

In analysing whether there was an agency arrangement I need to understand what was contracted between the parties in order to determine whether or not the relevant activities Mr F carried out were within the scope of what had been authorised and agreed to by Abana (i.e. had Abana given its actual authority for Mr F to carry on those activities on its behalf?).

Leaving aside the AR agreement, there are several other batches of evidence that are important to my consideration here.

the pension activities and arrangements Mr F was undertaking

Abana's told us that it knew that Mr F was involved with pension activities when it entered a relationship with him. In 2016 it told us:

"The relationship was that [Mr F] was a qualified IFA with a client base that he had built up while he worked for [another advice firm] with [a SIPP operator] products. These clients were transferred to Abana and he would continue to assist those clients. Abana obtained a [sic] agency with [the SIPP operator] and provided a home for his clients. [Mr F] paid us £5880 annually for this temporary service as he said he was going to be directly authorised. This agreement was superseded when [Mr F] introduced New Beginnings Ltd who became an AR of Abana."

This demonstrates that Abana expected Mr F to carry on pensions activities and facilitated this by entering into an agency agreement with a SIPP operator. Further, there's a pattern of contemporaneous evidence which bolsters my finding that Abana knew Mr F had a significant and ongoing involvement in pension activities, acting on its behalf.

For example, I've seen a letter dated November 2013 from Abana to one of Avalon's competitor SIPP providers relating to bank details for the payment of commission to each of Abana's "appointed representative / sub-agency" - Mr F is identified as one of these. Abana says this was provided in preparation for the fees generated by the existing SIPP client base.

There's an email exchange in early March 2014 between the same parties, in which the SIPP provider requests an *urgent* meeting with Abana. It writes:

"*I need to get our meeting in the diary. We have a number of questions to ask which really are just for us to get a better understanding of Abana, where you get your leads from and the way you implement your compliance and oversight. We now have a fair number of cases introduced by [Mr F] and we just need to monitor the relationship."*

And Abana responds:

"We have tried to coordinate a meeting with Mr F but he is leaving on two weeks holiday from Friday and is fully booked…we understand [Mr F's] clients are from referrals. All case fact finds and notes are uploaded to our secure client portal to be reviewed by our compliance and available to the client…"

Abana says this communication related to business Mr F transferred from other advisory firms. However, I think the exchange shows the SIPP provider understood the relationship to be that Mr F was working on behalf of Abana and it was attributing the business Mr F was submitting to it as being business done on behalf of Abana as principal.

Furthermore, I think it shows Abana was aware of the significant number of pension business *introductions* Mr F was making on its behalf. And that it tried to give the SIPP provider assurances about the records it was keeping for all the clients (fact finds and notes) and the compliance arrangements it had in place to check things were being done correctly.

Interestingly, there's correspondence between Abana and Mr F in April 2014 about the nature of the services he was providing. Abana says this *appears* to be in relation to a suitability report of an existing transferred SIPP. Its Director says this was a personal email, and Mr F *appears* to want feedback because he *may've* provided similar opinions for Mr F when he worked at a former company.

In the email Abana's Director tells Mr F (my emphasis):

*"I've had compliance read through the SL report and here are their comments re investment. I should add that **we** should tell the clients **we** are not regulated to give advice on funds and they should seek further assistance if they do not want to do it themselves. Let me know what you suggest please?"*

This doesn't seem to me to be a personal exchange. And I don't find Abana's explanation to be credible. I think the email is reflective of Abana giving Mr F guidance on how he should be constructing the suitability reports for what were effectively its clients, following a review by its compliance team. It's quite directive in tone and suggestive of a principal / agent relationship.

The advice from Abana's compliance function to Mr F focusses on investment funds. There was no similar concern expressed about the pension advice or arrangements Mr F was making. Otherwise, I would've expected this to have been made clear as well.

I think taken together, this package of evidence demonstrates the following:

- The written agreement between Abana and Mr F shows that there was a relationship between the parties under which they anticipated that Mr F would carry out certain activities on behalf of Abana.
- Unlike the requirements of section 39 FSMA, Abana and Mr F could agree in a more informal way that Mr F had authority to conduct pensions business on behalf of Abana, such as through the dealings between the parties. I'm satisfied based on the evidence that Abana was aware of, and consented to, Mr F carrying on these pension activities on its behalf and that consensual agreement to conduct these activities can be gleaned from the dealings between the parties.
- Mr F was not directly authorised by the FCA. The communications between Abana and Mr F that I have set out above show that Abana entered into a relationship with Mr F so that he could continue to provide advice to clients on the basis of Abana's authorisation (they would become Abana's clients who Mr F would continue to assist with). And it shows that Abana knew Mr F was providing advice to consumers to open SIPPs, in fact it entered into terms of business with a SIPP operator so that Mr F could provide the same for clients.

So, I'm satisfied that Mr F did have Abana's actual authority to undertake pension activities, including arranging SIPPs, on its behalf.

payments made by Avalon for business generated by Mr F

Avalon told us its records showed that commission payments for business introduced by Mr F before the end of May 2014 were paid directly to Abana. I've seen paperwork to this effect, with a charge for Mrs W's SIPP appearing on the May 2014 statement. Abana is shown as the introducer and the total payment (which included charges for multiple clients) was due to it. But unfortunately, it's not that straightforward.

I can also see that from April 2014 Mr F was liaising with Avalon to clarify what commission payments were being made – they appeared to be coming through as a lump sum and he couldn't work out how the payments related to different clients.

Mr F asked Avalon for more information about the transactions. He says the payment side was done from Portugal (where the main Abana group is based), so it was important for him to get a better breakdown of what the payments represented. Avalon appears to have acted on his request to ensure he received a copy of future commission statements to his own business address.

Communications between Mr F and Avalon continued through May and June 2014 and increasingly became about remuneration arrangements following his planned establishment of [Mr F] Associates. And then when this didn't work out, there were discussions about channelling payments to the New Beginnings network. It was agreed that fees would go direct to him in future, subject to certain conditions being met.

The position gets muddled for several reasons. Avalon started withholding some commission payments to Abana, giving Mr F an opportunity to get his clients to sign letters of authority (LOA) to transfer oversight of their SIPP affairs from Abana to his new agency.

It's clear getting the LOAs in place was problematic. And this may shed light on Abana's testimony when it says it never received payments from Avalon in respect of certain transactions. I think the following email from Avalon to Mr F from September 2014 is instructive:

"We are being chased by Abana to supply them with details of adviser charges paid in the last quarter. As you know we have held back payments to them pending receipt of LOA from you for 13 clients but we are now being put in a difficult position with regards to payment on these. Can I have your thoughts. We will have little choice other than to make payment to them if we can't have the LOA's in the very near future."

I've thought carefully about what all this means. Consistent with what I've set-out elsewhere, I think this information supports my finding that Mr F was acting on behalf of Abana until the end of May 2014, even though he appears to be hatching plans to work on his own account prior to this. I think Abana was expecting payments to flow back to it for this business, as it had done with other transactions, and when it didn't it queried the position with Avalon.

Again, I think this demonstrates that Mr F was given actual authority to undertake pension activities on behalf of Abana as it expected to be paid for introductions that Mr F was making to Avalon.

the independent review of pension transactions attributed to Abana

Abana acknowledged the outcome of an independent review into the advice Mr F gave and the arrangements he made for the switch of Mrs W's personal pensions into the Avalon SIPP and therein the investment in unregulated funds. It made a claim on its professional indemnity insurance. It appeared to accept responsibility for the things Mr F had done wrong.

But Abana now says that its initial offer to pay Mrs W redress wasn't an admission that it had got something wrong. It says it felt under an obligation following the FCA's intervention. It said the review work conducted by the regulatory compliance consultancy was flawed. It makes various allegations, including that the review relied on incomplete and false information provided by Avalon.

I've thought about what Abana has said here. I don't find its arguments convincing. If the review work was fatally flawed, then I'm surprised it made a claim to its insurers on that basis. And it hasn't provided any evidence of its assertions.

Actually, from what I've seen I think it's more likely Abana's later retraction of the offer of redress had more to do with its professional indemnity insurer rejecting its claim to cover the compensation costs. I note in December 2017 it wrote to the FCA in the following terms:

"Since the FCA is of the opinion that…our PI insurers, will not be able to cover any redress by virtue of the fact that [Mr F] was acting outside the remit of regulated activity, the victims are thus left in the unfortunate and unfair position of not being able to receive any redress whatsoever."

Ensuring its agents were only given authority to operate within the scope of its own permissions was Abana's responsibility. As I've already set out, it was aware of what activities Mr F was undertaking. Even if it didn't realise what he was doing would have the effect of nullifying its insurance cover because the activities fell outside the scope of Abana's permissions, it should've realised this.

So, I think Abana's initial acceptance of the review process and the redress proposals is significant and is another indication that it had in fact given Mr F authority to act on its behalf in arranging SIPPs, such as Mrs W's.

Abana's website

Abana's website around the time of the events complained about appears to have shown Mr F listed as a pensions/financial adviser" and part of "The Abana Team". It includes a photo of an individual that purports to be him. We obtained this information from an online resource. Mr F's details remained on the Abana website until at least December 2014.

Abana disputes these matters. For example, it says the historic website pages referenced were draft. It says Mr F's description is incomplete and this shows he didn't make it onto the Abana team. It told us the supposed photo of Mr F wasn't him.

Abana's argument here has some merit. I've checked and the image that appeared on its web site wasn't Mr F. And I don't know whether Mr F's details were published externally or as Abana suggests the pages were just draft.

However, in the context of everything else I've seen, I find the fact the web pages exist at all is in itself significant and more likely than not reflective of a close association between the parties. And it therefore bolsters the evidence that Mr F was acting with Abana's actual authority in conducting pensions activities such as arranging SIPPs.

Taking all these matters together with the other information I've already set-out in this decision, there's a weight of evidence and argument here. And I'm satisfied this demonstrates Mr F was acting as an agent of Abana.

I think Abana was aware of, expected, facilitated, guided and benefitted from the activities Mr F was undertaking, including giving advice on and making arrangements for SIPPs. I think Mr F had its actual authority to do this on its behalf. So, I think Abana is responsible for Mr F's acts and omissions.

The arrangements in this case involved more than just pensions business – Mr F also gave advice on and made arrangements for the ePortfolio Solutions bond and unregulated investments. But, even if Abana didn't give its actual authority for Mr F to conduct these matters (and only intended him to be carrying on pension business), there's well established case law that if there's one act that was authorised by the principal, we may be able to look at other acts linked to it.

In *Martin v Britannia* [1999] EWHC 852 (Ch) (21 December 1999) and *Tenetconnect Services Ltd v Financial Ombudsman and another [2018] EWHC 459 (Admin) (13 March 2018)*, the courts held that advice couldn't be confined to one part of an overall transaction and that acts can be "intrinsically linked". I agree with the investigator when he says this case is analogous. The arrangement of the SIPP and the subsequent investments in unregulated funds were so closely connected that they were intrinsically linked – part of the same transaction.

So, I think Abana can be held responsible for the advice given and arrangements made concerning the switch of Mrs W's personal pensions to her Avalon SIPP and the investments in unregulated funds, which together ultimately resulted in the financial loss she's suffered.

my conclusions on jurisdiction

I conclude that this is a complaint that this Service can consider. In summary this is because:

- Mrs W's complaint concerns both the advice about and the arrangements for the switch of her personal pension funds to the Avalon SIPP and the investments made therein. So, it's a complaint about regulated activities.
- I'm satisfied that Mr F gave Mrs W advice about and made arrangements for the switch of her personal pension funds to the Avalon SIPP and the investments in the Kijani and SAMAIF funds as an agent with the actual authority of Abana. I'm therefore satisfied that Abana is responsible for his acts and omissions in this regard.

considering the merits of Mrs W's complaint

As I'm satisfied this Service has jurisdiction to consider Mrs W's complaint about Abana in relation to the advice provided and arrangements made by Mr F, I've gone on to consider all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this case. And, after careful consideration, I'm upholding her complaint. I'll explain why.

The documentation I have from around the time of the events is incomplete. Abana provided very little information about Mrs W's case. For example, I've not seen a fact find covering her circumstances, nor a record of her objectives for her pension arrangements. There's no document which captures Mrs W's attitude to risk. And I haven't seen a recommendations report.

Mrs W has helpfully provided us with various documents, most of which relate to events as they unfolded after her personal pensions had been switched into the Avalon SIPP. In addition, she's told us about what happened when she was given advice.

For reasons I can understand, several of Abana's former customers who have found themselves in a similar situation to Mrs W have formed an informal group for communicating progress. I've not seen anything that concerns me about this development.

Nevertheless, as I would've done in any event, I generally give more weight to testimony which is more contemporaneous with the events complained about. That's because it tends to give a more accurate account of events given the effect of the passage of time and the potential for the benefit of hindsight to colour matters.

Fortunately, we've been able to obtain some relevant paperwork from other sources, including the firm which took over administration of Mrs W's SIPP. As previously established, this has been important in evidencing the role Mr F played on behalf of Abana in bringing about the switch of her pension.

While there's conflicting information about what happened in 2014 and many gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

how does the regulatory framework inform the consideration of Mr W's case?

The first thing I want to consider in relation to Mrs W's complaint is the extensive regulation around transactions like those performed by Mr F who I'm satisfied was acting as Abana's agent. The FCA Handbook contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2 G in the FCA Handbook). These include:

- Principle 2, which requires a firm to conduct its business with due skill, care and diligence
- Principle 3, which requires a firm to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems
- Principle 6, which requires a firm to pay due regard to the interests of its customers and treat them fairly

In *British Bankers Association v The Financial Services Authority & Anor* [2011] EWHC 999 (Admin), Ouseley J said [at paragraph 162]:

"The Principles are best understood as the ever-present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."

And at paragraph 77:

"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high-level principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."

So, the Principles are relevant and form part of the regulatory framework that existed at the relevant time. They provide the overarching framework for regulation and must always be complied with by regulated firms like Abana. As such, I need to have regard to them in deciding this case.

Further, COBS 2.1.1 R requires a firm to act honestly, fairly and professionally in accordance with the best interests of its clients, in relation to designated investment business carried on for a retail client. The definition of "designated investment business" includes "arranging (bringing about) deals in investments".

COBS 9.2.1R sets out the obligations on firms in assessing the suitability of investments. They are the same things that we will look at when reaching a decision about whether the advice was suitable. In summary, the business must obtain the necessary information regarding: the consumer's knowledge and experience in the investment field relevant to the advice; their financial situation; and their investment objectives.

When I consider a case where someone has switched their personal pension, I look at their circumstances at the time. Why were they interested in switching? Were those wants or needs reasonable? And so, should the adviser have recommended the switch?

Each case is different, but I'd expect the switch to be in the consumer's best interests to make the advice suitable. And in this regard, I'd expect to see a comparison was made between the old pension and the new one.

In 2009 the then Financial Services Authority published a checklist for pension switching that I think is still helpful today. It highlighted four key issues it thought should be focussed on:

- *Charges* - has the consumer has been switched to a pension that is more expensive than their existing one(s) or a stakeholder pension, without good reason?
- *Existing benefits* - has the consumer lost benefits in the switch without good reason? This could include the loss of ongoing contributions from an employer, a guaranteed annuity rate or the right to take benefits early.
- *Risk* - has the consumer switched into a pension that doesn't match their recorded attitude to risk (ATR) and personal circumstances?
- *Ongoing fund management* - has the consumer switched into a pension with a need for ongoing investment reviews but this was not explained, offered or put in place.

It's also important to review the FCA's specific stance on advice provided about SIPP's. For example, in January 2013 it issued an industry alert which 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…"

"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..''

"If, taking into account the individual circumstances of the customer, the original pension product, including its underlying holdings, is more suitable for the customer, then the SIPP is not suitable. This is because if you give regulated advice and the recommendation will enable investment in unregulated items you cannot separate out the unregulated elements from the regulated elements. There are clear requirements under the FSA Principles and Conduct of Business rules."

did Abana, through the acts and omissions of Mr F, adhere to the regulatory requirements placed on it in effecting the switch of Mrs W's personal pension plans into a SIPP?

In short, I don't think Abana met the regulatory requirements placed on it. I'll explain why.

Mrs W had four modest personal pension plans, two with Aviva Life and two with Scottish Widows. She'd started making contributions to these when she was 19. The funds were built up over a decade of her early working life with different companies. She didn't know what they were invested in. The value of the plans in 2014 was around £22,500.

Mrs W also had deferred membership of an occupational pension scheme built up over 13 years - she retained this fund. By 2005 she'd taken on a role in her husband's business and was no longer making any contributions towards a pension.

So, although modest, the funds built up in Mrs W's personal pension plans represented a significant element of her overall provision.

Mrs W and her husband re-mortgaged in 2013 and during the process an adviser was recommended to them to talk about their pension arrangements. They met Mr F2 several times, and he introduced them to Mr F in 2014.

Mrs W and her husband were led to believe both men worked for Abana. For example, they were given branded business cards and paperwork to that effect. They also formed the impression Mr F was the senior responsible person in the transaction.

Mrs W told us her objective was to grow her pension pot. And she wanted to be able to retire at 60 – she was 50 at the time of the advice. She says she and her husband had a low to medium risk appetite. They had no previous experience of investing.

Mrs W says that in their discussion with Mr F he mainly focussed on establishing the SIPP and where monies would best be invested. He showed them investment returns of certain funds over past 20 years. He characterised the commodity-based funds as high return and with a good track record.

Mrs W was persuaded to switch her pension funds to a Self-invested Personal Pension (SIPP) with Avalon Investment Services Limited (Avalon). Investments were made via a bond with a business called ePortfolio Solutions into two unregulated funds – Kijani and SAMAIF.

Mr F, as Abana's agent, had to obtain information from Mrs W in order to understand essential facts about her. In order to advise her to switch her personal pension pots into the Avalon SIPP and invest in the unregulated funds, Mr F had to believe that:

- The service or recommended transaction met Mrs W's investment objectives (including her attitude to risk, the purpose of investing and how long she wanted to invest for).
- Mrs W was able to financially withstand the investment risks.
- Mrs W had the necessary experience or knowledge to understand the risks involved.

As mentioned already, I've not seen a fact find covering Mrs W's circumstances, nor a record of her objectives for her pension arrangements. There's no document which captures her attitude to risk. I haven't seen a recommendations report. And I haven't seen a comparison of the performance, costs and benefits of her then existing plans with what was being proposed.

Abana hasn't produced information to show Mr F followed proper process, or if he did that this supported the subsequent transaction he advised and arranged. This is odd because in March 2014 when it was communicating with another SIPP provider about the business Mr F was generating, it provided some assurance that proper documents were on file and that its compliance function had oversight of what he was doing.

I think Mrs W was interested in building her pension pot. But I've not seen anything that shows her risk appetite would've been high. Her pension provision was modest, and her personal plans represented a significant proportion of this.

Mrs W's pension provisions were placed in the Kijani and SAMAIF funds, which were based overseas and unregulated. Unfortunately, by 2015 they'd been suspended leaving her facing substantial losses.

Abana told us that following the intervention of the FCA a consultancy service specialising in regulatory compliance was appointed to carry out a review of the suitability of certain pension advice and arrangements it had been associated with. This included Mrs W's case.

I think it's telling this specialist independent third party concluded in February 2016 that the advice Mrs W had been given by Mr F had been unsuitable. And it later set out how Abana should put things right. As we know, it ultimately failed to act on the outcome of the review.

Further, I've seen a communication between Abana and Mr F from around the same time he was providing Mrs W with advice in April 2014, which I think is also relevant here. In this email exchange Abana provides feedback to Mr F about his approach to suitability reports. This had been provided by its compliance function and appears to demonstrate Mr F's practices were lacking, for example in relation to advice around the risk appetite of clients.

Taking these matters together, I've concluded Mr F wasn't acting with due skill, care or diligence when he effected Mrs W's switch of pension plans into her Avalon SIPP and the unregulated funds. He was in breach of Principle 2 and COBS 9.2.1R, and therefore so was Abana.

I find Mrs W's testimony plausible and persuasive. And I think it's of note that Abana has never made the case that the switch of her personal pension plans into the Avalon SIPP and investments in unregulated funds was a suitable outcome.

Rather, Abana's response to this Service has largely focussed on why it wasn't responsible for what had happened, and how it was the fault of others. It's largely failed to engage with the merits of this case, despite clear evidence of the relationship it had with Mr F. I won't rehearse the arguments already made in my decision, but I've concluded that Mr F was acting as an agent of Abana with its actual authority to deal in pensions and arrange SIPPs.

In permitting Mr F to conduct pensions business Abana would've known or at the very least should've known that such activity was outside of its regulatory permissions which were restricted to insurance mediation activities. It didn't take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems. And this is a breach of Principle 3.

There's no evidence Mrs W was an experienced or sophisticated investor. As I've set out, she didn't know how her personal pensions had been invested. And she says she was told the proposals being recommended were low risk. She says she was "...a bit green". A small amount of care and due diligence would've exposed the switch to the Avalon SIPP as inappropriate.

Mr F gave advice and made arrangements for the switch of Mrs W's personal pension plans into a SIPP, which would be dealing in unregulated investments. Mr F's details were included on Mrs W's ePortfolio Solutions application. And both this and her SIPP application had Abana's details on as the authorised firm. Avalon dealt with Mr F as the key contact in this transaction. Mr F led it to believe that he was introducing business with Abana's authority.

In doing all this, Mr F would've been aware Mrs W was being exposed to significant risks in the investments he was arranging. He would've known unregulated funds could be Illiquid, meaning Mrs W might have difficulty getting access to her money. The funds were highly specialised, out of the ordinary and reliant on third parties. And they were subject to valuation uncertainty.

I'm satisfied that Mr F didn't act honestly, fairly and professionally, and in accordance with Mrs W's best interests in relation to designated investment business he was carrying out. He breached Principle 6 and COBS 2.1.1R, and Abana is responsible for his acts and omissions.

So, to conclude I don't think the switch of Mrs W's personal pension funds into the Avalon SIPP and the unregulated investments with the Kijani and SAMAIF funds could sensibly be regarded as fair to her.

As such I think Mr F, as Abana's agent, failed to meet the regulatory requirements I've set out when making these arrangements. So, taking all the circumstances of the case into account, it's fair and reasonable to uphold this complaint against Abana, and for Abana to put things right.

putting things right

I'm upholding Mrs W's case. So, she needs to be returned to the position she would've been in now - or as close to that as reasonably possible – had it not been for the failures which I hold Abana responsible for.

If Abana had done everything it should've, I don't think Mrs W would've switched her Aviva Life and Scottish Widows funds into an Avalon SIPP, and so she wouldn't have suffered the financial loss she's experienced. I think it's most likely she would've left her pensions where they were.

So, Abana needs to put things right in the following way:

1. Calculate the loss Mrs W has suffered as a result of making the switch

Abana must obtain the notional value of Mrs W's previous pension plans with Aviva Life and Scottish Widows, as at the date of calculation. So, as if they hadn't been switched to the Avalon SIPP.

If there are difficulties in obtaining a notional valuation, then the FTSE UK Private Investors Income Total Return Index (and prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index) should be used as a reasonable proxy for the type of return that could've been achieved if Mrs W's pension had remained invested in her personal pension plans.

Abana should then find the current value of Mrs W's SIPP, including investments and any cash held. Concerning the valuation here – the approach to be taken is set out in step 2.

My understanding is that Mrs W hasn't taken any tax-free cash or drawdowns. But she has made additional contributions. So, the value Abana obtains or the calculations Abana makes must assume these would still have occurred and on the same dates.

The adjusted, as appropriate, like for like difference between the notional value of Mrs W's former pension plans and the current value of her SIPP will be her basic financial loss that Abana needs to redress.

2. Pay a commercial value to buy any investments which cannot currently be redeemed

To close Mrs W's SIPP and avoid ongoing fees, the investments need to be crystallised. To do this Abana should ask the SIPP provider to determine an amount it's willing to accept as a commercial value for the investments and Abana can then pay this to take ownership of them.

If Abana is unwilling or unable to purchase the investments, the value should be assumed to be nil for the purposes of the loss calculation. In this instance Abana may ask Mrs W to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the investment. That undertaking should allow for the effect of any tax and charges on the amount she may receive from the investment and any eventual sums she would be able to access from the SIPP.

Abana will need to meet any costs in drawing up this undertaking.

3. Pay an amount into Mrs W's SIPP so that the transfer value is increased by the loss calculated (resulting from 1 and 2) or pay her an equivalent cash sum notionally adjusted for tax

If compensation is paid into Mrs W's SIPP, payment should allow for the effect of charges and any available tax relief, so that she is in the same position as if she'd stayed in her original Aviva Life and Scottish Widows pension plans.

If paying compensation into Mrs W's SIPP would conflict with any existing protection or allowance and / or the plan is closed and Abana takes on her investments, then it should pay her compensation as a cash sum.

Because Mrs W's SIPP would've been used to buy a taxable income any compensation paid in cash should be reduced to notionally allow for any income tax that would otherwise have been due. The notional allowance should be calculated using Mrs W's marginal rate of tax at retirement.

For example, if Mrs W is likely to be a basic rate taxpayer in retirement, the notional allowance would reduce the amount payable (after any allowance for tax-free cash), equivalent to the current basic rate of tax. So, if Mrs W is entitled to 25% tax free cash from her fund, the notional allowance should be applied to 75% of the total amount of compensation.

4. SIPP fees

If the investments aren't removed from Mrs W's SIPP, and it remains open after compensation has been paid, Abana should pay her an amount equivalent to five years of future fees. This should allow enough time for the issues with the investments to be dealt with, and for them to be removed from the SIPP.

If, after five years, Abana wants to keep the SIPP open, and to maintain an undertaking for any future payments under the investment, it must agree to pay any further future SIPP fees. If Abana fails to pay the SIPP fees, Mrs W should then have the option of trying to cancel the investments to allow the plan to be closed.

5. Trouble and upset

I also think Mrs W has been caused upset as a result of Abana's actions. The sudden loss of a substantial element of her pension fund would have come as a shock to her and has clearly had a significant impact. In recognition of this it should pay her £500 for the trouble and upset she's experienced.

my final decision

For the reasons I've already set out, I'm upholding Mrs W's complaint. I require Abana Unipessoal Lda to pay compensation to her as I've indicated in the section 'putting things right'. It should pay the compensation within 28 days of Mrs W's acceptance of my final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 29 June 2020.

Kevin Williamson
ombudsman