Complaint

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

background

In April 2014 Mrs C took a phone call which led to her agreeing to meet up with an adviser to discuss her personal pension. Mrs C has told us that the adviser who attended her home said he worked for Abana. She's given us a copy of the business card and referral material he left with her, which has Abana's details on it.

Mrs C was persuaded by the advisor to switch her fund with Scottish Life to a Self-invested Personal Pension (SIPP) with Avalon Investment Services Limited (Avalon). She was given paperwork to sign in order to complete the transaction during the same meeting at her home.

Mrs C transferred around £33,000 into the SIPP and this was invested in two unregulated funds through a business called ePortfolio Solutions. These were the Brighton SPC - Kijani Commodity Fund (Kijani) and the Swiss Asset Micro Assist Inc Fund (SAMAIF).

In June 2015 she began to think there might be problems with her SIPP arrangements. For example, she tried to access a tax-free cash sum but kept hitting barriers. And in August 2015 she 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.

I understand the Financial Conduct Authority (FCA) became involved with Abana when it became 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 the advice 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.

In October 2015 Mrs C was asked by the consultancy to complete a questionnaire related to the switch of her personal pension. Following the submission of her information, it wrote to her on 2 February 2016 with its conclusions. It said the advice she'd been given to switch to the SIPP and invest in unregulated funds had been unsuitable. And it set out what steps Abana should take to put her back in the position she would've been in had the switch of her pension not taken place.

Abana wrote to Mrs C about the outcome of the review on 15 February 2016. It noted that the individual it regarded as being responsible for providing her with services related to her pension was a UK based advisor whom I'll refer to in this decision as Mr F. It said it would pay her redress. And that it expected final calculations to be available by March 2016.

By May 2016 there'd been no substantive progress and so Mrs C brought her complaint to this Service. She had various concerns about what had happened. She'd been given poor advice and she wanted her pension funds back with interest. She also wanted compensation for the trouble and upset she'd been through.

Initially, Abana confirmed Mrs C 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 Mrs C received, so it wouldn't pay her compensation.

Abana submits that the individuals involved in this transaction with Mrs C weren't its appointed representatives (ARs), or its agents. It says those 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 C's complaint against it.

The investigator concluded that we could look into Mrs C'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 the investigator's opinion.

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 C'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 C 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 C 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 of 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 C'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 C'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. As I'll set out later in this decision, it is Mr F who appears to have arranged for Mrs C's pension to be switched to the SIPP with Avalon (and to invest in the unregulated Kijani and SAMAIF funds). One of the matters I will need to establish is whether in conducting those 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 W

Mr W was the advisor who met with Mrs C and gave her the advice to switch her pension pot to a SIPP with Avalon. Like Mr F, he was also a minority shareholder of New Beginnings. Given testimony we've had from other consumers with complaints against Abana, it seems likely Mr W also had a role working for [Mr F] Associates during 2014. Mr W did not 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 C 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 C'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 C complains done in the carrying on of a regulated activity?

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

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

Mrs C 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 pension to a SIPP with Avalon and make investments in the Kijani and SAMAIF funds. Mrs C says she hasn't been compensated despite Abana previously agreeing to provide redress.

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 C's Scottish Life pension plan had been in her name since the late 1990s. She's told us she wasn't actively looking to change her arrangements. It appears she only took action after being cold called in April 2014. Mrs C says Mr W gave her the impression he worked for Abana and the business card and other materials he left her confirmed this.

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 C about what Mr W told her when he visited her home.

Nevertheless, I think it's highly unlikely Mrs C would've embarked on a high-risk investment strategy using her only retirement funds without this course of action being recommended to her. She'd been invested in the Scottish Life pension for many years, and it seems more likely than not she would've received advice that motivated her to make the switch.

So, on balance, I'm satisfied that Mr W did provide advice to Mrs C to switch out of her personal pension scheme and invest in a SIPP with Avalon. And I believe that he told Mrs C that the unregulated investments would perform better than her Scottish Life pension plan which is why she was persuaded to make the switch.

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 completed Mrs C's application to open a SIPP using Abana's FCA authorisation details. He transmitted the necessary applications. In doing so, he led Avalon to believe that he was introducing the application 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).

Mr F authorised the paperwork submitted to Avalon which facilitated Mrs C opening the Avalon SIPP and the investment in the unregulated funds. 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 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.

However, 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 C – payment or other reward arising out of their making the arrangements. But we know from what Avalon has told us it was making commission payments to Abana and that Mr F received payment via this route. And I'm satisfied he would've received payment for arranging Mrs C's SIPP. So, the exclusion at article 29 does not apply.

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 C to an appropriate party under this provision, and where any said party was 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.

I'm satisfied that this complaint involves regulated activities – giving advice on switching from a personal pension to a SIPP with Avalon and investing in unregulated funds (Mr W) and making arrangements to give effect to these matters (Mr F).

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

The next thing I must consider is whether Abana is responsible for the acts and omissions of Mr W 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 W) 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 W or Mr F were acting as Abana's agents in relation to the acts complained about, and whether it is therefore responsible for Mrs C'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 W and/or Mr F (the agents) to act on its behalf in relation to conducting the activities Mrs C has complained about. And whether this was done with the express or implied agreement of Abana (actual authority), or whether the evidence shows Mrs C relied on a representation made by Abana (or that Abana allowed to be made) that Mr W and/or Mr F had its authority to carry out the acts complained about.

The advice given by Mr W

Mrs C says she thought that Mr W was working for Abana. She’s given us a copy of the business card and referral material he left with her, which has Abana’s name on it. I’ve no reason to doubt her testimony - which has been consistent since she approached this Service in 2016 - that Mr W 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 W 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 W and Abana.

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

For example, Mrs C didn’t mention New Beginnings when she brought her complaint to us. She doesn’t recall Mr W mentioning that firm being involved. 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 W being a shareholder in New Beginnings is not in itself enough to make Abana responsible for Mr W’s acts or omissions. Being a shareholder in a firm does not prevent Mr W 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 is no evidence of a contract between Abana and Mr W where Abana permits or requires Mr W to carry on business of a prescribed description and accepts responsibility for the same in writing. Mr W is therefore not an AR of Abana for the purposes of section 39(3) of FSMA;
- There is no evidence that Mr W 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 C that Mr W had authority to act on its behalf and that she relied on this representation. I have thought carefully about the business cards and other documents that Mr W provided to Mrs C bearing Abana's name, but there's no evidence that these documents were provided by Abana for Mr W to use.
- There's not enough evidence for me to conclude that Mr W was acting on behalf of New Beginnings in this transaction and Abana can therefore not be held responsible for Mr W's acts on the basis 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 W gave to Mrs C.

The arrangements made by Mr F

The first thing I need to consider is whether Mr F's dealings with Mrs C 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".

The arrangements, including the authorisation and transmission of Mrs C's application for a SIPP with Avalon, and the authorisation and transmission of her application to ePortfolio Solutions and effecting the investment in unregulated funds, were all signed by and submitted to Avalon by Mr F.

Having reviewed the evidence, I think the arrangements in Mrs C's introduction to Avalon were conducted by Mr F on behalf of Abana because:

- The key arrangements were made by Mr F in April 2014 – this is before he told Avalon he was leaving Abana and provided new terms of business at the end of May 2014. Before this time Mr F had 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 C's application paperwork required identification of the "Financial Adviser Firm Name", Mr F filled this in with "Abana Lda". And he provided its FCA firm reference number on the associated documents.

So, I'm satisfied Mr F arranged Mrs C'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).

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

I now need to consider whether Mr F did in fact have authority to act on behalf of Abana in arranging Mrs C's SIPP with Avalon. We have 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 this case 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 have 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 C 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 the investigator's opinion, 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.

I don't find Abana's argument 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. And it didn't say the document hadn't been signed by the parties. 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 into 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:

1. 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.
2. 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.
3. 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 the charge for Mrs C'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. In Mrs C's case, I can see there's a letter on file. It says:

"This letter confirms my wishes to keep any business I have with yourselves with [Mr F] and his Associates, as such I only authorise you to accept instruction on my behalf and to only give out information directly to Mr F"

The form has Mrs C's details and it's dated 22 May 2014. The form is annotated by Avalon to say the instruction was actioned on its SIPP database in June 2014. But there are significant problems with the LOA.

Mrs C is adamant she never signed such a form. I can see Avalon wrote to her in October 2014 to tell her it had received an LOA to change her agency from Abana to Mr F. It enclosed a copy. When it didn't hear back from her it made the assumption things were ok. While Mrs C thought this was a bit odd she doesn't seem to have followed it up at the time. She simply assumed the new arrangement would take effect from that point onwards.

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 the transaction with Mrs C. 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

When Abana wrote to Mrs C in February 2016 about the outcome of an independent review into the arrangements made by Mr F, it acknowledged he'd been responsible for the pension services she'd received. It agreed to pay her redress and reverted to its professional indemnity insurer on the matter. It appeared to accept responsibility for the things Mr F had done wrong on its behalf.

But Abana now says that its initial offer to pay Mrs C 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 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 have 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 C's.

Abana's website

Abana's website around the time 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 actually 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 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 made arrangements for the ePortfolio Solutions bond and unregulated investments, for example signing Mrs C's application form and liaising with that business on her behalf. 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 could not 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 arrangement of the switch of Mrs C's personal pension, her 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 is able to consider. In summary this is because:

- Mrs C's complaint is about both the advice and the arrangements for the switch of her personal pension fund to the Avalon SIPP and the investments made therein. So, it's a complaint about regulated activities.
- We don't have jurisdiction to consider her complaint about the advice she received from Mr W because there's not enough evidence that he provided this advice on behalf of Abana either as an appointed representative or agent.
- We can consider Mrs C's complaint about the arrangements made by Mr F. This is because I'm satisfied that he arranged Mrs C's switch to a SIPP with Avalon 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 C's complaint

As I'm satisfied this Service has jurisdiction to consider Mrs C's complaint about Abana in relation to the 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 Mrs C's 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 C'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 C's attitude to risk. And I haven't seen a recommendations report.

Mrs C has provided us with a detailed chronology of events, which largely covers what happened after the switch of her pension from Scottish Life into the Avalon SIPP had taken place.

For reasons I can understand, several of Abana's former customers who have found themselves in a similar situation to Mrs C 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 as Mrs C's SIPP provider. 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 Mrs C's case?

The first thing I want to consider in relation to Mrs C'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".

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

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

Mrs C says she's spent much of her life looking after family, so she hadn't built up significant personal pension provisions. Her Scottish Life plan was established in her name as part of a divorce settlement with her former husband in around 1998. And she's told us that this small plan was the only pension she had.

Mrs C didn't know what her Scottish Life plan was invested in. She didn't make any further contributions to it. She thought it would be a useful pot for when she retired, which she was planning to do when she reached 60.

In April 2014 Mrs C, who was then 54, took a call which led to her agreeing to meet up with an adviser to discuss her personal pension. Mrs C has said that the adviser, Mr W, told her that her Scottish Life plan wasn't performing – *"…effectively it was sat there doing nothing*". He said she'd achieve guaranteed growth for her pot by switching it to the SIPP with Avalon. She doesn't recall him saying where funds would be invested, but she is sure he didn't mention anything about overseas funds.

Mrs C was persuaded to switch around £33,000 into the SIPP and this was invested in two unregulated funds through a business called ePortfolio Solutions. These were the Kijani and SAMAIF funds I've already mentioned.

By June 2015 she began to think there might be problems with her SIPP arrangements. For example, she tried to access a tax-free cash sum but kept hitting barriers. And in August 2015 she 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.

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 C's case.

Mrs C provided the regulatory compliance consultancy with information in October 2015. It wrote to her on 2 February 2016 with its conclusions. It said the advice she'd been given to switch to the SIPP and invest in unregulated funds had been unsuitable. And it set out what steps Abana needed to take to put things right.

Abana wrote to Mrs C about the outcome of the review on 15 February 2016. It noted that the individual it regarded as being responsible for providing her with services related to her pension was Mr F. It said it would pay her redress. And that it expected final calculations to be available by March 2016. By May 2016 there'd been no substantive progress and so Mrs C brought her complaint to this Service.

Mrs C has told us that she never met Mr F. It wasn't until October 2014, when she received a letter about the transfer of the oversight of her pension affairs from Abana to [Mr F] Associates, that she became aware of him.

I've found Mrs C's testimony to have been plausible and persuasive throughout.

For the reasons I set out earlier in this decision, there's not enough evidence to conclude that Mr W provided the advice to Mrs C on behalf of Abana, so I'm unable to say it's responsible to her for the advice.

However, I think Mr F had a close association with Mr W. Not only were they both shareholders in New Beginnings, testimony we've had from other consumers with complaints against Abana suggest Mr W worked for [Mr F] Associates during 2014.

From what Mrs C has explained, it seems Mr W was passing the applications he'd prepared with her at her home, to Mr F for finalising. Mrs C's applications were then sent to Avalon with Mr F's signature and Abana's details to open the SIPP and arrange the investments in the funds.

Given this close working relationship, I think Mr F would've, or at the very least should've, known that Mr W wasn't covered by the same agency arrangement he had with Abana. So, Mrs C was being exposed to the risks associated with receiving unregulated advice. Not least a lack of access to effective dispute resolution and redress.

There's nothing to show Mr F made enquiries about the advice Mrs C had received from Mr W concerning the switch of her personal pension, the establishment of her SIPP or the underlying funds she was investing in. Before proceeding with the arrangements, I would've expected him to have satisfied himself on these matters.

Mr F must've been aware that Mrs C received no documents in relation the advice she was given by Mr W. It appears he made no enquiries at all to satisfy himself that the switch was in fact suitable for Mrs C before arranging it.

So, he wasn't acting with due skill, care or diligence when he effected Mrs C's switch of pension from Scottish Life into her Avalon SIPP and the unregulated funds. He was in breach of Principle 2 and therefore so was Abana.

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 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 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 C was an experienced or sophisticated investor. Indeed, as I've set out, quite the reverse given what we know about her circumstances at the time. A small amount of due diligence would've exposed the arrangements being made for her as inappropriate.

Mr F made arrangements for the switch of Mrs C's only personal pension plan into a SIPP, which would be dealing in unregulated investments. He completed her application to open a SIPP using Abana's FCA authorisation details. He transmitted the necessary applications. In doing so, he led Avalon to believe Mrs C had been advised on the transaction and that this activity was done with Abana's authority.

In doing all this, Mr F would've been aware Mrs C was being exposed to significant risks in the investments he was facilitating. He would've known unregulated funds could be Illiquid, meaning Mrs C 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.

So, I'm satisfied that Mr F didn't act honestly, fairly and professionally, and in accordance with Mrs C'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 C's personal pension with Scottish Life into the Avalon SIPP and the unregulated investments with the Kijani and SAMAIF funds could sensibly be regarded as fair to Mrs C. As such I think Mr F, as Abana's agent, failed to meet the regulatory requirements I have set out when making these arrangements. So, taking all the circumstances of the case into account, it is fair and reasonable to uphold this complaint against Abana, and for Abana to put things right.

putting things right

I'm upholding Mrs C'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 C would've switched her Scottish Life funds into an Avalon SIPP, and so she wouldn't have suffered the financial loss she's experienced. I think she would've left her pension where it was.

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

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

Abana must obtain the notional value of Mrs C's previous personal pension plan with Scottish Life, as at the date of calculation. So, as if it 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 C's pension had remained invested in her Scottish Life pension plan.

Abana should then find the current value of Mrs C'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 C hasn't taken any tax-free cash or drawdowns nor has she made any additional contributions. If it materialises there have been, then the value Abana obtains or the calculations Abana makes can 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 C's former pension plan 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 C'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 C 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 C'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 C'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 Scottish Life personal pension plan.

If paying compensation into Mrs C'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 C'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 C's marginal rate of tax at retirement.

For example, if Mrs C 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 C 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 C'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 C 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 C 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 C'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 C's acceptance of my final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or reject my decision before 15 June 2020.

Kevin Williamson
ombudsman