Complaint

Mr M says Abana Unipessoal Lda (Abana) gave him unsuitable advice about switching his personal pension funds into a Self-invested Personal Pension with unregulated investments, which caused him to suffer a financial loss.

background

Mr M knew Mr F through a friend. Many years earlier they'd discussed his occupational pension and Mr F had advised him to stay with that scheme because the benefits were very good and unlikely to be bettered through a transfer.

Years later, in 2013 Mr M approached Mr F for advice about his two Scottish Widows personal pension plans. At that time Mr F represented himself as being associated with Abana. Mr M says Mr F went through all his documentation and told him his funds could be placed in a low risk, low cost fund and generate a modest increase in his pot compared to what he was achieving with through his existing personal pension provider.

I'll set out more fully the individuals and organisations involved in what happened to Mr M later in this decision. But ultimately Mr M was persuaded to switch his personal pensions into a Self-invested Personal Pension (SIPP) with Westerby Trustee Services Limited (Westerby).

Mr M switched nearly £74,000 from his Scottish Widows plans into the SIPP. He took about £18,000 in tax-free cash (TFC). And around £52,000 was invested through a business called ePortfolio Solutions. Two unregulated vehicles accounted for 80% of this investment - the Brighton SPC - Kijani Commodity Fund (Kijani) and the Swiss Asset Micro Assist Inc Fund (SAMAIF). The balance was placed in the TCA Global Credit and Montello Real Estate Opportunity funds.

Abana wrote to Mr M in June 2015 to let him know that it had recently become aware that it hadn't been authorised to give him the investment advice it had done when making arrangements for his SIPP. This obviously gave Mr M cause for concern.

The Financial Conduct Authority (FCA) engaged 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 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 it hadn't been 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, Mr M was asked by the independent consultancy to provide information about the events leading up to the switch of his pension funds. Following his submissions, it wrote to him in January 2016 with its conclusions. It said the advice he'd been given to establish the SIPP and invest in unregulated funds had been unsuitable. It noted an agent of Abana – Mr F - had been responsible.

The consultancy set out what steps Abana should take to put Mr M back into the position he would've been in had the switch not taken place. In June 2016 it quantified the redress Abana would need to make. Fortunately, his loss had been mitigated to some degree because Westerby had been able to redeem around £30,000 from his investments.

Mr M says Abana assured him it would settle the redress. It had referred matters to its professional indemnity insurer. But Mr M brought his complaint to us in May 2017 because despite confirmation that he'd been given unsuitable advice and having been awarded compensation, Abana had still failed to pay him back.

Abana eventually changed its position on the payment of redress and argued it wasn't responsible for what had happened. Abana submits that Mr F who carried out the transaction with Mr M wasn't its appointed representative (AR), or its agent. So Abana says it's not responsible for the acts or omissions in this case and challenged our jurisdiction to consider Mr M's complaint against it.

The investigator concluded that we could look into Mr M'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 at various points in time over the past few years.

Abana argues that Westerby, as the SIPP provider, was regulated and allegedly accepted business introductions from an unregulated party and instructions to buy unregulated investments. Westerby had a responsibility to carry out due diligence. Abana says Westerby was the business that had the relationship with Mr F. So, it thinks Westerby should be answerable for what happened to Mr M.

Abana also questions why another SIPP provider Mr F had dealings with agreed new terms of business with the entities New Beginnings Ltd and [Mr F] Associates, suggesting it was because the clients it's being held accountable to weren't meant to be added to its agency. It has suggested collusion between Mr F and that SIPP provider, resulting in the complaints it now faces.

Abana has said the same SIPP provider gave false information to the specialist compliance consultancy which was commissioned to look into the advice Abana had given various clients. It says that consultancy was negligent in how it conducted the reviews. Further, it cites a fund management company as having responsibility for the SIPP investments. And it questions actions taken by the FCA in 2015 which it says could've had a material impact on the losses of some complainants.

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

We can't 'join' third parties to a complaint to help shed light on what's happened in a case. Whilst we do have powers to require parties to a complaint to provide information to us, we can't compel anyone who isn't a party to the complaint to provide evidence.

Abana will be aware, a court does have powers to compel third parties to give evidence and to be cross examined. It's free to pursue other parties it feels may have been responsible to whatever degree for what's happened to Mr M and for exposing it to any claims and costs that it now faces. But that's not something this Service can help with.

Abana has also said that in a meeting it held with Westerby and Mr F in May 2013, it was told some SIPP products were insurance based and therefore compliant under IMD permissions. It seems to be 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. In relation to other cases it said recently that this Service hadn't asked it for information. I'm afraid that position isn't credible.

The cases I've seen have been ongoing now for many years. Abana has been asked for the information it holds in relation to these complaints. For example, the following is an extract from a letter this Service sent to it in May 2017 about Mr M's complaint:

*"**what you need to do now***

So we can consider the complaint, we need you to send us:
- *your comments on the complaint*
- *any supporting documentation you want us to take into account*
- *the name of your professional indemnity insurers, if you will be involving them in this case*

For portfolio management cases, please also send us:
- *the account opening documentation – including all signed agreements*
- *valuations for the period complained about (or a snapshot if the period covers many years)*
- *any transcriptions/tape recordings or contemporaneous notes where a claim is reliant on a specific conversation"*

I'm satisfied Abana has had ample opportunity to make its case.

Abana has offered arguments in support of its position at various points over the past few years, and more recently in response to our investigators' opinions and some decisions this Service has already issued.

I've not provided a detailed response to all the arguments Abana has posed. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. And I won't be commenting further on decisions that have already been issued – those cases are now closed and Abana must adhere to any requirements placed on it.

While I've 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. That means the arguments Abana has made, including its most recent submissions to this Service on this case, where these are material to my consideration and the outcome reached, are addressed as appropriate in this decision.

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 Mr M'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 Westerby, the provider of Mr M'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's Mr F who provided Mr M with advice about switching his personal pensions and arranged for the funds to be switched to the SIPP with Westerby (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've been provided with a copy of the AR agreement between Abana and New Beginnings. 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 weren't 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.

Mr F told another SIPP provider he had dealings with - Avalon Investment Services Limited (Avalon) - that he was in the process of getting his own FCA authorisation (he had previously been submitting business to Avalon using Abana's authorisation number). He made an application for new terms of business on 28 May 2014 and this was acknowledged by Avalon, which at that point noted internally his intention to leave 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.

Westerby Trustee Services Limited (Westerby)

Westerby is a UK based SIPP provider and administrator, regulated by the FCA. Westerby is and was at the time of the complaint authorised, in relation to SIPPs, to arrange (bring about) deals in investments, deal in investments as principal, establish, operate and wind up a pension scheme and make arrangements with a view to transactions in investments.

A Westerby SIPP was used to make the unregulated investments that Mr M is unhappy about.

Avalon Investment Services Limited

Avalon was also 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. Mr F also provided advice and made arrangements for clients he introduced to this firm.

Avalon was placed into administration in February 2016 and was dissolved in August 2018. 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 Mr M'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 Mr M complains done in the carrying on of a regulated activity?

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

were the acts Mr M complained about done in carrying on a regulated activity?

Mr M has complained about Abana's role in him receiving unsuitable pension and investment advice. And the subsequent arrangements made on his behalf to switch his personal pension funds to a SIPP with Westerby and make investments in the Kijani and SAMAIF funds. Mr M says he hasn't been compensated despite previous assurances he would be.

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. Abana has provided an interpretation of an exchange it had with the FCA in 2015 as an argument why the activity it was involved in wasn't regulated. I'll provide my thoughts on its argument later in this decision.

We've not been provided with a fact find, risk appetite assessment, suitability report or recommendation letter – all we have is the testimony from Mr M about what Mr F told him during their discussions.

Nevertheless, I think it's highly unlikely Mr M would've embarked on a high-risk investment strategy using his personal pension provisions without this course of action being recommended to him. Mr M had built up his funds over many years. It seems more likely than not he received advice that motivated him to make the switch.

I'm satisfied Mr F gave advice to Mr M to switch his personal pension plans and invest through a SIPP with Westerby. I believe Mr F told Mr M that the unregulated investments would perform better than his existing plans. I think Mr M trusted the assurances he got about the safety of the funds, which is why he 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's details, including his signature were included on Mr M's ePortfolio Solutions application. And both this and his SIPP application had Abana's details on. He transmitted the applications and Westerby dealt with him as the key contact. 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).

Mr F transmitted the authorised paperwork to Westerby which facilitated Mr M opening the SIPP and the investment in the unregulated funds. I'm satisfied that this constitutes the regulated activity of arranging the pension scheme with Westerby. 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.

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 Mr M – 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 the SIPP provider, from it to Abana and to Mr F. So, the exclusion at article 29 doesn't apply.

Abana has asked for evidence of the payments it received via another SIPP provider in relation to the arrangement of certain other SIPPs. It should have a full record of all the payments it received in relation to Mr F's activities, including where he was dealing with Westerby.

I've seen a letter from Abana to Westerby dated 17 May 2013 about the transfer of clients from another advisory firm. It requests that these clients are held in a new sub-agency for identification purposes and directs that all commission payments under this sub-agency be paid to a particular account. That account was in the name of Mr F.

The advice and arrangements to switch Mr M's personal pensions into the Westerby SIPP happened in July 2013. A 3% adviser charge was made and this appears to have been executed in keeping with the arrangements agreed between Abana and Westerby.

A further letter from Abana to Westerby dated 18 November 2013 advised changes to its bank details for commission payments. It confirmed new bank account details for its ARs and sub-agents. This again included Mr F, but with different account details.

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. Asset Management International (AMI) was a non-regulated fund management organisation that was associated with e-Portfolio Solutions.

But I've seen no evidence that Mr F, Westerby or anyone else were introducing Mr M to an appropriate party under the provision it references. I think, Mr F on behalf of Abana, made the introduction to Westerby 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 doesn't apply.

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

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

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

The advice given and the arrangements made by Mr F

The first thing I need to consider is whether Mr F's dealings with Mr M 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 advice given and the arrangements made for the switch of Mr M's personal pensions, including the authorisation and transmission of his application for a SIPP with Westerby and his application to ePortfolio Solutions, and effecting the investment in unregulated funds, were dealt with by Mr F. Westerby relied on the authority it understood him to have in these matters.

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

- The main elements of the transaction happened in July 2013 – this is before he told another SIPP provider he was leaving Abana and provided new terms of business for it at the end of May 2014. Before this Mr F had been submitting business to SIPP providers in his capacity as an agent of Abana and using that firm's authorisation details.
- Further, where Mr M'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. Mr F signed to this effect as required, including other paperwork for example to confirm Mr M's identity.

Given what I've seen in this complaint and in other similar cases, I'm satisfied Mr F advised on and arranged Mr M's SIPP with Westerby 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 advising on and arranging Mr M's SIPP with Westerby. 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 Mr M 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 him.

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. 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 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 said 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 and that he asked for it to be forwarded anyway.

Abana seems to be acknowledging here 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 emails during that 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. 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 SIPP providers 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?).

In addition to 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 Westerby products. These clients were transferred to Abana and he would continue to assist those clients. Abana obtained a [sic] agency with Westerby 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 appointed representative of Abana."

Abana says this arrangement, which it still acknowledges, was for a fixed-fee for the caretaking of an existing client base for temporary period. It said the arrangement didn't confer any authority to Mr F.

I think it demonstrates that Abana expected Mr F to carry on pensions activities and facilitated this by entering into an agency agreement with Westerby. 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 from Abana to Westerby dated 17 May 2013 about the transfer of clients from another advisory firm. It requests that these clients are held in a new sub-agency for identification purposes and directs that all commission payments under this sub-agency be paid to a particular account. That account was in the name of Mr F.

The main advice and arrangements to switch Mr M's personal pensions into the Westerby SIPP happened in July 2013. A 3% adviser charge was made and appears to have been executed in keeping with these arrangements agreed between Abana and Westerby.

There's an email exchange in early March 2014 between the same parties, in which Westerby 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. 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 Westerby so that Mr F could provide the same for clients.

Further, Abana has said that in a meeting it held with Westerby and Mr F in May 2013, it was told some SIPP products were insurance based and therefore compliant under IMD permissions. It seems probable it didn't properly understand the business it was becoming involved with.

In June 2015 it sent Mr M a letter which I think is very telling, it begins:

*"…**IMPORTANT: Advice given to you by Abana Lda ("Abana") in relation to your SIPP with Westerby Trustee Services Limited…Why are we writing to you?***

I am writing to you with reference to the advice you received by your former advisor [Mr F] …concerning your investments held with Asset Management International (AMI) under your [SIPP]. It has recently come to our attention that Abana were not authorised to give the advice we gave to you regarding your investments as we do not have the correct regulatory permissions…"

Whether Abana was or wasn't misled by other parties into thinking it could carry on the activities that are the subject of Mr M's complaint, the fact as acknowledged in this letter is that it was responsible for its own regulatory compliance and its own acts and omissions in that regard.

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

payment of adviser charges made by SIPP providers for business generated by Mr F

I've already mentioned a letter I've seen from Abana to Westerby dated 17 May 2013 about the transfer of clients from another advisory firm. It directs that all commission payments under its sub-agency be paid to a particular account in the name of Mr F. The main advice and arrangements to switch Mr M's personal pensions into the Westerby SIPP happened in July 2013. A 3% adviser charge was made in keeping with that arrangement.

Abana sent a further letter to Westerby in November 2013 confirming bank account details for its ARs and sub-agents, in which Mr F's bank account details were updated.

As an aside, we were also told by a different SIPP provider (Avalon), about payments made to Abana for business introduced by Mr F before the end of May 2014. I've seen statements to this effect where 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 said 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 didn't receive 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.

Although I don't know what payments Abana ultimately received for the reasons I've set out, I do think the evidence here demonstrates that Mr F was given actual authority to undertake pension activities on behalf of Abana.

the independent review of pension transactions attributed to Abana

Abana acknowledged the outcome of an independent review into several cases that are now being dealt with by this Service. The reviews concluded Mr F had been responsible for unsuitable advice he gave and the arrangements he made for the switch of pension funds into SIPPs, and therein the investment in unregulated funds. In order to pay the redress due, Abana made a claim on its professional indemnity insurance. So, this was another example we have that for some time it accepted responsibility for the things Mr F had done wrong.

Abana ultimately changed its position. It says its initial notification to clients of the things that it had got wrong and the subsequent offer to pay redress wasn't an admission liability. 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 SIPP providers.

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 likely Abana's later repositioning here 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 or being beyond its insurance cover because his activities fell outside the scope of Abana's permissions, it should've done.

So, I think Abana notifying its clients that something had gone wrong, the review process it engaged with and its initial acceptance of 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 Mr M'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 disputed 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 website 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.

Abana's engagement with the FCA in 2015

In responding to some earlier decisions which have been upheld against it, Abana questioned the jurisdiction of this Service citing communications it had previously with the FCA on this matter. I can see that Abana's Director sought advice from the FCA on 2 February 2015. His email was as follows:

"Dear X, regarding FCA authorised firm 597069 Abana Lda. Thank you for advising me earlier of the rule book regarding SIPP advice I have read the following chapters that you referred me to…May we ask the following questions:1. Can we advise UK residents on SIPPs under our inward passported UK branch IMD permissions?..."

I can see the FCA responded on 16 March 2015 saying (bolding my emphasis):

"In respect of your question as to whether you can advise UK residents on SIPPs under an inward UK branch IMD passport. We understand that by UK residents ***you mean potential members or actual members*** *of SIPPS. These types of schemes are set up under a trust arrangement whereby the member is a beneficiary of the trust and the benefits to which they are entitled will be secured through the rights under the insurance policy being held by the trustee. Normally the trustee operates/holds a separate scheme and insurance contract for each member.* ***On that basis the IMD passport would not be sufficient and you would be required to seek a top-up permission****."*

"This is because arranging to obtain rights under an existing policy is not IMD business and to be precise the member would be entering into a trust relationship not an insurance contract. Additionally, the IMD would not generally apply to post conclusion activities such as arranging deals in and advising on subsequent transactions…So ***the IMD would not extend to advice within the pension (e.g. investment decisions on where to invest), transfers of benefits to or from the pension and advising on and arranging the taking of benefits****."*

This is consistent with my findings elsewhere in this decision.

Rather than supporting its position on jurisdiction, I think this exchange of emails in February and March 2015 is revealing that even at this time Abana still didn't know until it received FCA's advice whether or not it had permission to provide the services it had been up until that point.

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

The position adopted by Abana is that it was duped by Mr F and various other parties, in respect of what happened in this and other cases. Recently it quoted a judgement '*WM Morrison Supermarkets plc ("Morrisons") v Various Claimants (Supreme Court, 1 April 2020'*. It drew on this outcome to infer that a principle can't be held responsible for a dishonest agent.

Leaving aside that again it seems to be accepting something which it has previously argued against i.e. that Mr F was its agent, I don't find the facts and circumstances of the particular Supreme Court judgement it quotes to be telling in the matter I'm considering.

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.

Even if Abana wasn't fully aware of everything Mr F was doing, as I'll set out later, that isn't a defence here. It had to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

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 including his details on Mr M's application form and liaising with that business on his 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 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 it gave and the arrangements it made for the switch of Mr M's personal pension funds into the Westerby SIPP and the investments in unregulated funds, which together ultimately resulted in the financial loss he's suffered.

my conclusions on jurisdiction

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

- Mr M's complaint is about both the advice and the arrangements for the switch of his personal pensions to the Westerby SIPP and the investments made therein. So, it's a complaint about regulated activities.

- We can consider Mr M's complaint about the advice given and the arrangements made by Mr F. This is because I'm satisfied that he was responsible for the switch of his personal pensions to a SIPP with Westerby and the investments in the Kijani and SAMAIF funds, as an agent with the actual authority of Abana. It follows that Abana is responsible for his acts and omissions in this regard.

considering the merits of Mr M's complaint

As I'm satisfied this Service has jurisdiction to consider Mr M'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 Mr M'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 Mr M's case. For example, I've not seen a fact find covering his circumstances, nor a record of his objectives for his pension arrangements. There's no document which captures Mr M's attitude to risk. And I haven't seen a recommendations report.

In relation to another case Abana has said recently that this Service hasn't asked it for information. I'm afraid that position isn't credible. The cases I've seen have been ongoing now for many years. Abana has been asked for the information it holds in relation to the complaints, for example in Mr M's case a request was first sent in May 2017. It's had ample opportunity to make its case.

Mr M has provided us with testimony and some documentation which is relevant to the events he's complained about.

For reasons I can understand, several of Abana's former customers who have found themselves in a similar situation to Mr M 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, and in respect of both parties, I generally give more weight to testimony and evidence which is more contemporaneous with the events complained about. That's because it tends to give a more accurate account 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 Westerby as the provider of Mr M'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 Mr M's pension funds.

While there's conflicting information about what happened in 2013 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 M's case?

The first thing I considered in relation to Mr M'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 I 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 Mr M's personal pension into a SIPP?

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

Mr M knew Mr F through a friend. In 2013, he approached Mr F for advice about his two Scottish Widows personal pension plans. At that time Mr F represented himself as being associated with Abana.

Mr M says Mr F went through all his documentation and told him his funds could be placed in a low risk, low cost fund and generate a modest increase in his pot compared to what he was achieving through his existing personal pension provider. Mr M told us he didn't receive anything in writing from Mr F or Abana.

Mr F's details and signature were included on Mr M's ePortfolio Solutions application, which gave effect to him making investments in unregulated funds. Mr F's details were also on Mr M's Westerby SIPP application. In both cases, Mr F was identified as being associated with Abana and it's details were also supplied on the forms.

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

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

I've not seen a fact-find covering Mr M's circumstances, nor a record of his objectives for his pension arrangements. There's no document which captures Mr M's attitude to risk at that time. I haven't seen a recommendations report. And I haven't seen a comparison of the performance, costs and benefits of his 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 Mr M was interested in achieving greater returns on his pension funds than he was receiving from Scottish Widows. But I don't think his risk appetite would've been high from what I have managed to glean from the information I do have.

A risk profile analysis he completed for Abana in September 2015 suggests he had a cautious outlook. This information was gathered sometime after the event complained about and following issues emerging with his investments, so the weight I put on this is limited. But Abana hasn't provided the equivalent information from 2013.

I've not seen any analysis of Mr M's capacity for loss at the time. But his personal pensions were modest even though he was a member of an OPS. And taking on more risk to build up funds *might've* been something to consider if he'd been younger, but Mr M was already 65 when Mr F gave him advice.

As we know, Mr M was persuaded to switch nearly £74,000 from his Scottish Widows plans into the SIPP in July 2013. He took TFC of just over £18,000. The bulk of what remained after fees was invested in two unregulated funds through a business called ePortfolio Solutions. These funds were called Kijani and SAMAIF. Based on a valuation from 2015, they accounted for around 80% of his investments. The balance was in the TCA Global Credit and Montello Real Estate Opportunity funds.

Mr M said that although the only communication he received was from Westerby, everything appeared to be fine until November 2014. At this point it informed him that the Kijani fund was under investigation and that he should liaise with Mr F and Abana about the implications as it couldn't give him advice.

Mr M says that Mr F told him Westerby was panicking. He also contacted Abana's director who he said was dismissive and said that in the unlikely event that the fund failed he would be compensated.

Unfortunately, by 2015 the Kijani and SAMAIF funds had been suspended leaving Mr M facing a loss. Westerby was subsequently able to redeem £30,000 of his investments in 2016. And I can see this enabled him to drawdown a small pension income from 2018.

Abana wrote to him in June 2015 that year to let him know that it had recently become aware that it hadn't been authorised to give him the investment advice it did in 2013 when making arrangements for his SIPP.

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 Mr M's case.

I think it's telling that the specialist independent third party concluded in 2016 that Mr F, on behalf of Abana, had been responsible for what had happened to Mr M. And it 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 April 2014, which I think is also relevant. In this email exchange Abana provides feedback to Mr F about his approach to suitability reports. This was provided by its compliance function and appears to show Mr F's practices were lacking, for example in relation to advice around risk appetite.

Overall, I've concluded Mr F wasn't acting with due skill, care or diligence when he effected Mr M's switch of pension plans into his Westerby SIPP and the unregulated funds. He was in breach of Principle 2 and COBS 9.2.1R, and therefore so was Abana.

I find Mr M's testimony plausible and persuasive. And I think it's of note that Abana has never made the case that the switch his personal pensions into the Westerby SIPP and investments in unregulated funds was an appropriate or fair transaction.

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 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.

I've already mentioned the letter Abana sent Mr M in June 2015 which I think is very telling, it begins:

*"…**IMPORTANT: Advice given to you by Abana Lda ("Abana") in relation to your SIPP with Westerby Trustee Services Limited…Why are we writing to you?***

I am writing to you with reference to the advice you received by your former advisor [Mr F] …concerning your investments held with Asset Management International (AMI) under your Self-invested Personal Pension (SIPP). It has recently come to our attention that Abana were not authorised to give the advice we gave to you regarding your Investments as we do not have the correct regulatory permissions…"

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.

Mr F gave advice on and made arrangements for the switch of Mr M's personal pension funds into a SIPP, which would be dealing in unregulated investments. He transmitted the necessary applications. In doing so, he led Westerby to believe Mr M had been advised on the transaction and that this activity was done with Abana's authority.

Abana has asserted that SIPPs are actually straight-forward for customers to understand. I think the number of complaints brought to this Service about problems in this area suggests the opposite in some circumstances. And certainly when considering the portfolio put in place for Mr M which wasn't diversified, with interests in unregulated funds which weren't a match for his risk appetite, I think its assertion is ill-considered.

There's no evidence Mr M was an experienced or sophisticated investor. As I've set out, he thought the new arrangements being recommended were low risk and lost cost. A small amount of due diligence would've exposed the arrangements being made for him as inappropriate.

Mr F would've been aware Mr M was being exposed to significant risks in the investments he was facilitating. For example, there's no evidence Mr M had the capacity to withstand potential losses. Mr F would've known unregulated funds could be Illiquid, meaning Mr M might have difficulty getting access to his 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 Mr M'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 Mr M's personal pensions with Scottish Widows into the Westerby SIPP and the unregulated investments could sensibly be regarded as fair to Mr M. As such I think Mr F, as Abana's agent, failed to meet the regulatory requirements I've set out when providing the advice and making the 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 Mr M's case. So, he needs to be returned to the position he 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 Mr M would've switched his Scottish Widows funds into a Westerby SIPP, and so he wouldn't have suffered the financial loss he's experienced. I think he would've left his pension funds where they were.

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

1. Calculate the loss Mr M has suffered as a result of making the switch

Abana must obtain the notional value of Mr M's previous personal pension plans with Scottish Widows, as at the date of calculation. So, as if they hadn't been switched to the Westerby 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 Mr M's pension had remained invested in his Scottish Widows plans.

Abana should then find the current value of Mr M'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 Mr M took TFC in 2013 and has been drawing down a small pension income since 2018. I don't believe he's made any further contributions to his SIPP. The value Abana obtains or the calculations Abana makes should assume these adjustments would still have occurred and on the same dates.

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

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

To close Mr M'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 Mr M 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 he may receive from the investment and any eventual sums he 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 Mr M's SIPP so that the transfer value is increased by the loss calculated (resulting from 1 and 2) or pay him an equivalent cash sum notionally adjusted for tax

If compensation is paid into Mr M's SIPP, payment should allow for the effect of charges and any available tax relief, so that he is in the same position as if he'd stayed in his original Scottish Widows personal pension plans.

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

Because Mr M'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 Mr M's marginal rate of tax at retirement.

For example, if Mr M is likely to be a basic rate taxpayer in retirement, the notional allowance would reduce the amount payable equivalent to the current basic rate of tax.

4. SIPP fees

If the investments aren't removed from Mr M's SIPP, and it remains open after compensation has been paid, Abana should pay him 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, Mr M 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 Mr M has been caused upset as a result of Abana's actions. The sudden loss of a significant element of his pension fund would've come as a shock to him and has clearly had a significant impact. In recognition of this it should pay him £500 for the trouble and upset he's experienced.

my final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 15 October 2020.

Kevin Williamson
ombudsman