Complaint

Mr W complains that Westerby Trustee Services Limited ("Westerby") allowed his Self-Invested Personal Pension ("SIPP") to be invested in unregulated high-risk investments. He thinks Westerby should not have allowed this to happen.

Background

Westerby has been represented by two law firms for periods of our investigation of this complaint, and those law firms have made submissions on behalf of Westerby at various times. For simplicity, I have referred to Westerby throughout, whether the submissions came directly from Westerby or were made on its behalf.

Westerby's relationship with Mr W began in July 2013 when it received his application for a SIPP. On the application form, Mr W's financial advisor was noted as Richard Fletcher of Abana. Abana Unipessoal Lda ("Abana") is a financial advisory firm based in Portugal. At the relevant time Abana passported into the UK under the Insurance Mediation Directive ("IMD"). This means that during those dates, Abana was an EEA authorised firm and permitted to carry out some regulated activities in the UK.

Mr W held preserved benefits in an occupational pension scheme ("OPS"). Acting on advice from Abana, Mr W transferred the cash value of those benefits into a SIPP with Westerby. Mr W says he knew Abana's advisor as an insurance man and in a conversation with him had said he had a frozen pension, at which point Abana's advisor said he should do something with the frozen pension and that the advisor could help.

A SIPP application form was signed on 22 July 2013. Section 9 of the application asked the question "*Do you have a financial advisor?*" This was answered "yes" and the details of Richard Fletcher of Abana were added. It was also instructed that initial commission of 5% of the transferred value should be paid to Richard Fletcher.

An application form for an investment platform called E-Portfolio solutions, distributed in the UK by a business called Asset Management International, was also completed. This recorded the financial advisor as being Abana. Mr Fletcher, in his capacity as a financial adviser of Abana, signed a declaration on this application on 22 July 2013. The application was signed by Mr W on the same date. The form was signed by Westerby, as trustees of Mr W's SIPP, on 30 July 2013.

Around £108,000 was transferred to Mr W's SIPP from his OPS. Of this around £101,000 was transferred to the E-Portfolio platform.

Initially, some of the money placed on the E-Portfolio platform was invested in the Kijani Commodity Fund, which was at the time based in Mauritius (later based in the Cayman Islands), and some in the Swiss Asset Micro Assist Income Fund ("SAMAIF"), based in Mauritius. And the remainder of the money was held as cash or invested in a money market fund. It appears that at a later stage Mr W became an investor in something called the TCA Global Credit Fund. On this point, in its submissions to us dated 6 June 2016, Westerby said:

> *The funds were later transferred into a "Special Purpose Vehicle" by EPS* [E-Portfolio] *on the direction of the adviser, the EPS Managed Portfolio. This included an element of the TCA Global Credit Fund.*

And in its final response letter, Westerby quoted information given to Mr W by it in October 2015 about the funds he had invested in, which included the TCA Global Credit Fund:

- *Kijani - suspended, in liquidation. Likely to take a number of years. Unclear as to what will come back (as per PwC)*
- *SAMAIF - suspended, in discussions with regulators. No timescale for resolution.*
- *TCA Global - not suspended to our knowledge, but awaiting completion of takeover of EPS before withdrawals can be made. No timescale.*
- *IMMF* [the cash fund] - *Suspended by virtue of Belvedere's* [the business that ultimately provided the E-Portfolio platform] *suspension. Struggling to get information. No timescale.*

So it's not clear when Mr W became an investor in the TCA Global Credit Fund but it seems he did so at some point prior to October 2015.

On 11 November 2014 Westerby wrote to Mr W about his investments in the Kijani and SAMAIF funds. It explained that the funds would, following a Policy Statement from the Financial Conduct Authority ("FCA") in August 2014, be considered to be non-standard assets. It explained that the funds might be higher risk than Mr W originally considered. Its letter also said the Mauritian Financial Services Commission had issued enforcement orders against both the Kijani and the SAMAIF funds.

Westerby "*strongly urged*" Mr W to contact his "*regulated financial advisor*", Abana, and asked him to confirm whether he wanted to continue to hold the investments or for Westerby to attempt to sell them. Mr W confirmed to Westerby on 12 November 2014 that he'd sought financial advice from Richard Fletcher of Abana and wished to continue to hold his investments in the funds.

On 23 October 2015 Mr W called Westerby. Westerby's call note recorded that:

He [Mr W] *is concerned about the underlying funds - has taken advice and found that the funds are suspended. Wanted to know how we as Trustees had allowed this to happen.*

Westerby treated this as a complaint from Mr W. It sent a response to the complaint on 9 December 2015. It didn't uphold Mr W's complaint. It said:

- It undertook due diligence on the proposed investments. But the situation Mr W found himself in was entirely out of its control.

- It had written to Mr W in November 2014 to highlight problems with the investments, and to urge him to seek advice.

- The responsibility for investment advice sat with Abana, and the suitability of its advice was being reviewed.

On 23 December 2015 Westerby wrote to Mr W again. The letter of that date said:

"…we now have further information regarding the EPS platform, the Swiss Asset Micro Assist Income Fund (SAMAIF) and the Kijani Fund..."

"We have been in correspondence with the new managers of the platform and with Asset Management International to confirm details of your redemption (sale) request. We understand that trades in the underlying funds have been placed. The illiquid funds within your portfolio cannot be sold at present, and will remain within the SIPP EPS account for the time being.

Based on the information that we have been provided with, the current value of the liquid and illiquid elements of the investment are as follows:

Liquid Funds: £58,209.41 (SAMAIF expected to trade again in February)
Illiquid Funds: £58,349.36 (this is not a true value - please see below)"

The letter also sets out the redemption timescale for what are described as "*underlying*" funds, including the TCA Global Credit Fund.

It appears that Mr W had not, in fact, made a redemption request, as he contacted Westerby and requested a redemption form on 4 January 2016. It was provided to him on the same day. Mr W signed the form on 10 January 2016 requesting a full withdrawal "*as far as liquidity would allow*". Following this request, around £52,200 was paid into the bank account of his SIPP on 19 May 2016.

In its 6 June 2016 submissions to us Westerby said:

The SAMAIF is also currently not trading. It is our understanding that they are currently in communication with the Mauritian regulators in order to enable redemptions from the fund, however there are no definitive timescales as yet. A copy of their latest update is enclosed.

It also said:

I have enclosed a copy of a recent valuation of the account, which shows that the portfolio is currently split as follows:

- *£2,009.83 as a pending dividend from SAMAIF*
- *£53,010.40 in Managed Portfolio S (which we understand consists of Kijani and SAMAIF)*
- *£58,357.53 in cash, which we understand is due to be returned to the SIPP bank account in the near future.* [As noted above, cash was paid into the SIPP bank account on 19 May 2016, so it seems Westerby's information might have been out of date when it made this submission].

We've also been given a copy of a 24 April 2016 update from SAMAIF, which suggests work to begin trading is still ongoing. So it seems likely the amount paid to the SIPP bank account came from an investment in the TCA Global Credit Fund, or another investment rather than the Kijani or SAMAIF funds, which both appear to have been suspended over the relevant period, and to have still been held on the platform after the cash had been paid to the SIPP bank account.

After Mr W's complaint was referred to us Westerby said, in summary:

- By their nature, SIPPs are intended to allow members to choose the underlying investments. Westerby (as Trustee) is responsible for carrying out due diligence on proposed investments to ensure that they can be held within a SIPP but cannot assess the suitability of an investment for a given member.

- Westerby did not (and was not authorised to) provide financial advice. The responsibility for the advice and for the suitability of the transfer and underlying investments lies with the financial adviser.

- The advice given to Mr W by Abana has been deemed to be unsuitable by an independent compliance consultancy, who were attempting to arrange compensation for the adviser's clients.

- The investment was placed into what were at the time regulated, listed investments in a regulated platform. Mr W's financial adviser (not Westerby) instructed the investment into the individual funds within the platform.

- When Westerby highlighted possible problems with the underlying investments, Mr W was asked if he wished to remain in those investments. He gave a clear instruction that he wished to retain the investments.

Our investigator thought Mr W's complaint should be upheld. He thought the fact Abana was based abroad should have made it stand out when Westerby was carrying out its due diligence checks on Abana. He said the entry for Abana on the Financial Services Register ("the Register") would have shown that Abana was only authorised to carry out insurance or reinsurance mediation in the UK. Our investigator said that personal pensions advice is not an activity covered by the IMD and that Westerby, as a SIPP operator, ought to have had the knowledge and expertise to understand what permissions were required, and what services Abana was allowed to provide in the UK.

Our investigator concluded that as Westerby shouldn't have accepted Mr W's SIPP application from Abana, it was fair and reasonable for Westerby to compensate Mr W for his financial loss. He set out how he thought this loss should be assessed.

Westerby didn't agree. It made a number of submissions following the investigator's view. I have summarised below what I consider to be the main points made, but I have carefully considered the submissions made by Westerby in their entirety:

- It is the administrator of the SIPP only and didn't advise Mr W on investing in it.

- It carried out proper due diligence on Abana which didn't reveal Abana wasn't authorised to advise on pensions in the UK. Accordingly, there was no reason not to accept Mr W's application for a SIPP.

- It did search the Register in 2013, which showed that Abana was EEA-authorised. It wasn't possible to find details of Abana's passport permissions as these were not provided on the Register as it was at that time.

- Having established that Abana was EEA-authorised, and knowing Abana's country of origin was Portugal, it then searched the Portuguese Regulator's register, which was also available online. From this it established that Abana was authorised to undertake both life and non-life business in the UK. There was nothing to put it on notice that Abana wasn't authorised to advise clients in the UK about pensions. It was entirely reasonable for it to rely on the entries on the Register and on the Portuguese Regulator's register.

- It also followed good practice by putting in place a terms of business agreement with Abana. In this agreement Abana warranted it was suitably authorised in relation to the sale of SIPPs. This supported Westerby's own findings.

- It's neither fair nor reasonable for it to be required to compensate Mr W. The loss was caused by Abana's advice to enter into the SIPP and by Mr W's choice of investments.

- It in fact enabled Mr W to recover some of his money. It wrote to him in December 2015 confirming that redemptions could be made on some of his funds. As a result, he was able to redeem around half the sum he'd originally invested in the SIPP.

My first provisional decision

After careful consideration of the available evidence and the submissions, I decided to issue a provisional decision on the complaint. In brief, my provisional findings were:

- Abana required "top up" permissions from the FCA in order to give advice on personal pensions in the UK.

- Westerby ought to have carried out sufficient due diligence on Abana before accepting business from it. This included checking initially, and on an ongoing basis, that introducers that were providing advice to clients had the appropriate permissions to be providing that advice.

- When conducting its due diligence, Westerby ought to have concluded that Abana required "top up" permissions to give advice on personal pensions in the UK. And Westerby ought to have conducted sufficient due diligence checks on Abana to verify its permissions. It therefore should have identified that Abana did not have the relevant "top up" permissions.

- Westerby should not have accepted Mr W's application as it ought to have identified that Abana did not have permission to provide Mr W with personal pension advice. And it was fair and reasonable in the circumstances to expect that Westerby ought to have put a stop to the transaction.

- In the circumstances, it was fair to ask Westerby to compensate Mr W for the loss he has suffered.

My provisional findings were accepted by Mr W. They were not accepted by Westerby. Westerby's initial response to my provisional decision was to make a request for information. I responded to that request on 30 July 2019 and provided a copy of all the information I had relied on when reaching my provisional decision on Mr W's complaint. In my response to Westerby, I confirmed that it had seen - following my response - everything I had relied on when reaching my provisional decision.

I wrote to Westerby again on 30 October 2019 to provide it with some additional information we had received from FCA. My letter said:

As part of its submissions to this Service, Westerby provided a screen print which it said represented the information contained on the Financial Services Register ("the Register") at the time it checked Abana's permissions in 2013. The screen print notes that Abana is EEA-authorised, but the section confirming whether Abana "Undertakes Insurance Mediation" has been left blank (see page 15 of my provisional decision where I have included a copy of the screen print provided by Westerby).

In my provisional decision dated 16 July 2019, I stated I was not persuaded that a section of the Register described as providing "basic details" contained the totality of the information that would have been available to those searching the Register at the time.

We have sought additional information from the FCA in connection with this matter. The FCA has confirmed that "top up" permissions do appear on the Register under the "Permissions" section - and that the FCA understands this was the same process in place in 2013 when Westerby accepted [Mr W's] *SIPP application from Richard Fletcher on behalf of Abana.*

Following my first provisional decision, Westerby made copious submissions, across a number of letters. I have considered all of Westerby's submissions in their entirety, however I have only summarised here the points which I consider to be key:

- It has provided evidence that it checked the Register at the point that it received Mr W's SIPP application and at subsequent points. Its procedure is to check the Register every time a SIPP application is received from an introducer, and every time adviser fees are paid from the SIPP. This demonstrates good practice, as per the Financial Services Authority's (FSA) 2009 thematic review report (the FSA was FCA's predecessor).

- It reiterated that it had searched the Register in 2013, which showed that Abana was EEA-authorised. It wasn't possible to find details of Abana's passport permissions as these were not provided on the Register as it was at that time.

- The Complaints Commissioner's report about the Register, dated 21 November 2017, confirms that the FCA cannot state what information was available on the Register at a given time.

- It contacted the FCA on an unrelated matter and was told that the FCA could not confirm what was not publicly available on the Register. On that occasion the FCA told Westerby to contact the firm in question to get the information.

- It provided quarterly Product Sales Data reports to the FCA via the GABRIEL reporting system. This submits details of every new SIPP established over a quarter, including the FRN of the introducing firm. The FCA was therefore aware that Abana was providing advice on SIPPs, but it did not express any concern.

- It is contrary to European Union law to discriminate against a firm on the basis of the EEA country in which it has been established. In the absence of any way to independently verify Abana's permissions, it was entirely reasonable to rely on its representation (as an authorised and regulated firm) that it held the relevant permissions. If this was not the case, it would present a barrier to an EEA authorised firm that would not exist for their UK-based counterparts.

- GEN 4 Annex 1 states that an incoming (EEA) firm must make details of the extent of its permissions clear on request. This shows that the FCA directs that the firm should confirm its permissions. The terms of business it entered into with Abana provided for such a request and effectively formalised this disclosure through a signed agreement.

- Had it been able to identify that Abana did not hold the necessary “top up” permissions, it would have declined to establish terms of business with Abana in June 2013, and it would have notified Abana of the reason for its decision. However, given that Abana saw a business opportunity in providing advice on personal pensions within the UK, it is reasonable to expect that Abana would have applied for (and been granted) these “top up” permissions. Abana would then have either contacted Westerby again or gone to another SIPP operator, which would have accepted the business.

- It is therefore fair and reasonable to expect that Mr W would ultimately have made the investments that have led to his loss, regardless of whether it had initially been able to identify that Abana did not hold the necessary “top up” permissions.

- Mr W's decision to retain his investments in November 2014 has led directly to his inability to redeem the remainder of the funds. Westerby expects Mr W would have recovered his funds in their entirety had he requested a redemption at that time.

- It was reasonable for it to expect that Abana, as an authorised and regulated firm, would act diligently and provide suitable advice to Mr W, given the new developments in relation to the funds that it had previously recommended.

- It is relevant to note that the Financial Services and Markets Act 2000 (FSMA”) acknowledges that there is a general principle that consumers should take responsibility for their own investment decisions. And, as the Ombudsman Service is part of the consumer protection provisions under FSMA, it follows that we must similarly have regard to this principle.

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- Its due diligence was not simply a check of the Register. Its Chairman and Compliance Oversight was present at several face to face meetings with Abana's Adviser and Compliance Director. He was thorough in his "testing" of their processes and due diligence. This culminated in Westerby establishing a legal document: the terms of business in which Abana warranted that it had the required permissions to introduce SIPPs. Abana therefore effectively "defrauded" it.

- Paragraph 1.5 of the FCA's Thematic Review TR16/01 says: "*When firms carry out research and due diligence they should consider whether they can rely on the information supplied by the provider, such as marketing material. Firms can rely on factual information provided by other EEA-regulated firms as part of their research and due diligence process, for example, the asset allocation."*

- It is able to accept applications from non-regulated introducers. This is not something it has done, but it is relevant that doing so is acceptable to the FCA.

Westerby also referred me to the submissions which the Association of Member-Directed Pension Schemes (AMPS) included in their Intervention Document in the Berkeley Burke case (i.e. *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878). It also provided a summary of the correspondence between the FSA/FCA and the industry at the time of regulation and subsequently. I will not summarise those in any greater detail here, but I have carefully considered them in their entirety and I deal with the AMPS points raised by Westerby later in this decision.

We wrote to Westerby to ask if it was able to provide further details of the several face to face meetings it says took place between it and Abana's Advisor and Compliance Director. In reply, Westerby said it does not have any documentary evidence recording the several meetings that took place with Abana's representatives. It said there was no requirement for a SIPP operator to meet with an introducing IFA and as such it would not have created formal minutes recording the various discussions that took place and the information/assurances that Abana provided during these meetings.

At the same time, we had also shared with Westerby an archive of the FCA register entry for Abana from around the time of Westerby's acceptance of business from Abana. We also shared an example of how the entry under the "passports" section would likely have appeared for an incoming EEA firm on the Register in 2013. We invited Westerby to comment on these.

In response, Westerby acknowledged that there were additional sections on the Register, but maintained it would not have been able to ascertain from the Register at the relevant time whether or not Abana held the required "top up" permissions.

Following the judgment in *Adams v Options SIPP UK LLP (formerly Carey Pensions)* [2020] EWHC 1229 (Ch) ("Adams v Options SIPP") being handed down, Westerby made further submissions to our Service. It said, in summary:

- The FCA's submissions to the court gave the regulator's views on what obligations arose from COBS 2.1.1R for a SIPP provider, which were extensive. In his judgement, the judge rejected the regulator's contentions, and confirmed that COBS 2.1.1R must be read in light of the contract between Mr Adams (the client) and Options SIPP UK LLP (the SIPP provider).

- It is also of note that the judge stated that the thematic reviews "*cannot properly be described as a set of rules or even guidance and in my judgment cannot give rise to a claim for failing to follow the suggestions which it makes*". It is clear that thematic reviews have no legal status, being "suggestions" to help a firm to act in line with the Principles and the Rules.

- Notwithstanding that the recommendations made within the thematic reviews are not obligatory (as confirmed by paragraph 162 of Adams v Options SIPP), it recognised the reasoning behind them, and it implemented the suggestions within them, including the introduction of intermediary terms of business – and it had done this with Abana.

- Adams v Options SIPP has reaffirmed the general principle that consumers should take responsibility for their own investment decisions. It considers that any decision of the Ombudsman Service must take account of this principle.

- It refers to paragraph 154 of the judgment which says "*A duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed in my judgement as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed.*"

- There was no obligation to do more than Westerby has done in this case. Namely to execute Mr W's instructions.

- I had noted that its letter of November 2014 referred Mr W back to Abana, as his adviser. It does not consider this overrides Mr W's responsibility for either instructing it to retain funds that were clearly high risk, or for taking no action. Similarly, any decision to take no action in December 2015, when some funds became liquid for a short period of time (amounting to approximately half of the funds invested), should be the responsibility of Mr W.

- We should check to see if Mr W received a cash incentive to make his investment and ask for evidence to support his answer. The judge in Adams v Options SIPP thought this was the primary motivation of Mr Adams, and presented this as one of the reasons why his claim against Options SIPP should not succeed.

Further information provided by Mr W.

We asked Mr W to let us know what he would have done, had he been aware Abana did not have permission to give advice on personal pensions in the UK, and also to ask if he was offered or paid any sort of cash incentive to make the investment and/or transfer to the SIPP. Mr W told us the only incentive he was given was that the performance of the recommended investment would be better than his existing pension. He later added that he had, unexpectedly, been paid £200 by Abana's advisor after the application had completed. He says Abana's advisor told him he was giving him this as he had earned commission. Mr W also told us that he would not, under any circumstances, have dealt with Abana had he known it did not have the required permissions – he says he would have sought advice elsewhere.

My second provisional decision

In the circumstances of this complaint, I decided it was appropriate to issue a second provisional decision. My second provisional decision explained I was satisfied that:

- Westerby ought to have identified that Abana needed "top up" permissions to advise on personal pensions in the UK and it should have taken all steps available to it to independently verify that Abana had the required permissions.

- If Westerby had taken these steps, it would have established Abana did not have the permissions it required to give personal pensions advice in the UK, or alternatively that it was unable to confirm whether Abana had the required permissions.

- It is fair and reasonable in the circumstances of this case to conclude that none of the points Westerby had raised are factors which mitigate its decision to accept Mr W's application to open a SIPP in the first place.

I also remained of the view, given the general nature of Mr W's complaint, (he simply says Westerby should not have allowed the loss to happen), that when deciding what is fair and reasonable in all the circumstances of this case, it was appropriate for me to take an inquisitorial approach. And, I remained of the view that the key question to consider in this complaint is whether Westerby, acting in accordance with its own regulatory obligations as set out in the Principles, and to meet the requirement to act in the best interests of its clients and treat them fairly, ought to have accepted Mr W's application from Abana.

The main points I made in my second provisional decision, in summary, were:

On the authorisation and permissions of Abana:

- It is accepted that Abana was an authorised person for the purposes of FSMA (Abana was an EEA firm which qualified for authorisation under Schedule 3 of FSMA). The issue being considered here is whether Abana had the required *permissions* it needed to carry on the regulated activities that it carried on in relation to Mr W's SIPP.

- It is not disputed that Abana required "top up" permissions to give advice on and to arrange deals in personal pensions in the UK (and that it in fact did not have these permissions). What is disputed is whether Westerby ought to have identified that Abana did not have the required "top up" permissions.

- I remained of the view that Westerby ought to have done more to confirm whether Abana held the required "top up" permissions to give pensions advice in the UK. And, in failing to do so, it had not complied with the Principles, regulatory guidance (or COBS 2.1.1R).

On Westerby's due diligence on Abana:

- At the relevant time, Westerby was authorised as a SIPP operator. And, I was satisfied that it is fair and reasonable to say Westerby, as a SIPP operator, ought to have been familiar with the rules, guidance, legislation and relevant case law that I referred to in my provisional decisions. It should therefore have been aware that a business based in Portugal passporting into the UK under the IMD needed to have "top up" permissions to be giving advice and making arrangements in relation to personal pensions in the UK.

- Alternatively, if things weren't clear to Westerby, it ought to have checked whether "top up" permissions were required – and understood where to look. Guidance on this was available in the FCA Handbook (see SUP App 3). Westerby should have been aware of this guidance and should have checked if an incoming EEA-authorised firm required "top up" permissions in the circumstances.

- I had seen no evidence that Westerby documented this requirement and then made specific enquiries of Abana to ask it to confirm it had the required "top up" permissions in order to provide advice or make arrangements in relation to personal pensions in the UK.

- COBS 2.4.6R (2) and COBS 2.4.8G provide a general rule and guidance about reliance on others. These mean it would generally be reasonable for Westerby to rely on information Abana had provided to it *in writing*, unless Westerby was aware or ought reasonably to have been aware of any fact that would give reasonable grounds to question the accuracy of the information.

- I did not think an undocumented meeting with Abana amounted to Abana providing something in writing on which it may have been reasonable for Westerby to rely on, as any assurances Abana gave at such meetings were only a verbal exchange. Westerby has confirmed that it kept no records of the discussions it had with Abana during the meetings it has referred to, and I had seen no evidence it otherwise recorded what Abana told it about the permissions it held. So there appeared to be nothing in writing arising from these meetings. I therefore did not think COBS 2.4.6R was applicable in the circumstances.

- Westerby says the meetings it had with Abana culminated in Westerby establishing a legal document – the terms of business agreement – in which Abana warranted that it had the required permissions.

- I was not persuaded that an agreement written by Westerby and signed by Abana amounted to information provided by Abana in writing to Westerby or that COBS 2.4.6R was intended to apply to such circumstances. But, in any event, I thought, by the time of Mr W's application, Westerby was aware, or ought reasonably to have been aware, of facts that would give reasonable grounds to question the accuracy of what Abana had warranted:

    - I was satisfied that, by the time of Mr W's application, Westerby had checked the FCA register. And, for all the reasons I had given in my provisional decisions, I thought such a check ought to have led Westerby to conclude that Abana did not have any "top up" permissions. And, that Westerby ought reasonably to have been aware that relevant "top up" permissions were required for Abana to provide advice on and arrange personal pensions in the UK.

    - Therefore, even if the agreement did amount to information provided by Abana in writing to Westerby, Westerby could not have relied on it under COBS 2.4.6R (2) by the time it received Mr W's application for a SIPP. By that time, Westerby was aware, or ought reasonably to be aware, of facts that would give reasonable grounds to question the accuracy of the warranty Abana had given it by signing the terms of business agreement.

- I did not think there was any other basis on which it was reasonable for Westerby to rely on the meetings or the agreement with Abana, because in summary:

    - Simply asking Abana to warrant broadly that "*it had all the required permissions*" was not sufficient to meet the standard of good practice at the relevant time. This is a view Westerby itself appears to have shared at the time. It has told us it checked the Register at the point that it received Mr W's SIPP application and at subsequent points. It has told us its procedure was to check the Register every time a SIPP application is received from an introducer, and every time adviser fees are paid from the SIPP. It says that, in its view, this demonstrates good practice, as per the FSA's 2009 thematic review report. That is a view I shared.

    - So Westerby should not have – and did not – rely solely on the agreement and meetings it had with Abana. And, for all the reasons given in my provisional decisions, I thought Westerby's check of the Register ought to have led to the conclusion that Abana did not in fact have the required "top up" permissions to be giving advice on and arranging pensions in the UK.

- Therefore, in all the circumstances of this case, I did not think it was reasonable for Westerby to have relied on any verbal assurances Abana may have provided at the meetings it had with Westerby, or to have relied on the warranty Abana provided in the subsequent terms of business agreement the parties entered into.

- Westerby says when it checked the Register, Abana's permissions were not included on its entry in the Register at the relevant time. Westerby provided a screenshot of Abana's entry on the Register at the time it checked it on receipt of Mr W's application for a SIPP. Westerby initially said it understood this was the totality of the information available on the Register entry for Abana at the relevant time. However, it's arguments on this point seem to have evolved over time and, following my first provisional decision, it seems Westerby have now accepted that the Register did include other sections, such as a "passports" section and a "permissions" section. However, it says that on checking the Register at the relevant time, these sections did not contain any further information about Abana's passports or permissions.

- I was satisfied that in order to meet its regulatory obligations, Westerby ought to have looked at the totality of the Register entry for Abana. I did not think it would be fair and reasonable to say that looking only at the "basic details" section of the Register amounted to an adequate completion of the check. I thought the "passports" and "permissions" sections of the Register were obviously relevant in the circumstances and therefore ought to have been looked at too, and that any check which overlooked these sections would be inadequate.

- Westerby has provided no evidence that it carried out a check of the relevant "passports" or "permissions" sections of the Register entry for Abana. The only record of a check it carried out on Abana at the relevant time is the screen shot it has provided of the "basic details" entry for Abana. And, as I set out above, Westerby previously submitted that the "basic details" section was the totality of the Register entry available for Abana at the relevant time. So, I thought it fair and reasonable in the circumstances to conclude that Westerby did not carry out an adequate and/or complete check of the Register prior to accepting Mr W's application for a SIPP.

- In any event, if I accepted the point Westerby has made on the basis of its evolved arguments - that the Register entry for Abana did not include any further details under the "passports" and "permissions" sections - then I remained of the view that the check of the Register would not have confirmed that Abana had the required permissions to be providing advice on or to be arranging deals in personal pensions in the UK. Therefore, Westerby ought to have contacted the FCA for direct confirmation of the correct position on Abana's permissions.

- Westerby says the FCA will not (and would not) confirm any details about a firm that are not available on the public Register. I accepted this. However, I noted the FCA has confirmed that "top up" permissions do appear on the Register under the "Permissions" section - and that the FCA understands this was the same in 2013 when Westerby accepted Mr W's application for a SIPP

- I noted that as Abana did not have any "top up" permissions there would have been no information about any "top up" permissions recorded on the Register. So I thought, if contacted, the FCA would have done no more than confirm that publicly available information. In other words, the FCA would have confirmed what the Register recorded – that Abana had no "top up" permissions allowing it to give advice on and to arrange deals in personal pensions in the UK.

- So, if Westerby had thought it necessary to contact the FCA directly about Abana's permissions, I did not think the restriction it refers to on what the FCA could confirm would have prevented it getting the information about Abana's permissions that it needed. Abana did not have any "top up" permissions. That was a matter of public record. The FCA would have been able to confirm this to Westerby.

- In any event, if Westerby was unable to independently verify Abana's permissions, I thought it is fair and reasonable to say it should have concluded that it was unsafe to proceed with accepting business from Abana. It was not reasonable, and not in-line with Westerby's regulatory obligations, for it to proceed with accepting business from Abana if the position about Abana's permissions was not clear.

I also considered the further points raised by Westerby following my first provisional decision. These points did not persuade me to depart from my first provisional decision. I have considered these again in my findings below, so will not set out a summary of this here.

In my second provisional decision I also concluded it was fair and reasonable to hold Westerby to account for its failure to decline Mr W's application from Abana, and for it to be accountable for the financial loss to Mr W that flowed from this failure.

The responses to my second provisional decision

In response to my second provisional deciison, Westerby repeated a number of the points it had made previously. It also submitted a third party report, authored by a cyber forsensic investigator. It says the report deals expressly with the question of *"whether there was online access to permissions recorded on the FSA Register (2013) for Abana LDA, an EEA Firm authorised under the passporting provisions for the purposes of the Insurance Mediation Directive."* And it says the report draws the following conclusions:

- After an extensive search of relevant internet archived records, in the opinion of the expert there was *"no evidence that, in 2013, Permissions data relating to Abana LDA could have been searched by Westerby"* using the Register.

- The screenshot provided by Westerby dating from 2013 is genuine.

- The structure of the Register was changed after 2013, such that by 2015 the relevant permissions for Abana were accessible.

Westerby also said:

- When Westerby accessed the Register entry for Abana in 2013, there was no information available or accessible to reveal the permissions position. That information was simply not available for an online user. That is self-evident from the screenshot that Westerby has provided, which the expert confirms is genuine.

- As the expert report identifies, the pages I have referred to in fact reflect post 2013 changes to the structure of the Register.

Westerby also referred to the Court of Appeal's judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474 ("Adams v Options SIPP CA") and said it wanted to draw my attention to two points from the judgment which it thought were relevant to this complaint, namely that:

- The Court of Appeal refused to interfere with the High Court's conclusion that the scope of the COBS 2.1.1R duty was to be determined according to the contractual arrangements in place between the parties.

- The Court of Appeal observed that issues of causation arose because of the contractual warnings provided to Mr Adams.

My findings

I've reconsidered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

When considering what is fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time. This goes wider than the rules and guidance that come under the remit of the FCA. Ultimately, I'm required to make a decision that I consider to be fair and reasonable in all the circumstances of the case.

Relevant considerations

I have carefully taken account of the relevant considerations to decide what is fair and reasonable in the circumstances of this complaint.

In my view, the FCA's Principles for Businesses are of particular relevance. The Principles for Businesses, which are set out in the FCA's Handbook "*are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G). Principles 2, 3 and 6 provide:

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

I have carefully considered the relevant law and what this says about the application of the FCA's Principles. In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) ("BBA") 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 of BBA Ouseley J said:

> *"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."*

In *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) ("BBSAL"), Berkeley Burke brought a judicial review claim challenging the decision of an ombudsman who had upheld a consumer's complaint against it. The ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and had not treated its client fairly.

Jacobs J, having set out some paragraphs of BBA including paragraph 162 set out above, said (at paragraph 104 of BBSAL):

> *"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles-based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."*

The BBSAL judgment also considers section 228 of FSMA and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the ombudsman in that complaint, which I have described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

On 18 May 2020, the High Court handed down its judgment in the case of Adams v Options SIPP. I took this judgment into account when making my second provisional decision. Mr Adam's subsequently appealed the decision of the High Court, and on 1 April 2021, the Court of Appeal handed down its judgment in Adams v Options SIPP CA. I have taken account of both these judgments when making this decision on Mr W's case.

I note that the Principles for Businesses did not form part of Mr Adam's pleadings in his initial case against Options SIPP. And, HHJ Dight did not consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of these judgments provide any assistance with the application of the Principles for Businesses, and in particular, they say nothing about how the Principles apply to an ombudsman's consideration of a complaint.

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what is fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in BBSAL. I am therefore satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

COBS 2.1.1R

In my provisional decisions I referred to COBS 2.1.1R. As a reminder, the rule says:

"*A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*"

Unlike the Principles, COBS 2.1.1R was considered by HHJ Dight in the Adams v Options SIPP case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ("the COBS claim"). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams case.

The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adam's appeal did not so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case).

I note that in Adams v Options SIPP, HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at paragraph 148:

> *"In my judgment in order to identify the extent of the duty imposed by Rule 2.1.1 one*

> *has to identify the relevant factual context, because it is apparent from the submissions of each of the parties that the context has an impact on the ascertainment of the extent of the duty. The key fact, perhaps composite fact, in the context is the agreement into which the parties entered, which defined their roles and functions in the transaction."*

However, the factual context in Mr W's case is very different to that of Mr Adams. In Adams v Options SIPP HHJ Dight accepted that the transaction with Options SIPP proceeded on an execution only basis. In contrast to that, the transaction between Mr W and Westerby proceeded on the footing that Mr W was being advised by an *authorised advisor*. And, I need to construe the duties Westerby owed to Mr W under COBS 2.1.1R in light of the specific facts of Mr W's case.

I also want to again emphasise here that I do not say that Westerby was under any obligation to advise Mr W on the SIPP and/or the underlying investments. Refusing to accept an application because it came about as a result of advice given by a firm which did not have the required permissions to be giving that advice, and had been introduced by that same firm, is not the same thing as advising Mr W on the merits of investing and/or transferring to the SIPP.

I think it is important to also again emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I am required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in Adams v Options SIPP. That was a legal claim which was defined by the formal pleadings in Mr Adam's statement of case.

Overall, I am satisfied that COBS 2.1.1R remains a relevant consideration – but that it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Mr W's case.

The regulatory publications

The FCA (and its predecessor, the FSA) has issued a number of publications which remind SIPP operators of their obligations and which set out how they might achieve the outcomes envisaged by the Principles, namely:

- The 2009 and 2012 thematic review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 "Dear CEO" letter.

The 2009 Thematic Review Report

The 2009 report included the following statement:

"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its clients and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.

It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.

We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.

Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their clients' interests in this respect, with reference to Principle 3 of the Principles for Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*

- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*

- *Identifying instances of clients waiving their cancellation rights, and the reasons for this."*

The later publications

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

"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.

All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a "client" for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."

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

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

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un-authorised business warnings.*
- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*

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

Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers.

Examples of good practice we have identified include:

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*
- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*
- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from non-regulated introducers*

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

"Due diligence

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

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*
- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
- *having checks which may include, but are not limited to:*
    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*
- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*

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

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

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

- *Correctly establishing and understanding the nature of an investment*
- *Ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*
- *Ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*
- *Ensuring that an investment can be independently valued, both at point of purchase and subsequently*
- *Ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc)*

Although I've referred to selected parts of the publications, to illustrate their relevance, I have considered them in their entirety.

I acknowledge that the 2009 and 2012 reports and the *"Dear CEO"* letter are not formal *"guidance"* (whereas the 2013 finalised guidance is). However, the fact that the reports and *"Dear CEO"* letter did not constitute formal guidance does not mean their importance should be underestimated. They provide a *reminder* that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators expectations of what SIPP operators should be doing also goes some way to indicate what I consider amounts to good industry practice, and I am, therefore, satisfied it is appropriate to take them into account.

It is relevant that when deciding what amounted to have been good industry practice in the BBSAL case, the ombudsman found that *"the regulator's reports, guidance and letter go a long way to clarify what should be regarded as good practice and what should not."* And the judge in BBSAL endorsed the lawfulness of the approach taken by the ombudsman.

I'm also satisfied that Westerby, at the time of the events under consideration here, thought the 2009 thematic review report was relevant, and thought that it set out examples of good industry practice. As I set out below, and set out in my first provisional decision, Westerby *did* carry out due diligence on Abana. So, it clearly thought it was good practice to do so, at the very least.

Like the ombudsman in the BBSAL case, I do not think the fact the publications, (other than the 2009 and 2012 Thematic Review Reports), post-date the events that took place in relation to Mr W's complaint, mean that the examples of good practice they provide were not good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

It is also clear from the text of the 2009 and 2012 reports (and the *"Dear CEO"* letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' *understanding* of how the good practice standards shaped what was expected of SIPP operators changed over time, it is clear the standards themselves had not changed.

That doesn't mean that in considering what is fair and reasonable, I will only consider Westerby's actions with these documents in mind. The reports, Dear CEO letter and guidance gave non-exhaustive examples of good practice. They did not say the suggestions given were the limit of what a SIPP operator should do. As the annex to the Dear CEO letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

In determining this complaint, I need to consider whether, in accepting Mr W's SIPP application from Abana, Westerby complied with its regulatory obligations as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regard to the interests of its customers, to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Westerby could have done to comply with its regulatory obligations and duties.

In this case, the business Westerby was conducting was its operation of SIPPs. I am satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business. The regulators' reports and guidance provided some examples of good practice observed by the FSA and FCA during its work with SIPP operators. This included confirming, both initially and on an ongoing basis, that introducers that advise clients have the appropriate permissions to give the advice they are providing.

So taking account of the factual context of this case, it is my view that in order for Westerby to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), it should have undertaken sufficient due diligence checks to ensure Abana had the required permissions to give advice on and make arrangements in relation to personal pensions in the UK before accepting Mr W's business from it.

Westerby says it did carry out due diligence on Abana before accepting business from it. And I accept that it did undertake some checks. However, the question I need to consider in this complaint is whether Westerby ought to have, in compliance with its regulatory obligations, identified that Abana did not in fact have the "top up" permissions it required to be giving advice on and arranging personal pensions in the UK, and whether Westerby should therefore not have accepted Mr W's application from it.

The regulatory position

Abana is based in Portugal and is authorised and regulated in Portugal by Autoridade de Supervisao de Seguros e Fundos de Pensoes ("the ASF"). As I set out above, Abana held an IMD branch passport from 8 January 2014 to 7 January 2016 and an IMD services passport from 12 March 2013 to 29 December 2015.

Under Article 2 of the Insurance Mediation Directive 2002/92/EC, *"insurance mediation"* and *"reinsurance mediation"* are defined as:

> *2. "Insurance mediation means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or assisting in the administration and performance of such contracts, in particular in the event of a claim.*
>
> *3. Reinsurance mediation means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of reinsurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim."*

In the FSA's consultation paper 201, entitled *"Implementation of the Insurance Meditation Directive for Long-term insurance business"* it is stated (on page 7):

"We are implementing the IMD for general insurance and pure protection business… from January 2005 (when they will require authorisation).

Unlike general insurance and pure protection policies, the sale of life and pensions policies is already regulated. Life and pensions intermediaries must be authorised by us and are subject to our regulation."

Chapter 12 of the FCA's Perimeter Guidance Manual ("PERG") offers guidance to persons, such as Westerby, running personal pension schemes. The guidance in place at the time the application was made for Mr W's SIPP confirms that a personal pension scheme, for the purpose of regulated activities (PERG 12.2):

"…is defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the Regulated Activities Order) as any scheme other than an occupational pension scheme (OPS) or a stakeholder pension scheme that is to provide benefits for people:

- *on retirement; or*
- *on reaching a particular age; or*
- *on termination of service in an employment".*

It goes on to say:

"This will include self-invested personal pension schemes ('SIPPs') as well as personal pensions provided to consumers by product companies such as insurers, unit trust managers or deposit takers (including free-standing voluntary contribution schemes)".

So, under the Regulated Activities Order, a SIPP is a personal pension scheme. Article 82 of the Regulated Activities Order (Part III Specified Investments) provides that rights under a personal pension scheme are a specified investment.

Westerby itself had regulatory permission to establish and operate personal pension schemes – a regulated activity under Article 52 of the Regulated Activities Order. It did not have permission to carry on the separate activity under Article 10 of effecting and carrying out insurance.

At the time of Mr W's application, SUP App 3 of the FCA Handbook set out "Guidance on passporting issues" and SUP App 3.9.7G provided the following table of permissible activities under Article 2(3) of the Insurance Mediation Directive in terms of the attendant Regulated Activities Order Article number:

Table 2B: Insurance Mediation Directive Activities		**Part II RAO Activities**	**Part III RAO Investments**
1.	Introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance.	Articles 25, 53 and 64	Articles 75, 89 (see Note 1)
2.	Concluding contracts of insurance	Articles 21, 25, 53 and 64	Articles 75, 89
3.	Assisting in the administration and performance of contracts of insurance, in particular in the event of a claim.	Articles 39A, 64	Articles 75, 89

I note this shows Article 82 investments are not covered by the Insurance Mediation Directive.

The guidance in SUP 13A.1.2G of the FCA Handbook at the time of Mr W's application for the SIPP explains that an EEA firm wishing to carry on activities in the UK which are outside the scope of its EEA rights (i.e. its passporting rights) will require a "top up" permission under Part 4A of the Act (the Act being FSMA). In other words, it needs "top up" permissions from the FCA to carry on regulated activities which aren't covered by its IMD passport rights.

The relevant rules regarding "top up" permissions could be found in the FCA Handbook at SUP 13A.7. SUP 13A.7.1G states (as at July 2013):

> *If a person established in the EEA:*
>
> *(1) does not have an EEA right;*
>
> *(2) does not have permission as a UCITS qualifier; and*
>
> *(3) does not have, or does not wish to exercise, a Treaty right (see SUP 13A.3.4 G to SUP 13A.3.11 G);*

> *to carry on a particular regulated activity in the United Kingdom, it must seek Part 4A permission from the appropriate UK regulator to do so (see the appropriate UK regulator's website: http://www.fca.org.uk/firms/about-authorisation/getting-authorised for the FCA and www.bankofengland.co.uk/pra/Pages/authorisations/newfirm/default.aspx for the PRA). This might arise if the activity itself is outside the scope of the Single Market Directives, or where the activity is included in the scope of a Single Market Directive but is not covered by the EEA firm's Home State authorisation. If a person also qualifies for authorisation under Schedules 3, 4 or 5 to the Act as a result of its other activities, the Part 4A permission is referred to in the Handbook as a top-up permission.*

In the glossary section of the FCA Handbook EEA authorisation is defined (as at July 2013) as:

> *(in accordance with paragraph 6 of Schedule 3 to the Act (EEA Passport Rights)):*
>
> > *(a) in relation to an IMD insurance intermediary or an IMD reinsurance intermediary, registration with its Home State regulator under article 3 of the Insurance Mediation Directive;*
> >
> > *(b) in relation to any other EEA firm, authorisation granted to an EEA firm by its Home State regulator for the purpose of the relevant Single Market Directive or the auction regulation*

The guidance at SUP App 3 of the FCA Handbook (which I set out above) was readily available in 2013 and clearly illustrated that EEA-authorised firms may only carry out specified regulated activities in the UK if they have the relevant EEA passport rights.

In this case the regulated activities in question did not fall under IMD passporting – they required FCA permission for Abana to conduct them in the UK. Westerby, acting in accordance with its own regulatory obligations, should have ensured it understood the relevant rules, guidance and legislation I have referred to above, (or sought advice on this, to ensure it could gain the proper understanding), when considering whether to accept business from Abana, which was an EEA firm passporting into the UK. It should therefore have known - or have checked and discovered - that a business based in Portugal that was EEA-authorised needed to have top up permissions to give advice and make arrangements in relation to personal pensions in the UK. And, that top up permissions had to be granted by the the UK regulator, the FCA.

In my view, it is fair and reasonable to conclude that in the circumstances of this case Westerby ought to have understood that Abana required the relevant top up permissions from FCA in order to carry on the regulated activities it was undertaking.

Westerby's checks on Abana's permissions

Westerby says it took appropriate steps to conduct due diligence on Abana and it could not and should not reasonably have concluded that Abana did not have the required top up permissions. I have again carefully considered all of Westerby's submissions on this point.

The Register

I am satisfied that in order to meet its regulatory obligations, Westerby ought to have independently checked and verified Abana's permissions before accepting business from it. I therefore consider it is fair and reasonable to expect Westerby to have checked the Register entry for Abana in the circumstances. And, to be clear, I think it fair and reasonable to say that the checks Westerby ought to have conducted on Abana's Register entry should have included a review of all the relevant information available.

Westerby says it did check Abana's entry on the Register. So, Westerby clearly thought it should check the Register, rather than simply ask Abana what permissions it had and merely rely on what Abana told it. And the Register - and in particular what would have been seen on Abana's Register entry at the time of Mr W's SIPP application - is the main focus of Westerby's most recent submissions. On this point it says *"When Westerby accessed the online register for Abana LDA in 2013, there was no information available or accessible to reveal the permissions position. That information was simply not available for an online user*".
I have carefully considered everything Westerby has said about the format of the Register in or around 2013 when Mr W's application was submitted by Abana.

In a letter dated 18 December 2017 Westerby, via its then legal representative, said:

WTS [Westerby] *searched Abana on the Financial Services register on 10 May 2013 and established that they were EEA authorised. A copy of a screenshot of the search dated 10 May 2013 is attached. You will note that the search results did not include a "Passports" section, or any mention in the "notices" or "other information" sections of any restrictions on Abana's permission, which would be usual if there had been any restriction. Whilst WTS accept that a present day search includes a "Passports" section, they dispute that a search in May 2013 did, as illustrated by the enclosed screenshot. Acting reasonably, WTS could not have found details of the passport permission from a search of the Financial Services register at that time.*

The following print out from the Register was attached to that letter:

Image Removed

The third-party report provided by Westerby following my second provisional decision is helpful on the question of the format of the Register at the time of Mr W's SIPP application. The report includes the following screenshot of the archived Register for Abana (dated 24 July 2013):

Image Removed

Each of the red titles at the top of the entry for Abana (i.e. Regulators, Basic details, Contact for complaints, etc) is a hyperlink to another page of Abana's entry on the Register. So, this screenshot is in fact consistent with my findings to date that Abana's 2013 entry on the Register included both "Permission" and "Passports" pages (amongst other pages, including the "Basic Details" page that Westerby has provided). It is therefore reasonable to conclude from the above screenshot that the format of the Register in or around the time Mr W's SIPP application was submitted to Westerby in 2013 included pages which provided information in relation to both a firm's passport details and in relation to a firm's permissions.

However, the third-party report goes on to say that there is no evidence that in 2013 the Register contained any permissions information relating to Abana that could have been searched by Westerby. The report refers to paragraph 24 as forming the basis for this conclusion.

I have carefully reviewed the third-party report and paragraph 24 only confirms that if the hyperlink to the "Permission" page is clicked, there is no archive of that specific page. In my view, the fact the link to the "Permission" page on the archive entry for Abana yields nothing speaks only to the limitations of the internet archive. It is not evidence that no Permission page for Abana existed in 2013. To the contrary, the evidence provided elsewhere in the report strongly suggests such a page *did* exist for Abana.

I accept that, for the relevant time, only the "Regulators" page has been archived for Abana's entry on the Register. But the report provided by Westerby, helpfully, provides examples of several Permission pages for other firms which *were* archived, dating from the around the time of Mr W's SIPP application or earlier. The below example, dating from 2012, and relating to a Cypriot firm which, like Abana, was an incoming EEA firm, is particularly helpful:

Image Removed

This shows that the Permission page for this incoming EEA firm did exist in 2012, and that it showed "*no matches found*". This is strong evidence that the format of the Register for EEA firms did include a page with information on a firm's permissions, even if all it recorded is that "no matches are found", (i.e. it had no permissions from the FCA).

The third-party report also includes a screenshot of a 2013 Permission page for a UK firm which ceased to be authorised in 2008 (which also shows "*no matches found*"), and a page for a UK firm which was authorised and held permissions at the relevant time, which shows the firm's permissions set out in detail.

All of this information taken together demonstrates that, when Mr W's application was submitted to Westerby, the format of the Register did contain a page labelled "Permission" and this page is where a firm's permissions would be set out on the Register. And, where a firm did not have any FCA permissions at the time of the search, the Permission page on their Register entry would state "*no matches found*" (as there were no permissions to display).

This is consistent with the information we received from FCA when we asked it to confirm whether top up permissions appear on the Register, and whether this has changed since 2013. In response to our query, FCA confirmed that "top up" permissions do appear on the Register under the "Permission" page, and that the FCA understands the same information was available on the Register in 2013.

To be clear, I have never said that the "Basic Details" screenshot Westerby has provided for Abana is not genuine. I say that this screenshot is only one page of Abana's Register entry for the relevant time, and there were several other pages, all of which could and should have been checked by Westerby - including the Permission page, which is where any top up permissions held by Abana would have appeared (if they had in fact been held by the firm).

So, to summarise my conclusions so far, I am satisfied:

- That in order to meet its regulatory obligations, Westerby ought to have independently checked and verified Abana's permissions before accepting business from it. And it is fair and reasonable to expect Westerby to have checked the *totality* of Abana's Register entry in the circumstances.

- The format of the Register in 2013 did include a "Permission" page and it follows that the entry for Abana on the Register at the time of Mr W's application would have included a "Permission" page which Westerby ought to have checked.

As I set out above, Westerby's arguments on the Register appear, in my view, to have evolved since I issued my first provisional decision. In previous submissions to us, Westerby has said that the "Basic details" page was the totality of the Register entry available for Abana at the relevant time. However, it now seems to have accepted that the Register did include other sections, such as a "Passports" page and a "Permission" page. However, it says that on checking the Register at the relevant time, these sections did not contain any further information about Abana's passports or permissions.

I think it is highly relevant that Westerby has been unable to produce any evidence that it did in fact check the "Permission" page for Abana before it accepted Mr W's SIPP application from the firm. And, this together with Westerby's previous submissions on the Register strongly suggest, in my view, that the "Basic details" page is the extent of the check Westerby made of the Register at the relevant time. In light of this, I am not satisfied that Westerby took adequate steps to check the totality of information available at the relevant time on Abana's entry on the Register.

Even if I accepted that Westerby did check the Permission page for Abana at the relevant time, it appears to have failed to have kept a record of this check, and unfortunately, as set out above, the 2013 record of the Permission page for Abana has not been archived. So we have no evidence of what specific information was available on this page for Abana at the relevant time. However, in light of the evidence I've set out above, I am satisfied that there would have been a Permission page available on Abana's Register entry. And, if this page had erroneously failed to contain any information on whether or not Abana held the relevant permissions, (i.e. it had been left entirely blank), Westerby ought to have taken further steps to ascertain what the correct position was. I do not accept Westerby's submission that information about a firm's permissions was simply not available for an online user in 2013. The report submitted by Westerby demonstrates the contrary to be the correct position.

Westerby has referred me to two reports from the Complaints Commissioner both of which highlighted errors and/or weaknesses of the Register. I have considered these reports and the submissions Westerby has made on this point. However, notwithstanding the criticisms of the Register, I am satisfied that a regulated market participant such as Westerby, acting in accordance with its regulatory obligations, ought to have understood that Abana needed permission from the FCA to give advice on and make arrangements for personal pensions in the UK. Therefore, before accepting business from Abana, Westerby needed to confirm that Abana held the required permissions. And, for the reasons I have set out above, I am satisfied that Abana's entry on the Register at the relevant time would have included a page with information on its permissions. And, if this page had not set out any information (it had erroneously been left blank) Westerby, in accordance with its regulatory obligations, should not have accepted Mr W's application from Abana before carrying out further enquiries to clarify the correct position on the firm's permissions.

On this point, in its response to my second provisional decision, Westerby has repeated its previous submission that the FCA will not (and nor would it have at the relevant time) confirm details about a firm that are not available on the public register. There is little I can add to my second provisional decision on this point. I accept FCA will not (and would not) confirm details about a firm that are not available on the public register. However, for all the reasons I've given above, I'm satisfied that top up permissions are something which are recorded on the FCA's public register, and that this was also the case in 2013 when Westerby accepted Mr W's application from Abana. So, although we do not have evidence of exactly what did appear on Abana's "Permission" page in 2013, if it had erroneously been left blank, I think it is fair and reasonable to conclude the FCA would have been able to confirm the position that Abana did not – in fact – have the required permissions, as this was information that ought to have been publicly available, on the Register. So, I am not persuaded by Westerby's submissions on this point and I am satisfied this was a sensible and proper route open to it to verify Abana's permissions before accepting business from it.

So, if Westerby had thought it necessary to contact the FCA directly to confirm Abana's permissions because the Register did not contain the relevant details, I do not think the restriction it refers to on what the FCA could confirm would have prevented it getting the information it needed. Abana did not have any top-up permissions. That was a matter of public record. So, the FCA would have been able to confirm this to Westerby.

For completeness, if I am wrong in my finding that Abana's entry on the Register at the relevant time included a "Permission" page, (and the Basic details page was the totality of the Register entry for Abana in 2013), I still do not think it is fair and reasonable to conclude that it was appropriate – or in accordance with its regulatory obligations - for Westerby to have proceeded with Mr W's application from Abana in those circumstances.

As set out above, Westerby ought to have independently checked and verified Abana's permissions before accepting business from it. If there was no information available or accessible on the Register at the relevant time to reveal the permissions position of Abana, then Westerby ought to have either found another way to verify Abana's permissions, or it ought to have declined to accept any applications from Abana until such a time as it could verify the correct position on Abana's permissions.

Furthermore, if Westerby was simply unable to independently verify Abana's permissions – a position I think is very unlikely given the available evidence - I think it is fair and reasonable to say that Westerby should have then concluded that it was unsafe to proceed with accepting business from Abana in those circumstances. In my opinion, it was not reasonable, and not in-line with Westerby's regulatory obligations, for it to proceed with accepting business from Abana if the position was not clear.

So, to summarise, I am satisfied:

- It was not fair and reasonable for Westerby to proceed to accept business from Abana if, as Westerby now says, there was no information available or accessible to reveal the permissions position.

- In that case Westerby should have sought confirmation from the FCA as to whether Abana held any top up permissions. And, as I am satisfied this would have been a matter of public record, I am satisfied the FCA would have been able to confirm whether or not Abana held any permissions.

- Alternatively, if it was unable to independently verify Abana's permissions, Westerby should simply have declined to accept business from Abana.

Could Westerby have relied on what Abana told it?

Westerby has made no further representations on this point, following my second provisional decision. But, for completeness, I have reconsidered it. Westerby says that it agreed Terms of Business with Abana ("the Agreement") and, in signing the Agreement, Abana confirmed it held the permissions it required. Westerby also refers to meetings which it says took place between it and Abana. It says Abana confirmed its permissions in these meetings. Westerby says that as Abana was an authorised firm, it was entitled to rely on what Abana had told it. Westerby refers to FCA's thematic review TR16/1, and to Gen 4 Annex 1 of the FCA Handbook. These set out respectively that: firms can rely on factual information provided by other EEA-regulated firms as part of their due diligence process (TR/16/1, Para 5), and the statutory status disclosure incoming EEA firms are required to make.

COBS 2.4.6R (2) provides a general rule about reliance on others:

"(2) A firm will be taken to be in compliance with any rule in this sourcebook that requires it to obtain information to the extent it can show it was reasonable for it to rely on information provided to it in writing by another person."

And COBS 2.4.8 G says:

"It will generally be reasonable (in accordance with COBS 2.4.6R (2)) for a firm to rely on information provided to it in writing by an unconnected authorised person or a professional firm, unless it is aware or ought reasonably to be aware of any fact that would give reasonable grounds to question the accuracy of that information."

So, it would generally be reasonable for Westerby to rely on information provided to it in writing by Abana, unless Westerby was aware or ought reasonably to have been aware of any fact that would give reasonable grounds to question the accuracy of the information.

As I set out in my second provisional decision, Westerby has confirmed that it kept no records of the discussions it had with Abana during the meetings it has referred to, nor did Westerby record in writing specifically what Abana told it about the permissions it held. Westerby says that SIPP operators are not required to meet with IFAs/firms before accepting business from them, and accordingly, it was not required to keep any records of the meetings it had with Abana.

However, Westerby now seeks to rely on these meetings to evidence that it did take steps to ascertain Abana's permissions and that Abana had confirmed to Westerby that it had the required top up permissions. In my view, if these meetings were the way Westerby was intending to evidence Abana's permissions, in order to comply with it regulatory obligations, in particular Principle 2, (to conduct its business with due skill, care and diligence), and Principle 3, (to take reasonable care to organise and control its affairs responsibly and effectively), Westerby ought to have had processes in place to ensure that it was able to evidence the due diligence it had carried out on Abana, including the steps taken to confirm Abana's permissions.

I do not think any meetings Westerby had with Abana amounts to Abana providing something *in writing* on which it may have been reasonable for Westerby to rely as it was a verbal exchange only and there appears to be nothing in writing arising from these meetings. I do not therefore think COBS 2.4.6R applies to the meetings.

Westerby says that the meetings it had with Abana culminated with Westerby establishing a legal document – the Agreement – in which Abana warranted that it had the required permissions to introduce SIPPs business. However, the Agreement appears to be a generic document and not specific to Abana. It does not refer to, nor require either party to confirm or warrant the accuracy of information supplied during a prior due diligence process (i.e. the meetings at which Westerby claims Abana gave verbal assurances as to its permissions).

The Agreement provides as follows:

"The Intermediary warrants that he/she is suitably authorised by the Financial Services Authority in relation to the sale of the SIPP, and advice on underlying investments where appropriate, and will maintain all authorisations, permissions, authorities, licences and skills necessary for it to carry out its activities under this contract and will in all aspects comply with all Applicable Laws".

In my view, this does not amount to a clear statement that Abana had the required top up permissions for it to advise on and arrange personal pensions in the UK that Westerby would be entitled to rely. Firstly, at the date of the Agreement, the FSA was no longer in existence, so the warranty that the intermediary [Abana] was authorised by the FSA was clearly incorrect and should have been a cause for concern.

In addition, the activity of advising on rights under personal pension schemes is not mentioned; rather, the authorisation is said to relate to "*the sale of the SIPP*" which is an ambiguous term that might easily apply only to the activity of arranging deals. And, the warranty that "he/she is suitably authorised" is generic and does not refer specifically to top up permissions being required and Abana warranting that it has top up permissions to conduct personal pensions business in the UK.

After carefully considering the terms of the Agreement and all the submissions Westerby has made in relation to what Westerby says Abana told it about the permissions it held, I am not satisfied on the evidence provided that Westerby did establish what top up permissions Abana required to be arranging and giving advice on personal pensions in the UK and that it requested, and received, confirmation from Abana that it held those permissions. I am also not satisfied, for the reasons given above, that Westerby met its regulatory obligations in seeking to rely on the terms of the Agreement to conclude that Abana warranted it had the required top up permissions.

In any event, it is my view that Westerby should have done more to independently verify that Abana had the required top up permissions. If Westerby had carried out independent checks on Abana's permissions as required by its regulatory obligations, it ought to have been privy to information which did not reconcile with what Abana had told it about its permissions. So, in failing to take this step, I think it is fair and reasonable to conclude that Westerby did not do enough in order to establish whether or not Abana did have the permissions it required.

So, for all the reasons I've set out above, I do not think COBS 2.4.6R (2) applies to either the meetings Westerby had with Abana or the Agreement the parties entered into. However, I've also given careful thought to whether it, was reasonable for Westerby to rely on these things generally. I note Westerby refers to FCA's thematic review TR16/1 and to Gen 4 Annex 1 of the FCA Handbook, and I have considered this question with those details in mind. However, I am not satisfied there was any other basis on which it was reasonable for Westerby to rely on the meetings and Agreement, for much the same reasons as I have given above in relation to COBS 2.4.6R (2).

As the 2009 Thematic Review report makes clear, good practice, consistent with a SIPP operator's regulatory obligations under the Principles, included:

Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.

The 2009 report also makes it clear that a SIPP operator should have systems and controls which adequately safeguarded their clients' interests. So, it was good practice to confirm a firm had the appropriate permissions and to do so in a way which adequately safeguarded their clients' interests. And I do not think simply asking the firm if it had the permissions or requiring it to sign something providing this confirmation was sufficient to meet this standard of good practice. This is a view Westerby itself appears to have shared at the time. It has told us it checked the Register at the point that it received Mr W's SIPP application and at subsequent points. It has also told us its procedure was to check the Register every time a SIPP application is received from an introducer, and every time adviser fees are paid from the SIPP. It says that, in its view, this demonstrates good practice, as per the FSA's 2009 thematic review report. That is a view I share.

So Westerby should not have – and did not – rely solely on the Agreement and meetings. And, as mentioned above, for all reasons I have given, I think Westerby's check of the Register ought to have led to the conclusion that Abana did not have the required top up permissions (i.e. if the information on Abana's Permission page had been correctly recorded), or in the alternative, that the Register did not record the information on Abana's Permission page in order for Westerby to confirm the position one way or the other (i.e. if the Permission page had erroneously been left blank). This means that either Westerby ought to have become aware of information which did not reconcile with what Abana had told it about its permissions in the meetings and the Agreement, or that it was still under a regulatory obligation to undertake further enquiries to independently check Abana's permissions, and by failing to do so, it did not meet the requirements it was under as a regulated SIPP operator.

Anomalous features

In both my provisional decisions, I said Westerby ought to have identified a risk of consumer detriment to Mr W. I remain of the view that Westerby ought to have identified a risk of consumer detriment here. Mr W was taking advice on his pension from a business based in Portugal. That advice was to transfer from an occupational pension scheme, which may have offered important guaranteed benefits, into a SIPP, and then to send the majority of the money transferred into the SIPP to investments based in Mauritius. The investments involved were unusual, and specialised. And the chances of them being suitable investments for a significant portion of a retail investor's pension were very small. So, given the relevant factors, Westerby ought to have viewed the application from Mr W as carrying a significant risk of consumer detriment. And it should have been aware that the role of the advisor was likely to be a very important one in the circumstances – emphasising the need for adequate due diligence to be carried out on Abana to independently ensure it had the correct permissions to be giving advice on personal pensions in the UK.

I do not expect Westerby to have assessed the suitability of such a course of action for Mr W – and I accept it could not do that. But, in order to meet the obligations set by the Principles (and COBS 2.1.1R), I think it ought to have recognised this as an unusual proposition, which carried a significant risk of consumer detriment. So, it ought to have taken particular care in its due diligence – it had to do so to treat Mr W fairly and act in his best interests.

In any event, regardless of the point I have made above about anomalous features of the proposed business, I remain of the view that Westerby ought to have properly checked Abana's permissions in order to comply with its regulatory obligations. I make the above point only to highlight the importance of carrying out this check.

Other points previously raised by Westerby

Following my second provisional decision, Westerby has made no further submissions on any of the below points it has raised in previous submissions. However, for completeness, I have reconsidered all these points and I provide a summary of my findings below:

- In my view, carrying out adequate checks on Abana's permissions does not equate to treating Abana differently by virtue of its location. Westerby should have carried out these checks on *any* firm introducing advised business to it.

- I have seen no evidence to suggest that, at the time Westerby accepted Mr W's application from Abana, a factor in its decision to do so was that it had been reporting the previous business it had been doing with Abana to the FCA, and the FCA had not raised any concerns with it about this business. In any event, I remain of the view that this is irrelevant, because if Westerby had acted in compliance with its regulatory obligations, it would not have accepted business from Abana *at all* and Abana would therefore not have featured in its reporting to FCA.

- I do not think the document submitted to the court in the BBSAL case (the submissions from AMPS) makes any points which are relevant to this case. The main point being made in the AMPS submissions is that the BBSAL case had retrospectively moved the goal posts, with the result of duties being imposed on SIPP operators which go far beyond what SIPP operators had understood their duties to be at the relevant time. However, Westerby's understanding of its obligations at the relevant time appear to be aligned with my view of what it should have done: it accepts it should have checked the permissions held by Abana, and it says it carried out such a check at the time. It has also submitted that it entered into terms of business with Abana and that Abana had verified to it that it held the required permissions. So, I think it is fair and reasonable in the circumstances to conclude that Westerby understood its obligations to include checking that Abana held the required permissions. It is fair and reasonable in the circumstances to conclude that Westerby understood its obligations at the time to include checking that Abana held the required permissions – this is evidenced in the actions that Westerby took in relation to Abana.

- In any event, the issue at the heart of this complaint was dealt with specifically in the FSA's 2009 Thematic Review Report, which pre-dates Mr W's business by a number of years. It is therefore fair and reasonable to conclude that Westerby was aware, or ought to have been aware, of its obligation to independently verify Abana's permissions before accepting business from it.

- Westerby says if it had identified that Abana did not have the required top up permissions, Abana would have applied for, and been granted, the relevant top up permissions. However, I find no merit in this submission. I am required to consider what is fair and reasonable in all the circumstances of this case. And in this case, Westerby accepted business from a firm which did not have the required permissions to be carrying on the business that it did. And, Westerby failed to identify this fact prior to accepting Mr W's application. So, this is what I need to consider here – not a possible situation that *could* have happened.

- I remain of the view that there seems to be no basis on which Mr W's application could or would have proceeded on the understanding Abana was an unregulated introducer. It seems to have been understood from the outset that Abana was not simply an introducer of investments to its customers. It was carrying on the regulated activities of advising and arranging. It seems that in any event, Westerby had a policy not to accept introductions from unregulated businesses. So, in the circumstances, I don't think it is fair and reasonable to make any findings based on the fact that Westerby was able to accept introductions from unregulated businesses, as that was not the circumstances involved in this case.

In conclusion

Westerby ought to have identified that Abana needed top up permissions to advise on and make arrangements for personal pensions in the UK, and taken all the steps available to it to independently verify that Abana had the required permissions.

If Westerby had taken these steps, it would have established Abana did not have the permissions it required to give advice or make arrangements for personal pensions in the UK, or that it was unable to confirm whether Abana had the required permissions.

In either event, it was not in accordance with its regulatory obligations nor good industry practice for Westerby to proceed to accept business from Abana.

It is fair and reasonable in the circumstances of this case to conclude that none of the points Westerby has raised are factors which mitigate its decision to accept Mr W's application from Abana.

I am therefore satisfied the fair and reasonable conclusion in this complaint is that Westerby should not have accepted Mr W's SIPP application from Abana.

Is it fair to ask Westerby to pay Mr W compensation in the circumstances?

Would the business have still gone ahead if Westerby had refused the application?

Mr W has told us he knew Abana's advisor as "an insurance man" and was given advice on his pension after he had mentioned to Abana's advisor that he had a "frozen" pension and Abana's advisor said he should do something with that pension.

I remain satisfied that if Westerby had refused to accept Mr W's application from Abana, and explained to Mr W why it was not able to do so, Mr W would not have continued to accept or act on pensions advice provided by Abana (as he would then have been aware it was not able to provide such advice). Mr W has told us that if had been made aware that Abana was acting outside its permissions in giving pensions advice, he would have sought advice elsewhere. And, I think it very unlikely advice from an authorised business would have resulted in Mr W taking the same course of action. I think it reasonable to say Mr W would have sought out a business with the required permissions and that business would have given suitable advice.

In Adams v Options SIPP, the judge found that Mr Adams would have proceeded with the transaction regardless. HHJ Dight says (at paragraph 32):
"The Claimant knew that it was a high risk and speculative investment but nevertheless decided to proceed with it, because of the cash incentive.."

But, in this case, I have seen no evidence to show Mr W proceeded in the knowledge that the investment he was making was high risk and speculative, and that he was determined to move forward with the transaction in order to take advantage of a cash incentive offered by Abana.

Instead, it appears Mr W understood the investment, via the SIPP, would offer a better return than his existing pension. In a questionnaire Mr W completed at the request of the business which was appointed to review the advice he was provided by Abana, Mr W said he was not made aware of any potential risks and was just told the investment was a good one.

Mr W was also not paid a cash incentive. As set out above, he did receive a £200 payment unexpectedly after the investments completed. But, Mr W was not expecting to receive this payment and it therefore cannot be said that the payment had "incentivised" him to enter into the transaction. I am satisfied that Mr W, unlike Mr Adams, was not eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams.

In the circumstances, I am satisfied it is fair and reasonable to conclude that if Westerby had refused to accept Mr W's application from Abana, the transaction would not still have gone ahead.

The involvement of Abana

I note Westerby says that Mr W has been made an offer of compensation by Abana. I have not seen any evidence to show an offer of compensation has been made to Mr W by Abana. We have asked Mr W about this, and he has said he has received no such offer.

In any event, in this decision I am considering Mr W's complaint about Westerby. While it may be the case that Abana gave unsuitable advice to Mr W to transfer from an OPS to a SIPP and make unsuitable investments, Westerby had its own distinct set of obligations when considering whether to accept Mr W's application for a SIPP.

Abana had a responsibility not to conduct regulated business that went beyond the scope of its permissions. Westerby was not required to ensure Abana complied with that responsibility. But Westerby had its own *distinct* regulatory obligations under the Principles. And this included to check that firms introducing advised business to it had the regulatory permissions to be doing so. In my view, Westerby has failed to comply with these obligations in this case.

I remain satisfied that if Westerby had carried out sufficient due diligence on Abana, and acted in accordance with good practice and its regulatory obligations by independently checking Abana's permissions before accepting business from it, Westerby would not have done any SIPP business with Abana in the first place.

I also remain satisfied that if Mr W had been told Abana was acting outside its permissions in giving pensions advice, he would not have continued to accept or act on advice from that business. And, having taken into account all the circumstances of this case, it is my view that it is fair and reasonable to hold Westerby responsible for its failure to identify that Abana did not have the required "top up" permissions to be giving advice and making arrangements on personal pensions in the UK.

I appreciate that Mr W has also made a complaint against Abana, and Westerby maintains that the responsibility for the financial loss suffered by Mr W should lie with Abana.

The Dispute Resolution: Complaints rules ("the DISP rules") - found in the Redress section of the FCA Handbook - sets out the following at DISP 3.6.3G:

"Where a complainant makes complaints against more than one respondent in respect of connected circumstances, the Ombudsman may determine that the respondents must contribute towards the overall award in the proportion that the Ombudsman considers appropriate".

The DISP rules also set out that when an ombudsman's determination includes a money award, then that money award may be such amount as the ombudsman considers to be fair compensation for financial loss, whether or not a court would award compensation (DISP 3.7.2R).

In this case Mr W has complained about both Westerby, as the SIPP operator, and about Abana as the financial advisor. But here I am considering only Mr W's complaint about Westerby. And, as I set out above, in my opinion it is fair and reasonable in the circumstances of this case to hold Westerby accountable for its own failure to comply with the relevant regulatory obligations and to treat Mr W fairly.

The starting point therefore, is that it would be fair to require Westerby to pay Mr W compensation for the loss he has suffered as a result of Westerby's failings. I have however considered if there is any reason why it would not be fair to ask Westerby to compensate Mr W for his loss.

The complaint about Abana has not yet been determined and it is possible the ombudsman who decides that complaint will find that Mr W also has a valid complaint about Abana. And, as the complaints relate to connected circumstances, (i.e. the transfer of Mr W's pension out of an OPS and into a SIPP), any complaint about Abana would need to consider the same losses suffered by Mr W as in his complaint about Westerby – although the losses arise from different failings.

So, in these circumstances I have discretion to decide what Westerby must contribute towards the overall award in the proportion that I consider appropriate. And, in deciding what fair compensation is in this case, I have carefully taken this into account. As mentioned, the starting position is that Mr W is entitled to fair compensation from Westerby for the financial loss he has suffered. And, for the following reasons, I consider it appropriate and fair in the circumstances for Westerby to compensate Mr W to the full extent of the financial losses he has suffered due to Westerby's failings.

I accept that it may be the case that Abana, in advising Mr W to enter into a SIPP, is responsible for initiating the course of action that led to Mr W's loss. However, it is also the case that if Westerby had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr W would not have come about in the first place, and the loss he suffered could have been avoided.

I further note that the document that sets out the terms of business between Westerby and Abana includes a section where the intermediary - Abana - agreed to indemnify Westerby for any loss it may suffer as a result of the intermediary acting beyond its authority. So, this gives Westerby a form of recourse if it thinks Abana has breached the terms of this agreement.

In addition, Westerby can have the option to take an assignment of any rights of action Mr W has against Abana before compensation is paid. Compensation could be made contingent upon Mr W's acceptance of this term of settlement.

I want to make clear that I have considered all of Westerby's submissions on this issue and that I have carefully taken everything it has said into consideration. It remains my view that it is appropriate and fair in the circumstances for Westerby to compensate Mr W to the full extent of the financial losses he has suffered due to Westerby's failings. And, taking into account the combination of factors I've set out above, I am not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that Westerby is liable to pay to Mr W.

Mr W taking responsibility for his own investment decisions

I note the point is made by Westerby that consumers should take responsibility for their own investment decisions. I have considered the actions of Mr W in relation to the mitigation of loss, in the section below. Beyond that, I am satisfied that it would not be fair or reasonable to say Mr W's actions mean he should bear the loss arising as a result of Westerby's failings.

Mr W took advice from a regulated advisor (albeit one acting outside the permissions it held – a fact unknown to Mr W), and used the services of a regulated personal pension provider, Westerby. I am satisfied that in the circumstances, for all the reasons given, it is fair to say Westerby should compensate Mr W for the loss he has suffered. I do not think it would be fair to say in the circumstances that Mr W should suffer the loss because he ultimately instructed the investments to be made.

Opportunity to mitigate losses

Westerby has said that Mr W's decision to retain his investments in November 2014 has led directly to his inability to redeem the remainder of the funds. Westerby expects Mr W would have recovered his funds in their entirety had he requested a redemption at that time. However, I remain of the view that it is fair to take account of any amount Mr W recovered as a result of the redemption request he made following Westerby's letter of 23 December 2015 but that there was nothing else Mr W could or should reasonably have done to have reduced his losses.

I do not think it fair to say Mr W should have made a redemption request when Westerby wrote to him in November 2014. That letter required Mr W to seek advice, and urged him to contact his financial advisor, Abana. It seems Mr W did this, and was advised to keep the investments. In these circumstances, I remain of the view that it is not fair to say Mr W ought to have acted differently. I also remain of the view that Westerby did not act in accordance with its regulatory obligations in sending this letter. Westerby says its process was to check an advisory firm's permissions every time it received an application to open a SIPP, and every time an advisor's renumeration was to be paid. So, by the time Westerby wrote to Mr W in November 2014, it would have had many opportunities to discover that Abana did not have the top up permissions it needed to give advice or make arrangements on personal pensions in the UK.

For Westerby to have suggested that Mr W seek advice from Abana once problems with the funds he had invested in had come to light, is a further failing of its regulatory obligations and the requirement to treat Mr W fairly. In fact, it should have alerted Mr W to the fact that Abana did not have the required permissions and have suggested he seek independent advice from a regulated advisor as a matter of urgency.

As I set out in my first provisional decision, it seems the next contact from Westerby was in December 2015, when it referred to a redemption request. In response to this, Mr W asked for a redemption form, which he promptly completed, asking that any liquid assets the SIPP held to be sold. Westerby has not offered any further evidence on this point. So, I remain of the view there is no more Mr W could or should reasonably have done before this time.

All in all, I think it is fair to take account of the amounts paid to Mr W following his redemption request, but that no further reduction should be made to fair compensation on the basis of a failure by Mr W to mitigate his loss.

Putting things right

My aim is to return Mr W to the position he would now be in but for what I consider to be Westerby's failure to verify that Abana had the correct permissions to be providing advice on pensions in the UK before accepting Mr W's SIPP application from it.

If Mr W had sought advice from a different advisor I think it's more likely than not that the advice would have been to stay in his OPS. I think it is very unlikely that another advisor, acting properly, would have advised Mr W to transfer away from his OPS.

In light of the above, Westerby should calculate fair compensation by comparing the current position to the position Mr W would be in if he had not transferred from his OPS. In summary, Westerby should:

1. Calculate the loss Mr W has suffered as a result of making the transfer.

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

3. Pay an amount into Mr W's SIPP so that the transfer value is increased to equal the loss calculated in (1). This payment should take account of any available tax relief and the effect of charges. It should also take account of interest as set out below.

Lastly, in order to be fair to Westerby, as set out above, it should have the option of payment this redress being contingent upon Mr W assigning any claim he may have against Abana, to Westerby – but only in so far as Mr W is compensated here. The terms of the assignment should require Westerby to account to Mr W for any amount it subsequently recovers against Abana that exceeds the loss paid to Mr W.

I have explained how Westerby should carry out the calculation set out at 1-3 above in further detail below:

Calculate the loss Mr W has suffered as a result of making the transfer

Westerby must undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out as at the date of my decision, and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr R's acceptance of the decision. This calculation should be carried out as at the date of my final decision, and using the most recent financial assumptions published at the date of that decision.

Westerby may wish to contact the Department for Work and Pensions (DWP) to obtain Mr W's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the employer's scheme on Mr W's SERPS/S2P entitlement.

The calculation should take account of the value of any cash held in the SIPP currently, the £200 paid to Mr W after the investments were made and the amount he was paid in May 2016, following his redemption instruction. Any existing value of the investment should be covered by the next step.

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

The SIPP only exists because of the investments made in 2014. In order for the SIPP to be closed and further SIPP fees to be prevented, any remaining investments need to be removed from the SIPP.

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

If Westerby is unwilling or unable to purchase the investments the value of it should be assumed to be nil for the purposes of the loss calculation.

Westerby may ask Mr W to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the investments. That undertaking should allow for the effect of any tax and charges on the amount Mr W may receive from the investments and any eventual sums he would be able to access from the SIPP. Westerby will need to meet any costs in drawing up the undertaking.
Pay an amount into Mr W's SIPP so that the transfer value is increased to equal the loss calculated in (1).

I am not certain whether, currently, Mr W can pay the redress into a pension plan. If he can, the compensation should be reduced to notionally allow for the income tax relief Mr W could claim. The notional allowance should be calculated using Mr W's marginal rate of tax. For example, if Mr W is a basic rate taxpayer, the total amount should be reduced by 20%.

On the other hand, Mr W may not currently be able to pay the redress into a pension plan. But had it been possible to pay the compensation into the plan, it would have provided a taxable income. Therefore the total amount to be paid to Mr W should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr W's marginal rate of tax in retirement. For example, if Mr W is likely to be a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr W would have been able to take a tax free lump sum, the notional allowance should be applied to 75% of the total amount.

SIPP fees

If the investments can't be removed from the SIPP, and it hence cannot be closed after compensation has been paid, Westerby should pay Mr W an amount equivalent to five years' of future fees, to ensure its unlikely Mr W will have to pay further fees for holding the SIPP. Five years should allow enough time for the issues with the investments to be dealt with, and for them to be removed from the SIPP. As an alternative to this, Westerby can agree to waive any future fees which might be payable by Mr W's SIPP.

interest

The compensation resulting from this loss assessment must be paid to Mr W or into his SIPP within 90 days of the date Westerby receives notification of his acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 90 days.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period – and so any period of time where the only outstanding item required to undertake the calculation is data from the DWP may be added to the 90 day period in which interest won't apply.

My final decision

For the reasons given, I uphold Mr W's complaint against Westerby.

determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Westerby Trustee Services Limited should pay the amount produced by that calculation up to the maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Westerby Trustee Services Limited pay Mr W the balance plus any interest on the balance as set out above.

If the loss does not exceed £150,000, or if Westerby accepts the recommendation to pay the full loss as calculated above, Westerby should have the option of taking an assignment of Mr W's rights in relation to any claim he may have against Abana, and an assignment of the right to any future payment Abana may make to Mr W.

If the loss exceeds £150,000 and Westerby does not accept the recommendation to pay the full amount, any assignment of Mr W's rights should allow him to retain all rights to the difference between £150,000 and the full loss as calculated above.

If Westerby elects to take an assignment of rights before paying compensation, it must first provide a draft of the assignment to Mr W for his consideration and agreement. Any expenses incurred for the drafting of the assignment should be met by Westerby.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 29 July 2021.

John Pattinson
ombudsman