DRN-3410224

The complaint

Mr L complains that Westerby Trustee Services Limited ('Westerby') allowed his Self-Invested Personal Pension ('SIPP') to be invested in high risk investments. Mr L says Westerby shouldn't have allowed this to happen.

What happened

Westerby's 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've referred to Westerby throughout, whether the submissions came directly from Westerby or were made on its behalf.

In August 2013 Westerby received Mr L's application for a SIPP. On the application form, Mr L's financial advisor was recorded as Mr F of Abana.

Abana Unipessoal Lda ('Abana') is a financial advisor firm based in Portugal. In December 2013, Abana passported into the UK on an Insurance Mediation Directive ('IMD') branch passport from 8 January 2014 to 7 January 2016 and an IMD services passport from 12 March 2013 to 29 December 2015. This means that during those dates, Abana was an EEA authorised firm and permitted to carry out some regulated activities in the UK.

As I understand it, Mr L was a member of two defined contribution occupational pension schemes with a former employer. Mr L transferred the cash value of the benefits from these schemes to a SIPP with Westerby. A little over £70,000 was transferred.

A SIPP application form was signed on 26 July 2013. Section 9 of the application says "*Do you have a financial advisor?*". This was answered *"yes"* and the details of Mr F of Abana were added. It was also instructed that initial commission of 5% of the switched value should be paid to Mr F.

An application form for an investment platform called ePortfolio solutions, distributed in the UK by a business called Asset Management International ('AMI'), was also completed. This recorded the financial advisor as being Abana. Mr F, as a financial advisor with Abana, signed a declaration on the application on 26 July 2013. The application was signed by Mr L on the same date. The form was signed by Westerby, as trustees of Mr L's SIPP, in August 2013. Some of the money placed on the ePortfolio platform was invested in the Kijani Commodity Fund ('the Kijani Fund'), and some in the Swiss Asset Micro Assist Income Fund ('SAMAIF'), both of which were based in Mauritius. The remainder of the money was either held as cash or invested in other holdings.

On 11 November 2014, Westerby wrote to Mr L 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 L originally considered. Its letter also said the Mauritian Financial Services Commission ('MFSC') had issued enforcement orders against both the Kijani and the SAMAIF funds.

It explained that such assets are often speculative and high risk, and that it only permitted such assets where full investment advice had been provided by a regulated financial advisor. It further explained that the investments might be higher risk than Mr L originally considered, and it was therefore imperative that Mr L discuss this with his financial advisor.

Westerby strongly urged Mr L to contact his regulated financial advisor, and it provided the details for Abana, and asked him to confirm whether he wanted to continue to hold the investments or for Westerby to attempt to sell them. Mr L signed a form on 14 November 2014 to confirm that he'd sought financial advice from Mr F of Abana and wished to retain his investments in the funds.

In June 2015, Westerby wrote to Mr L providing an update on the Kijani Fund. The letter reminded Mr L that the Kijani and SAMAIF funds were now considered non-standard assets and explained:

- The Kijani fund was being investigated by auditors. The fund managers had taken the decision to liquidate all assets and return client investments within 30 to 60 days.
- This information had been given to Westerby by AMI, but it hadn't been able to ascertain who made the statement originally.
- Some investors had made redemption requests over 90 days ago but not received any money.
- The advisor dealing with Abana clients (by this point a Mrs B, not Mr F) had become "*directly authorised with the FCA*" under a new firm – Abana (FS) Ltd.
- Abana customers were in the process of being novated (moved over) to Abana (FS) Ltd.
- Again it strongly urged Mr L to contact his "*regulated financial advisor*", (referring, I assume, to Abana (FS) Ltd). It didn't however ask Mr L to confirm whether he wanted to continue to hold the investments on this occasion.

Westerby then wrote to Mr L again in July 2015. It explained that Abana customers weren't, in fact, being novated to Abana (FS) Ltd. Westerby said it understood the reason for this was that Abana didn't consider Abana (FS) Ltd to be suitably independent to provide advice on Mr L's SIPP. Westerby urged Mr L to have his SIPP reviewed immediately by an independent financial advisor with the necessary permissions. It also said if Mr L had any queries about its letter, he should address them to a Mr G of Abana and it provided Mr G's contact details.

Westerby sent investors further updates over the following months. In a 26 June 2017 email to Westerby, Mr L mentioned a letter he'd received from Westerby in September 2015 that said accounts were suspended. I've not seen a copy of that letter, but I can see that Westerby responded to Mr L's email the same day and said that:

> *"The letter of 10th September 2015 also referred to the effective suspension of the ePortfolio Solutions platform, pending completion of a buy-out - this meant that it was not possible to submit trades through them, so even liquid funds could not be redeemed. The buy-out was completed shortly before we issued our letter of 23rd December, and at that point it became possible to submit redemption requests again."*

On 23 December 2015, Westerby wrote to Mr L again. The letter 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: £39,400.94 (SAMAIF expected to trade again in February)
Illiquid Funds: £39,527.38 (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, the Lucent Strategic Land Fund and the Premier Socially Responsible Investment Fund.

The letter says the following about SAMAIF:

"*We have been informed that the suspension on this fund has been lifted, however it is not yet active, pending final authority from the Mauritius Financial Services Commission.*

EPS have included the value of this fund in the Liquid Funds referred to above. We have been advised that this is because the underlying assets and the value of the fund have been verified, and that the fund is expected to begin trading again in February 2016."

It appears that Mr L hadn't, in fact, made a redemption request, as Mr L contacted Westerby and requested redemption forms in March 2016. Westerby says that a redemption form was sent to Mr L on 17 March 2016, following a request to transfer his funds to a Hargreaves Lansdown SIPP. But that the hard copy of Mr L's signed form wasn't received by it. Westerby's said that *"wet signatures"* were required by ePortfolio Solutions in order to redeem funds, so it wasn't able to instruct the redemption.

Mr L's provided us with a copy of a Westerby Transfer Out Request Form he completed, this was signed by Mr L on 12 April 2016. Mr L selected *"All"* as the amount to transfer and asked for the monies to be transferred out, in cash, to Hargreaves Lansdown. Mr L's also provided us with a copy of a Redemption form for ePortfolio Solutions that he completed. As far as I can make out, this also appears to have been signed on 12 April 2016.

On 14 April 2016, Mr L emailed Westerby and said:

"Please [sic] *attached transfer forms. Can you advise what is missing so I can action and get the document filled out for both me and* [Mrs L]*."*

On 15 April 2016, Westerby emailed Mr L and explained that holdings in the Kijani and SAMAIF fund were illiquid and that:

"Due to the liquidity issues with the funds within the portfolio, the Managed Portfolio was split into two - Managed Portfolio S representing the Suspended funds (mostly Kijani) and Managed Portfolio L representing the Liquid funds (initially approximately 20% TCA Global and 80% SAMAIF). ePortfolio Solutions have advised us that

SAMAIF was initially included in the Liquid portfolio as it was expected to begin trading again imminently, however this has not yet happened."

Mr L emailed Westerby back later the same day and asked it, amongst other things, to review the transfer forms he'd submitted to ensure they'd been completed correctly.

On 19 April 2016 Westerby emailed Mr L, it confirmed that:

> *"The EPS Redemption is completed correctly and the transfer out form only the first page needs to be completed unless you are transferring to a QROPS. Please note this is for your pension scheme and not the specific funds in the EPS portfolio.*
>
> *You will also be required to sign a BACS authority to transfer the funds when available to Hargreaves Lansdown…"*

I've also seen a copy of a 24 April 2016 update from SAMAIF to investors, this explains that the re-structured SAMAIF Fund has (since 22 April 2016) been licensed by the MFSC and suggests that work to begin trading is still ongoing.

And in its 6 June 2016 submissions to us on a separate complaint featuring SAMAIF 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."*

In its response to my provisional decision Westerby's sought to clarify that the quoted wording above, which is taken from a letter Westerby sent to us on 6 June 2016, was given by Abana.

The transfer to Hargreaves Lansdown wasn't effected. In June 2017 Mr L attempted to effect a transfer again, this time into a Prudential SIPP. In response to this request Westerby said that the SAMAIF investment was included within a Managed Portfolio (S) holding. And that the funds within that holding were suspended and couldn't be redeemed. Westerby explained that SAMAIF had said it was valuing underlying investments before trading could start again, but it hadn't provided a timescale for redemptions. And the only liquid monies that could be transferred to Mr L's Prudential SIPP were in the SIPP bank account, totalling a little over £300.

Mr L asked to proceed with the transfer of the small liquid amount available, and on 26 June 2017 Westerby sent him a Transfer Out request Form for this. Westerby also provided an update on SAMAIF. It explained that it had initially been advised that the fund would be trading again in early 2016, but that it had taken far longer than anticipated to verify assets.

Mr L first complained to Westerby in November 2015. He said that he'd been advised by the FCA to complain to Westerby about the management and likely loss of his SIPP, which was invested in high risk and suspect investments. Mr L said he'd been told that the pension fund would be used for bridging loans in the City of London. And that the *"SIPP was a fairly low risk fund with good returns and we therefore put our trust in the management of the SIPP with companies such as Westerby."*

On 18 December 2015 Westerby issued its final response letter to Mr L's complaint. In summary, it said:

- It's not responsible for the advice given by Mr L's advisor, Abana.

- Abana had appointed an independent compliance company to review the suitability of the advice it gave.
- Westerby isn't responsible for the performance or management of the funds Mr L invested in. Or for any misappropriation or deception in those funds.
- Westerby cannot know if a fund is suitable for a member; that's the responsibility of the advisor.
- The funds could be held within a pension under HM Revenue & Customs ('HMRC') rules. There was nothing to indicate any issues with the funds when Mr L invested.
- Mr L said it should've taken immediate action to safeguard his monies, but it did write to him on 11 November 2014 to tell him about the issues it had discovered.
- It cannot take action on a client's investments without their instructions and Mr L instructed it to retain the investments.

Mr L then complained to this service saying that Westerby had done nothing to protect his pension fund and that it denies any responsibility.

Amongst other things, Westerby initially said to us that:

- Mr L hadn't referred his complaint to this service within six months of its final response letter. The complaint was therefore made late and shouldn't be considered.
- It carried out due diligence on Abana before accepting business that was introduced by it. Abana was authorised and regulated in Portugal by the Instituto de Seguros de Portugal ('ISP').
- It verified on the ISP's online register that Abana held passported authorisations into the UK for both life (insurance) and non-life activities. It also verified that Abana was authorised by the FCA, under reference 597069.
- It put in place a Terms of Business with Abana which required Abana to ensure that all necessary permissions were maintained.
- SIPPs 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 it cannot assess the suitability of an investment for a given member.
- Westerby didn't (and wasn't authorised to) provide financial advice. The responsibility for the advice and for the suitability of the transfer and underlying investments lies with the financial advisor.
- The advice given to Mr L by Abana has been deemed to be unsuitable by an independent compliance company, who were attempting to arrange compensation for the advisor's clients.
- The investment was placed into what were at the time regulated, listed investments in a regulated platform. Mr L's financial advisor (not Westerby) instructed the investment into the individual funds within the platform.
- When Westerby highlighted possible problems with the underlying investments, Mr L was asked if he wished to remain in those investments. He gave a clear instruction that he wished to retain the investments.

One of our investigators reviewed the complaint. They said that Westerby's final response letter didn't meet the requirements for such a letter, so the relevant time limit didn't start. And the complaint had, therefore, been made in time.

Our investigator also thought that the complaint should be upheld. He thought the fact Abana was based abroad should've made it stand out when Westerby was carrying out its due diligence checks. He said the entry for Abana on the regulator's register would've shown that Abana was only authorised to carry out insurance or reinsurance mediation in the UK. Our investigator said that personal pensions advice isn't 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.

Our investigator concluded that as Westerby shouldn't have accepted Mr L's SIPP application from Abana, it was fair and reasonable for Westerby to compensate Mr L for his financial loss.

Westerby didn't agree. In summary, it's made a number of points including:

- The complaint was made late and shouldn't be considered.
- The investigator said the relevant letter didn't refer to this service's website address in the body of the letter. But the rule doesn't require that, it only requires it to *provide* the website address and this was noted in the leaflet that was included with the letter. Terms may be incorporated into documents in this way.
- Mr L had sufficient information to enable him to make his complaint in time, but he failed to do so.
- Westerby complied with both the spirit and the letter of the rules.
- Westerby doesn't accept that this service has jurisdiction to consider the complaint.
- Westerby was only the administrator of the SIPP and didn't advise Mr L on investing in it. Westerby's role only began in August 2013 when it received the application following the advice Mr L had already received from Abana.
- The FCA carried out a review of Westerby's business in October 2014. The FCA commended Westerby on its high levels of due diligence.
- The investigator's view that Westerby didn't act with due care and diligence flowed from his view that it should've known Abana wasn't authorised to advise on pensions. Westerby disagrees and says it did carry out proper due diligence.
- Westerby carried out the searches that the investigator thought should've been made before accepting Mr L's SIPP application. It searched the FCA Register in May 2013, and established that Abana was EEA authorised. It has a screenshot of the Register which doesn't include a *"Passports"* section or make any mention of restrictions on Abana's permissions. Acting reasonably, Westerby couldn't have found details of the passport permissions from the FCA Register at the time.
- It provided a copy of a report by the Complaints Commissioner, which Westerby thought supported its view that information in the FCA Register was limited.
- Knowing that Abana's country of origin was Portugal, Westerby also searched the website of the Portuguese regulator. Abana was authorised and regulated in Portugal by the ISP under reference 412378472. This showed that Abana was authorised to undertake both life and non-life business in the UK. There was nothing to put Westerby on notice that Abana wasn't authorised to advise UK investors.
- It was entirely reasonable for Westerby to rely on the entries in the FCA Register and the Portuguese Register.
- Abana's website said it was a specialist in compliance services to

international financial advisors and also gave pension advice.

- Westerby carried out investigations which complied with the regulator's good practice requirements. These didn't show that Abana wasn't authorised to give advice on pensions in the UK. If they had, Westerby wouldn't have accepted the business. It's often declined to accept business from introducers where investigations have revealed they weren't of an appropriate standard.
- Having carried out proper due diligence in May 2013, Westerby then followed good practice in setting up a Terms of Business agreement with Abana. In this agreement, Abana warranted it was suitably authorised in relation to the sale of the SIPP.
- There was no failure by Westerby to act with due care and diligence. In the absence of sufficient information on the publicly available register, and as the only source of confirming whether the required permissions were held was by reference to the firm itself, it required that Abana provide a warranty (by way of the Intermediary Terms of Business) that it held (and would maintain) the necessary permissions.
- It considers that it acted in good faith by accepting business that was introduced by Abana.
- It's contrary to European Union law to discriminate against a firm on the basis of the EEA country in which it's been established. Checks on UK-based introducers are carried out with reference to the Financial Services Register, and checks on EEA passported introducers should be carried out in the same way.
- Westerby also provided quarterly Product Sales Data reports to the FCA, including details of who it accepted business from. The FCA never expressed any concerns about it accepting business from Abana.
- The investigator has referred to the regulator's Principles 2, 3 and 6 in reaching his conclusion. But he hasn't clarified which of the Principles Westerby has breached. Also, the Principles must be read in conjunction with COBS 11.2.19(2). This states that a firm satisfies its obligations to a client if it executes an order following specific instructions from a client.
- As the investigator acknowledged, Westerby didn't provide Mr L with any advice. When Mr L signed the SIPP application he agreed that he was solely responsible for all investment decisions.
- Section 19 of the Financial Services and Markets Act ('FSMA') states that no person may carry on a regulated activity in the UK or purport to do so unless he's an authorised person. But even if a person acts in breach of permission, the transaction itself is proper and legal. This is emphasised in Section 20 of FSMA, which doesn't say that such a transaction is unenforceable.
- Once the SIPP had been established, if Westerby had failed to follow Mr L's instructions it would've been liable for damages under section 150 of FSMA. Also, under Westerby's trust deed it was required to act in accordance with Mr L's instructions.
- Mr L's loss has been caused by the advice he received from Abana. The FCA investigated Abana and third-party compliance experts reviewed the advice Mr L was given. It was found the advice was unsuitable, and if Abana had provided redress as was proposed Mr L would've been compensated for his loss. It's neither fair nor reasonable to expect Westerby to compensate Mr L in these circumstances.
- It can't understand why this service hasn't pursued Abana in respect of the redress it's failed to pay Mr L.
- Also, Mr L contributed to his own loss. Westerby wrote to him in 2014 when it became aware there were problems with some of the funds he'd invested in. He could've chosen to switch into different funds if he'd wanted to, but didn't do this.

- While it's not reasonable to expect Westerby to compensate Mr L at all, it's even more unreasonable to compensate him for losses he could've avoided.

Previous provisional decision by a different ombudsman on this complaint

One of our ombudsmen previously issued a provisional decision on this complaint in June 2019. The ombudsman thought the complaint should be upheld. In brief, his provisional findings were:

- Abana needed *"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 and it didn't do this.
- Westerby shouldn't have accepted Mr L's application; it could've put a stop to things if it had acted fairly and reasonably by rejecting the application.
- In the circumstances, it was fair to ask Westerby to compensate Mr L for the loss he's suffered.

In the interests of clarity on this point. While an initial provisional decision was issued on this complaint a couple of years ago, this complaint didn't then proceed further while we focussed our work on another complaint (the other complaint was the subject of the published decision I mention in the next section). The ombudsman who issued the initial provisional decision on this case didn't have capacity to deal with the case – and, as such, this case was passed to me to review.

Previous final decision on a complaint against Westerby

We issued a final decision on another complaint involving Westerby's acceptance of a SIPP application from Abana in February 2021 ('the published decision'). That final decision has been published on our website under DRN7770418.

That decision relates to Abana and features the same key point – namely the permissions held and required by an incoming EEA firm dealing with personal pensions in the UK, and Westerby's knowledge of this. Westerby's made the same, or very similar, submissions on that case and some of its recent submissions on this case are made with reference to the published decision.

After the published decision was issued, Westerby was asked to take it into consideration, as an important representative decision, in accordance with the relevant FCA DISP Rules and Guidance (particularly DISP 1.4.1, 1.4.2 and 1.3.2A), which should be taken into account when assessing other similar complaints.

On this basis, Westerby was asked to review (amongst others) outstanding complaints involving Abana – including Mr L's – and if it wasn't prepared to change its position after taking account of the detailed reasons set out in the published decision, to explain why that was the case. Westerby didn't change its position.

Other submissions from Westerby

I've considered all the submissions Westerby has made over the course of this complaint. This includes further submissions it's made following on from the other ombudsman's previous provisional decision on this case and the published decision. I've considered all these submissions carefully and, amongst other things, Westerby's said:

- A number of points raised haven't been addressed by this service.
- The published decision confirms we contacted the FCA about whether *"top-up"* permissions appear on the FCA Register and that the *"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."*
- There's been no disclosure of: the details of the contact at the FCA with whom this service communicated; records of such communications; file notes or attendance notes; details of the FCA contact's role at the FCA; whether the FCA contact was dealing with the Register in 2013; and what the FCA contact's understanding of the Register in 2013 is based upon.
- An understanding of what was on the Register in 2013 isn't proof of what was actually on the Register at the relevant time. This service should provide full disclosure of this information. Not to do so is procedurally unfair.
- It was reasonable for Westerby to assume from the Terms of Business agreement that Abana had the necessary permissions. It doesn't accept that it ought to have been reasonably aware of cause to have questioned the accuracy of the statement in the agreement.
- The published decision concedes that information which wasn't available on the Register wouldn't have been provided to Westerby by the FCA if it wasn't already on the Register. But the published decision also says that if Westerby had contacted the FCA directly the FCA would've been able to confirm Abana's permissions. No information's been provided about this and the FCA's position generally.
- Westerby made a Freedom of Information request to the FCA. And, in response, the FCA confirmed that in 2013, the Register would've indicated the broad permissions held under IMD by a firm which would've been either insurance mediation or reinsurance mediation and that there was no requirement under the IMD to display more detailed activities. Any further information not displayed on the Register would've been considered confidential information under Section 348 of FSMA which prohibits disclosure of this information.
- In the published decision the ombudsman sought to distinguish the complaint from the situation in the Adams court case on the basis that Abana was offering an advisory service. It's unclear how Abana's contractually defined role impacts on the scope of duty owed by Westerby under COBS 2.1.1R. It was no part of Westerby's contractual obligations to investigate the permissions of third-party advisors.
- In the published decision the ombudsman failed to follow DISP 3.6.3G, which provides: *"Where a complainant makes a complaint 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 ombudsman failed to assess apportionment and causation.
- Despite a related complaint about the actions of Abana, in the published decision the ombudsman decided that Westerby should compensate the consumer for the full extent of his financial losses.
- Abana has ceased trading and closed, as such any indemnity from Abana and/or assignment of any action against it would now be worthless.
- Complaints made against Abana to this service ought to have been decided first, or at least at the same time as complaints against Westerby. This service dealing with

the complaint against Westerby first has led to the failure to address the issue of apportionment.
- This service has found against Abana in a number of complaints involving a different SIPP operator, and ordered Abana to pay redress yet we haven't pursued, or invited the complainants to pursue, the SIPP operator.

Westerby's also made a number of other submissions to us previously, some in this complaint and others in separate complaints featuring Abana and the same key point – namely the permissions held and required by an incoming EEA firm dealing with personal pensions in the UK, and Westerby's knowledge of this. These submissions include that:

- 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. Its Terms of Business provided for such a request and effectively formalised this disclosure through a signed agreement.
- The FSMA acknowledges that there's a general principle that consumers should take responsibility for their decisions, a principle which the FCA should have regard to when considering consumer protection. This service is part of the consumer protection provisions under the FSMA, it follows that we must similarly have regard to this principle. There's a clear intention in law that consumers have a level of responsibility. And this service has issued other decisions which take account of a consumer's failure to take action to mitigate their losses.
- Its due diligence wasn't simply a check of the Register. Its Chairman and Compliance Oversight was present at several face to face meetings with Abana's advisor and Compliance Director. And 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 the SIPP. Abana therefore effectively *"defrauded"* it.
- It's able to accept applications from non-regulated introducers. This isn't something it's done, but it's acceptable to the FCA.
- It doesn't hold a copy of the *"Permission"* page for Abana.
- The *"Basic Details"* page of Abana's Register entry included a field labelled *"Undertakes Insurance Mediation",* but the field was left blank; for UK firms it was always completed.
- Westerby's argument isn't that there weren't other sections of the Register, it's that Abana's permissions couldn't be determined from the Register due to the limited information available. In other words, Westerby doesn't accept that, at the relevant time (when the online Register was viewed in 2013), that there was information regarding permissions available or accessible by an online user.
- There were opportunities to mitigate losses. Westerby wrote to Mr L in November 2014. That letter drew to Mr L's attention the regulatory enforcement actions against the funds, and it gave him the opportunity to redeem his funds. Westerby also wrote to Mr L again in December 2015, to inform him that there was an opportunity to redeem approximately half of his funds. Mr L didn't then contact Westerby until March 2016, when a request was received to transfer his funds to Hargreaves Lansdown. But he didn't return a hard copy of a redemption form that was sent to him at that time.

My provisional decision

I issued a provisional decision on this complaint and I concluded Mr L's complaint should be upheld. In brief, I concluded that:

- The complaint was one we could consider.
- 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've established Abana didn't 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 wasn't in accordance with its regulatory obligations nor good industry practice for Westerby to proceed to accept business from Abana.
- Additionally, Westerby ought to have considered the anomalous features of the business. These were further factors relevant to Westerby's acceptance of Mr L's application which, at the very least, emphasised 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.
- It's 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 L's application from Abana.
- It's 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 L fairly. And it's appropriate and fair in the circumstances for Westerby to compensate Mr L to the full extent of the financial losses he's suffered due to Westerby's failings.

Westerby didn't accept my provisional decision and provided a detailed response. I've carefully considered that response in full. Amongst other things, Westerby said that:

- A number of the submissions it had previously made were accurately summarised in the provisional decision but weren't then addressed properly.
- Following the published decision, it hadn't declined to change its position, it performed a review and there were no compelling reasons and/or evidence for it to change its position that the complaint ought not to be upheld.
- It had previously requested disclosure of: the details of the contact at the FCA with whom this service communicated; records of such communications; file notes or attendance notes; details of the FCA contact's role at the FCA; whether the FCA contact was dealing with the Register in 2013; and what the FCA contact's understanding of the Register in 2013 is based upon. It's only been provided with the FCA's response that's referred to in the published decision and it's not received the further disclosure it's requested. It doesn't understand why I consider that it could or should provide more information to show what was on the Register in 2013. And it's asked me to clarify my position on this.
- It took all reasonable steps available to it to verify Abana's permissions.
- It disagrees that Abana not holding the relevant permissions would've been a matter of public record. The FCA could only confirm what was on the Register, not what was missing from it. And the FCA cannot provide any more information than that which is provided on the Register.
- Abana had confirmed orally and in writing that it had the necessary permissions and it was reasonable for Westerby to rely on this.
- It disagrees that the Written Agreement was vague and generic in nature. The term *'permissions'* encompasses *'top-up'* permissions. And it's unrealistic to consider that any change of wording would have caused Abana to not provide the undertaking.

- During the changeover from the FSA to the FCA, the FSA allowed a further twelve months for firms to alter their paperwork, including agreements, letterheads and business cards. The date of the Written Agreement falls under this time period.
- It was no part of its contractual obligations to Mr L to investigate the permissions of third-party advisors and anomalous features.
- It administers esoteric high risk non-standard assets for members on a regular basis and there's nothing unusual or extraordinary about its administration of such investments.
- The provisional decision downplays the extent and thoroughness of the due diligence it performed. It met with Abana's representatives and obtained information from them. Abana's representatives had good technical knowledge and confirmed it had the correct permissions.
- Before accepting applications, it checked the FCA register and the permissions page, the latter was blank.
- It checked the Portuguese register which had to be translated into English. The Portuguese register explained that Abana was authorised to advise on "life" and "non-life", the latter Westerby understood meant investments and pensions.
- Much later, independent consultants appointed by the FCA also spoke to the Portuguese Regulator and were told that Abana was authorised to advise on pension products.
- In Adams v Options it was said (at paragraph 163) that:

> *"The claimant also relies on reviews, guidance and alerts which were published by the FCA in 2013, 2014, 2016 and 2017, after the events relevant to his claim in this case, and it seems to me that they can therefore have no direct bearing on the matters which I have to decide."*

- The October 2013 and 2014 publications were published after Mr L's SIPP was set up and should not be applied retrospectively. Notwithstanding this, Westerby acted in accordance with the regulatory publications.
- An attempt's been made in the provisional decision to distinguish Mr L's complaint from the decision in *Adams* but I've made a material error of law in doing so. Westerby's said that:

> *"In Adams HHJ Dight stated that the scope of the 'best interests' duty at COBS 2.1.1R was to be determined by "the relevant factual context" and, in particular, the parties' "defined… roles and functions in the transaction" as set out by the terms of their agreement. He therefore concluded that the duty argued for on Mr Adams' behalf did not arise because the defendant's role was limited to 'execution-only'."*

- In the provisional decision I'd sought to distinguish Mr L's complaint from the situation in *Adams* on the basis that Abana was offering an advisory service. It's unclear how Abana's contractually defined role impacts upon the scope of duty owed by Westerby under COBS 2.1.1R. It was no part of Westerby's contractual obligations to Mr L to investigate the permissions of third-party advisors. And it's wrong in principle to conclude that the contractual responsibilities of an unrelated third-party could somehow be used to define those owed by Westerby under COBS 2.1.1R.
- The *Options* appeal decision commented that s27 of the FSMA is designed to shift the risks of accepting business from unauthorised parties onto providers. However, s20 FSMA does the exact opposite – it explicitly shields authorised parties from the risks of accepting business from authorised parties acting outside their permissions (such as Abana). And FCA guidance I'd referred to in my provisional decision appears to directly contradict the intention of legislation.

- There should be some, if not a full, apportionment of liability made against Abana. And I've failed to assess apportionment.
- In a previous decision, a different ombudsman did deal with the apportionment issue where the complaint was against an EEA firm that had acted outside its permissions. The decision made an apportionment between the SIPP provider and the advisor on a 50/50 basis.
- Abana's ceased to trade and any indemnity from Abana and/or assignment of any action against it from Mr L is effectively worthless.
- Appropriate liability should be attributed to Abana for its involvement in the losses that complainants have suffered.
- Had it uncovered that Abana didn't have the relevant permissions, it would've declined all business from Abana from the outset, and would never have received Mr L's application or have been in a position to highlight Abana's lack of permissions.
- It wouldn't have been at liberty to contact investors directly to tell them why their application was refused.
- If it had rejected Mr L's application, Abana would've re-applied on behalf of Mr L to another SIPP provider that Abana was using and that SIPP provider would've accepted the application.
- Mr L would've continued to accept or act on pensions advice from Abana. In or around September 2015, Mr L chose to seek independent advice elsewhere from KB Wealth Management Limited ('KB Wealth'), a firm owned and operated by one of Abana's advisors.
- Mr L's company had dealings with accountants run by individuals connected to Abana.
- When it wrote to Mr L in November 2014, it anticipates that Mr L would've discussed the matter with the accountants and Mr F, and that Westerby's concerns about the permissions of the firm were dismissed.
- The action it took was in line with the FCA Principles and it was acting in the best interests of investors by keeping an eye on the investments and flagging issues with them. Its actions were correct and resulted in some clients being able to make a redemption.
- Following its November 2014 letter, any investor would've sought independent financial advice or made some reasonable lines of enquiries. Mr L's a company director and it would've been reasonable for someone with his business background to have made some enquiries.
- It doesn't agree that it was reasonable for Mr L to conclude following its June 2015 letter that he didn't need to do anything. Further, in July 2015, it urged Mr L to have his SIPP reviewed by an independent financial advisor with the necessary permissions. Having received such correspondence, it would've been reasonable for any investor to have sought independent financial advice.
- In September 2015, Westerby received a Letter of Authority confirming that Mr L had appointed KB Wealth as his financial advisor. KB Wealth was owned and operated by one of the advisors of Abana. KB Wealth was originally called Abana (FS) Ltd, which was the same firm that Abana's clients were to be novated to until it was deemed not to be suitably independent (which Westerby had informed investors of in July 2015). So, Mr L chose to use a firm who he ought to have known was connected to Abana for 'independent' advice.
- Westerby sent a letter to Mr L in December 2015, which explained that the suspension of the SAMAIF Fund might lift. By this stage any investor would've made some enquiries into their funds, but Mr L didn't. There was no attempt to try to mitigate his losses promptly. And when Mr L contacted it in February 2016, it was to seek transfer forms and not redemption forms.

- By concluding that it wasn't reasonable for Mr L to take some action after its letters, I'm effectively deciding that Westerby was always liable for any subsequent losses irrespective of the duty on Mr L to mitigate his losses.
- The provisional decision says that any efforts to redeem the investments wouldn't have been successful, but it disagrees. In the complaint that was the subject of the published decision, the consumer was able to redeem their funds in May 2016. And it's likely that Mr L could've mitigated his losses with a timely redemption request.

Mr L agreed with my provisional decision and didn't have any further comments to add.

What I've decided – and why

jurisdiction

I've considered all the evidence and arguments in order to decide whether we may consider Mr L's complaint.

The rules I must follow in determining whether we can consider this complaint are set out in the Dispute Resolution ('DISP') rules, published as part of the FCA's Handbook.

<u>Has the complaint been brought in time?</u>

When Mr L referred his complaint to the ombudsman service in 2017 the relevant jurisdiction rule (DISP 2.8.2R) provided:

> *"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
>
> *(1) more than six months after the date on which the respondent sent the complainant its final response…*
>
> *unless:*
>
> *(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R … was as a result of exceptional circumstances; …or*
> *(5) the respondent has consented to the Ombudsman considering the complaint where the time limits in DISP 2.8.2 R…have expired…"*

The term final response has the meaning given in DISP 1.6.2R. And in December 2015 DISP 1.6.2R said:

> *"The respondent must, by the end of eight weeks after its receipt of the complaint, send the complainant:*
>
> *(1) a 'final response', being a written response from the respondent which:*
>
> *(a) accepts the complaint and, where appropriate, offers redress or remedial action; or*
> *(b) offers redress or remedial action without accepting the complaint; or*
> *(c) rejects the complaint and gives reasons for doing so;*
>
> *and which:*

(d) encloses a copy of the Financial Ombudsman Service's standard explanatory leaflet;
(da) provides the website address of the Financial Ombudsman Service;
(e) informs the complainant that if he remains dissatisfied with the respondent's response, he may now refer his complaint to the Financial Ombudsman Service; and
(f) indicates whether or not the respondent consents to waive the relevant time limits in DISP 2.8.2 R or DISP 2.8.7 R (Was the complaint referred to the Financial Ombudsman Service in time?) by including the appropriate wording set out in DISP 1Annex 3R; …"

Westerby accepts that its letter of 18 December 2015 didn't, in the body of the letter, give the relevant website address. Westerby acknowledges it's required to provide the website address, but says it's not required to do so expressly within the body of the letter. And it says the website address was provided to Mr L, as it was in the leaflet Westerby provided.

The requirement to include our website address hasn't always been part of the definition of a final response letter. It was added on 9 July 2015. This suggests that if sending the leaflet was sufficient to meet the requirement to include our website address, then DISP 1.6.2R(1)(da) wouldn't have been added as a requirement for a final response as a separate criterion - particularly as including the leaflet (which includes the website address) had been a part of the definition for many years before the rule was added to in July 2015.

The above is consistent with the FCA's guidance at DISP 1.6.6A, which was also updated on 9 July 2015:

> *"The information regarding the Financial Ombudsman Service required to be provided in responses sent under the complaints time limit rules (DISP 1.6.2 R and DISP 1.6.4 R) should be set out clearly, comprehensibly, in an easily accessible way and prominently within the text of those responses."*

Further the letter of 18 December 2015 doesn't comply with the requirement at 1.6.2R(1)(f) above, as it doesn't indicate whether or not Westerby consents to waive the relevant time limits. This should've been dealt with in the body of the letter in the way indicated by the Appendix referred to in the rule.

Accordingly, my finding is that the letter of 18 December 2015 didn't meet all the requirements for a final response letter. Therefore, the six-month time limit didn't start to run and hadn't expired before the complaint was referred to this service in 2017. So, I'm satisfied that this complaint was brought in time and that it's one we can consider.

merits

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

When considering what's 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.

Mr L initially complained to Westerby that it shouldn't have allowed *"high risk and suspect"* investments to be made in his SIPP. It's clear Mr L had become concerned because both the Kijani and SAMAIF funds were experiencing difficulties. Mr L said that Westerby had a duty of care to ensure his monies were protected, and that they couldn't be taken by individuals or companies where little hope would exist for them once invested. Mr L said in his complaint form that he trusted Westerby to manage his SIPP and that it did nothing to protect his monies.

In deciding what's fair and reasonable in the circumstances, it's appropriate to take an inquisitorial approach. And, ultimately, what I'll be looking at here is whether Westerby took reasonable care, acted with due diligence and treated Mr L fairly, in accordance with his best interests. And what I think's fair and reasonable in light of that. And I think the key issue in Mr L's complaint is whether it was fair and reasonable for Westerby to have accepted Mr L's SIPP application in the first place. So, I need to consider whether Westerby carried out appropriate due diligence checks on Abana before deciding to accept Mr L's SIPP application from it.

The parties to this complaint have provided detailed submissions to support their position and I'm grateful to them for doing so. I've considered these submissions in their entirety. However, I trust that they won't take the fact that my decision focuses on what I consider to be the central issues as a discourtesy. To be clear, the purpose of this decision isn't to comment on every individual point or question the parties have made, rather it's to set out my findings and reasons for reaching them.

Relevant considerations

I've carefully taken account of the relevant considerations to decide what's fair and reasonable in the circumstances of this complaint.

Having carefully reconsidered all of the evidence, including the submissions in response to my provisional decision, I'm still of the view that the relevant considerations in this case are those that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

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 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."*

I've 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'd 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've refused to accept the investment. The ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and hadn't 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've 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.

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's 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'm therefore satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

On 18 May 2020, the High Court handed down its judgment in the case of Adams v Options SIPP [2020] EWHC 1229 (Ch). Mr Adams 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 UK Personal Pensions LLP [2021] EWCA Civ 474. I've taken account of both these judgments when making this decision on Mr L's case.

I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Options SIPP. And, HHJ Dight didn't 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 the judgments say anything about how the Principles apply to an ombudsman's consideration of a complaint. But, to be clear, I don't say this means Adams isn't a relevant consideration at all. As noted above, I've taken account of both judgments when making this decision on Mr L's case.

I acknowledge that COBS 2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client)* overlaps with certain of the Principles, and that this rule was considered by HHJ Dight in the High Court 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 Adams' appeal didn't 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."*

In its response to my provisional decision Westerby said that I'd sought to distinguish Mr L's complaint from the situation in *Adams* on the basis that Abana was offering an advisory service. That it's unclear how Abana's contractually defined role impacted upon the scope of duty owed by Westerby under COBS 2.1.1R. And that in attempting to distinguish Mr L's complaint from the decision in *Adams* I'd made a material error of law.

I've carefully considered what Westerby has said about this, but I'm still of the view that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams (summarised in paragraph 120 of the Court of Appeal judgment) and the issues in Mr L's complaint. In particular, as HHJ Dight noted, he wasn't asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP.

I explained in my provisional decision that the facts of the case were also different. And that I had to construe the duties Westerby owed to Mr L under COBS 2.1.1R in light of the specific facts of Mr L's case. And that's still my view.

In my provisional decision, I explained that in the published decision it was noted that in Adams v Options SIPP HHJ Dight accepted that the transaction with Options SIPP proceeded on an execution only basis, i.e. without any advice from the business introducing the SIPP application. And that the transaction between Mr L and Westerby proceeded on the footing that Mr L was being advised by an authorised advisor. I made that point in the provisional decision, and I've repeated it here, simply to highlight that there are factual differences between Adams v Options SIPP and Mr L's case.

So, I've considered COBS 2.1.1R - alongside the remainder of the relevant considerations, and within the factual context of Mr L's case, including Westerby's role in the transaction.

However, I think it's important to 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'm 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 Adams' statement of case.

I also want to emphasise that I don't say that Westerby was under any obligation to advise Mr L 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 didn't have the required permissions to be giving that advice, and had been introduced by that same firm, isn't the same thing as advising Mr L on the merits of investing and/or transferring to the SIPP.

So, I'm still satisfied that COBS 2.1.1R is a relevant consideration – but that it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Mr L's case.

The regulatory publications

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

- The 2009 and 2012 Thematic Review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 *"Dear CEO"* letter.

The 2009 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 members 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 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 customers' 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 stated:

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

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

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

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

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

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

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

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

I acknowledge that the 2009 and 2012 reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 finalised guidance is). However, the fact that the reports and *"Dear CEO"* letter didn't constitute formal guidance doesn't 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's treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take them into account.

It's 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 also remain 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. Westerby *did* carry out due diligence on Abana. So, it clearly thought it was good practice to do so, at the very least.

I've carefully considered what Westerby's said about publications that were published after Mr L's SIPP was set up, which would include the October 2013 finalised SIPP operator guidance and the July 2014 *"Dear CEO"* letter. But I remain of the view stated in my provisional decisional that, like the ombudsman in the BBSAL case, I don't 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 L's complaint, mean that the examples of good practice they provide weren't 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's 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's clear the standards themselves hadn't changed.

That doesn't mean that in considering what's fair and reasonable, I'll 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 didn't 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 response to my provisional decision Westerby's stated that the *Options* appeal decision commented that s27 of the FSMA is designed to shift the risks of accepting business from unauthorised parties onto providers. But s20 of the FSMA does the exact opposite – it explicitly shields authorised parties from the risks of accepting business from authorised parties acting outside their permissions (such as Abana). And Westerby's highlighted that FCA guidance I'd referred to in my provisional decision, and which I've repeated above, appears to directly contradict the intention of legislation.

I've carefully considered Westerby's submissions, and the contents of s20 and s27 of the FSMA. But, to be clear, with regards to the contents of s20, it's not my role to determine whether an offence has occurred or if there's something that gives rise to a right to take legal action and I'm not making a finding here on whether Mr L's application is void or unenforceable. Rather, I'm making a decision on what's fair and reasonable in the circumstances of this case – and for all the reasons I've set out above I'm satisfied that the Principles and the publications listed above are relevant considerations to that decision.

In determining this complaint, I need to consider whether, in accepting Mr L's SIPP application from Abana, Westerby complied with its regulatory obligations: to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and 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've done to comply with its regulatory obligations and duties.

In this case, the business Westerby was conducting was its operation of SIPPs. I'm 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're providing.

So taking account of the factual context of this case, it remains my view that in order for Westerby to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), it should've 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 L's business from it.

Westerby says it carried out due diligence on Abana before accepting business from it. And from what I've seen I accept that it undertook some checks. However, the question I need to consider is whether Westerby ought to have, in compliance with its regulatory obligations, identified that Abana didn't in fact have the *"top-up"* permissions from the FCA it required to be giving advice on, and arranging, personal pensions in the UK. And whether Westerby should, therefore, not have accepted Mr L's application from it.

The regulatory position

Having carefully reconsidered all of the evidence on this point, including the submissions in response to my provisional decision, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

Abana is based in Portugal and is authorised and regulated in Portugal by Autoridade de Supervisao de Seguros e Fundos de Pensoes ('ASF'). As I've mentioned 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:

> *"3. '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 of assisting in the administration and performance of such contracts, in particular in the event of a claim.*
> *…*
> *4. '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 Mediation Directive for Long-term insurance business"* it's 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 L'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, contractual scheme 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 didn't have permission to carry on the separate activity under Article 10 of effecting and carrying out insurance.

At the time of Mr L'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 aren't covered by the Insurance Mediation Directive.

The guidance in SUP 13A.1.2G of the FCA Handbook at the time of Mr L'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've 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 didn't fall under IMD passporting, and they required FCA permission for Abana to conduct them in the UK. Westerby, acting in accordance with its own regulatory obligations, should've ensured it understood the relevant rules, guidance and legislation I've 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's 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 the FCA in order to carry on the regulated activities it was undertaking.

Westerby's checks on Abana's permissions

Having carefully reconsidered all of the evidence on this point, including the submissions in response to my provisional decision, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

Westerby says it took appropriate steps to conduct due diligence on Abana and it couldn't, and shouldn't, reasonably have concluded that Abana didn't have the required *"top-up"* permissions. I've carefully considered all of Westerby's submissions on this point.

The Register

I'm 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 think it's fair and reasonable to expect Westerby to have checked the Register entry for Abana in the circumstances. And I think it's fair and reasonable to say that the checks Westerby ought to have conducted on Abana's Register entry should've included a review of all the relevant information available.

Westerby says it checked Abana's entry on the Register. So, I think it's clear that Westerby thought it should check the Register, rather than simply asking Abana what permissions it had and then merely relying on what Abana said.

Westerby says that, at the time of Mr L's SIPP application, there wasn't information available or accessible on the FCA Register that would've shown Abana's permissions position. It says that screenshots show that the Register at that time didn't include a *"Passports"* section, or make any mention of any restrictions on Abana's permissions. Westerby also believes that the FCA would've been unable to confirm Abana's permissions if asked, as this information wasn't available on the then Register.

I've carefully considered everything Westerby's said about the format of the Register in or around 2013, when Mr L's application was submitted by Abana.

In a letter dated 2 March 2018 Westerby said:

> *"WTS* [Westerby] *searched Abana on the Financial Services register on 10 May 2013 and established that they were EEA authorised. Please refer to the enclosed copy screenshot of the search dated 10 May 2013. This shows 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:

Financial Services Register — Page 1 of 1

The Financial Services Register

Home | Financial Services Firm Search | Individuals Search | Payment Services Firm Search | CIS Search | EPF Search

Basic details for:

597069 - Abana, Lda.

Current status:	EEA Authorised
Effective Date:	12/03/2013
Tied Agent:	
Undertakes Insurance Mediation:	
Registered under Money Laundering Regulations:	
Address: The address shown is the firm's principal place of business. If the firm is a company, this address may be the same as its registered office but it does not have to be. A company's registered office can be found by contacting Companies House.	Praceta do Sol Nascente, No 39 Alcabiddeche 2645 087
Phone: Fax: Email: Website:	- - -
Notices:	
Other information:	Consumers considering or currently doing business with passported EEA firms ('EEA Authorised'), may wish to ask for further information from the firm or its UK branch about its complaints and compensation arrangements. This is because the position may differ compared to a UK authorised firm.

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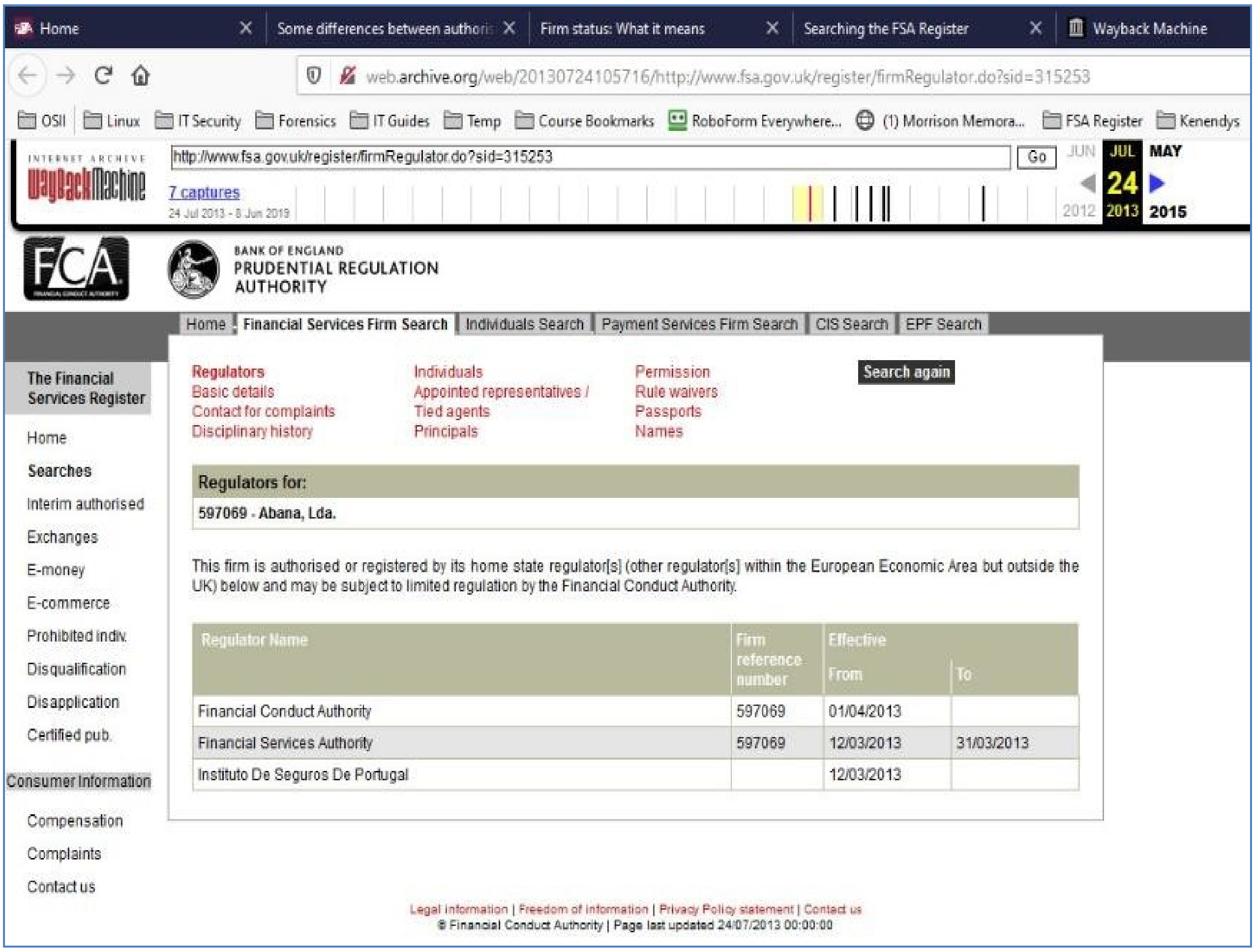
The third-party report on the Register, provided by Westerby during the investigation of the complaint which was the subject of the published decision, is helpful to discussions about the format of the Register at the time of Mr L's SIPP application. The report included the following screenshot of the archived Register for Abana (dated 24 July 2013):



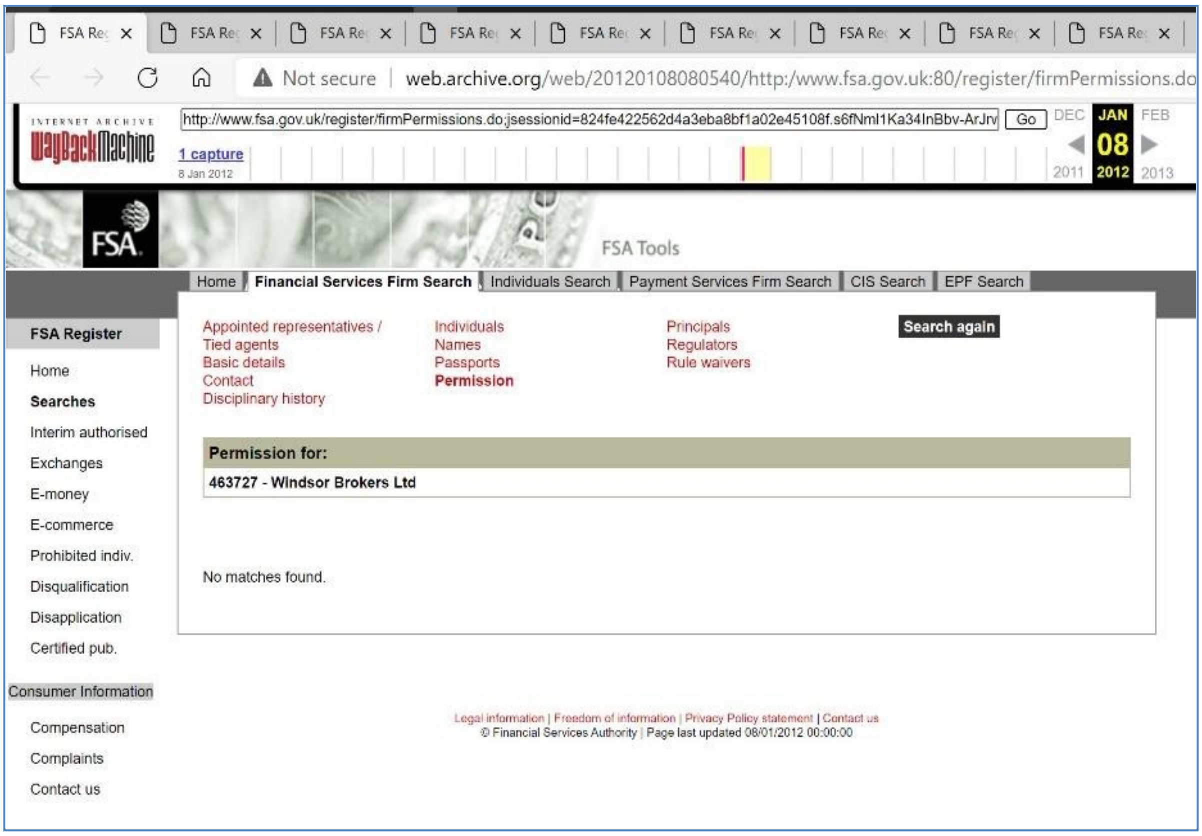
Regulator Name	Firm reference number	Effective From	To
Financial Conduct Authority	597069	01/04/2013	
Financial Services Authority	597069	12/03/2013	31/03/2013
Instituto De Seguros De Portugal		12/03/2013	

Each of the red titles at the top of the entry for Abana (Regulators, Basic details, Contact for complaints, Disciplinary History and so on) is a hyperlink to another page of Abana's entry on the Register. So, this screenshot shows that Abana's 2013 entry on the Register would've included, amongst other things, both *"Permission"* and *"Passports"* pages. And it's reasonable to conclude from the above screenshot that the format of the Register, in or around the time Mr L'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.

Elsewhere in the third-party report it says there's no evidence that in 2013 the Register contained any *"Permissions data"* relating to Abana that could've been searched by Westerby. The report refers to paragraph 24 as forming the basis for this conclusion.

I've carefully reviewed the third-party report. Paragraph 24 only confirms that if the hyperlink to the *"Permission"* page is clicked, there's no archive of that specific *"Permission"* page. In my view, the fact this hyperlink yielded nothing when clicked just speaks to the limitations of the internet archive in question. So, I don't think paragraph 24 shows that no *"Permission"* page for Abana existed in 2013. However, I do think that evidence provided elsewhere in the third-party report strongly suggests a *"Permission"* page *did* exist for Abana.

Only the *"Regulators"* page has been archived for Abana's entry on the Register from 2013. But the third-party report provides examples of several *"Permission"* pages for other firms which were archived, dating from around the time of Mr L'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:



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 was 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 FCA permissions at the relevant time, which shows the firm's permissions set out in detail.

I'm satisfied that all of this information taken together demonstrates that, when Mr L's application was received by Westerby, the format of the FCA Register contained a page labelled *"Permission"* where a firm's permissions would be set out on the Register. And, where a firm didn't have any FCA permissions at the time of the search, the *"Permission"* page on their Register entry would simply state "*No matches found*" (as there were no permissions to display).

This is consistent with the information we received from the FCA when we asked it to confirm whether *"top-up"* permissions appear on the Register, and whether this has changed since 2013. In response, the FCA confirmed that *"top-up"* permissions do appear on the Register under the *"Permission"* page, and that it understands the same information was available on the Register in 2013. In other words, the FCA's response to our question accords with what I've already said I'm satisfied has been demonstrated by the evidence that's available in this case.

Westerby's said, amongst other things, more information should be provided about the details of the contact with the FCA. But, as I explained in my provisional decision, Westerby's already been provided with the FCA's response to our question. So, I'm satisfied that Westerby's had the opportunity to consider the response, and that it's also had the opportunity to make further submissions to us. So, I remain satisfied that I can fairly determine this complaint now and that Westerby doesn't need to be provided with further information on this point.

Further, and as I've already mentioned above, the FCA's response to our question accords with what I've already said I'm satisfied has been demonstrated by the evidence that's available in this case. So, my decision on this complaint would still be the same with or without the FCA's response to our question.

Accordingly, I remain 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's 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 included a *"Permission"* page. And it follows that the entry for Abana on the Register, at the time of Mr L's application, would've included a *"Permission"* page which Westerby ought to have checked.

In previous submissions to us, Westerby seemed to suggest that the *"Basic details"* page was the totality of the Register entry available for Abana at the relevant time. But, as I understand it, Westerby now seems to accept that the Register did include other sections. But it says that on checking the Register at the relevant time, these sections didn't contain any further information about Abana's passports or permissions.

Westerby's been unable to produce evidence to demonstrate that it did in fact check the *"Permission"* page for Abana before it accepted Mr L's SIPP application from it. But even if it did check the *"Permission"* page for Abana at the relevant time, Westerby appears to have failed to have kept a record of this check and, unfortunately, the 2013 record of the *"Permission"* page for Abana hasn't been archived. So, we've no evidence of what specific information was available on the *"Permission"* page for Abana at the relevant time.

However, in light of the evidence I've set out above, I'm satisfied that there would've 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, (for example, if the *"Permission"* page had erroneously been left blank), Westerby ought to have taken further steps to ascertain what the correct position was. So, I don't agree with Westerby's submission that information about a firm's permissions wasn't available for an online user in 2013. And, in my view, the third-party report submitted by Westerby demonstrates the contrary to be the correct position.

Westerby's referred to a Complaints Commissioner's report that highlights some issues with the Register. I appreciate that there've been criticisms of the Register and that it may, on occasion, have contained errors. However, I'm 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've detailed above, I'm satisfied that Abana's entry on the Register at the relevant time would've included a *"Permission"* page. And, if this page hadn't set out any information (for example, if the *"Permission"* page had erroneously been left blank) Westerby, in accordance with its regulatory obligations, shouldn't have accepted Mr L's application from Abana before carrying out further enquiries to clarify the correct position on Abana's permissions.

Westerby says that the FCA won't confirm details about a firm that aren't available on its public register, I accept that. However, and for all the reasons I've given above, I'm satisfied that *"top-up"* permissions are something that are recorded on the FCA's public register, and that this was also the case at the date Westerby accepted Mr L's application from Abana.

Westerby says that Abana not holding the relevant permissions wouldn't have been a matter of public record. Further, that the FCA could only confirm what was on the Register, not what was missing from it and that the FCA would've been unable to provide any more information than that which was provided on the Register.

As I've mentioned above, we don't have evidence of exactly what did appear on Abana's *"Permission"* page in 2013. However, this was information that ought to have been publicly available on the Register, so I'm satisfied that whether Abana had *"top-up"* permissions was a matter of public record. And, if the *"Permission"* page had erroneously been left blank, I think it's fair and reasonable to conclude that, if asked, the FCA would've been able to confirm the position that Abana didn't have the required permissions.

So, I'm still not persuaded by Westerby's submissions on this point; I think contacting the FCA was a sensible and proper route open to Westerby to verify Abana's permissions before accepting business from it. And if Westerby had contacted the FCA directly to confirm Abana's permissions because the Register didn't contain the relevant details, I don't think the restriction Westerby's referred to regarding what the FCA could confirm would've prevented Westerby getting the information it needed. Abana didn't have any *"top-up"* permissions. That was a matter of public record. So, I think the FCA would've been able to confirm this to Westerby.

In response to my provisional decision Westerby's highlighted that this complaint arises from the FCA's negligence in failing to complete the permissions page for Abana on the public register. But, to be clear, even if there was an issue with Abana's Register entry, or if I'm 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 don't think it's fair and reasonable to conclude that it was appropriate – or in accordance with its regulatory obligations - for Westerby to have proceeded with Mr L's application from Abana in those circumstances.

Westerby ought to have independently checked and verified Abana's permissions before accepting business from it. And 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 it could verify the correct position on Abana's permissions.

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

So, to summarise, I remain satisfied that:

- It wasn't fair and reasonable for Westerby to proceed to accept business from Abana if, as Westerby says, it was unable to establish what permissions Abana held.

- In that case Westerby should've sought confirmation from the FCA as to whether Abana held any *"top-up"* permissions. And, as I'm satisfied this would've been a matter of public record, I think the FCA would've been able to confirm whether 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?

Having carefully reconsidered all of the evidence on this point, including the submissions in response to my provisional decision, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

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's referred to meetings that took place between it and Abana. It says Abana confirmed its permissions in these meetings. And that, as Abana was an authorised firm, it was entitled to rely on what Abana had told it.

Westerby's also previously referred to the 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.

Westerby, in previous submissions, has confirmed that it kept no records of the discussions it had with Abana during the meetings it's referred to, nor did Westerby record in writing specifically what Abana told it about the permissions it held. Westerby's said that SIPP operators aren't required to meet with introducing IFAs before accepting business from them and, as such, it didn't have formal records of the discussions 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 opinion, if these meetings were the way Westerby was intending to evidence Abana's permissions, in order to comply with its 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 should've 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.

Further, I don't 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. The corollary of this is that I don't therefore think COBS 2.4.6R (2) 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.

I've carefully considered what Westerby's said about the Written Agreement in response to my provisional decision. Amongst other things, it's contended that the Written Agreement wasn't vague and generic in nature and that the term 'permissions' encompasses 'top-up' permissions.

However, I remain of the view that the Agreement appears to be a generic document and not specific to Abana. It doesn't 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".*

I remain of the view that this doesn't 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 on.

In addition, the activity of advising on rights under personal pension schemes isn't mentioned; rather, the authorisation is said to relate to "*the sale of the SIPP"* which I still think is an ambiguous term. And, the warranty that *"he/she is suitably authorised"* is generic and doesn't 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's made in relation to what it says Abana told it about the permissions held, I'm 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'm 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's my view that Westerby should've 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 didn't reconcile with what Abana had told it about its permissions. So, in failing to take this step, I think it's fair and reasonable to conclude that Westerby didn't do enough in order to establish whether or not Abana did have the permissions it required.

So, for the reasons I've set out above, I don't 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. Westerby's referred, in previous submissions, to the FCA's Thematic Review TR16/1 and to Gen 4 Annex 1 of the FCA Handbook, and I've considered this question with those details in mind. However, I'm not satisfied there was any other basis on which it was reasonable for Westerby to rely on the meetings and Agreement, and for much the same reasons as I've 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 don't 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's told us it checked the Register at the point that it received Mr L's SIPP application. It's also told us its procedure was to check the Register every time a SIPP application is received from an introducer, and every time advisor 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. And that's a view I share.

So Westerby shouldn't have – and didn't – rely solely on the Agreement. And, as mentioned above, for all the reasons I've given, I still think Westerby's check of the Register ought to have led to the conclusion that Abana didn't 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 didn't record the information on Abana's *"Permission"* page in order for Westerby to confirm the position one way or the other (for example, if the *"Permission"* page had erroneously been left blank).

This means that either Westerby ought to have become aware of information which didn't 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 didn't meet the requirements it was under as a regulated SIPP operator.

Anomalous features

Having carefully reconsidered all of the evidence on this point, including the submissions in response to my provisional decision, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

In my view, Westerby ought to have identified a risk of consumer detriment here. Mr L was taking advice on his pension from a business based in Portugal. That advice was to transfer the monies from two defined contribution occupational pension schemes with a former employer into a SIPP, and then to send the majority of the money transferred into the SIPP to investments based in Mauritius (with one later moving to the Cayman Islands). 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 L as carrying a significant risk of consumer detriment. And it should've 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 don't expect Westerby to have assessed the suitability of such a course of action for Mr L – and I accept it couldn't 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 L fairly and act in his best interests.

In any event, regardless of the points I've made above about anomalous features of the proposed business, I'm 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.

Further points

Westerby's said it's contrary to European Union law to discriminate against a firm on the basis of the EEA country in which it's been established. However, in my view, carrying out adequate checks on Abana's permissions doesn't equate to treating Abana differently by virtue of its location. Westerby should've carried out these checks on *any* firm introducing advised business to it.

Westerby's said it provided quarterly Product Sales Data reports to the FCA, and that the FCA never expressed any concerns about it accepting business from Abana. I've seen no evidence to suggest that at the time Westerby accepted Mr L'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 that the FCA hadn't raised any concerns with it about this business. In any event, I'm of the view that this is irrelevant, because if Westerby had acted in compliance with its regulatory obligations, it wouldn't have accepted business from Abana *at all* and Abana would therefore not have featured in its reporting to the FCA.

Westerby's said that it's able to accept applications from non-regulated introducers. But there seems to be no basis on which Mr L's application could, or would, have proceeded on the understanding Abana was an unregulated introducer. Westerby seems to have understood from the outset that Abana wasn't 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's 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.

I appreciate that there's also an argument that if it had been identified that Abana didn't have the required *"top-up"* permissions, Abana might have applied for, and been granted, the relevant *"top-up"* permissions. However, I find no merit in this line of argument. I'm required to consider what's fair and reasonable in all the circumstances of this case. And in this case, Westerby accepted business from a firm which didn't have the required permissions to be carrying on the business that it did. And, Westerby failed to identify this fact prior to accepting Mr L's application. So, this is what I need to consider here – not a possible situation that *could've* happened.

Westerby's submitted that where complaints have been received by this service against both Abana and Westerby, that we should decide the complaint against Abana before, or at the same time as, the complaint against Westerby. Later in this decision, I've addressed the question of whether it's fair to ask Westerby to pay Mr L compensation in the circumstances of this complaint. But, before going on to address that issue in detail below, I wanted to repeat what I'd previously said in the provisional decision about the fact that Mr L hasn't referred a complaint about Abana to us. He's only referred a complaint to us about Westerby. So, that's the only complaint from Mr L I'm reviewing.

In conclusion

Having carefully reconsidered all of the evidence in this case, including the submissions in response to my provisional decision, I've arrived at the same conclusion as I reached in my provisional decision. For completeness, I've repeated this conclusion below.

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've established Abana didn't 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 wasn't in accordance with its regulatory obligations nor good industry practice for Westerby to proceed to accept business from Abana.

Additionally, Westerby ought to have considered the anomalous features of this business I've outlined above. These were further factors relevant to Westerby's acceptance of Mr L's application which, at the very least, emphasised 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.

It's 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 L's application from Abana.

I'm therefore satisfied the fair and reasonable conclusion in this complaint is that Westerby shouldn't have accepted Mr L's SIPP application from Abana.

Due diligence on the underlying investments

In light of my conclusions about Westerby's regulatory obligations to carry out sufficient due diligence on introducers, and given my finding that in the circumstances of this complaint

Westerby failed to comply with these obligations, I've not considered Westerby's obligations under the Principles in respect of carrying out sufficient due diligence on the underlying investments. I understand that this was the basis of Mr L's original complaint to Westerby but it's my view that had Westerby complied with its obligations under the Principles to carry out sufficient due diligence checks on Abana, then this arrangement wouldn't have come about in the first place.

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

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

Having carefully reconsidered all of the evidence on this point, including the submissions in response to my provisional decision, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've repeated much of what I'd said about this point in my provisional decision.

I think it's *most likely* that if Westerby had refused to accept Mr L's application from Abana and Mr L had received an explanation as to why his application hadn't been accepted (as Abana didn't have the necessary *"top-up"* permissions it needed to provide such advice, or alternatively as Westerby hadn't been able to independently verify that Abana had the necessary *"top-up"* permissions to provide such advice), Mr L wouldn't have continued to accept or act on pensions advice provided by Abana. And I think it's very unlikely that advice from a business that did have the necessary permissions would've resulted in Mr L taking the same course of action. I think it's reasonable to say that a business that did have the necessary permissions would've given suitable advice.

In response to my provisional decision Westerby's said that had it uncovered that Abana didn't have the relevant permissions, it wouldn't have accepted business from Abana and it wouldn't have received Mr L's application. Westerby also says its contract was with Abana not Mr L and that if Mr L's application was refused it wouldn't have been at liberty to, or had reason to, contact Mr L.

But Westerby *did* receive Mr L's application, so I'm considering what it ought to have done having received Mr L's application. And for the reasons I've explained at length above I'm satisfied that, having received Mr L's application from Abana, it shouldn't then have accepted Mr L's SIPP application.

Mr L went through a process with Abana that culminated in him completing paperwork to set up a new Westerby SIPP and with the expectancy that monies from existing pension plans would be transferred into the newly established SIPP. Having gone to the time and effort of doing this, I think it's *most likely* that if the Westerby SIPP wasn't then established, and if his pension monies weren't then transferred to Westerby, that Mr L would've wanted to find out why from Abana and Westerby.

And I wouldn't think it fair and reasonable to say that Westerby shouldn't compensate Mr L for his loss on the basis of any speculation that Abana and/or Westerby wouldn't have confirmed to Mr L the reason why the transfer hadn't proceeded if asked by him.

So, I think it's fair to conclude that one or more of the parties involved would've then explained to Mr L that his application hadn't been accepted as Abana didn't have the necessary *"top-up"* permissions it needed to provide the advice, or alternatively as Westerby hadn't been able to independently verify that Abana had the necessary *"top-up"* permissions to provide the advice. And that Mr L wouldn't then have continued to accept or act on pensions advice provided by Abana. Further, I think it's very unlikely that advice from a business that did have the necessary permissions would've resulted in Mr L taking the same course of action. I think it's reasonable to say that a business that did have the necessary permissions would've given suitable advice.

In response to my provisional decision, Westerby's highlighted that Mr L appointed KB Wealth as his financial advisor in September 2015. And it's contended that this suggests Mr L would've continued to act on pensions advice from Abana.

I've noted what was said in Westerby's June 2015 and July 2015 letters about Abana (FS) Ltd. But I've not seen sufficient evidence to show that Mr L was aware that KB Wealth was the same business as Abana (FS) Ltd. But, even if I had, I can't see that Mr L was ever told that KB Wealth didn't have the *necessary permissions* to provide him with pension advice and that he still then decided to consult with it.

So, I don't think the situation with KB Wealth is analogous to the situation with Abana. And it's still my view that, once he'd been told that his application hadn't been accepted as Abana didn't have the necessary *"top-up"* permissions it needed to provide the advice, or alternatively as Westerby hadn't been able to independently verify that Abana had the necessary *"top-up"* permissions to provide the advice, Mr L wouldn't then have continued to accept or act on pensions advice provided by Abana.

Further, I think it's still reasonable to say that a business that did have the necessary permissions would've given suitable advice. And as Mr L's application for the SIPP was received before Abana (FS) Ltd had been incorporated, so I'm also satisfied that any advice given to Mr L in 2013 from a firm other than Abana wouldn't have been from Abana (FS) Ltd/KB Wealth.

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've seen no evidence to show Mr L 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.

It appears Mr L understood that his pension monies were being moved into a low to medium risk pension arrangement. And there's no evidence to show Mr L understood he was making a high-risk investment. Mr L's said "…*we were offered advice from an IFA* [Mr F] *to move our pensions into a medium to low risk pension scheme - told that it was linked to bridging loans in the city of London".*

I've also not seen any evidence to show Mr L was paid a cash incentive. It therefore cannot be said he was *"incentivised"* to enter into the transaction. And, on balance, I'm satisfied that Mr L, unlike Mr Adams, wasn't 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 response to my provisional decision, Westerby's contended that Mr L would likely have proceeded with the transfer and investments regardless of the actions it took. It's highlighted that other SIPP providers were accepting such investments at the time, and says the transactions would've been effected with another provider.

Westerby might argue that another SIPP operator would've accepted Mr L's application, had it declined it. But I don't think it's fair and reasonable to say that Westerby shouldn't compensate Mr L for his loss on the basis of speculation that another SIPP operator would've made the same mistakes as I've found it did. I think it's fair instead to assume that another SIPP provider would've complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr L's application from Abana.

Further, and in any eventuality, even if another SIPP provider had been willing to accept Mr L's application from Abana, that process would still have needed Mr L to be willing to continue to do business with Abana after Westerby had rejected his application for another application to proceed. And, for the reasons I've given above, I'm not satisfied that Mr L would've continued to accept or act on pensions advice from Abana in such circumstances.

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if Westerby had refused to accept Mr L's application from Abana, the transaction wouldn't still have gone ahead.

The involvement of Abana

Having carefully reconsidered all of the evidence on this point, including the submissions in response to my provisional decision, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've repeated much of what I'd said about this point in my provisional decision.

In this decision I'm considering Mr L's complaint about Westerby. While it may be the case that Abana gave unsuitable advice to Mr L to transfer the monies from his defined contribution occupational pension schemes into a SIPP and make unsuitable investments, Westerby had its own distinct set of obligations when considering whether to accept Mr L's application for a SIPP.

Abana had a responsibility not to conduct regulated business that went beyond the scope of its permissions. Westerby wasn't 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's failed to comply with these obligations in this case.

I'm 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 wouldn't have done any SIPP business with Abana in the first place.

I'm also satisfied that if Mr L had been told that Abana was acting outside its permissions in giving pensions advice, or alternatively that Westerby hadn't been able to independently verify that Abana had the necessary *"top-up"* permissions to provide such advice, he wouldn't have continued to accept or act on advice from it. And, having taken into account all the circumstances of this case, it's my view that it's fair and reasonable to hold Westerby responsible for its failure to identify that Abana didn't have the required *"top-up"* permissions to be giving advice and making arrangements on personal pensions in the UK.

The DISP rules 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).

As I set out above, in my opinion it's 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 L fairly.

The starting point therefore, is that it would be fair to require Westerby to pay Mr L compensation for the loss he's suffered as a result of Westerby's failings. I've considered whether there's any reason why it wouldn't be fair to ask Westerby to compensate Mr L for his loss, including if it would be fair to hold another party liable in full or in part. And I'm satisfied it's appropriate and fair in the circumstances for Westerby to compensate Mr L to the full extent of the financial losses he's suffered due to its failings.

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

I explained in my provisional decision that Westerby could have the option to take an assignment of any rights of action Mr L has against Abana before compensation is paid. And that the compensation could be made contingent upon Mr L's acceptance of this term of settlement.

In response to this Westerby's said that as Abana's ceased to trade then any indemnity from Abana and/or assignment of any action against it from Mr L is effectively worthless.

I accept that may be true. However, the key point here is that but for Westerby's failings, Mr L wouldn't have suffered the loss he's suffered. As a result, the trading/financial position of Abana, and the fact that Westerby may not be able to rely on an indemnity from Abana and/or the fact that any assignment of any action against Abana from Mr L might be worthless, doesn't lead me to change my overall view on this point. And, as such, I remain of the opinion that it's appropriate and fair in the circumstances for Westerby to compensate Mr L to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by Abana.

In response to my provisional decision Westerby's also highlighted that in a previous decision involving an EEA firm that had acted outside its permissions, a different ombudsman made an apportionment between the SIPP provider and the advisor on a 50/50 basis.

The circumstances and facts of the other complaint Westerby's mentioned appear to be very different to Mr L's complaint. And it also looks like the SIPP provider in the other complaint had already compensated the consumer for half of their losses before the ombudsman was asked to decide the complaint against the EEA firm.

Importantly, we consider each complaint on its own merits, and the question I have to address in this case is whether, in all of the circumstances of this specific complaint, it's fair to ask Westerby to compensate Mr L to the full extent of the financial losses he's suffered due to its failings and, for the reasons I've already given above, I'm satisfied it is.

I want to make clear that I've carefully taken everything Westerby has said into consideration. And I remain of the view that it's appropriate and fair in the circumstances for Westerby to compensate Mr L to the full extent of the financial losses he's suffered due to Westerby's failings. And, taking into account the combination of factors I've set out above, I'm not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that Westerby has to pay to Mr L.

Mr L taking responsibility for his own investment decisions

I note the point has been made by Westerby that consumers should take responsibility for their own investment decisions. I've considered the actions of Mr L in relation to the mitigation of loss, in the section below. Beyond that, I'm satisfied that it wouldn't be fair or reasonable to say Mr L's actions mean he should bear the loss arising as a result of Westerby's failings.

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

Opportunity to mitigate losses

Having carefully reconsidered all of the evidence on this point, including the submissions in response to my provisional decision, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've repeated much of what I'd said about this point in my provisional decision.

Westerby says it wrote to Mr L to highlight issues with the funds his SIPP invested in and to inform him of an opportunity to realise some of his investment value. It says Mr L had a responsibility to take appropriate action to safeguard his funds and so should be responsible for the losses he's suffered.

Westerby says it disagrees with the finding in my provisional decision that efforts to redeem the investments wouldn't have been successful. Westerby says that in the complaint that was the subject of the published decision, the consumer was able to redeem their funds in May 2016. And it's likely that Mr L could've also mitigated his losses with a timely redemption request.

I've carefully reconsidered this point but, as I explain below, I still don't think it's fair for any reduction to be made to fair compensation on the basis of a failure by Mr L to mitigate his loss.

In response to my provisional decision Westerby's said, amongst other things, that it was acting in the best interests of investors by keeping an eye on the investments and flagging issues with them. Further, that following its November 2014 letter, any investor would've sought independent financial advice or made some reasonable lines of enquiries.

I don't think it would be fair to say Mr L should've made a redemption request when Westerby wrote to him in November 2014. Regarding enquiries, the November 2014 letter required Mr L to seek advice, and urged him to contact his financial advisor, Abana. It seems Mr L did this, and was advised to keep the investments. In these circumstances, I'm of the view that it's not fair to say Mr L ought to have acted differently.

Westerby's told us that 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 remuneration was to be paid. So, by the time Westerby wrote to Mr L in November 2014, it would've had many opportunities to discover that Abana didn't have the *"top-up"* permissions it needed to give advice or make arrangements on personal pensions in the UK. As such, it's still my view that for Westerby to have suggested that Mr L seek advice from Abana once problems with the funds he'd invested in had come to light, is a further failing of Westerby's regulatory obligations and the requirement to treat Mr L fairly.

In its June 2015 letter to Mr L, Westerby had mentioned that Abana clients were being moved over to Abana (FS) Ltd – a UK based firm authorised by the FCA. Westerby then explained to Mr L in July 2015 that clients were no longer being moved over to Abana (FS) Ltd. Westerby said it understood the reason for this was that Abana didn't consider Abana (FS) Ltd to be suitably independent to provide advice on Mr L's SIPP.

Westerby also urged Mr L to have his SIPP reviewed by an IFA with the necessary permissions. I think that was a fair and reasonable step to take in the circumstances, which goes some way towards correcting Westerby's earlier failure to meet its regulatory obligations by referring Mr L back to Abana.

There was then the letter of 10 September 2015, that explained that trading in the ePortfolio Solutions platform had been suspended pending the completion of a buy-out.

Mr L doesn't appear to have taken much action following these letters. In the June 2015 letter Mr L was told of an investigation into the Kijani Fund, but he was told at the same time that he'd be getting his money back. And the letter of 10 September 2015 then explained that all trading on the ePortolio Solutions platform had been suspended. So, I don't think it fair to say Mr L could, or should, have done anything further at that time. That's because I think following the June 2015 update it was reasonable for Mr L to think he didn't need to do anything, and following the September 2015 update it was reasonable for him to conclude he couldn't do anything.

Westerby's explained that in September 2015 it received a letter of authority confirming that Mr L had appointed KB Wealth as his financial advisor. Further, that KB Wealth was originally called Abana (FS) Ltd (it appears from the FCA Register that the name change occurred in August 2015).

I've carefully considered what Westerby's said about Mr L appointing KB Wealth as his advisor but, to be clear, it still doesn't alter my view that following Westerby's June 2015 update it was reasonable for Mr L to think he didn't need to do anything, and following the September 2015 update it was reasonable for him to conclude he couldn't do anything.

Further, I've noted that in the complaint that was the subject of the published decision Westerby's confirmed in a letter dated 21 December 2015 that it summarised the situation with the Kijani fund to the complainant in that case, in October 2015, as "*suspended, in liquidation. Likely to take a number of years. Unclear as to what will come back*".

So, in any eventuality, I also think there's insufficient evidence to show any redemption request made in relation to the Kijani fund after Westerby's July 2015 letter would've been successful.

There was then the December 2015 letter in which it was explained that a suspension on the SAMAIF Fund might lift, but I think it's fair to consider that by that point there was a lot of uncertainty surrounding the status of the fund and it wasn't at all clear what level of loss Mr L might be crystallising if he were to sell his investment. So, even if the suspension was lifted as envisaged, I don't think it's fair to say Mr L has contributed to his loss by not ordering its redemption.

In the December 2015 letter, Westerby referred to there being liquid funds of about £40,000 available, but I don't think this was accurate as the majority of this was the SAMAIF holding which was suspended, and there was no independent verification of this value. And I see

Westerby itself noted in its letter there was *"uncertainty around these funds".* So, I don't think it fair to say there was (around) £40,000 available to Mr L at this time, or that he ought to have concluded that was the case.

And I also think the December 2015 letter is somewhat contradictory as it says the suspension of SAMAIF has been lifted but then says that the lift of the suspension is "*not yet active"* (i.e. it's still suspended).

I've noted that redemption forms were requested for Mr L in March 2016. There was further correspondence between Mr L and Westerby about transfer forms in April 2016. And Westerby also told Mr L in April 2016 that the holdings in the Kijani and SAMAIF funds were illiquid.

Westerby's said that *"wet signatures"* were required by ePortfolio Solutions in order to redeem funds. And that a hard copy of Mr L's signed form wasn't received by it, so it wasn't able to instruct a redemption.

In April 2016 there was email correspondence between Mr L and Westerby about Mr L's forms, this included Mr L asking Westerby to *"advise what is missing so I can action"*. And I've not seen that Westerby then requested hard copies of forms or *"wet signatures"* in response. But this is a secondary point in any event, because I've also not seen sufficient evidence to show a redemption request would've been successful even if Westerby *had* received a hard copy of a redemption request with *"wet signatures"* from Mr L.

I note that in June 2016 Westerby stated in a letter it sent to us in another complaint that SAMAIF still wasn't trading yet. And in June 2017, Westerby explained to Mr L that the SAMAIF investment was included within a Managed Portfolio (S) holding. And that the funds within that holding were suspended and couldn't be redeemed.

All of which suggests SAMAIF was still suspended for quite some time after the 23 December 2015 letter and it's not clear if that suspension was ever lifted. This appears to be consistent with what was said in the published decision, in which it was stated that the amount paid to the SIPP in that case likely came from another investment rather than the Kijani or SAMAIF funds, as both appeared to have been suspended over the relevant period in that case.

So, there's insufficient evidence to show any redemption request made in relation to the Kijani fund after Westerby's July 2015 letter would've been successful. And my view remains that I've not seen sufficient evidence to show a redemption request would've been successful even if Westerby had received a hard copy of a redemption request from Mr L.

Putting things right

My aim is to return Mr L 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 and before accepting Mr L's SIPP application from it.

Prior to transferring to Westerby, Mr L had defined contribution pension schemes with a former employer with a combined transfer value of a little over £70,000. If Mr L had sought advice from a different advisor, who was qualified to give pension switching advice, I think it's more likely than not that the advice would've been to stay in his existing pension schemes. I think it's unlikely that another advisor, acting properly, would've advised Mr L to transfer away from his existing pension schemes.

In light of the above, Westerby should calculate fair compensation by comparing the current position to the position Mr L would be in if he hadn't transferred away from his existing pension schemes. In summary, Westerby should:

1) Obtain the current notional value, as at the date of this decision, of Mr L's previous pension plans, if they'd not been transferred to the SIPP.

2) Obtain the actual current value of Mr L's SIPP, as at the date of this decision, less any outstanding charges.

3) Deduct the sum arrived at in step 2) from the sum arrived at in step 1).

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

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

6) Pay Mr L £500 for the distress and inconvenience the problems with his pension have caused him.

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

I've explained how Westerby should carry out the calculation, set out in steps 1 - 6 above, in further detail below:

1) *Obtain the current notional value, as at the date of this decision, of Mr L's previous pension plans, if they'd not been transferred to the SIPP.*

   Westerby should ask the operator of Mr L's former defined contribution pension schemes to calculate the current notional value of Mr L's plans, as at the date of this decision, had he not transferred into the SIPP. Westerby must also ask the same operator to make a notional allowance in its calculations for any additional sums Mr L has contributed to, or withdrawn from, his Westerby SIPP since outset.

   Any notional contributions or notional withdrawals to be allowed for in the calculation, should be deemed to have occurred on the date on which monies were actually credited to, or withdrawn from, the Westerby SIPP by Mr L.

   If there are any difficulties in obtaining a notional valuation from the operator of Mr L's former defined contribution pension schemes, Westerby should instead calculate a notional valuation by ascertaining what the monies transferred away from the schemes would now be worth, as at the date of this decision, had they achieved a return from the date of transfer equivalent to the FTSE UK Private Investors Income Total Return Index.

   I'm satisfied that's a reasonable proxy for the type of return that could've been achieved over the period in question. And, again, there should be a notional allowance in this calculation for any additional sums Mr L has contributed to, or withdrawn from, his Westerby SIPP since outset.

2) *Obtain the actual current value of Mr L's SIPP, as at the date of this decision, less any outstanding charges.*

This should be the current value as at the date of this decision.

3) *Deduct the sum arrived at in step 2) from the sum arrived at in step 1).*

The total sum calculated in step 1) minus the sum arrived at in step 2), is the loss to Mr L's pension.

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

I'm satisfied that Mr L's Westerby SIPP only still exists because of the illiquid investments that are held within it. And that but for these investments Mr L's monies would've been transferred away from Westerby. 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's willing to accept as a commercial value for the investments, and pay this sum into the SIPP and take ownership of the relevant investments.

If Westerby's unwilling or unable to purchase the investments, then the actual value of any investments it doesn't purchase should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include their being given a nil value for the purposes of ascertaining the current value of Mr L's SIPP in step 2).

If Westerby doesn't purchase the investments, it may ask Mr L to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Mr L 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.

5) *Pay an amount into Mr L's SIPP, so that the transfer value of the SIPP is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.*

The amount paid should allow for the effect of charges and any available tax relief. Compensation shouldn't be paid into a pension plan if it would conflict with any existing protections or allowances.

If Westerby's unable to pay the compensation into Mr L's SIPP, or if doing so would give rise to protection or allowance issues, it should instead pay that amount direct to him. But had it been possible to pay into the plan, it would've provided a taxable income. Therefore, the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr L's expected marginal rate of tax in retirement at his selected retirement age.

For example, if Mr L is likely to be a basic rate taxpayer in retirement at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr L would've been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

6) Pay Mr L £500 for the distress and inconvenience the problems with his pension have caused him.

In addition to the financial loss that Mr L has suffered as a result of the problems with his pension, I think that the loss of a significant portion of his pension provision has caused Mr L distress. And I think that it's fair for Westerby to compensate him for this as well.

SIPP fees

If the investments can't be removed from the SIPP, and it hence cannot be closed after compensation has been paid, then it wouldn't be fair for Mr L to have to continue to pay annual SIPP fees to keep the SIPP open. As such, Westerby should pay an amount into Mr L's SIPP equivalent to five years' worth of the fees that will be payable on the SIPP (based on the most recent year's fees). 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 L's SIPP.

Interest

The compensation resulting from this loss assessment must be paid to Mr L or into his SIPP within 28 days of the date Westerby receives notification of Mr L's 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 isn't paid within 28 days.

My final decision

For the reasons set out above it is my decision that we can consider Mr L's complaint against Westerby Trustee Services Limited.

It is also my decision that the complaint is upheld and that Westerby Trustee Services Limited must pay fair compensation to Mr L as set out above.

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 L the balance plus any interest on the balance as set out above.

If the loss does not exceed £150,000, or if Westerby Trustee Services Limited accepts the recommendation to pay the full loss as calculated above, Westerby Trustee Services Limited should have the option of taking an assignment of Mr L'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 L as part of the settlement agreed following the third-party review.

If the loss exceeds £150,000 and Westerby Trustee Services Limited does not accept the recommendation to pay the full amount, any assignment of Mr L'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 L for his consideration and agreement. Any expenses incurred for the drafting of the assignment should be met by Westerby Trustee Services Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 28 April 2022.

Alex Mann
Ombudsman