complaint

Mr L complains that he received unsuitable advice from an appointed representative (AR) of Abana, to transfer his Occupational Pension Scheme (OPS) funds into an Avalon SIPP and invest in high risk investments. These investments now don't have a realisable value.

To resolve the complaint, Mr L wants to be put back in the financial position he would have been in if he hadn't been given the unsuitable advice.

background

On 28 April 2014 Mr L completed the necessary documentation to transfer his occupational pension into a SIPP with the provider Avalon Investment Services Limited (Avalon).

The SIPP was used to make investments in two unregulated funds via a bond with a business called ePortfolio Solutions (ePortfolio) namely:

- the Kijani Commodity Fund (Kijani); and
- the Swiss Asset Micro Assist Inc Fund (SAMAIF).

In total, Mr L transferred £189,778.33 into the SIPP.

The application documents for the SIPP and ePortfolio bond listed Mr L's adviser as individuals ill refer to as KB and RF. I'll set out more detail about this below.

The unregulated funds were suspended a short time later and Mr L has suffered losses from the investments.

Mr L brought his complaint to us in October 2015. He said that he had received a letter from a business called Complete Compliance Support Limited (CCSL) in February 2016 setting out that Abana would compensate him for the unsuitable advice he had received for making the transfer to the SIPP with Avalon. He told us that he had written back to CCSL confirming his acceptance of the offer.

Mr L said that Abana hadn't paid him the compensation despite him chasing it. So, he asked us to resolve the matter.

In summary, Mr L has said the following:

- He was initially contacted by his mortgage adviser who I'll refer to as MB, who discussed his 'frozen' occupational pension scheme with him.
- His mortgage adviser explained that he'd recently started advising on pensions alongside a colleague, RF, and they could recommend a SIPP which would provide safer growth and the potential for larger returns than his existing scheme.
- His mortgage adviser provided the advice, with RF subsequently completing the paperwork. Both said they worked for Abana.
- Mr L said he was told what boxes to tick on the forms by MB.
- Towards the end of the process, MB told Mr L that RF needed to come to his house as he needed some forms signing. Mr L signed the forms but RF didn't engage in conversation and left as soon as he could.
- Mr L said he wasn't put in touch with KB or was aware of who she was (her name is on a lot of the paperwork) until after he'd complained to Avalon about his SIPP.

- Mr L received a call from MB saying Avalon would call him and to give authority to change the servicing of the SIPP from the existing (Abana) to RF Associates as he had joined RF now at RF associates.

Abana has said that after the remediation exercise was undertaken by CCSL, it came to its attention that RF didn't complete the paperwork acting in his capacity as an AR of Abana. Instead, Abana says, RF was doing this business as "RF Associates", and RF Associates wasn't its AR. Therefore, Abana says that RF in fact arranged the SIPP for Mr L via RF Associates and not in his capacity as an AR of Abana. So, Abana says it isn't responsible for the losses Mr L has incurred because of this.

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

Abana argues that Avalon, as the SIPP provider, was regulated and allegedly accepted business introductions from an unregulated party and instructions to buy unregulated investments. Avalon had a responsibility to carry out due diligence. Abana says Avalon was the business that had the relationship with RF.

Abana also questions why Avalon agreed new terms of business with the entities New Beginnings Ltd and RF Associates, suggesting it was because those clients were not meant to be added to its agency. It has suggested collusion between RF and Avalon, resulting in the complaints it now faces.

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

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

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

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

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

Abana has offered arguments in support of its position at various points over the past few years, and more recently in response to our investigator's opinions and some decisions this Service has already upheld. But much of these arguments have already been considered by our Service, responded to and explained in our views and decisions. So I've not provided a detailed response to all the arguments Abana has posed. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers.

While I've taken account and considered all Abana's submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint. As much of what Abana has said has already been considered and communicated in other views and decisions, much of what I say in this decision will already be familiar to it. However, this case has been considered on its own merits and in light of the particular circumstances of this case.

my findings

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

the parties involved in this case

I believe a good starting point to be an explanation of the parties that may have been involved in the acts or omissions which have led to this complaint.

- *Abana Unipessoal Lda*

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

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

- *Avalon Financial Services Limited*

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

An Avalon SIPP was used to make the unregulated investments that Mr S has complained about.

Avalon was placed into administration in February 2016 and was dissolved in August 2018. I understand the Financial Services Compensation Scheme (FSCS) is currently considering claims against Avalon.

Embark took over the administration of Avalon's pension scheme, however, they didn't take on its liabilities. Therefore, any claims against Avalon are being considered by the FSCS.

As part of our investigation, we were provided with some very helpful emails and documents by Embark. Embark hasn't been able to locate all the records (much of which appears to have been by way of telephone calls) and so we don't have a complete picture of some of the relationships between the parties.

- *New Beginnings (Financial Solutions) Ltd*

New Beginnings was listed on the FCA register as an appointed representative of Abana from 11 March 2014 until 6 February 2015. RF was a minority shareholder of this firm as was MB. And KB was a director of this firm.

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

WHEREAS:

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

The definition section of the agreement sets out:

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

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

- *RF*

RF is a central figure in this complaint because, as I'll set out later in this decision, it is RF who appears to have arranged for Mr L's pension to be transferred to the SIPP with Avalon (and to invest in the unregulated Kijani and SAMAIF). One of the matters I will need to establish is whether in conducting those activities, RF was acting on behalf of Abana (either as its appointed representative or its agent).

Abana has said the following about its relationship with RF.

> *"The relationship was that RF (redacted) was a qualified IFA with a client base that he had built up while he worked for* [another advice firm not linked to Abana] *with* [a SIPP operator] *products. These clients were transferred to Abana and he would continue to assist those clients. Abana obtained a [sic] agency with* [the SIPP operator] *and provided a home for his clients. RF paid us £5880 annually for this temporary service as he said he was*

> *going to be directly authorised. This agreement was superseded when RF introduced New Beginnings Ltd who became an appointed representative of Abana."*

RF doesn't appear on the FCA's register as an appointed representative of Abana. However, this isn't a requirement under section 39(3) of the Financial Services and Markets Act 2000 (FSMA), so it's not determinative of whether or not he was acting as Abana's appointed representative.

And I'm satisfied that he was an appointed representative of Abana because of what Abana has said above and because we have seen an appointed representative agreement between RF and Abana dated 1 May 2013. Abana has now suggested that it believes this agreement is a forgery. But it was Abana itself that provided us with this document, and it said nothing at the time of providing the document that it was fraudulent or not valid for any reason. So, I don't think Abana's argument is credible.

Based on the evidence I've seen, (this will be discussed in more detail later), I'm satisfied that RF introduced business to Avalon as an appointed representative of Abana for a short time between March 2014 to the end of May 2014. As a reminder, Mr L's SIPP arrangements were made at the end of April 2014.

RF was also a minority shareholder of the firm New Beginnings described above.

- *RF Associates*

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

RF initially introduced business to Avalon as an appointed representative of Abana. Avalon has said its records indicate that commission payments for business introduced by RF before May 2014 were paid directly to Abana.

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

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

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

- *MB*

Mr S says he received advice from MB who was Mr L's mortgage adviser. He said he was a friend of RF and had moved into pensions, he purported to be an agent of Abana. But we've found no evidence that there was an appointed representative agreement between MB and Abana. MB was also a minority shareholder of New Beginnings.

- *KB*

KB details are found throughout the transfer documentation. She has signed the suitability report, commissioned the transfer value analysis (TVAS) and signed the ePortfolio and Avalon application forms. She claims to work for Abana and on behalf of RF and said she completed the work for RF. However, Mr L makes no mention of him throughout the advice process which he says was given by MB. Mr L never met KB and understood that it was RF who was carrying out the arrangements.

We have seen no evidence that there is an AR agreement between KB and Abana and KB was not listed as an AR of Abana on the FCA register. Companies House records do show that KB was a director of New Beginnings. I think she was associated with RF given that he was a shareholder of New Beginnings. She did not have her own FCA authorisation.

can our Service consider Mr L's complaint against Abana?

the jurisdiction of the ombudsman service

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

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

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

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

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

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

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

Mr L has complained about Abana's role in him receiving unsuitable pension and investment advice. And the subsequent arrangements made on his behalf to transfer his Occupational Pension Scheme (OPS) funds to a SIPP with Avalon and make investments in the Kijani and SAMAIF funds. Mr L says he hasn't been compensated despite previous assurances he would be.

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

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

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

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

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

I'm satisfied Mr L was provided with advice to transfer his OPS into a SIPP with Avalon. I believe Mr L was told that the unregulated investments would perform better than his existing plans. I think Mr L trusted the assurances he got about the safety of the funds, which is why he was persuaded to make the transfer.

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

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

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

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

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

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

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

RF's details were included on Mr L's ePortfolio Solutions application. And both this and his SIPP application had Abana's details on. The SIPP was setup, the transfers occurred and were invested into the ePortfolio Solutions bond. So I'm satisfied that a regulated arranging activity took place here.

was Abana responsible for the acts and omissions of the individuals involved?

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

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

Appointed representatives

Section 39 FSMA sets out the following:

> *"Exemption of appointed representatives.*
>
> *(1) If a person (other than an authorised person)–*
>
> *(a) is a party to a contract with an authorised person ("his principal") which–*
>
> *(i) permits or requires him to carry on business of a prescribed description, and*
> *(ii) complies with such requirements as may be prescribed, and*
>
> *(b) is someone for whose activities in carrying on the whole or part of that business his principal has accepted responsibility in writing, he is exempt from the general prohibition in relation to any regulated activity comprised in the carrying on of that business for which his principal has accepted responsibility.*
> *…*
>
> *(2) In this Act "appointed representative" means—*
>
> *(a) a person who is exempt as a result of subsection (1)*
>
> *(3) The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility.*
>
> *(4) In determining whether an authorised person has complied with—*
> *(a) a provision contained in or made under this Act, … anything which a relevant person has done or omitted as respects business for which the authorised person has accepted responsibility is to be treated as having been done or omitted by the authorised person.*
>
> *(5) "Relevant person" means a person who at the material time is or was an appointed representative by virtue of being a party to a contract with the authorised person."*

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

The law of agency

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

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

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

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

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

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

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

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

"Apparent (or Ostensible) Authority

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

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

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

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

The advice given to Mr L.

We have seen copies of a fact find, transfer analysis and a suitability report of sorts named *'Pension Comparison Information Report'* purporting to come from Abana – with Abana in a header at the top of each page and references to contacting Abana. This seems to have been completed by KB as she has signed the form but with RF's name also at the bottom.

Mr L has told us he understood that Abana was owned by RF and that MB was working for RF. He's said he wasn't aware of KB until Avalon put him in touch with her much later on and following his complaint. He'd trusted MB as he'd got him good deals on his mortgage and he's said that it was MB that advised him to transfer his pension. Mr L knew about the documents and did see them but didn't really understand them. He said he can't remember realising that it had KB's name on them. And the detailed conversation around transferring was had with MB. He met RF only to sign the paperwork to transfer later but understood him to be overseeing things and that he was MB's boss.

Mr L trusted MB. I don't think he was clear who he worked for. But he presented himself as someone associated with RF, Mr L has said he'd been led to believe RF owned Abana and MB worked for him. It seems from Mr L's testimony it was MB who advised him despite KB and RF were the names included on various bits of paperwork he received prior to transfer.

Ultimately despite the paperwork completed by KB with RF's name included, I think it was MB who carried out the advice.

But I haven't seen any evidence that there was an AR agreement or any other written agreement between MB and Abana. And he was never listed as an appointed representative

of Abana on the FCA's register. In fact, I've seen no evidence of any direct relationship between MB and Abana.

MB was a shareholder and KB was a director of New Beginnings, which later became an AR of Abana. So, there may have been an emerging relationship between MB/KB and Abana through that entity. But there's no evidence they were acting on behalf of New Beginnings in the transaction with Mr L.

It seems clear that the advice given by MB and the reports KB drew up was a means to an end to get Mr L to transfer and so the arrangements could be made. I think RF was aware of what MB and KB had done but didn't play a direct role in the giving of advice. So I don't think Abana can be held responsible for the advice.

But this was just essentially a hurdle to overcome prior to the arrangements. And therefore what's important to decide this case is whether RF was acting in his capacity as an AR or agent of Abana in his dealings with Mr L.

The arrangements made for Mr L.

The first thing I need to consider is whether RF was responsible for the arrangements made here. His name is on some of the forms, but these were signed by KB, who also included her own names in places. But I think this was done with RF's knowledge, permission and he was overseeing these arrangements. I think RF was responsible for the arrangements and I say this because:

- Mr L's testimony is that MB referred to RF of Abana throughout and MB was working for RF
- Mr L met RF when RF visited his home to get Mr L to sign the relevant paperwork for the arrangements
- It seems RF got KB to a lot of the legwork in this case, it is her signature on the forms but we have testimony from her that she was doing this on behalf of RF. Whilst her evidence has a cloud hanging over it, considering her involvement, this does fit with the evidence we've been presented with. And I'm persuaded that at least that part of what she says is true.
- RF's details were included on Mr L's ePortfolio Solutions application. And both this and his SIPP application had Abana's details on. RF's details were submitted on the ePortfolio Solutions application as the adviser and Abana as the firm he was conducting the business for.
- Whilst KB signed the forms on behalf of Abana. RF was the key contact and it was RF who led Avalon to believe that he was introducing business for Abana.
- Avalon emailed RF alongside KB about Mr L's arrangements. This shows that RF was aware and I think alongside all the other evidence, indicates that KB's involvement was allowed by Avalon through her association with RF and ultimately his with Abana.
- Had Avalon had any concern about KB being separate from RF and/or signing forms on RF's behalf. I'm certain it would've contacted RF. The information provided by Embark shows Avalon and RF had open lines of communication.

The next thing I need to consider is whether RF was conducting these activities with Mr L either (1) in his capacity as an AR or agent of Abana, (2) in his own unregulated capacity (i.e. as RF Associates, or (3) as part of the New Beginnings "Network".

The arrangements, including for the transfer of his Occupational Pension Plan, the transmission of his application for a SIPP with Avalon were done with RF's knowledge and oversight and Abana was listed as the firm. His relationship with Avalon as an AR of Abana allowed the business to be submitted and the SIPP to be set up and the subsequent arrangements that followed. Mr L's application to ePortfolio Solutions, and effecting the investment in unregulated funds, were done in RF's name with Abana listed as the firm. Avalon relied on the authority it understood him to have in these matters.

So, having reviewed the evidence, I think the arrangements in Mr L's introduction to Avalon were conducted by RF on behalf of Abana because:

- Key arrangements were set in motion around the end of April with the SIPP application submitted at the end of April 2014 and the SIPP setup early May 2014 – this is before RF told Avalon that he was leaving Abana and provided new terms of business for it at the end of May 2014. Before this date RF had been submitting business to SIPP providers in his capacity as an agent of Abana and using that firm's authorisation details.
- Where Mr L's application paperwork required identification of the "Financial Adviser Firm Name", this was identified as "*Abana Lda*".
- Avalon set up the SIPP with Abana listed as the introducer – so it understood the business to have been submitted by RF in his capacity as an appointed representative of Abana.
- The transfer of funds to the SIPP and the investments in the bond did not complete until August 2014 due to delays in receiving the funds. But the SIPP was arranged in early May 2014 in Abana's name and it wasn't replaced as Mr L's adviser to RF Associates until October 2014.
- The arrangements to invest in the unregulated funds with ePortfolio Solutions listed RF's name and Abana as the firm.
- The change of servicing rights to [RF] Associates occurred on 10 October and after the delayed arrangements had taken place.

Given what I've seen in this complaint and in other similar cases, I'm satisfied RF arranged Mr L's SIPP with Avalon while he was still an agent of Abana (and not in his capacity as an unregulated introducer when he was purporting to seek direct authorisation for RF Associates, or as part of the New Beginnings Network).

RF was responsible for transmission of the authorised paperwork to Avalon which facilitated Mr L opening the SIPP and the investment in the unregulated funds. I'm satisfied that this constitutes the regulated activity of arranging the pension scheme with Avalon. And, I'm satisfied that the actions of RF constitute making arrangements for another person to buy and sell a specified investment under Article 25(1) of the RAO.

Abana has said it didn't receive payment from Avalon in relation to this case. Embark has provided us with some records of payment for the business RF conducted between April and September 2014 and Mr L is not listed. However, the evidence suggests this isn't complete or exhaustive list of payments made in relation to each individual client.

As I'll explain in more detail later, the way in which the commission payments were paid by Avalon was not straightforward or always set out with client specification. And in any event it's not a simple case of just checking if Abana received payment for Mr L that either absolves it of its responsibility or not.

I'm satisfied RF was acting as an agent of Abana when making the arrangements for Mr L. And that Abana is the authorised person here.

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

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

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

BETWEEN:

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

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

WHEREAS:

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

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

The definition section of the agreement sets out:

""Activities" means the activities agreed and discussed between the parties on execution of this agreement, as amended from time to time, which the parties may further clarify in an annex hereto, in default of which such activities shall include activities defined in FSA Regulations as insurance mediation activities and designated life assurance business;

"AR" means the AR (as set out above) and any employee, officer or agent or any person or persons acting in conjunction with or appointed by or under the control of the AR and any person or persons connected with the AR"

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

The agreement is signed by both parties.

The arrangements made in connection with the SIPP and the underlying investments for Mr L didn't constitute insurance mediation activities or life assurance business – both of which relate to contracts of insurance. So, based on the evidence I've seen, I'm satisfied the terms of the AR agreement didn't authorise RF to conduct the arrangements that he carried out for him.

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

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

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

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

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

Abana seems to be acknowledging here that there was an agreement, but that it was terminated. In any case, we've been unable to find a recording of the conversation between it and the investigator in February 2016. But I've seen an exchange of emails during that month between Abana's Director and the investigator. At no point was a terminated AR agreement mentioned. The exchange was focussed on understanding the nature of the relationship between it and RF.

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

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

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

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

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

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

the pension activities and arrangements RF was undertaking

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

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

Abana says this arrangement, which it still acknowledges, was for a fixed-fee for the caretaking of an existing client base for temporary period. It said the arrangement did not confer any authority to RF.

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

For example, I've seen a letter dated November 2013 from Abana to Avalon relating to bank details for the payment of commission to each of Abana's "appointed representative / sub-agency".

Abana says this was provided in preparation for the fees generated by the existing SIPP client base. But we know from documentation that the fees generated by RF acting as an agent of Abana were sent by another SIPP provider in December 2013 to the account Abana had provided details for, showing RF as its AR or sub-agent.

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

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

And Abana responds:

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

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

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

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

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

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

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

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

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

- The written agreement between Abana and RF shows that there was a relationship between the parties under which they anticipated that RF would carry out certain activities on behalf of Abana.
- Unlike the requirements of section 39 FSMA, Abana and RF could agree in a more informal way that RF had authority to conduct pensions business on behalf of Abana, such as through the dealings between the parties. I'm satisfied based on the evidence that Abana was aware of, and consented to, RF carrying on these pension activities on its behalf and that consensual agreement to conduct these activities can be gleaned from the dealings between the parties.

- RF was not directly authorised by the FCA. The communications between Abana and RF that I have set out above show that Abana entered into a relationship with RF so that he could continue to provide advice to clients on the basis of Abana's authorisation (they would become Abana's clients who RF would continue to assist with). And it shows that Abana knew RF was providing advice to consumers to open SIPPs, in fact it entered into terms of business with SIPP providers so that RF could provide the same for clients.

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

In June 2015 Abana sent a letter to clients of RF which corroborates the position that RF was working for it, it begins:

*"…**IMPORTANT: Advice given to you by Abana Lda ("Abana") in relation to your SIPP with [Provider] …Why are we writing to you?***

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

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

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

payment of adviser charges made by SIPP providers for business generated by RF

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

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

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

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

It's clear getting the LOAs in place was problematic. And this may shed light on Abana's testimony when it says it didn't receive payments from Avalon in respect of certain transactions. The following email from Avalon to RF from September 2014 is revealing:

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

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

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

the independent review of pension transactions attributed to Abana

Abana acknowledged the outcome of an independent review into several cases that are now being dealt with by this Service. The reviews concluded RF had been responsible for unsuitable advice he gave and the arrangements he made for the transfer of pension funds into SIPPs, and therein the investment in unregulated funds. In order to pay the redress due, it made a claim on its professional indemnity insurance. So, at one stage it appeared to accept responsibility for the things RF had done wrong.

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

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

It seems more likely that actually Abana's later retraction of the offer of redress had more to do with its professional indemnity insurer rejecting its claim to cover the compensation costs. I note in December 2017 it wrote to the FCA in the following terms:

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

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

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

Abana's website

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

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

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

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

Abana's engagement with the FCA in 2015

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

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

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

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

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

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

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

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

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

I think Abana was aware of, expected, facilitated, guided and benefitted from the activities RF was undertaking, including giving advice on and making arrangements for SIPPs. I think RF had its actual authority to do this on its behalf.

Even if Abana wasn't fully aware of everything RF was doing, as I'll set out later, that isn't a defence here. It had to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems. So, I think Abana is responsible for RF's acts and omissions.

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

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

So, I think Abana can be held responsible for the arrangement of the transfer of Mr L's pension funds into the Avalon SIPP and the investments in unregulated funds, which together ultimately resulted in the financial loss he's suffered.

my conclusions on jurisdiction

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

- Mr L's complaint is about both the advice and the arrangements for the transfer of his OPS pensions to the Avalon SIPP and the investments made therein. So, it's a complaint about regulated activities.

- It appears that MB was responsible for the advice given to Mr L to transfer his pensions. Whilst it's clear that behind the scenes RF was aware, I don't think there is enough to link RF to the actual advice process and therefore to conclude that Abana was responsible for the advice. However, the advice was just a vehicle to bring about the arrangements which I'm satisfied Abana is responsible for.
- We can consider Mr L's complaint about the arrangements made by RF. This is because I'm satisfied that he facilitated the transfer of his pension to a SIPP with Avalon and the investments in the Kijani and SAMAIF funds as an agent with the actual authority of Abana. It follows that Abana is responsible for his acts and omissions in this regard.

considering the merits of Mr L's complaint

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

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

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

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

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

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

exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."

And at paragraph 77:

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

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

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

did Abana, through the acts and omissions of RF, adhere to the regulatory requirements placed on it in effecting the transfer of Mr L's OPS funds into a SIPP?

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

In 2013 Mr L was approached by MB, who represented himself as being associated with Abana. He'd known MB prior to this, as he'd got him good deals on his mortgage. MB told Mr L he was now getting into pensions with RF of Abana.

Mr L said he'd been told the investment in the SIPP and the unregulated funds would provide safe growth and outstrip his Occupational Pension Scheme. He was led to believe what he was doing had no downside. Mr L has said he didn't really understand it but trusted what he was being told.

Mr L was persuaded to transfer his entire retirement provision of over £189,000, built up over two periods totalling 20 years pensionable service with his employer. The bulk of funds were invested in two unregulated funds through a business called ePortfolio Solutions. These were the Kijani and SAMAIF funds I've already mentioned.

I find Mr L's testimony plausible and persuasive. And I think it's of note that Abana has never made the case that the transfer of the entirety of Mr L's OPS funds into the Avalon SIPP and investments in unregulated funds was an appropriate or fair transaction.

As we know, Mr L's investments were made via a bond with a business called ePortfolio Solutions into the Kijani and SAMAIF funds, which were based overseas and unregulated. Unfortunately, by 2015 they'd been suspended leaving him facing substantial losses.

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

I think it's significant that this specialist independent third party concluded in 2016 that RF, on behalf of Abana, had been responsible for what had happened. And it set out how Abana should put things right. As we know it ultimately failed to act on the outcome of the review.

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

However, I think RF had a close association with MB (advice) and KB who carried out much of the administration. Not only were they all involved in New Beginnings, testimony I've seen suggests MB and KB worked closely with RF. MB and KB carried out their work with the knowledge and approval of RF who was the leader of the operation.

RF's details were included on Mr L's ePortfolio Solutions application, which gave effect to him making investments in unregulated funds. And detailed earlier he facilitated the transfer to the SIPP. In both cases, the firm name used is Abana and its details were also supplied on the forms.

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

There's nothing to show RF made enquiries about the advice Mr L had received from MB concerning the transfer of his OPS funds, the establishment of his SIPP or the underlying funds he was investing in. Before proceeding with the arrangements, I would've expected him to have satisfied himself on these matters.

The transfer analysis, although quite rudimentary shows a critical yield of over 10% making it clearly unsuitable for someone of Mr L's circumstances. Mr L was transferring guaranteed benefits that made up his entire OPS retirement provision into a specialised and high risk investment. So I've no doubt in my mind that RF wasn't acting with due skill, care or diligence when he effected Mr L's transfer of his OPS into his Avalon SIPP and the unregulated funds. He was in breach of Principle 2 and therefore so was Abana.

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

I've already mentioned the letter Abana sent to clients which I think is very telling, it begins:

*"…**IMPORTANT: Advice given to you by Abana Lda ("Abana") in relation to your SIPP with [SIPP Provider]…Why are we writing to you?***

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

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

There's no evidence Mr L was an experienced or sophisticated investor. Indeed, as I've set out, quite the reverse given his testimony that he hadn't understood or remembered the details of the reports prepared. A small amount of due diligence would've exposed the arrangements being made for him as inappropriate.

RF facilitated arrangements for the transfer of Mr L's entire OPS funds into a SIPP, which would be dealing in unregulated investments. He used his relationship with Avalon to open a SIPP for Mr L using Abana's FCA authorisation details. In doing so, he led Avalon to believe Mr L had been advised on the transaction and that this activity was done with Abana's authority.

In doing all this, RF would've been aware Mr L was being exposed to significant risks in the investments he was facilitating. For example, there's no evidence Mr L had the capacity to withstand potential losses.

RF would've known unregulated funds could be Illiquid, meaning Mr L might have difficulty getting access to his money. The funds were highly specialised, out of the ordinary and reliant on third parties. And they were subject to valuation uncertainty.

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

So, to conclude I don't think the transfer of Mr L's OPS funds into an Avalon SIPP and the unregulated investments with the Kijani and SAMAIF funds could sensibly be regarded as fair to Mr L.

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

putting things right

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

If Abana had done everything it should've, I don't think Mr L would've transferred his OPS funds into a Avalon SIPP, and so he wouldn't have suffered the financial loss he's experienced. I think he would've left his pension funds where they were.

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

So, Abana should calculate fair compensation by comparing the position he would be in, if he had not transferred. In summary, Abana should:

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

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

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

4. Pay Mr L the equivalent of five years' worth of SIPP fees.

5. Pay Mr L £500 for trouble and upset.

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

I have explained how Abana should carry out the calculation set out at above in further detail below.

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

   Abana should undertake a redress calculation in line with the pension review methodology, as amended by the Financial Conduct Authority in October 2017.

   This calculation should be carried out using the most recent financial assumptions at the date of the actual calculation. Abana may wish to contact the Department for Work and Pensions (DWP) to obtain Mr L's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P).

   These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr L's SERPS/S2P entitlement.

   Any existing value of the investment should be covered by the next step.

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

   It's likely that the SIPP only exists because of the investment unregulated investments made in 2014. In order for the SIPP to be closed and further SIPP fees to be prevented, the investments need to be removed from the SIPP.

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

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

Abana may ask Mr L to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the investment. That undertaking should allow for the effect of any tax and charges on the amount Mr L may receive from the investment and any eventual sums he would be able to access from the SIPP. Abana will need to meet any costs in drawing up the undertaking.

3. *Pay an amount into Mr L's SIPP so that the transfer value is increased to equal the loss calculated in (1).*

   If the calculation in (1) demonstrates a loss, the compensation amount should if possible be paid into Mr L's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.
   If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr L as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

4. *SIPP fees*

   If the investments can't be removed from the SIPP, and it hence cannot be closed after compensation has been paid, Abana should pay Mr L an amount equivalent to five years' of future fees, to ensure its unlikely Mr L will have to pay further fees for holding the SIPP. Five years should allow enough time for the issues with the investments to be dealt with, and for them to be removed from the SIPP.

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

5. *Trouble and upset*

   I also think Mr L has been caused upset as a result of Abana's actions. The sudden loss of nearly all his pension fund would have come as a shock to him, and has clearly had a significant impact. I think it would be fair and reasonable for Abana to pay Mr L £500 compensation for this.

Where we consider that total fair compensation requires payment of an amount that might exceed £150,000, this service may recommend that the business pays the balance.

Its highly likely the amount produced by the calculation of fair compensation will exceed the £150,000, so I also recommend Abana Unipessoal Lda pays Mr L the balance.

The recommendation to pay over the £150,000 limit isn't part of my determination or award. It wouldn't bind Abana Unipessoal Lda. It's unlikely that Mr L can accept an offer made by Abana Unipessoal Lda and go to court to ask for the balance of the compensation owing to him. And so Mr L may want to consider getting independent advice.

my final decision

For the reasons explained I uphold Mr L's complaint against Abana Unipessoal Lda. And I direct it to put thing right as detailed in the above *'putting things right'* section of this decision.

It should pay the compensation within 28 days of Mr L's acceptance of my final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 1 November 2020.

Simon Hollingshead
ombudsman