Complaint

Mr L, who is represented by his financial adviser in this complaint, says Abana Unipessoal Lda gave him unsuitable advice about transferring his occupational and personal pension funds into a Self-invested Personal Pension with unregulated investments, which caused him to suffer a loss.

background

Mr L was thinking about his retirement plans in 2013 when he was 55. He'd worked in the same industry for decades and had found his role increasingly stressful. He was introduced to Mr F as someone who could provide him with advice about his pension arrangements.

Mr F indicated to Mr L that he worked for [Mr F] Associates. And when Mr L complained about what had happened in 2015, he reported that Mr F had been acting in his capacity as an appointed representative (AR) of Abana.

Mr L was persuaded to transfer his occupational and personal pension funds - which had valuable protections - into a Self-invested Personal Pension (SIPP) with Avalon Investment Services Limited (Avalon). He was given paperwork to sign in order to complete the transaction during one of these meetings.

Mr L decided to take tax-free cash (TFC) of around £75k. So, after allowing for fees and a cash balance, the bulk of his residual pot of around £202k was invested in two unregulated funds through a business called ePortfolio Solutions. These were the Brighton SPC - Kijani Commodity Fund (Kijani) and the Swiss Asset Micro Assist Inc Fund (SAMAIF).

I note that during 2016 and 2017 Mr L was able to take benefits from his SIPP, and he redeemed significant monies from his investments. However, much of his capital remained invested and ultimately this was caught up in the problems that had emerged with the Kijani and SAMAIF funds which had been suspended. So he faced substantial losses.

I understand the Financial Conduct Authority (FCA) became involved with Abana when it became aware the firm may have been operating in the UK outside of its permissions. At the relevant time, Abana was an EEA authorised firm and passported into the UK under the insurance mediation directive (IMD). However, it appeared to be providing services in the UK, namely giving advice and making arrangements in relation to pensions, without the required top-up permissions it required from the FCA

Abana has told us the FCA directed that an independent third party should review the advice the firm had given UK consumers to determine whether the advice had been suitable, and if not, to assess any detriment. Abana has said that a consultancy service specialising in regulatory compliance was appointed to carry out this review.

Mr L was asked by the specialist consultancy to complete a questionnaire in 2015 related to the transfer of his pensions. It wrote to him some months later with its conclusions. It said the advice he'd been given by Abana had been unsuitable. And in correspondence issued on 1 August 2016, it set out how Mr L should be put back into the position he'd have been in had the transfer not taken place.

Mr L's financial adviser (FA) had concerns about the redress proposed. He didn't think it represented what would've been the full value of Mr L's previous provisions and protections.

Mr L brought his complaint to this Service in July 2016. He had three main areas of concern about what had happened. He said the advice he received to transfer his occupational and personal pension plans into a SIPP and unregulated investments had been seriously flawed. It hadn't properly explained what benefits and guarantees he was giving up. The advice hadn't taken into account his risk appetite or lack of investment experience. And the costs associated with the advice and transfer hadn't been properly explained.

Initially, Abana indicated it would settle the redress detailed in the reviews carried out by the regulatory compliance consultancy in cases like Mr L's. It referred matters to its professional indemnity insurer. But later it changed its position and argued it wasn't responsible for what had happened, so it didn't pay him any compensation.

Abana submits that the individuals involved in the transaction with Mr L weren't its appointed representatives (ARs), or its agents. It says those responsible had entered into business arrangements with Avalon without its approval. So Abana says it's not responsible for the acts or omissions in this case and challenged our jurisdiction to consider Mr L's complaint against it.

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 has said Avalon, as the SIPP provider, was regulated and allegedly accepted business introductions from an unregulated party and instructions to buy unregulated investments. It says Avalon had a responsibility to carry out due diligence.

Further, Abana suggests the problems identified in Mr L's case also rest at the door of another SIPP provider which it says had a relationship with Mr F. It also cites a fund management company as having responsibility. And it goes on to question actions taken by the FCA in 2015 which it says could've had a material impact on the losses Mr L and others suffered.

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

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

Abana hasn't provided much information and evidence from the time of the events complained about. But it has offered arguments in support of its position at various points over the past few years, and more recently in response to our investigators opinions and some decisions this Service has already upheld.

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

While I've taken account and considered all Abana's submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint. This means the arguments Abana has made, including its most recent submissions to this Service, which are material to my consideration and the outcome reached, are addressed as appropriate in this decision.

So, I'll now turn to whether this Service has jurisdiction in this case.

my findings

the parties involved in this case

Before I decide whether this Service has jurisdiction to consider Mr L's complaint against Abana, I thought it would be helpful to set out some of what we know about the parties who may have been involved in the transaction leading to this complaint.

There were several entities and individuals who could potentially have been involved, and the relationships between them aren't entirely clear. Some information is missing. Some firms no longer exist as a going concern. So, in this regard, and given the passage of time, the case is difficult to get to the bottom of.

However, we've been provided with some helpful documents by the organisation which took on the administration of Mr L's SIPP scheme. And these documents have been used to help us build a picture of the key relationships between the various parties.

Abana Unipessoal Lda

Abana is a Portuguese advisory firm that, at the relevant time, passported into the UK under the IMD on a branch passport. So, at the relevant time, it was an "EEA authorised" firm. Abana's business model appears to have involved generating fees from advisors conducting activities in the UK. It has previously been attached to several firms and individuals (see tab "Appointed representatives / tied agents / PSD or EMD agents" under Abana's entry on the Financial Services Register (the Register)).
Mr F.

Mr F is a central figure in this complaint. He's the person who met with Mr L and gave him advice to transfer his pensions to a SIPP with Avalon (and to invest in the unregulated Kijani and SAMAIF funds). It appears he also made arrangements for this to happen. One of the matters I will need to establish is whether in conducting these activities, Mr F was acting on behalf of Abana (either as its appointed representative (AR) or its agent).

Mr F isn't listed on the FCA register as an AR of Abana. However, this isn't a requirement under section 39(3) of the Financial Services and Markets Act 2000 (FSMA), so it's not determinative of whether or not he was acting as Abana's AR. I will examine the relationship between Abana and Mr F in more detail below.

New Beginnings (Financial Solutions) Limited (New Beginnings)

New Beginnings was listed on the FCA register as an AR of Abana from 11 March 2014 until 6 February 2015. Mr F was a minority shareholder of this firm.

We've been provided with a copy of the AR agreement between Abana and New Beginnings which is dated 7 March 2014. The recitals of the agreement set out the following:

> ***WHEREAS:***
>
> (1) *The Company [Abana] is in the business of international wealth management, life assurance and general insurance mediation and is authorised and regulated by the Instituto de Seguros de Portugal ("ISP") with registration number 412378472. The Company has established a branch in England with company registration FC031241 with limited regulation by the Financial Conduct Authority ("FCA") number 597069 and authorised by the DGSFP In Spain.*
>
> (2) *The Company hereby appoints the AR [New Beginnings] as its appointed representative, subject to the terms of this agreement whereby the Company shall authorise and the AR shall conduct the Activities defined herein.*

The definition section of the agreement sets out:

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

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

[Mr F] Associates

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

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

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

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

Mr B

I understand Mr B introduced Mr L to Mr F. He was also a minority shareholder of New Beginnings. Given testimony we've had from other complainants it seems likely Mr B had a role working for [Mr F] Associates during 2014. Mr B didn't have his own FCA authorisation.

Ms B.

Ms B signed to say she was responsible for giving Mr L advice about his pension. But it doesn't seem that she met him when the initial transfer was being arranged. It appears she signed the paperwork after it had been completed. Ms B was a Director and shareholder of New Beginnings.

Avalon Investment Services Limited

Avalon was a UK based SIPP provider and administrator, regulated by the FCA. Amongst other activities, it was authorised to arrange deals in investments and to establish, operate and wind up a pension scheme. Mr L is unhappy about the SIPP arrangements, including the unregulated investments it facilitated.

Avalon was placed into administration in February 2016 and was dissolved in August 2018. I understand the Financial Services Compensation Scheme (FSCS) is currently considering claims against the firm (see https://www.fscs.org.uk/failed-firms/avalon/).

can our Service consider 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 and personal pension funds to a SIPP with Avalon and make investments in the Kijani and SAMAIF funds.

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.

Mr L was considering 'semi-retirement' and was introduced to Mr F to provide him with advice about his pension arrangements. In making a complaint about what happened Mr L said he believed Mr F had been acting in his capacity as Abana's AR.

We've not been provided with a fact find, risk appetite assessment, suitability report or recommendation letter. We do have testimony from Mr L about what Mr F told him when they met.

I think it's highly unlikely Mr L would've embarked on a high-risk investment strategy using the bulk of his retirement provision without this course of action being recommended to him. Mr L had built up his pension funds over decades of service. It seems more likely than not he received advice that motivated him to make the transfer.

I'm satisfied Mr F provided advice to Mr L to transfer out of his personal pension scheme and invest in a SIPP with Avalon. And I believe he told Mr L that the unregulated investments would perform better than his existing schemes and that a SIPP would provide him with more flexibility in accessing his benefits, 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))."

Mr F's details were included on Mr L's ePortfolio Solutions application. And both this and his SIPP application had Abana's details on. He transmitted the applications and Avalon dealt with him as the key contact. It was led it to believe that he was introducing business with Abana's authority.

PERG 12.3 makes it clear that the circumstances in which rights under a personal pension scheme may be bought or sold include when the member first joins the scheme and acquires all the rights that the scheme provides to its members (since he has bought those rights).

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

Abana says it's taken advice about the regulations. It asserts that it can rely on certain exclusions in the RAO (which, if applicable, would bring the activities outside the scope of Article 25). For example, it says that the exclusion at Article 29 applies because Mr F was an unauthorised arranger.

Even if I was to accept Abana's point about Mr F's status, for the exclusion at article 29 to apply, it's necessary that, in return for making the arrangements, Mr F didn't receive from any person - other than Mr L – payment or other reward arising out of their making the arrangements.

In a recent submission, Abana said Mr F received payment at the clients request, direct from the assets of the Trust overseeing the pension fund. It also said this wasn't commission. But I think the actual arrangement was supposed to work along the lines set out in the AR agreement between Mr F and Abana. For example, at paragraphs 5 of that document it says:

"The Company will pay the AR 100% of the Commission to which the AR becomes entitled as a result of the Activities."

The agreement goes on to make further provision for its control and adjustment of payments made. The commission/introducer fees were meant to flow from the funds injected into the pension fund with Avalon, from it to Abana and then to Mr F. So, the exclusion at article 29 doesn't apply.

Abana has asked for evidence of the payments it received via Avalon in relation to the arrangement of certain SIPPs. It should have a full record of all the payments it received in relation to Mr F's activities. I can see it requested some of this information on 20 February 2017 when its Director emailed Avalon to say:

"*We are missing <u>all</u> adviser fee statements except for the April 2014 payment of £10278.73 [which included commission payments]. This information has been requested by the FCA as …evidence of the fees that were paid to Abana*."

Avalon responded attaching copies of the statements from March 2014 to September 2014 saying it had no other statements showing payments made to Abana. I've no doubt payment matters were complicated by discussions ongoing between Mr F and Avalon about payment arrangements from May 2014 – and I refer to these later in this decision.

In any case, in relation to the arguments around article 29, as I'll set out later in this decision, I'm satisfied Mr F was acting as an agent of Abana. So, Abana is the authorised person here. And it's arguments are not telling.

Abana also refers to the exclusion set out at article 33 and says that an independent fund manager was appointed to manage the assets of the SIPP. I disagree. I've seen no evidence that Mr F, Avalon or anyone else were introducing Mr L to an appropriate party under this provision.

I can see in a recent submission Abana interprets what I've said here is that I've seen no evidence of the involvement of Asset Management International (AMI). This was a non-regulated fund management organisation that is associated with e-Portfolio Solutions.

To clarify. I think, Mr F on behalf of Abana, made the introduction to Avalon as an authorised person. But this wasn't for the purpose for it to provide independent advice or the independent exercise of discretion in relation to investments generally or in relation to any class of investments to which the arrangements relate. So, the exclusion at article 33 does not apply.

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

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

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

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

<u>*Appointed representatives*</u>

Section 39 FSMA sets out the following:

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

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

The law of agency

As set out above, a firm may also be responsible for the acts or omissions of its agents (DISP 2.3.3G). So in the alternative, I will need to consider whether Mr F was acting as Abana's agent 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 Mr F (the agent) 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 Mr F had its authority to carry out the acts complained about.

The advice given and arrangements made by Mr F.

The first thing I need to consider is whether Mr F’s dealings with Mr L were either (1) in his capacity as an AR or agent of Abana, (2) in his own unregulated capacity (i.e. as [Mr F] Associates, or (3) as part of the New Beginnings “Network”.

The advice about and arrangements for Mr L’s application for a SIPP with Avalon, and the transmission of his application to ePortfolio Solutions and effecting the investment in unregulated funds, were led by Mr F. Avalon relied on the authority it understood him to have in these matters.

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

- The advice and key arrangements were made by Mr F in April 2014 – this is before he told Avalon he was leaving Abana and provided new terms of business at the end of May 2014. Before this time Mr F had been submitting business to Avalon in his capacity as an agent of Abana and using that firm’s authorisation details.
- Further to the above, where Mr L’s application paperwork required identification of the “Financial Adviser Firm Name”, this was identified as “Abana Lda”. And its FCA firm reference number on the associated documents.
- Mr C’s testimony is that Mr F gave him advice and believed him to be acting in the capacity of an AR of Abana.

I'm satisfied Mr F advised on and made arrangements for 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 [Mr F] Associates, or as part of the New Beginnings Network).

Abana says Mr L's applications for the Avalon SIPP and ePortfolio Solutions weren't signed by Mr F. I can see they were signed by Ms B, although Mr F's details were included on the ePortfolio Solutions form. I've thought carefully about this this point.

However, from what I've seen in this and other cases, Mr F's role in these pension and investment transactions for the relevant period has been clear. I don't think the transfer of Mr L's funds into the SIPP with Avalon and the investment in unregulated funds would've proceeded without him. I say this because Avalon relied on the authority it understood Mr F to have in these matters and it liaised with him as the key contact. I'll develop this point in the next section.

Abana has also said Mr L has been inconsistent about who gave him advice because on the questionnaire he completed for the regulatory compliance consultancy in 2015 he said he'd been advised by [Mr F] Associates.

I can see Mr L has referred to receiving advice from [Mr F] Associates, that's consistent with what he's said all along. For example, when he complained to Abana in November 2015 he said:

"…I wish to make a complaint surrounding the provision of financial advice given to me by one of your appointed representatives, [Mr F], of [Mr F] Associates… I have transferred pension funds from a Defined Benefit Occupational pension scheme and a Section 32 plan … into a SIPP arrangement with Avalon on the specific advice of Mr F."

So Abana's arguments haven't persuaded me that Mr F didn't advise on and make arrangements for Mr L's SIPP with Avalon while he was still an agent of Abana.

did Abana accept responsibility for this advice and arrangements under section 39(3) FSMA?

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

> *"THIS AGREEMENT is made this 1st day of May 2013*
>
> *BETWEEN:*
>
> *(1) ABANA Lda, a company registered in Portugal under number 510205410…("the Company"); and*
>
> *(2) [Mr F] (a person) of [specified address] ("the Appointed Representative or AR").*
>
> *WHEREAS:*
>
> *(1) The Company is in the business of international wealth management, life assurance and general insurance mediation and is authorised and regulated by the Institute de Seguros de*

Portugal ("ISP") with registration number 412378472. The Company is authorised to conduct business in the UK under the regime of free provision of services within the European Union and has been authorised as such by ISP and the Financial Services Authority ("FSA") with FSA registration number 597069.

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

The definition section of the agreement sets out:

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

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

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

The agreement is signed by both parties.

I agree with the conclusion of the investigator here. The arrangements made in connection with the SIPP and the underlying investments for Mr 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 Mr F to conduct the arrangements that he carried out for him.

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

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

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

However, I'd note it was Abana itself which provided the copy of the agreement to us that it now asserts is a fraud. In an email to this Service in 2016, responding to an enquiry about Mr F's role with Abana, it told us *"We have not been able to locate a written agreement with*

[Mr F] as an individual". To this it attached the agreement. Later it explained it had meant it couldn't find a document with his original signature.

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

Abana seems to be acknowledging here that there was an agreement, but that it was terminated. In any case, I can't find a recording of the conversation between it and the adjudicator in February 2016. But I've seen an exchange of emails during that month between Abana's Director and the adjudicator. At no point was a terminated AR agreement mentioned. The exchange was focussed on understanding the nature of the relationship between it and Mr F.

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

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

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

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

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

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

the pension activities and arrangements Mr F was undertaking

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

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

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

For example, I've seen a letter dated November 2013 from Abana to one of Avalon's competitor SIPP providers relating to bank details for the payment of commission to each of Abana's "appointed representative / sub-agency" - Mr F is identified as one of these. Abana says this was provided in preparation for the fees generated by the existing SIPP client base.

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

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

And Abana responds:

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

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

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

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

In the email Abana's Director tells Mr F (bolding is my emphasis):

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

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

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

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

- The written agreement between Abana and Mr F shows that there was a relationship between the parties under which they anticipated that Mr F would carry out certain activities on behalf of Abana.
- Unlike the requirements of section 39 FSMA, Abana and Mr F could agree in a more informal way that Mr F had authority to conduct pensions business on behalf of Abana, such as through the dealings between the parties. I'm satisfied based on the evidence that Abana was aware of, and consented to, Mr F carrying on these pension activities on its behalf and that consensual agreement to conduct these activities can be gleaned from the dealings between the parties.
- Mr F was not directly authorised by the FCA. The communications between Abana and Mr F that I have set out above show that Abana entered into a relationship with Mr F so that he could continue to provide advice to clients on the basis of Abana's authorisation (they would become Abana's clients who Mr F would continue to assist with). And it shows that Abana knew Mr F was providing advice to consumers to open SIPPs, in fact it entered into terms of business with a SIPP operator so that Mr F could provide the same for clients.

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

payments made by Avalon for business generated by Mr F.

Avalon told us its records showed that commission payments for business introduced by Mr F before the end of May 2014 were paid directly to Abana. I've seen paperwork to this effect, with charges for Mr L's SIPP appearing on the May and June 2014 statements. Abana is shown as the introducer and the total payment (which included charges for multiple clients) was due to it. But unfortunately, it's not that straightforward.

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

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

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

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

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

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

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

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

the independent review of pension transactions attributed to Abana

Abana acknowledged the outcome of an independent reviews into several cases that are now being dealt with by this Service. The reviews concluded Mr F had been responsible for unsuitable advice he gave and the arrangements he made for the transfer of pension funds into the Avalon 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 Mr F 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 Avalon.

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

Actually, from what I've seen I think it's more likely Abana's later retraction of the offer 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 [Mr F] was acting outside the remit of regulated activity, the victims are thus left in the unfortunate and unfair position of not being able to receive any redress whatsoever."

Ensuring its agents were only given authority to operate within the scope of its own permissions was Abana's responsibility. As I've already set out, it was aware of what activities Mr F was undertaking. Even if it didn't realise what he was doing would have the effect of nullifying or being beyond its insurance cover because his activities fell outside the scope of Abana's permissions, it should've 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 given Mr F 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 Mr F listed as a pensions/financial adviser" and part of "The Abana Team". It includes a photo of an individual that purports to be him. We obtained this information from an online resource. Mr F's details remained on the Abana website until at least December 2014.

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

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

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

Abana's engagement with the FCA in 2015

In responding to some earlier decisions which have been upheld against it, Abana questioned the jurisdiction of this Service citing communications it had previously with the FCA on this matter. It says the FCA instructed that it wasn't regulated to advise on Trust-based SIPPs.

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 saying that in order to conduct such business Abana would need to secure 'top-up' permissions. That's consistent with the case I've been making elsewhere in this decision.

Rather than supporting its position on jurisdiction, I think this exchange of emails in February and March 2015 is 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 and argument here. And I'm satisfied this demonstrates Mr F was acting as an agent of Abana.

I think Abana was aware of, expected, facilitated, guided and benefitted from the activities Mr F was undertaking, including giving advice on and making arrangements for SIPPs. I think Mr F had its actual authority to do this on its behalf. So, I think Abana is responsible for Mr F's acts and omissions.

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

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

So, I think Abana can be held responsible for the arrangement of the transfer of Mr L's occupational and personal pensions 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 that this is a complaint this Service can consider. In summary because:

- Mr L's complaint concerns both the advice about and the arrangements for the transfer of his occupational and personal pension funds to the Avalon SIPP and the investments made therein. So, it's a complaint about regulated activities.
- I'm satisfied that Mr F gave Mr L advice about and made arrangements for the transfer of his personal pension funds to the Avalon SIPP and the investments in the Kijani and SAMAIF funds as an agent with the actual authority of Abana. I'm therefore satisfied that Abana is responsible for his acts and omissions in this regard.

considering the merits of Mr L's complaint

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

The documentation I have from around the time of the events is incomplete. Abana provided very little information about Mr L's case. For example, I've not seen a fact find covering his circumstances, nor a record of his objectives for his pension arrangements. There's no document which captures Mr L's attitude to risk. And I haven't seen a suitability report with recommendations.

Mr L provided us with testimony about what he could recall from the time when he was given advice to transfer his occupational and personal pensions into the Avalon SIPP.

With regard to the testimony of both parties, I generally give more weight to what they told us the more contemporaneous it is with the events complained about. That's because it tends to give a more accurate account of events given the effect of the passage of time and the potential for the benefit of hindsight to colour matters.

Fortunately, we've been able to obtain some relevant paperwork from other sources, including the firm which took over as Mr L's SIPP provider. As previously established, this has been important in evidencing the role Mr F played on behalf of Abana in bringing about the transfer of his occupational and personal pensions.

While there's conflicting information about what happened in 2014 and many gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

how does the regulatory framework inform the consideration of 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 Mr F who I'm satisfied was acting as Abana's agent. The FCA Handbook contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2 G in the FCA Handbook). These include:

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

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

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

And at paragraph 77:

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

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

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

COBS 9.2.1R sets out the obligations on firms in assessing the suitability of investments. They are the same things that I look at when reaching a decision about whether the advice was suitable. In summary, the business must obtain the necessary information regarding: the consumer's knowledge and experience in the investment field relevant to the advice; their financial situation; and their investment objectives.

When I consider a case where someone has transferred their occupational or personal pension, I look at their circumstances at the time. Why were they interested in transferring? Were those wants or needs reasonable? And so, should the adviser have recommended the transfer?

Each case is different, but I'd expect the transfer to be in the consumer's best interests to make the advice suitable. And in this regard, I'd expect to see a comparison was made between the old pension and the new one.

In 2009 the then Financial Services Authority published a checklist for pension switching that I think is still helpful today. It highlighted four key issues it thought should be focussed on:

- *Charges* - has the consumer has been switched to a pension that is more expensive than their existing one(s) or a stakeholder pension, without good reason?
- *Existing benefits* - has the consumer lost benefits in the switch without good reason? This could include the loss of ongoing contributions from an employer, a guaranteed annuity rate or the right to take benefits early.
- *Risk* - has the consumer switched into a pension that doesn't match their recorded attitude to risk (ATR) and personal circumstances?

- *Ongoing fund management* - has the consumer switched into a pension with a need for ongoing investment reviews but this was not explained, offered or put in place.

It's also important to review the FCA's specific stance on advice provided about SIPP's. For example, in January 2013 it issued an industry alert which said:

"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments…"

"Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect. The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes..''

"If, taking into account the individual circumstances of the customer, the original pension product, including its underlying holdings, is more suitable for the customer, then the SIPP is not suitable. This is because if you give regulated advice and the recommendation will enable investment in unregulated items you cannot separate out the unregulated elements from the regulated elements. There are clear requirements under the FSA Principles and Conduct of Business rules."

did Abana, through the acts and omissions of Mr F, adhere to the regulatory requirements placed on it in effecting the transfer of Mr L's occupational and personal pension plans into a SIPP?

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

Mr L had spent most of his working life in service to same industry. His role had been outsourced and he found the situation quite stressful. He was 55 and thinking about taking a 'step back' – early or semi-retirement. He was introduced to Mr F who gave him advice about his pension arrangements and how he could invest his pension funds.

Mr L's representative told us he was considering taking some of the benefits from his pension provisions and supplementing his income with a part-time job. He was also interested in securing TFC which he might use to clear a few debts, including his mortgage. And he wanted more time to pursue his hobbies, like his interest in classic motorcycles.

Mr L was a member of an occupational pension scheme. After nearly 22 years of service he'd accrued deferred benefits with a transfer value of about £213k. He also had a personal pension plan built up during his early employment. This had valuable protections, for example a guaranteed minimum pension. It had a transfer value of around £89k. Together his occupational and personal pensions provided for a projected annual pension of around £22,000 (assuming he didn't take any TFC) when he reached 65.

Mr L says he had at least two meetings with Mr F who would've been responsible for completing the paperwork. As Abana's agent, Mr F had to obtain information from Mr L in order to understand essential facts about him. In order to advise him to transfer his occupational and personal pensions into the Avalon SIPP and invest in the unregulated funds, Mr F had to believe that:

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

As we know, Mr L decided to take tax-free cash (TFC) of around £75k. After allowing for fees, charges and a small cash balance, the bulk of his residual pot of around £202k was invested in two unregulated funds - Kijani and SAMAIF.

During 2016 and 2017 Mr L was able to withdraw monies from his investments. It appears from statements I've seen, the redemptions made by Mr L left him with about £95k tied up in his SIPP. This represented what was left of his pension provision. Unfortunately, he couldn't access further monies because the investment funds had been suspended leaving him facing substantial losses.

As 've mentioned already, I've not seen a fact find covering his circumstances, nor a record of his objectives for his pension arrangements. There's no document which captures Mr T's attitude to risk. I haven't seen a recommendations report. And I haven't seen a useful comparison of the performance, costs and benefits between his then existing plans with what was being proposed.

Mr L says he wasn't made fully aware of the benefits he was giving up when Mr F advised him to transfer his funds into the Avalon SIPP. Although he received transfer analysis reports, he says these documents were never explained to him. And he told us he never received a suitability report explaining why the transfer had been recommended and why it was suitable for his circumstances and objectives.

Abana hasn't produced information to show Mr F followed proper process, or if he did that this supported the subsequent transaction he advised and arranged. This is odd because in March 2014 when it was communicating with another SIPP provider about the business Mr F was generating, it provided some assurance that proper documents were on file and that its compliance function had oversight of what he was doing.

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 telling this specialist independent third party concluded in August 2016 that the advice Mr L had been given by Mr F had been unsuitable. And it set out how Abana should put things right. As we know it ultimately failed to act on the outcome of the review.

Further, I've seen a communication between Abana and Mr F from around the same he was providing Mr L with advice in April 2014, which I think is also relevant here. In this email exchange Abana provides feedback to Mr F about his approach to suitability reports. This had been provided by its compliance function and it appears to demonstrate Mr F's practices were lacking, for example in relation to advice around risk appetite.

From what Mr L's representative has told us, I think Mr L was interested in getting access to his pension benefits early. He seems to have well developed plans about what he wanted to do. But I don't think his risk appetite was high. His occupational and personal pension pots were modest given the stage he was at in his working life. And they represented the bulk of his retirement provision – his capacity for loss was small.

Indeed, in responding to the investigator's view earlier this year, Abana provided us with a copy of the questionnaire Mr L was asked to complete in 2015 by the consultancy firm looking into the suitability of the pension transfer. It's suggests Mr L had a cautious attitude to risk and modest objectives for his retirement.

To make Mr F's advice suitable, there needed to be a reasonable prospect that Mr L would be better off in retirement. There would be little advantage in transferring if the benefits were likely to be similar in value. And being a more conservative investor, the potential benefits would need to be far greater.

I've seen copies of the very basic transfer value analysis (TVAS) reports conducted for Mr L's occupational and personal pension plans. This showed a critical yield of around 12.9% and 11.3% respectively would've been required from transferring his pensions into the SIPP simply to match the benefits he was giving up.

But I've not seen anything that makes me think Mr L was properly informed about the benefits, guarantees and flexibilities available from his then existing pensions. The performance required from any alternative arrangement was unrealistic given his risk appetite. His entire pension provisions, after taking TFC, were being invested in high risk funds which given his age, objectives and capacity for loss was not appropriate.

In addition, I'm not confident Mr L would've had a clear idea about fees he was to be charged for going ahead with the transfer in comparison to the fees and charges on his existing pensions. I don't think he would've expected these to exceed £15,000 as they did.

So, I've concluded Mr F wasn't acting with due skill, care or diligence when he gave advice on and effected the transfer of Mr L's occupational and personal pensions into his Avalon SIPP and investments in unregulated funds. He was in breach of Principle 2 and COBS 9.2.1R, and therefore so was Abana.

I find Mr L's testimony from 2015 plausible and persuasive. And I think it's of note that Abana has never made the case that the transfer of Mr L's occupational and personal pensions was a suitable outcome. Rather, Abana's response to this Service has largely focussed on why it wasn't responsible for what had happened, and how it was the fault of other parties.

Abana has largely failed to engage with the merits of this case, despite clear evidence of the relationship it had with Mr F. I won't rehearse the arguments already made in my decision, but I've concluded that Mr F was acting as an agent of Abana with its actual authority to deal in pensions and arrange SIPPs.

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

Mr L says he can't recall completing an assessment of his risk attitude with Mr F in 2014. But he says Mr F told him that by transferring his pensions to a SIPP far more income could be available by investing in a new suite of funds. At no point was it mentioned these would be held offshore in non-regulated investments.

There's no evidence Mr L was an experienced or sophisticated investor – quite the reverse. A small amount of care and due diligence would've exposed the transfer of his pension funds to the Avalon SIPP and investment in unregulated funds as inappropriate.

Mr F was the lead actor in advising on and arranging Mr L's SIPP and the unregulated investments made through it using Abana's FCA authorisation. It's more likely than not he had a hand in transmitting the necessary applications. 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, Mr F would've been aware Mr L was being exposed to significant risks in the investments he was arranging. He 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.

I'm satisfied that Mr F didn't act honestly, fairly and professionally, and in accordance with Mr T'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.

To conclude I don't think the transfer of Mr L's occupational and personal pensions into the Avalon SIPP and unregulated investments with the Kijani and SAMAIF funds could sensibly be regarded as fair to him. As such I think Mr F, as Abana's agent, failed to meet the regulatory requirements I've set out when providing him advice and making arrangements for the transaction.

So, taking all the circumstances of the case into account, it's fair and reasonable to uphold this complaint against Abana, and for Abana to put things right.

putting things right

I'm upholding Mr 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 funds from his occupational and personal pension plans into the Avalon SIPP and high-risk unregulated investments, and so he wouldn't have suffered the financial loss he's experienced. I also think he wouldn't have incurred the scale of fees he did.

That said, Mr L appears to have had several reasons for accessing some of his pension benefits early, including important work/life objectives. He also wanted TFC. Although his former pensions offered guarantees, protections and flexibilities, from what I've seen there could've been restrictions and penalties applied if he'd tried to achieve his objectives prior to the normal retirement age for these schemes which was 65.

I'm also mindful that Mr L did manage to take further substantial income from his SIPP during 2016 and 2017.

So, in arriving at what I think is fair redress I've tried to weigh all of these matters.

I require Abana Unipessoal Lda needs to put things right in the following way:

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

(a) *In relation to his occupational pension scheme…*

Abana should undertake a redress calculation in line with the Pension Review methodology, as amended by the FCA in October 2017. A figure should be derived up to the date of calculation. And this should be carried out using the most recent financial assumptions published.

Abana will need to contact the Department for Work and Pensions 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 any 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr L's SERPS/S2P entitlement.

(b) *In relation to his personal pension plan which included certain Section 32 protections and guarantees…*

(b1) Abana should obtain the notional value of Mr L's previous personal pension plan, as at the date of calculation. So, as if it hadn't been transferred to the Avalon SIPP. It will need to obtain the value of the plan as invested. If there are any difficulties in obtaining a notional valuation then the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index) should be used as I'm satisfied that's a reasonable proxy for the type of return that could've been achieved if Mr L's pension had remained invested in his previous pension.

(b2) Abana must also obtain the minimum value of Mr L's personal pension plan as provided for with his Section 32 guarantees and protections, as these would've applied at the date of calculation. So, again as if it hadn't been transferred to the Avalon SIPP.

Abana must use the higher figure resulting from the calculations at (b1) or (b2) in its redress settlement.

Abana will then have the total notional value for Mr L's previous pensions (a+b). It should then find the current value of his SIPP, including investments and any cash held. Concerning the valuation here – the approach to be taken is set out in step 2.

Mr L took tax-free cash in 2014 and drew down significant income in successive years. There may also have been additional contributions to account for. After confirming the detailed position, then the value Abana obtains or the calculations Abana makes can assume these adjustments would still have occurred and on the same dates.

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

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

To close Mr L's SIPP and avoid ongoing fees, the investments need to be crystallised. To do this Abana should ask the SIPP provider to determine an amount it's willing to accept as a commercial value for the investments and Abana can then pay this to take ownership of them.

If Abana is unwilling or unable to purchase the investments, the value should be assumed to be nil for the purposes of the loss calculation. In this instance, where Abana has compensated Mr L fully in line with my assessment, then it may ask him to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the investment. That undertaking should allow for the effect of any tax and charges on the amount he may receive from the investment and any eventual sums he would be able to access from the SIPP.

Abana will need to meet any costs in drawing up this undertaking.

3. Pay an amount into Mr L's SIPP so that the transfer value is increased by the loss calculated (resulting from 1 and 2) or pay him an equivalent cash sum notionally adjusted for tax

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

If paying compensation into Mr L's SIPP would conflict with any existing protection or allowance and / or the plan is closed and Abana takes on his investments, then it should pay him compensation as a cash sum. In doing so it should make a notional deduction to allow for income tax that would otherwise have been paid.

If Mr L is a basic rate taxpayer, the notional allowance would reduce the amount payable (after any allowance for tax-free cash), equivalent to the current basic rate of tax.

4. SIPP fees

If the investments aren't removed from Mr L's SIPP, and it remains open after compensation has been paid, Abana should pay him an amount equivalent to five years of future fees. This should allow enough time for the issues with the investments to be dealt with, and for them to be removed from the SIPP.

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

5. Trouble and upset

I also think Mr L has been caused upset as a result of Abana's actions. The sudden loss of a substantial element of his pension fund would have come as a shock to him and has clearly had a significant impact. In recognition of this it should pay his £500 for the trouble and upset he's experienced.

putting things right – summary

I can award fair compensation to be paid by a financial business, given the regulations that apply in this case, of up to £150,000, plus any interest and costs I consider appropriate. If I think that fair compensation is *or could be* more than the £150,000 limit, I may recommend that the business pays the balance.

Decision and award: I consider that fair compensation should be calculated as set out above (steps 1-5). My decision is that Abana Unipessoal Lda should pay Mr L the amount produced by those calculations - up to a maximum of £150,000, plus any interest.

Recommendation: If the amount produced by the calculations of fair compensation exceeds £150,000, I recommend that Abana Unipessoal Lda pays Mr L the balance.

This recommendation is not part of my determination or award. Abana Unipessoal Lda doesn't have to do what I recommend. It's unlikely that Mr L can accept my decision and go to court to ask for any balance. Mr L may want to get independent legal advice before deciding whether to accept my final decision.

my final decision

For the reasons I've already set out, I'm upholding Mr L's complaint. I require Abana Unipessoal Lda to pay compensation to him as I've indicated above. 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 10 July 2020.

Kevin Williamson
ombudsman