DRN-4027675

The complaint

The member trustees of a Small Self-Administered Scheme (SSAS) pension trust ("A"), who I'll also refer to individually as Mr R1 and Mr R2, complain that Atkins Bland Limited advised them to invest twice in a "complex, esoteric, overseas, non-standard investment which was not suitable given [their] investment aims and objectives", as they were inexperienced and unsophisticated in investments.

The complaint was originally brought by Mr R1, as he received the advice in question when acting on behalf of both trustees. However the decision I'm making affects the trust (A) as a whole, and I've already informed both parties that I'm now considering it on that basis.

What happened

Mr R1 and Mr R2 had set up the SSAS in 2002 on Atkins Bland's advice for the company they jointly owned. In September 2004 a single employer pension contribution was made to the SSAS with a view to buying shares in the sponsoring employer. However the funds were deferred in cash and it was decided against doing this.

By the time of the advice under complaint, the SSAS had reached a value of £495,000 including a commercial property worth £260,000 – for which £20,000pa rent was being paid into the SSAS. The rest other than a bank account was invested in a portfolio with 'Transact'. In April 2007 Atkins Bland's fact find showed Mr R1 and Mr R2 were aged 51 and 48 respectively and in good health. Neither of them had mortgages, although companies owned a portion of each of their main residences. The attitude to pension risk shown on this fact find of "Historically Average but interested in Above Average if opportunity is sufficiently attractive" appears to be based on Mr R1's and is similar to the 'Above Average' answer he ticked for himself on a 'Customer Care Survey' in October 2006. That was defined as:

> *"I am happy to expose capital to a high degree of shorter-term volatility and have all or most linked to the equity markets at home and abroad but preferring to maintain some capital in average risk sectors to help balance the adventurous holdings.*
> *Typical core investments are stock markets at home and abroad including specialist more volatile funds."*

The only higher option was 'High Risk'. Mr R1 had also declared at that time that he had a 'little' knowledge of non-deposit based investments. Atkins Bland also noted on its fact find:

> *"There is a preference to look at property based investment within the pension. [Mr R1] is looking at building a property based income portfolio longer term with the proceeds from the sale of the business one day. Using similar gearing based property investment is the preferred option.*
> *Need to be mindful of leaving enough in liquid investments to fund tax free lump sum release at 50 due to changes going through on minimum retirement age by April 2009."*

Mr R2 had also recently completed a risk questionnaire, which described him in two places as 'speculative' and able to "weather periods in which your investment decreases in value". However some of the answers reflected that in general he sought security and was only willing to accept ‘some risk’. But in the future he was prepared to take a ‘medium high’ amount of risk. The overall conclusion of the questionnaire was:

> *“Your total overall risk score puts you in the ‘high risk’ category. People in this category are willing to speculate with their investments You are generally interested in investments which could provide high returns, but which therefore could also suffer high losses. People in this category will be fairly tolerant of dips in the market, and will not usually require immediate access to their capital.”*

Atkins Bland advised A to invest £50,000 of the available SSAS cash in shares in the Stirling Mortimer Majestic Village No.3 (Spain) Fund. This was one cell of a Protected Cell Company (PCC) registered in Guernsey. The offers for subscription for this particular investment said that each Cell was an unregulated collective investment scheme (UCIS) and as such, the offer had to be communicated by an authorised firm in the UK to persons who fell within exemptions contained in either:

- The Financial Services and Markets Act 2000 (FSMA) (Promotion of Collective Investment Schemes (Exemptions) Order 2001 (which I’ll refer to as ‘PCIS Order’); or
- Chapter 3 of the Financial Services Authority’s Conduct of Business (COB) handbook.

Atkins Bland described the fund as an opportunity to invest for potentially as short a term of two years with the potential for high growth. The fund would invest and then resell 'Right To Purchase’ (RTP) contracts at the first stage in construction of properties. The contracts were offered to the fund at a 20-30% discount on the off-plan price – a margin which was expected to narrow to zero by the time the development completed. Three particular developments of townhouses by the Majestic Group in Spain were listed in the prospectus.

Atkins Bland emphasized the bank guarantees affording protection of the sums paid (plus 15%) in the event that the property developer went bust. The 15% part of the guarantee, backed by a cash deposit held with the Fund’s lawyers, was triggered if the RTPs couldn’t be resold into the market after two years. A return of the rest of the investment would also be triggered if the RTPs were resold in years three or four for less than the off-plan price.

Otherwise and if the RTPs couldn’t be resold after four years (at a penalty payable to the fund of 2% in years 3 and 4), the fund was obliged to complete on the properties. That could require borrowing that it would seek to cover through the penalty payments, rental income and/or disposal of the properties. Borrowing could be at up to 250% of the net asset value of the fund. The prospectus set out the various scenarios under which Spanish taxes would have to be borne by the fund (or affect the price at which it could sell on the RTPs).

Atkins Bland said to Mr R1 that “Our own appraisal of your circumstance is that you are in a position to accept some risk to part of your capital.” But it added, “We really do not believe this investment is suitable to anyone who is particularly risk averse.”

In August 2007 Atkins Bland recommended A invest £25,000 in the Stirling Mortimer No.4 (Cape Verde) Fund. This was another Cell of the same PCC, but Stirling Mortimer’s view of the regulatory status of this (and presumably therefore the other Cells) seems to have changed. The offers for subscription said that the promotion should only be directed to persons in the United Kingdom who were Qualified Investors or investment professionals. This fund would work on essentially the same basis as the Spain fund, with RTPs on a beach and golf resort. Atkins Bland made the same references to Mr R1’s ability to take risk.

In April 2008, Mr R1 took his maximum tax-free cash sum and drawdown income from the SSAS. A fact find at this time noted that he held £180,000 in cash deposits and was seeking an arrangement (without borrowing) to buy out the company’s 49% share in his home. A further attitude to risk assessment scored him as 'below average' in respect of drawing benefits from other pension arrangements outside the SSAS (which totalled £47,000).

The remainder of the Transact Portfolio was valued at £68,754, comprising £2,773 in cash and the rest divided between the following:

Aegon High Yield Bond Class A	JM Finn Global Opportunities Fund
ETFS Grains (AIGG)	JPMorgan Europe A
F&C Progressive Growth Class 1	JPMorgan Natural Resources A
First State Global Listed Infrastructure A	Lincoln Far East
FTF-Franklin Global Emerging Markets Fund	M & G Recovery Fund X Class
Gartmore UK Equity Income Retail Class	New Star UK Property
Invesco Perpetual Income	Premier Pan European Property Share
Invesco Perpetual Pacific	Schroder Global Property Securities A
J O Hambro UK Equity Income Retail Class	Threadneedle Latin American Class 1

In January 2009, Atkins Bland wrote updating A about the status of both investments. It explained they had been affected by the financial crisis of 2007-08 and the maturity dates of both had been put back to January 2011. It reiterated that penalties would be paid to the fund, meaning at least a 15% compensation payment. The actual values of the investments were still reported on A's SSAS statements at a higher level than the original amounts.

Mr R1 retired as director of the sponsoring employer and disposed of his shares in December 2009, although Mr R2 had resumed a director's appointment which he then held until he also retired and sold his shares in the company in March 2013. The SSAS has continued to own the commercial property and receive rent to pay pension income.

An update Atkins Bland sent in May 2010 summarised that it was anticipated – although not guaranteed – that the Spain fund would return the original capital invested, and the Cape Verde fund could possibly deliver a profit to investors. In September 2011 the maturity date of the latter was extended to the end of July 2012, but as this again failed to materialise Atkins Bland continued to provide A with updates.

A's 21 October 2011 statement showed the Cape Verde fund's value dropping back below the amount originally invested – although it took until the 20 October 2016 statement for this to happen with the Spain fund. In November 2014 Atkins Bland had said *"There are no borrowings on the fund and therefore there are no secondary bank covenants to consider. At this stage we would suggest patience is the byword and confidence that the fund manager is doing everything they possibly can to sell the properties in the fund as rapidly as possible."*

In May 2016 when he was age 60, Mr R1 started to want to understand the process and implications of splitting the SSAS's value with his brother, so he could draw his entire share out and manage the commercial property as a joint asset outside the SSAS. The adviser emphasized the inheritance tax disadvantages of doing so and also weighed up the pros and cons of switching the SSAS to two SIPPs, which they decided not to do.

During these discussions in June 2016, Mr R1 acknowledged the possibility of the Cape Verde investment being written off, as he asked if it would be possible to offset that loss against the tax bill he might pay when accessing the rest of his SSAS entitlement. Atkins Bland regarded this as the point that Mr R1 (and by extension A) ought reasonably to have been aware of a cause for complaint. However its response at the time was:

> *"I have attached a summary that we have put together of the position based upon fund manager newsletter releases, this gives a good overview of the current position rather than rely on ill-informed speculation on the internet. However, as we have stated it is*

impossible to know at this stage as to the eventual timetable for maturity on both funds or on the amounts that may eventually be returned to investors."

The conversations about the split in assets between Mr R1 and Mr R2 continued. Although the values of both investments had gradually declined as noted above, they then fell abruptly to zero in A's 23 October 2017 statement (in respect of the Spain fund) and A's 5 May 2018 statement (in respect of the Cape Verde fund). Notably, the latter statement prompted Mr R1 to tell Atkins Bland on 3 June 2018 that he was 'shocked' that both funds had been delisted, and was *"concerned that I stand to lose a great deal of money"*. By 20 September 2018, Mr R1 had deflected his concern onto Atkins Bland's involvement:

"I want to express my concern in relation to the two Sterling Mortimer investments…that have been written down to zero, and I feel I need to raise this with you and see if we can agree on a way forward.

As you know, the Sterling Mortimer investments were supposed to be short term high yield, but the reality appears to be that I have lost all the invested funds with very little hope of being able to draw down on the cash in my lifetime.

From the research I have conducted, it is evident that these investments were never suited to my investment risk strategy as they were high risk unregulated investments. I am sure you will be aware several Sterling Mortimer investments have been the subject of a Serious Fraud Office investigation and the FSA [sic] are accepting claims for mis sold Sterling Mortimer No 4 investments along with others (for companies that are no longer trading) and I suspect it will only be a matter of time before Majestic Village No 3 takes a similar course.

I have read your email of 12 June 2018 and can't say that it gives me any comfort. My experience in business has shown time and time again companies in this sort of difficulty usually end up paying very low dividends and often zero with a legal process dragging on for years. The only beneficiaries are usually the receivers / administrators with the creditors at the bottom of the pile !

I am aware there are plenty of companies eager to take on my case on a no win no fee basis, but I feel we have developed a good working relationship over the years, and want to give you the opportunity to address my concerns amicably.

Initially I would like to get your thoughts on the matter, but I don't want the situation continuing indefinitely.

I look forward to hearing from you."

The adviser's reply of 15 October 2018 read in part (with my emphasis):

"Thank you for your email of 20th September and I do understand your disappointment with the outcome of these investments.

As you say, they were designed to be reasonably short term and to provide potentially high returns from investing in overseas holiday property developments, but had, as you know, failed to deliver as a consequence of the collapse in the sector following the financial crisis 10 years ago.

Since this initial failure to achieve their objectives, the managers have been trying to dispose of the assets they hold in a way which can generate some return of capital to investors but, so far, have been unsuccessful.

With regard the SFO investigation, the SFO did commence an investigation after an allegation of fraud back in last 2012 but then dropped this earlier this year, and I am unaware of any evidence of fraud or wrongdoing by the managers of these funds.

The impression I have always had is that the managers have been genuine in their attempts to recover some value for investors and, rather than being involved with fraud, have been the victims of it, as they have reported in their updates on the Spanish fund.

> *Clearly, there is a probability that all the efforts from the managers will come to nothing and there will ultimately be no return to investors, but I do feel the record indicates they are doing their best against a very difficult background.*
>
> *With regard your comment on claims management companies eager to encourage investors to complain and assist them on a no win no fee basis, this does seem to be one of the worlds current epidemics.*
>
> *I won't comment in terms of my views on the relentless rise of the modern claims culture which is being driven by the "claims management" companies but, with reference your own position, I do feel that the ingredients to support a justifiable claim are absent.*
>
> *The core issue here is that, as far as I am aware, successful complaints are predicated on either the investment having been promoted as low risk or it being unsuited to the investor due to their financial inability to accept the risk, or both.*
>
> *In your own case, you were clearly in a financial position to accept the risk and were correctly classified as both a high net worth and a sophisticated investor, in terms of the regulatory classifications for these definitions. In addition, our correspondence with you from before the time the investments were arranged did clearly state that these investments involved the risk of losing the capital and were not low risk."*

The letter then quoted back from the product summary Atkins Bland had supplied Mr R1 at the time of the investments, and added:

> *"The overall risk preference we were applying to the portfolios, in line with our discussions and agreements, was average risk. To achieve any specific risk category in a portfolio it is normal to hold assets in categories above and below the overall target, thus widening diversification.*
>
> *While the Stirling Mortimer funds were above average to high risk, and based on speculating in property development, their inclusion did not move the total for the portfolio, which was worth in excess of £500,000, beyond an overall classification of average risk.*
>
> *We do, of course, know with the benefit of hindsight that investing in overseas holiday property in 2007 has proven a very poor strategy, but at the time the enthusiasm for this sector was massive and the Stirling Mortimer funds did seem an attractive way to gain access to the potential gains, for those happy to accept the potential risks.*
>
> *I do hope that, on reading the above and recalling the background to this advice back in 2007, you will conclude that,* ***although the advice to include these funds has produced poor results, this is the consequence of unforeseen events****, and particularly the impact of the financial crisis on overseas holiday property developments****, rather than any actions or inactions on the part of myself or Atkins Bland which justify a complaint****.*
>
> *As you say, we have always had a very good working relationship. I genuinely hope this can continue but will leave it with you to let me know how you wish to proceed."*

Mr R1 engaged a legal representative who formally complained on 20 August 2019. Essentially, Atkins Bland responded that Mr R1 (and by extension, the trustees) had both the attitude and capacity for risk to make the investments, and had adequate experience and comprehension to understand the nature and structure of the Stirling Mortimer funds. Furthermore it said his classification as high net worth/sophisticated entitled him to receive promotions of the investments. It also believed that the complaint was raised outside the six- and three-year time limits that apply under DISP 2.8.2R(2) in the regulator's handbook.

An ombudsman decided that the complaint was brought within these time limits on 12 October 2022, and then an investigator found that the complaint should be upheld on its merits.

Atkins Bland has added:

- Mr R1 had selectively recalled his attitude to risk, which he lowered after the 2008 financial crisis.
- He hadn't been using A's funds as his sole source of income in retirement. If the true value of the SSAS and 50% of his shareholding in the sponsoring employer were combined, Mr R1's half of the Stirling Mortimer Investments was about 5% of these.
- He had the capacity to accept the risks involved given his ongoing income from that employer, which also paid £20,000pa rent into the SSAS.
- The FSA thematic review into advice on unregulated investments in 2010 came after these events and was in all likelihood prompted by the 2008 financial crisis.
- It wasn't correct of the investigator to state that the funds carried a 'substantial' risk of losing the full capital value. She had exaggerated that risk.
- Atkins Bland was entitled to point out the inbuilt protections to the fund at the time, and warned these couldn't be relied upon and the property 'boom' could be reversed.

Mr R1 has added:

- He has never been a sophisticated investor and his only expertise is in the retail sector his company traded in, as is borne out in the documents at the time. That was why he went to Atkins Bland for advice.
- He felt that reference to the funds being underwritten by bank guarantees gave the illusion of being 'watertight'.
- Atkins Bland forced him into the position of having to seek legal advice to establish whether he had a claim against it, as a result of its email to him of 15 October 2018. So, he wanted his legal costs to be considered as a result.

The complaint was referred to me and I issued a provisional decision on 16 March 2023, which follows below. Firstly, on **time limits**:

The complaint is brought by two trustees, and the losses on the Stirling Mortimer investments have been suffered by them together. However it's very much in evidence that Mr R1 was the contact point between Atkins Bland and matters relating to the SSAS. Not only was he following the values of the investments on SSAS statements, he also received the words of reassurance Atkins Bland gave at various times.

I agree with what my colleague previously said in her decision of 12 October 2022 about the extent to which Atkins Bland continued to reassure Mr R1 throughout the period since A made the investments, including in June 2016. And I would make the same observations about how – before the first one fell to zero on 23 October 2017 – both investments still reported values on annual statements within a moderate range of their starting position. I say this bearing in mind that it is accepted that the trustees were prepared to take risk, and would have had some understanding – not least because Atkins Bland gave this to them – that the investments had been affected by the financial crisis.

So, I would already have agreed with my colleague that Mr R1 complained within three years of when the trustees ought reasonably to have been aware of cause for complaint in October 2017. However there's another reason why I don't think Atkins Bland could successfully argue that he should have complained within three years of his email of June 2016 (which is the one acknowledging the possibility of the Cape Verde investment being written off). I think Mr R1 did raise what amounted to a complaint within three years of that date anyway.

The regulator defines a complaint in its handbook as essentially, an expression of dissatisfaction – whether justified or not – about Atkins Bland's provision of a financial service (i.e. the advice it gave the trustees, an activity which is covered by our service); and which alleges that they have suffered (or may suffer) financial loss. All these elements are present in Mr R1's email of 20 September 2018 which I've quoted above.

The timing of the email is relevant in indicating it was the confirmation of nil values for the investments and the potential involvement of *'receivers / administrators'* that triggered his concern. It's understandable that he found that development relatable to his own line of work, and it changed his willingness to take *'any comfort'* from Atkins Bland's reassurances. However it's also clearly an expression of dissatisfaction about the way Atkins Bland assessed, in its advice, that these investments were appropriate for the SSAS risk strategy. It's evident that Mr R1 now felt he had now lost all the amounts invested. He was looking to resolve the situation 'amicably', but that isn't an option open to Atkins Bland in the regulator's handbook: it was required to treat Mr R's concerns like any complaint.

Atkins Bland's response shows that it knew Mr R1 had made a complaint. It clearly thought the complaint wasn't justified, and said so. For the purposes of our jurisdiction, that was a complaint that stops time running under the time limits at DISP 2.8.2(2)R. And so I'm not persuaded there are any grounds to say the trustee's complaint was brought out of time.

Secondly, on ***the merits of the complaint:***

Should the investments have been promoted to the trustees?

As I've set out above, Stirling Mortimer said in the prospectus that the Spain fund would constitute a UCIS. It's possible that could be questioned, given subsequent funds were classified differently. But on the basis of the information it had at the time, Atkins Bland was bound to observe that promoting this investment to Mr R1 and Mr R2 would be in breach of the restrictions on promotion of these schemes, unless it fell under a valid exemption.

At the time, the exemptions under the PCIS Order would have required any individuals to be certified as high net worth, sophisticated or self-certified sophisticated investors. All of the exemptions required the individual themselves to sign a declaration in a prescribed format accompanied by a statement of the criteria for them to qualify as such, and explaining that they may be exposed to a significant risk of losing all the property invested. From what I can see, none of these requirements were contemporaneously satisfied – and so any promotion seeking to retrospectively rely on the PCIS Order would be unlawful.

Even if it's arguable there was only a technical breach of the steps required (because the criteria themselves could have been met), in my view this could only apply to the exemptions for high net worth or self-certified sophisticated investors, because they were reliant on purely **quantitative** criteria which it appears Mr R1 and Mr R2 may have been able to satisfy (as a result of the value of their assets in their company, or in Mr R1's case being a director of a company with a high annual turnover). But as it happens, both of those exemptions were restricted to a scheme *'which invests wholly or predominantly in the shares in or debentures of one or more unlisted companies'.* From what I can see, the Spain fund bought and sold *contracts*, so I can't see these exemptions would have been available.

The other sophisticated investor exemption required Atkins Bland to carry out a **qualitative** test that the trustees met the criteria of being *'sufficiently knowledgeable to understand the risks associated with participating in unregulated schemes'.* I've been provided with no evidence that they'd invested in such schemes before; and Mr R1 – who was the trustee primarily engaging in these matters – had already declared that he only had a 'little' knowledge of making investments at risk (i.e. not in deposits).

The Cape Verde promotion could only be directed at Qualified Investors or investment professionals. Clearly the two trustees were not investment professionals. It appears that the fund's prospectus wasn't approved by a home state authority, so it could therefore only be promoted to Qualified Investors at the time (ss.85-86 FSMA refer). This relates to EU

Directive 2003/71/EC ("the Prospectus Directive"), which sets out that certain natural persons could expressly ask to be considered as Qualified Investors if:

> *"(a) the investor has carried out transactions of a significant size on securities markets at an average frequency of, at least, 10 per quarter over the previous four quarters;*
> *(b) the size of the investor's securities portfolio exceeds EUR 0,5 million;*
> *(c) the investor works or has worked for at least one year in the financial sector in a professional position which requires knowledge of securities investment."*

It's clear that criteria (a) and (c) wouldn't apply to the trustees in this case. And the size of the Transact portfolio in the SSAS once the commercial property was excluded can't have been more than £235,000, which was under €500,000 in 2007. So, I'm not satisfied that Atkins Bland was lawfully able to promote these funds to the trustees as Qualified Investors ***or*** under any of the PCIS Order exemptions. But even if I'm wrong on any of the above, it remains the case that Atkins Bland advised them to invest as well as promoting the investments. So, it also needed to ensure its advice was suitable as per the COB rules.

This is in effect little different to the other relevant exemption available (for promoting any funds which were UCIS) in the table at COB 3 Annex 5: *'a person… for whom the firm has taken reasonable steps to ensure that investment in the collective investment scheme is suitable…'*. So, to the extent to which either of the funds could even be lawfully promoted to the trustees at all, I will need to decide whether it was suitable advice for A to invest.

Did Atkins Bland give the trustees suitable advice?

No extensive fact-finding was carried out on Mr R1 and Mr R2's assets other than their homes and company, but we later learned in 2008 that Mr R1 already held £180,000 in cash. There's no reference to any other assets invested at risk, and Mr R1's other pension arrangements were relatively small compared with his share of the SSAS. Mr R2 wasn't receiving a salary but only dividends from the company, and Atkins Bland didn't record any notable savings or investments for him at all.

Given that a company owned part of each of their main residences, it seems to me that both trustees would be reliant on some of the savings and income they received to maintain their financial security. And when the company from which they derived their income was sold, which seems to have been aligned with their plans to both retire in the short to medium term, the SSAS would then become their primary source of income along with whatever proceeds they received from the company.

Atkins Bland noted that Mr R2 had a higher recorded attitude to risk than Mr R1. However the investments were being made by the trustees together, and they would form a significant part of the assets in the SSAS that weren't tied up in the commercial property – particularly after Mr R1 started drawing his benefits, which was noted to be imminent. Atkins Bland believed that the beneficial interest in the SSAS assets was divided in roughly equal shares between Mr R1 and Mr R2, so I don't see how it could conclude that it was appropriate to expose investments that would likely be needed to fund *both* trustees' retirement to a higher risk than they were *both* willing to accept.

I agree with Atkins Bland's comments that Mr R1's lowering of his attitude to risk after 2007 shouldn't inform my decision. However, Mr R1 already agrees that he was willing to take an 'average' risk at the time - he just doesn't agree that he wanted to take more risk than that. And it's not clear how Atkins Bland reached a 'high risk' classification for Mr R2 either.

Whilst Mr R2 hasn't been directly involved in the submissions for this complaint, I have some doubt about the internal consistency of the risk questionnaire he completed. It seems unlikely to me that someone who had sought security in the past would then switch to the opposite end of the scale. He had himself only said at the time he was prepared to take 'average to high' risk, so it appears that this was uplifted to high risk in order to fit with the risk profile of the investments being made.

I'm prepared to accept from what was recorded at the time and given the value built up in their company, that Mr R1 and Mr R2 together had an appetite to take up to a medium-high level of risk. But there's another issue with the nature of the assets already in the SSAS, and the need to ensure it was adequately diversified and able to meet its aim of providing for their retirement. About half the SSAS was invested in a single UK commercial property and some of the Transact portfolio was already invested in property funds. Atkins Bland recorded that Mr R1 had a preference for further such property investment with the SSAS, but I think the adviser should have questioned whether it was appropriate to do so.

In addition, much of the rest of the Transact portfolio was in a range of UK and regional equity funds, and other natural resources, commodity and infrastructure funds. In my view this already presented a medium-high risk, and the way to achieve overall balance in the portfolio was not therefore to make the property element even more overweight – but to invest in a wider range of other assets, potentially including other shares but also bonds.

To invest further into highly specialised, unregulated property funds was in my view going to exacerbate the problem of a lack of diversification. There's already evidence from what Mr R1 himself said that he lacked experience of making non-deposit investments (which is in part why I don't think Atkins Bland should have promoted these investments at all). And these would take the overall risk profile of the SSAS outside what the trustees could tolerate.

I've said that the value in Mr R1 and Mr R2's company meant the pensions weren't going to be their only source of funds in retirement, and gave them the capacity to take more risk with their pension. But that doesn't mean it would be right to regard the company as 'part' of the pension portfolio, because it clearly wasn't. There would be other demands on the company proceeds, including it seems giving them security over their own homes. So on that basis, the first investment they were advised to make in 2007 already came to 10% of the value of the SSAS – and would be progressively more as they each drew benefits from the SSAS.

I accept Atkins Bland's comments that the regulator hadn't yet published its view on good practice for the proportion of unregulated investments to include in a portfolio. But I've already questioned whether Mr R1 and Mr R2 had the appetite or capacity for making unregulated investments at all. On that basis putting as much as this in a single, undiversified, high-risk investment would clearly have been unsuitable for their needs. And I have significant doubts that they would have been in a position to appreciate and understand the multiple risks involved - even though these were highlighted to some degree by Atkins Bland in its reasons why letters.

I have some sympathy with Mr R1's argument that the bank guarantees were used to downplay the worst case scenario with the investments. Atkins Bland said:

> *"We are not in a position to confirm whether or not the protection strategy will actually prove successful and we feel it would be unwise to consider the investment really does carry no downside risk. However, significant due diligence has been carried out first by the Channel Islands Stock Exchange and by Grant Thornton. This leads us to be satisfied as far as possible on the nature of the protection mechanisms in place, although we are unable to absolutely guarantee this."*

In my view this suggested that a failure to achieved the expected returns was a low likelihood indeed. And this was compounded by saying that the trustees only needed to be prepared to take ‘some risk’, a ‘degree of risk’, or not ‘particularly risk averse’, as it underplayed that these investments were very high risk. There was not yet an underlying physical asset to back up the contracts being purchased. And from what I can see, the return of (at least) the amount invested was only guaranteed if the developer was actually able to sell on the contracts. That calls into question the value of the guarantees.

Although it made brief reference to it in its commentary, I’m not satisfied Atkins Bland put enough emphasis on the possibility that “*At the extreme this risk would, presumably, be loss of capital which could, in theory, occur in the event of the fund having to borrow to complete on properties and then the property values falling, causing the debts to exceed the assets...”.* But an even worse case scenario was of no property being built which the fund was able to complete on and sell to anyone at all.

Instead, Atkins Bland appeared to suggest that the other assets in A’s portfolio also carried ‘downside risk’, and that the possibility of these negative outcomes should therefore be accepted by Mr R1 and Mr R2. Whereas in my view the Stirling Mortimer investments presented more risk than the trustees were willing to or should have been expected to take. So, I don’t agree with Atkins Bland that the investigator has exaggerated the risk posed by these investments. If anything, Atkins Bland had done the opposite by downplaying the impact of the risks involved at the same time as it was highlighting them.

In conclusion, if Atkins Bland had correctly observed the restrictions on promoting these investments to Mr R1 and Mr R2, and (to the extent still necessary) appropriately advised and informed the trustees on their purchase, I’m not persuaded that the SSAS would have purchased these investments at all.

Both parties responded to the provisional decision. Mr R1’s representative said that its clients felt the decision was reasonable and they had no further comments. Atkins Bland said the following:

<u>Time limits</u>

- Important wording had been cropped from the end of the September-October 2018 email exchange (at Atkins Bland’s request I have now included it in the summary above).
- The missing wording showed that Mr R1 didn’t want his September email treated as a complaint until Atkins Bland had first commented, so Atkins Bland responded accordingly.
- Its argument that the complaint was outside the time limits didn’t, in any event, pivot on the 2016 email exchange as Mr R1 had been aware of the matters complained about ‘many years’ before that.

<u>Merits</u>

- Its understanding at the time of the advice was that the Stirling Mortimer investments were eligible for promotion to either a high net worth or sophisticated investor and that Mr R1’s circumstances [I assume – the response referred to only one individual] qualified him on both measures.
- If that was incorrect (which Atkins Bland isn’t sure about) it was due to a misunderstanding of the regulations rather than a disregard for them.

<u>Redress</u>

- The trustees decided to sell all of the investments by July 2016 and, beyond the amounts they chose to withdraw at various times, to keep the money within the Transact account but in cash.

- The benchmark I recommended for comparison with the Stirling Mortimer funds in my provisional decision is therefore inappropriate, and the correct measure should be the interest paid on the Transact cash account.

What I've decided – and why

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

Time limits

As we are an informal dispute resolution service I was aiming – where possible – for brevity in my provisional decision. I'd like to assure Atkins Bland that any wording cropped from the September and October 2018 emails was with that in mind, and not because I was seeking to downplay their significance. In any event, having reread the emails in their entirety, I'm not persuaded the presence of the omitted wording changes the points I was making.

I already acknowledged in my provisional decision that I could see Mr R1 was looking to resolve the situation 'amicably', but I said that wasn't an option open to Atkins Bland because of the definition of a complaint in the regulator's handbook: it was required to treat Mr R's concerns like any complaint.

To be clear on this, the application of DISP 2.8.2R(2) which governs our six- and three-year time limits is not a matter of considering what is fair and reasonable, which is the basis on which I'm required to determine the merits of a complaint. The extent of the 'reasonableness' test included in that rule is where specifically stated:

> *"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
> *…*
> *(2) more than:*
> *(a) six years after the event complained of; or (if later)*
> *(b) three years from the date on which the complainant became aware (or **ought reasonably** to have become aware) that he had cause for complaint;*
> *unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received…"*

Atkins Bland hasn't provided any persuasive evidence for why it considers Mr R1 ought reasonably to have been aware of cause for complaint at a time when the reported values of the Stirling Mortimer investments had only fallen a moderate way below their initial levels. This was consistent with the trustees being willing to take up to a medium-high level of risk (according to the fact find, "if opportunity is sufficiently attractive") – but remaining unaware that they lacked the capacity to take the level of risk involved in these two investments, because this wasn't properly assessed in Atkins Bland's advice.

So, having reached the view that Mr R1 ought not to have reasonably been aware of his complaint until the first investment suddenly fell to zero in the October 2017 statement, there is no provision for me to consider whether it was 'reasonable' for Atkins Bland to avoid addressing his concerns about the advice it had given as a complaint, simply because Mr R1 preferred to resolve the matter amicably.

In any event, I don't think that was what Atkins Bland was doing in its response of October 2018. The definition of a final response to a complaint includes that it may reject the complaint and gives reasons for doing so. Looking at the totality of Atkins Bland's October email it said:

- The objective for the investments *("to be reasonably short term and to provide potentially high returns from investing in overseas holiday property developments")*
- The reason that objective hadn't been achieved was due to *"collapse in the sector following the financial crisis 10 years ago"* and the ongoing lack of success by the fund managers (who Atkins Bland didn't consider were behaving fraudulently) to alleviate this.
- A complaint against Atkins Bland wasn't justified, in part because it would be driven by an 'epidemic' of 'the modern claims culture', and also because the complaint wouldn't succeed on its merits.
- That was because Atkins Bland didn't mis-describe the investments as low risk, Mr R1 was a high net worth and sophisticated investor who was willing to take sufficient risk, and the investments were sold to achieve overall diversification of risk within a portfolio that was broadly average risk.
- It was only with the benefit of hindsight and realisation of unforeseen events that the strategy had been proven to be poor.

There is no doubt in my view that Atkins Bland was rejecting a complaint, and giving its reasons for doing so. (It simply omitted to include the other necessary parts of a final response, such as giving referral rights to this service.) So it cannot claim, at the same time, that it was not a complaint.

<u>Merits</u>

I accepted in my provisional decision that it is possible Stirling Mortimer had wrongly classified the first (Spain) investment as a UCIS, given that it was part of the same PCC that was subsequently classed as intended for Qualified Investors rather than being a UCIS. Atkins Bland has provided no evidence that the Qualified Investors wording accompanied the promotion for the Spain fund, and I found no reference to the same in my review of the file.

So, the question remains why Atkins Bland wasn't considering Mr R1 (and R2)'s eligibility for promotion of UCIS at the time, and I've set out in the provisional decision why they were not so eligible. I could understand Atkins Bland's point if it turned out Mr R1 and Mr R2 were, in fact, Qualified Investors – but they also on my finding were not. I accept Atkins Bland may have been mistaken but it should have been more careful in familiarising itself with the regulations. Its mistake doesn't change the fact that the investments were likely promoted to the trustees in breach of the restriction on such promotions under FSMA.

Moreover, nothing Atkins Bland has said has altered my view that the investments were unsuitable for the trustees, for the reasons I gave in the provisional decision.

<u>Redress</u>

I've given further thought to Atkins Bland's point on this. I'm aware from the statements I do have that at the time the complaint was brought there was about £27,000 in total in cash within the SSAS, in various accounts. And that remains largely the case today. The only information I have from earlier statements is that the result of Mr R1 taking retirement benefits in 2008 left only £68,754 remaining in the Transact portfolio. I have no reason to doubt what Atkins Bland is saying - that in effect although the commercial property was providing rent to the SSAS which would pay ongoing pension income, the trustees later decided to liquidate the rest of the portfolio. It then seems the commercial property income proved to be insufficient, and/or they chose to draw down some more of the original £68,754 sum in addition - as of course they are entitled to do.

However, I'm not persuaded that this changes my overall view on whether the FTSE UK Private Investors Income Total Return Index is a fair and reasonable benchmark to use as a comparison. I'll explain why.

It's understandable that the trustees would seek to leave a 'reserve fund' in cash in the SSAS to meet immediate income needs, in the event rent was not paid from the commercial property. But it doesn't flow from that that they would want to leave a significant further sum, in all likelihood over £100,000 (had they not made the Stirling Mortimer investments) also in cash. As Atkins Bland itself says, they were prepared to take a risk.

If, as Atkins Bland may think, it's more likely the trustees would also have chosen to draw these funds out of the SSAS for their personal use – and I was persuaded of that possibility – then my award would simply change to one for loss of use of those funds in Mr R1 and Mr R2's hands. In that eventuality our service will typically look to the rate applied by the courts of 8% per year simple. Of all of the possible eventualities I find it most unlikely that this much money would have been left accumulating in the SSAS bank account being eroded by inflation.

Having looked at the date range Atkins Bland argues the SSAS was invested in cash, it is unlikely that an 8% per year simple award would be more favourable to Atkins Bland. I already said in my provisional decision that I couldn't be sure exactly what the trustees would have done, but I considered an award that assumed the compensation sum remained invested in line with the FTSE UK Private Investors Income Total Return Index was fair compensation. I remain of that view on the basis that an investment could feasibly be in the SSAS *or* in Mr R1 and Mr R2's hands – and I selected that benchmark because it was aligned with their attitude to risk.

Putting things right

My aim in awarding fair compensation is to put the trustees back into the position they would most likely have been in, had the SSAS not made the two investments in question.

The Transact account contained a large cash holding prior to making these investments, which would have needed to be invested elsewhere. And the trustees would then reasonably make some changes to those investments in the intervening years. I'm not in a position to say precisely what they would have done, but what I've set out below is fair and reasonable given their circumstances and objectives when they invested.

To compensate the trustees fairly Atkins Bland Limited should:

- Compare the performance of the two Stirling Mortimer investments with that of the benchmark shown below. If the fair value is greater than the actual value, there is a loss and compensation is payable. If the actual value is greater than the fair value, no compensation is payable.

- If there is a loss, it should ideally pay into the SSAS, to increase its value by the amount of the compensation and any interest. The payment should allow for the effect of charges and any available tax relief. Atkins Bland shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.

- If Atkins Bland is unable to pay the compensation into the SSAS – which I expect is likely in this particular case if Mr R1 and Mr R2 have retired – it should pay the total amount of compensation directly to them, split in such proportions as they agree as trustees of the SSAS.

- The payments direct to Mr R1 and Mr R2 should take into account that had it been possible to pay compensation into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so the trustees won't be able to reclaim any of the reduction after compensation is paid.

- The notional allowance should be calculated using Mr R1 and Mr R2's expected marginal rate of tax throughout retirement. I think it's reasonable to assume that they are likely to be basic rate taxpayers, so the reduction would equal 20%.

- Provide the details of the calculation to the trustees in a clear, simple format.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Further interest
Both Stirling Mortimer funds	Still exists but illiquid	FTSE UK Private Investors Income Total Return Index	date of each transfer respectively	date of my final decision	8% per annum simple if not settled within 28 days of receipt of the trustees' acceptance of the final decision

Income tax may be payable on any interest paid. If Atkins Bland considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell the trustees how much it's taken off. It should also give them a tax deduction certificate in respect of interest if they ask for one, so they can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Actual value
This means the actual amount paid or payable from the investment at the end date. If, at the end date, the investment is illiquid (meaning it cannot be readily sold on the open market), it may be difficult to find the actual value of the investment. So, the actual value should be assumed to be nil to arrive at fair compensation. Atkins Bland should take ownership of the illiquid investment by paying a commercial value acceptable to the SSAS provider. The amount paid should be included in the actual value before compensation is calculated.

If Atkins Bland is unable to purchase the investment the actual value should be assumed to be nil for the purpose of calculation. It may wish to require that the trustees provide an undertaking to pay it any amount they may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Atkins Bland will need to meet any costs in drawing up the undertaking.

Fair value
This is what the investments would have been worth at the end date had they grown in line with the benchmark. Any withdrawal, income or other distributions paid out of the *investments* (rather than the SSAS itself) should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Atkins Bland totals all those payments and deducts that figure at the end.

Why is this remedy suitable?

I've chosen this method of compensation because:

- I think the trustees would most likely have wanted to obtain capital growth with a moderate amount of investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given the trustees' circumstances and risk attitude.

I've considered the arguments about the distress the sale of these investments has caused the trustees, and Mr R1's claim for the costs of using a representative. I note that Atkins Bland initially responded to the complaint by denying liability and not giving him the right to refer matters to this service. However, I'm insufficiently persuaded that this in and of itself has caused Mr R1 costs that it would be appropriate for me to make an award for.

Many firms do deny liability, and their customers bring their complaints to us nonetheless asserting why they feel the firm is liable. And I expect that any professional representative would have informed Mr R1 at the outset of his right to approach us himself if he did not feel he required representation. It would be exceptional for me to make an award for costs and I'm not persuaded that's justified in this case. But, having regard to the impact the loss of these investments has had on the value of the SSAS, I require Atkins Bland to pay the trustees £300 for the distress caused.

My final decision

I uphold this complaint and require Atkins Bland Limited to pay Mr R1 and Mr R2 redress as set out above. They are reminded that they should notify Atkins Bland when accepting this decision, in what proportion the redress should be divided between them.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R1 and Mr R2 to accept or reject my decision before 13 April 2023.

Gideon Moore
Ombudsman