DRN-4516556

The complaint

Mr P complains that AJ Bell Management Limited failed to carry out appropriate due diligence on an investment he intended to make before accepting it into his Self-Invested Personal Pension ('SIPP').

What happened

Mr P applied for a SIPP with AJ Bell in February 2010 through his independent financial adviser, a business I'll call Firm A.

Firm A was an appointed representative ('AR') of TenetConnect Limited between 21 July 2008 and 30 September 2014.

The SIPP application form had an 'Investment Options' section, where Mr P was asked to specify his chosen investment option out of the following:

- Advisory
- Investment Partner
- Execution Only

None of these options were marked but beside them, someone had written, 'OFF PANEL INVESTMENT EXECUTION ONLY'.

In the 'Adviser Details' section, a stamp was placed with the details of Firm A. And the application stated that Firm A should receive 3% of the pension transfer value.

Mr P signed the SIPP application form declaration on 26 February 2010, which included a declaration where off panel investments were to be made. By signing the declaration, Mr P agreed that AJ Bell could accept instructions from his adviser in relation to off panel investments.

The SIPP application was accepted by AJ Bell and it was opened in March 2010. On 24 March 2010, around £14,000 was transferred to the SIPP from Mr P's existing personal pension.

In May 2010 AJ Bell received an 'Off Panel Investment Instruction' from Firm A on Mr P's behalf to invest in a company – I'll refer to this as 'the investment'. It also received an application form for the investment, and a declaration confirmed the client had read and understood the terms and conditions relating to the investment.

AJ Bell was also sent a 'Collective Investment Schemes' – Declaration for non-UK regulated and/or illiquid investments' form completed for Mr P, which set out some of the risks associated with investments of this nature. The form included a 'Declaration by Financial Adviser' which stated the following:

"I confirm that I have made the client aware of the risk factors and terms and conditions for the investment named above, set out in the key features and/or prospectus and other documentation provided, and the issues set out above.

I confirm that the client has been made aware of the above issues and notwithstanding, still wishes to proceed with the investment.

I confirm neither AJ Bell Management Limited nor Sippdeal Trustees Limited has provided any advice to the client on the suitability of this investment for their pension arrangement. I understand that neither AJ Bell Management Limited nor Sippdeal Trustees Limited accept any liability for any issues that may arise in respect of the investment."

Firm A signed this declaration on 24 May 2010.

The investment Mr P made took the form of shares in an unlisted company and the business of the company was property development. It intended to purchase land adjacent to a golf course in Spain with a view to acquiring planning permission and then building a number of luxury villas on in it. The life span of the investment was forecast to be five to ten years.

Mr P was part of a group of investors (family and friends) who had all decided to make the investment together.

AJ Bell was sent an 'Off Panel Investment Declaration', which Mr P signed on 5 July 2010. By signing this, Mr P agreed that he authorised AJ Bell to accept investment instructions from Firm A.

AJ Bell received additional instruction forms, application forms and Collective Investment Schemes Declarations between June and September 2010. Mr P invested a total of around £26,000 in the investment.

Mr P complained to AJ Bell in April 2019; he said AJ Bell had failed to carry out full and detailed due diligence of the investment before allowing it into his SIPP.

AJ Bell didn't agree it had done anything wrong by accepting the application from Mr P to make the investment. It said Mr P had appointed Firm A to be his financial adviser and Firm A had submitted the SIPP application to it, as well as the investment instruction. AJ Bell said it did not provide Mr P with any financial advice; that Mr P had agreed with its SIPP terms and conditions outlining this and that Mr P agreed AJ Bell could accept investment instructions from Firm A.

AJ Bell said that the investment was permitted to be held in the SIPP under HMRC rules and it had carried out a reasonable amount of due diligence checks on the investment before accepting it. It said this was in line with good industry practice for a SIPP operator, in order to establish:

- the nature and legal structure of the investment;
- that it was a genuine investment and not a scam, or linked to fraudulent activity, money laundering or pensions liberation;
- that appropriate custody arrangements were in place in order to ensure that the investment was safe and secure, and
- that the investment could be independently valued at the point of purchase and subsequently.

Ultimately AJ Bell said it was fair for it to have accepted the investment into Mr P's SIPP and that it understood Firm A had advised him to make the investment. Any concerns he had about the suitability of the investment for him was the responsibility of Firm A.

Mr P referred his complaint to the Financial Ombudsman Service in December 2019. He said he'd made his complaint alongside a group of other investors who'd lost money by making the investment. Mr P alleged that AJ Bell was in breach of the Principles for Businesses and the Conduct of Business Sourcebook. He also cited *Berkeley Burke Sipp Administration Ltd v Financial Ombudsman Service Ltd (2018) EWHC 2878 (Admin.)* which he said established that SIPP providers, such as AJ Bell, were required to carry out due diligence on any investment proposition before accepting it into the SIPP.

Mr P said the investment was plainly inappropriate as a vehicle to be offered by AJ Bell to the public. This was because the investment opportunity was purely speculative, there were conflicts of interest and no independent valuations or assessments of the land had been carried out, as per the Investment Memorandum.

The investment company was dissolved in March 2021. In June 2021, AJ Bell wrote to Mr P, saying that because the company had been dissolved, his investment was likely to have no discernible value and so it had removed the investment from his SIPP. It added that because the investment had now been finalised, it had arranged for the SIPP to be closed and the cash balance to be deducted as a final administration/closure charge.

The Investigator asked Mr P to explain how he had come to make the investment. Mr P said:

"For some years I had already been investing in land and property abroad along with a group of friends. The person who the group used to arrange the purchases of these properties in Spain and other Countries was a person called [Mr S] who was an acting agent for the developer company...

…At some stage, the idea came about that some members of our group would use their pensions to make a further investment in a piece of undeveloped land in Spain…

…a family friend mentioned that he was transferring his pension and for the monies to be used to purchase shares in a Spanish company called [the investment].

[The investment company] was the owner of a piece of land [in Spain]. The plan was for the land to be developed over a 10-year time scale into villas and apartments, and eventually sold for a profit. Because [the family friend] who I trusted decided to go ahead with these pension transfers, I decided I would do also.

After I decided I wanted to transfer my pension, [Mr S] our existing contact introduced me to a financial advisor, I understood I would need a financial advisor to assist me in transferring the pension to AJ Bell. After speaking with the financial advisor, he informed me that he could not give me any advice or recommendations either for the transferring the pension and investing the money into [the investment]. I understood that the level of service he provided me with was on an execution-only basis."

Mr P said that in effect, because other members of the group had already decided to move their pensions to make the investment, he decided to do so as well. And Mr S, who he'd known for a number of years, had already assisted him in making direct investments into another property investment in Spain. Mr P said he understood the land being developed was being purchased at 50% of its actual value and he could possibly see a return of 150%. Mr P said he thought the investment was relatively low risk as he was investing in a piece of land at 50% of its actual value.

When asked about what he understood AJ Bell's role to be, Mr P said he thought it was simply to facilitate the investment. However, he said he now knew that they were the pension trustees, and that this required them to carry out detailed due diligence into the investment before accepting it into the SIPP. He also felt AJ Bell had failed to stop an individual I'll refer to as 'Mr D', who he believed to be a Director of the investment company, from selling the land and pocketing the proceeds, particularly as AJ Bell had, by this time, already reported him to Action Fraud.

Mr P later reiterated that he received no advice from Firm A and Firm A had nothing to do with his decision to move his pension. He said he recalled signing a document confirming that he hadn't received any advice from Firm A, but could not locate a copy of it. Mr P said he had no intention of making a complaint about Firm A; it was his decision to make the investment.

Our Investigator asked AJ Bell to provide its file and asked questions about the due diligence checks it had carried out on Firm A and the investment so that they could consider the complaint.

AJ Bell provided additional information about Firm A and other investors who'd complained about Firm A's involvement. It said that it was aware of four complaints having been made about Firm A by customers who'd made the same investment via an AJ Bell SIPP. AJ Bell said the Financial Ombudsman Service had issued decisions on those cases, none of which were upheld. It provided a copy of published decision and gave the references of the other three cases. It said in each case the Ombudsman had found that Firm A should not have acted for the complainant on an execution only basis. But that he thought it more likely than not that the complainant would have found an alternative adviser to provide advice, or found a SIPP operator willing to accept the investment without the involvement of a regulated adviser. So, he thought the pension switch and the investment would've gone ahead regardless.

AJ Bell said:

"From reviewing those determinations we identified that [Firm A] had entered into an agreement with an unregulated introducer, who they knew would be introducing clients to them on the basis that [Firm A] would then arrange to open SIPPs for those clients, transfer their existing pension arrangements to those SIPPs and then invest in a single high risk unregulated investment via those SIPPs, on an execution only basis. In addition, [Firm A] knew that AJ Bell, as the SIPP provider, would only provide a non-advised service to those customers. The introducer and [Firm A] also knew that AJ Bell would not accept business from an unauthorised introducer, only from an adviser firm which was authorised and regulated by the [Financial Services Authority - FSA].

Those particular clients of Firm A were part of a group of nine friends and family who had each made a number of property investments, some of whom had provided witness statements to the FOS via TenetConnect. We do not have details of the nine individuals who were part of the group, nor have we had sight of those witness statements, but ask that you please identify whether or not [Mr P] was part of that group, or connected with that group, as part of your investigation."

"From reviewing those determinations we also identified that [Firm A] had contacted a member of our telephone Adviser Support Team on 3 March 2010 and it appears there may have been a breakdown in our systems and controls, as a consequence of human error by the individual involved, who is no longer with the business, so we are not able to obtain input from him directly. This may have resulted in him agreeing to accept business from Firm A in

relation to clients who had not been made aware of the related risks and the terms and conditions for the investment directly by [Firm A] or advised on the investments by [Firm A], because that business had been undertaken by [Firm A] on an execution only basis. However, the reason I refer to 'may' is because, although we have been able to locate the recording of the telephone call of 3 March 2010 which is referred to in the email of that date, a recording of which is attached as Appendix C, we have not been able to find the recording of the call which preceded it and which is referred to during the call. From the content of that call it would appear that it was on the earlier call that [Firm A] may have indicated that he was not advising the clients, although he is hesitant when it comes to explaining the basis on which he is acting on the recording. It would appear from the content that the member of AJ Bell's staff, who was relatively junior, did not appreciate the significance of what had been discussed from AJ Bell's perspective and was under the impression that [Firm A] was trying to protect himself against a subsequent claim by the customer, as he referred to [Firm A] doing what he needed to do 'to cover himself…

… We believe it clear from the circumstances of this particular case, that [Firm A] took advantage of the above human error by a relatively junior member of staff in order to introduce business to us on execution only basis, which he knew that we would not otherwise accept. In this regard, given the significance of the point and the extent of the risk, we find it difficult to believe that [Firm A] honestly believed that as a business we would be prepared to accept introductions on that basis, and that is why he did not formally write to us to confirm or otherwise endeavour to clearly document what had been 'agreed', which is what we would expect a regulated financial adviser to have done in such circumstances. However, notwithstanding that human error, we still believe that it was reasonable in the particular circumstances for us to accept the introduction and permit the investments. That is because this was not a situation where the management of the business had approved entry into an agreement or arrangement under which the business had agreed to accept the introduction of business on an execution-only basis to invest in a specific high-risk investment."

AJ Bell added that Firm A had charged the client 3% of the pension transfer value, which is the maximum amount it allowed as an initial advice fee, suggesting advice had been given.

AJ Bell responded as follows regarding the due diligence checks it had carried out:

<u>Introducer due diligence</u>

- Firm A completed its adviser registration process in September 2009, during which it accepted AJ Bell's 'Adviser Handshake' agreement.
- Following registration, AJ Bell checked that Firm A was regulated and authorised by the FSA (the then regulator). This confirmed Firm A had been authorised since 21 July 2008 as an AR of TenetConnect, which had been regulated since 1 December 2001.
- It understood Firm A's business model would involve the provision of a range of advisory services to their clients, which would include advice on opening SIPPs, the transfer in of existing pensions and subsequent investments. Firm A would be remunerated for the services they provided to their clients by the payment of adviser remuneration, as agreed with the client, the payment of which we would facilitate out of the client's SIPP.
- There was no expectation as to the number of introductions AJ Bell would receive from Firm A, nor did it have any discussions with Firm A about its business model or the number of introductions that it would make.

- There were no further discussions with Firm A about their client process or the business they were referring, as the number of introductions was not material in the context of AJ Bell's overall business.
- It didn't carry out ongoing checks on Firm A specifically following the introduction, but it received a weekly report from the regulator notifying it of changes to the status of authorised firms so it could update its systems accordingly.
- AJ Bell didn't pay any commission, introduction or other fees to Firm A in respect of introductions or otherwise.
- As a matter of policy, AJ Bell does not request copies of suitability or pension transfer reports from authorised advisers. This is because, as a SIPP operator, providing pension administration services on a non-advised basis, it does not have the expertise or access to the required information about the customer to form a view on the content of the adviser's suitability or pension transfer reports.
- AJ Bell is not required to do so under the Financial Conduct Authority ('FCA') Rules or Principles, as it is not responsible for assessing the suitability or appropriateness of investments or products recommended by authorised advisers.
- AJ Bell does not believe it is good industry practice for, nor is it reasonable to expect, a SIPP operator to request copies of suitability reports from FCA authorised and regulated advisers because by doing so they would appear to be accepting some degree of responsibility for the advice, and/or giving tacit approval (or rejection) of the regulated advice, when it is generally accepted, including by the FCA and the Financial Ombudsman Service in previous decisions, that is not their responsibility.
- Firm A has been associated with at least 41 customers of AJ Bell since 2009, either as a result of them having been introduced by Firm A or the transfer in of an existing customer to their agency. Mr P was the 11th customer introduced by Firm A.
- The number of introductions Firm A made in 2010 (when the customers who made the investment were introduced) accounted for 0.371% of the total business introduced during that period.
- 30 of the 41 customers introduced or associated with Firm A invested in more high-risk and complex type of investments of the nature which Mr P selected. However, as the overall volume of business received from Firm A was not material in the context of the AJ Bell business, this was not something which caused, or should reasonably have caused, it to have concerns about Firm A's business model.
- The SIPP application and investment processes are separate, so AJ Bell would not know in advance of opening a SIPP account what the intended investments were.

<u>Investment due diligence</u>

- It considered the investment to be acceptable for a SIPP under HMRC's rules at the time Mr P made his investment. It was not considered to be an anomalous investment as it was essentially a commercial property investment.
- It said, *"Our normal custom and practice at the time in relation to the approval of unregulated collective investment schemes, such as [the investment], was to review the related product literature, in this case the Investment Memorandum, and to have an information request completed by the manager of the investment. However, in this particular case, as we had already had an information request completed by the same manager, [Firm W – the project manager], in relation to two other schemes with the same structure, we did not require a further questionnaire to be completed. That was because we were satisfied that the structure involved, i.e. a 'genuinely diverse commercial vehicle', was an acceptable structure for a SIPP. In particular, as the use of a genuinely diverse commercial vehicle was not restricted by any HMRC rules nor would it result in the imposition of any additional tax charges.*

As the investment involved raising funds to finance the future acquisition of building plots via a Spanish company, as opposed to an investment in an existing development, the extent to which we could reasonably undertake due diligence in relation to the underlying investment was limited by the very nature of that investment. There was, however, nothing to indicate that it was not a genuine investment, or that it was a scam or linked to any fraudulent activity, money laundering or pensions liberation.

We were satisfied with the custody arrangements for the investment, as it would be held via a shareholding in an unlisted limited company which was registered in England and Wales. Although illiquid in nature, we were satisfied that the investment would be capable of transfer to a third-party buyer introduced by a customer or his advisers under the constitution of the issuer if it was not purchased by other existing investors under their pre-emption rights. We were also satisfied that the investment could be transferred in specie to another pension scheme or, on death, to the beneficiaries under a customer's SIPP.

We were also satisfied that the investment was capable of being independently valued on the basis set out in the Investment Memorandum.

In light of the above, [the investment] was an investment which we considered to be acceptable for a SIPP at the time [Mr P's] SIPP investment was made and, as a consequence, we do not believe that there was any breach of our due diligence duties in relation to the investment."

- It was Mr P's adviser's responsibility to assess its suitability and appropriateness for his particular circumstances and satisfy themselves that he had been made aware of commercial terms and related investment risks. There was nothing anomalous in the surrounding circumstances which was such that it could reasonably have caused AJ Bell to have considered it necessary to undertake any additional due diligence, as the underlying investment was essentially a property related investment.
- It did not commission an external report, and given that this was on the face of it an advised investment, there was nothing in the background circumstances which was such that it should reasonably have prompted it to do so. Although the nature of the investment was such that it would not be suitable for all retail customers, it wasn't the case that it wouldn't be suitable for any retail customers whatsoever, and as such, not be an acceptable investment for a SIPP.
- The investment involved raising funds to finance a speculative property purchase, the success of which was dependent upon planning permission for residential development being obtained, as opposed to an investment in an existing property development. So the extent of the duty imposed on AJ Bell in respect of valuation was not such that it needed to take any specific action in order to satisfy itself that the amount being subscribed by Mr P's SIPP for his investment was fair and reasonable.
- It was fair and reasonable in the circumstances of the case, for AJ Bell to rely on Mr P's financial advisers to ensure that he was satisfied with the valuation and understood the other commercial terms of the investment and the related risks. It was, however, indicated in the Investment Memorandum that independent valuations had been obtained, with details being provided, which were consistent with the terms of the investment proposals set out in the literature.
- AJ Bell didn't carry out any checks into the individuals connected with the investment.
- AJ Bell didn't ask Mr P to sign any risk warnings or disclaimers, but Firm A, as his financial adviser, signed declarations on his behalf, confirming that the risks had been explained but Mr P wished to proceed.

- The partially completed investment application form which it received from Firm A in relation to the final investment made by Mr P on behalf of his SIPP in September 2010, had been signed by Mr P on 8 September 2010. In that form Mr P confirmed that he had read and understood the Information Memorandum and related terms and conditions for the investment and had taken appropriate professional advice.

AJ Bell added that it started to have concerns about Mr D in connection with another company he was Director of, in 2016. And this led to it referring this business to Action Fraud. It said it did not have any concerns about this individual when Mr P made his investment.

After considering all of the information provided, our Investigator ultimately didn't uphold the complaint. He thought that Firm A was providing conflicting information to each side; AJ Bell believed Firm A was engaged to provide Mr P with advice on his pension transfer and investment, whereas Mr P understood Firm A was acting in an execution only capacity, and that it was not advising him on the transaction. Based on what he'd seen, which included the AR agreement Firm A had with TenetConnect, the Investigator thought AJ Bell would've reasonably considered Firm A was providing Mr P with advice on the pension and investment. And the volume of introductions AJ Bell had received from Firm A at the time of Mr P's application wouldn't have given it any cause for concern. So, the Investigator didn't think it was unreasonable for AJ Bell to have accepted the introduction from Firm A.

The Investigator believed that AJ Bell had undertaken sufficient due diligence checks on the investment, insofar as was possible at the time, given the speculative nature of it. There was nothing to suggest the investment wasn't genuine, even though it was relatively high-risk. The Investigator also noted Mr P had already undertaken other property and land investments in Spain, so likely understood and accepted the risks of making the investment. But even if AJ Bell had refused to permit the investment, he thought it was likely Mr P and Firm A would have found an alternative SIPP provider to accept it.

The Investigator explained that based on information provided by AJ Bell, it had no reason to have concerns about Mr D until 2016, and only in respect of his connection to another company. However, this then led to concerns about the investment in late 2016. And AJ Bell then wrote to investors in December 2016 to make them aware of the concerns it had about the valuation of the investment, which it had reduced to £1 until it received further information. The Investigator didn't think AJ Bell could've reasonably contacted investors earlier than this.

Mr P didn't accept the Investigator's view. His reasons were as follows:

- As per its own terms and conditions, AJ Bell did not permit execution only transactions for non-standard investments. AJ Bell said it believed Firm A had given Mr P advice but that this was a mistake and it ought to have discovered this. As such, the investment should not have been permitted.
- The Investigator had no evidence to suggest that Mr P would've gone on to make the investment regardless, even if AJ Bell hadn't permitted it.
- The Investigator had failed to take account of the approach established in *Berkeley Burke Sipp Administration Ltd v Financial Ombudsman Service Ltd (2018)* – AJ Bell should have looked carefully at the proposed investment and independently verified the viability of it.
- With this in mind, AJ Bell ought to have engaged a specialist in Spain to independently value the land, both at the time of the investment and after, when it was struggling to obtain valuations from the investment company.

- Whether the investment was fraudulent or not, there were many red flags. The Investment Memorandum highlighted these, for example that the investment proposition was purely speculative and that there were conflicts of interest between the parties involved.

The Investigator didn't change his view on the matter so the complaint was referred to me to make a final decision.

I issued a provisional decision on 16 November 2023, explaining why I wasn't minded to uphold Mr P's complaint. Mr P responded, saying he'd been labelled as an 'experienced investor' in the decision and asked why that was the case. He added that given the facts of the case and the purpose of the Financial Ombudsman Service, he couldn't understand why he wasn't being compensated for his loss. AJ Bell didn't provide any comments. So, I'm now providing my final decision on the matter.

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.

Having done so, I've decided not to uphold the complaint. I've considered Mr P's response but ultimately I see no reason to depart from the findings I made previously. So, I've largely repeated my findings as per my provisional decision below.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Businesses ('PRIN') and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The Principles for Businesses, which are set out in the FCA's handbook, "*are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G). And I consider that Principles 2, 3 and 6 are relevant to my consideration of this complaint. They say:

"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.

Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."

I've carefully considered the relevant law and what this says about the application of the FCA's Principles. In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) ('BBA') Ouseley J said at paragraph 162:

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

On 18 May 2020, the High Court handed down its judgment in the case of *Adams v Options SIPP* [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. I've taken account of both these judgments when making this decision on Mr P's case.

I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Options SIPP. And, HHJ Dight didn't consider the application of the Principles

to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of the judgments say anything about how the Principles apply to an Ombudsman's consideration of a complaint. But, to be clear, I don't say this means Adams isn't a relevant consideration at all. As noted above, I've taken account of both judgments when making this decision on Mr P's case.

I acknowledge that COBS 2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client)* overlaps with certain of the Principles, and that this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ('the COBS claim'). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim, on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal didn't so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case. I note that in *Adams v Options SIPP*, HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at paragraph 148:

"In my judgment in order to identify the extent of the duty imposed by Rule 2.1.1 one has to identify the relevant factual context, because it is apparent from the submissions of each of the parties that the context has an impact on the ascertainment of the extent of the duty. The key fact, perhaps composite fact, in the context is the agreement into which the parties entered, which defined their roles and functions in the transaction."

In my view there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams (summarised in paragraph 120 of the Court of Appeal judgment) and the issues in Mr P's complaint. In particular, as HHJ Dight noted, he wasn't asked to consider the question of due diligence *before* Options SIPP agreed to accept the store pods investment into its SIPP.

The facts of Mr Adams' and Mr P's cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Mr P's case. And I need to construe the duties AJ Bell owed to Mr P under COBS 2.1.1R in light of the specific facts of Mr P's case.

So, I've considered COBS 2.1.1R – alongside the remainder of the relevant considerations, and within the factual context of Mr P's case, including AJ Bell's role in the transaction.

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

I also want to emphasise that I don't say that AJ Bell was under any obligation to advise Mr P on the SIPP and/or the underlying investments.

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

The regulatory publications

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

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

I've considered them in their entirety but only made reference to the parts that I consider most relevant to my consideration of this complaint.

The 2009 Thematic Review Report

The 2009 report included the following statement:

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

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

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

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

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate*

permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.

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

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

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

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

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

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

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

I'm also satisfied that AJ Bell, at the time of the events under consideration here, thought the 2009 Thematic Review Report was relevant, and thought that it set out examples of good industry practice. AJ Bell says it *did* carry out checks on Firm A when it registered to transact business with it and that it undertook some due diligence checks on the investment. So, it clearly thought it was good practice to do so, at the very least.

Like the Ombudsman in the *BBSAL* case, I don't think the fact the publications, (other than the 2009 Thematic Review Report), post-date the events that took place in relation to Mr P's complaint, means that the examples of good practice they provide weren't good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

It's also clear from the text of the 2009 and 2012 reports (and the *"Dear CEO"* letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the regulators' comments

suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it's clear the standards themselves hadn't changed.

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

Overall, in determining this complaint I need to consider whether AJ Bell complied with its regulatory obligations as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regards to the interests of its customers (in this case Mr P), to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I'm looking to the Principles and the publications listed above to provide an indication of what AJ Bell could have done to comply with its regulatory obligations and duties.

Mr P's relationship with AJ Bell and other connected parties

AJ Bell says it is an execution only SIPP administrator, which means that it only acts on the instruction of the investor or any third party professional who has authority to make an instruction on their behalf. AJ Bell said it does not provide financial advice so it was not involved in the advice given to Mr P as a member of the SIPP, or assessing whether the investment was suitable for him. It said these were matters for the financial adviser acting on Mr P's behalf, Firm A.

Mr P has explained that he was introduced to Firm A by an unregulated introducer, Mr S, who had previously been regulated but was not regulated in any capacity when Mr P and the other investors in the group used their pension monies to make the investment.

Mr P has said that Firm A did not give him any advice and that he understood Firm A was facilitating the transaction on an execution only basis. Mr P says he signed a letter to this effect, but he was unable to provide a copy of it.

I accept that AJ Bell didn't provide any advice here, and so it didn't have an obligation to consider the suitability of the investment for Mr P. Nevertheless, I think AJ Bell was required (in its role as an execution only SIPP provider) to consider whether it was appropriate to accept business from Firm A and to consider whether the investment was an appropriate investment to make within its SIPP. And overall, I think AJ Bell's duty as a SIPP operator was to treat Mr P fairly and to act in his best interests. So, taking account of the regulator's guidance and what I consider to have been good practice at the time, I think it ought to have carried out due diligence to check points such as:

- whether Firm A was regulated to provide pensions and investment advice and had a clear disciplinary history;
- that it understood Firm A's business model and what services it provided its clients;
- that it understood how the investment would operate;
- that the investment was a genuine asset and was not part of a fraud or a scam or pensions liberation;
- that the persons with significant control over the investment had a clear disciplinary history;
- that the investment was safe/secure;
- that the investment could be independently valued and that it wasn't impaired.

What checks did AJ Bell carry out on Firm A

AJ Bell has said that it only allows FCA (then the FSA) regulated and authorised businesses to transact with it. It said that although it now understands an unregulated introducer, Mr S, was involved, it had no knowledge of this at the time. Mr P's SIPP application form and other related documents were all submitted to it by Firm A.

It doesn't appear that AJ Bell had a specific introducer agreement with Firm A before accepting business from it. However, it has explained that when Firm A completed its adviser registration process in September 2009, Firm A accepted AJ Bell's 'Adviser Handshake' agreement. I've seen a copy of this and it sets out a summary of the terms upon which AJ Bell accepts business from an adviser registered with it. This included a section called 'Your Responsibilities', which said, amongst other things that the adviser would comply with the principles and rules as laid down by the FSA at all times and that all matters pertaining to advice to clients in accordance with FSA rules were the adviser's responsibility.

Following registration, AJ Bell says that it checked that Firm A was regulated and authorised by the FSA. This confirmed Firm A had been authorised since 21 July 2008 as an AR of TenetConnect, which had been regulated since 1 December 2001. And Firm A had the relevant permissions to advise on pensions and investments. So, AJ Bell was happy to accept business from it.

AJ Bell was asked what additional checks it undertook on Firm A, but it said this was the extent of it. Nevertheless, it understood Firm A's business model would involve the provision of a range of advisory services to their clients, which would include advice on opening SIPPs, the transfer in of existing pensions and subsequent investments. Firm A would be remunerated for the services they provided to their clients by the payment of adviser remuneration, as agreed with the client, the payment of which it would facilitate out of the client's SIPP.

AJ Bell has told us that it did not accept SIPP applications on an execution only basis, it required customers to have received advice on their pension transfers and investments. And it says that Firm A misled it about this. But having reviewed the documents Firm A and/or Mr P were asked to complete for AJ Bell to open the SIPP, make the pension transfer and the subsequent investment, I cannot see any documents that set out this requirement. It may have been implied that as an adviser-led SIPP, AJ Bell expected clients to have received pensions and investment advice, but that was not explicitly stated anywhere. The Adviser Handshake agreement didn't set out this requirement, and there were no sections on any of the AJ Bell application forms or investment instructions where Mr P or Firm A could say whether or not advice had been given. If this was a requirement, as AJ Bell says it was, I would've expected that to be clear in the documentation.

In the absence of any documents confirming this, particularly in view of the lack of this requirement being detailed in the Adviser Handshake agreement, I would've expected AJ Bell to ask further questions of Firm A when it registered to transact business with it. I think it ought to have asked questions to understand Firm A's business model, including the type of business it intended to introduce and whether or not it gave clients advice. I think that this would've been a reasonable step to take in order to meet the requirements of Principles 2 and 3. And as AJ Bell didn't, as a rule, accept execution only business, I think it was even more important for it to establish this at the outset.

It also appears that by 3 March 2010, AJ Bell was aware that Firm A was processing pension transfers and facilitating non-standard investments for a group of investors who were all making the investment on an execution only basis. A call took place between Firm A

and an agent of AJ Bell on 3 March 2010 where this was discussed. AJ Bell provided a copy of this call recording with its file on this complaint and I've listened to it.

In the call, Firm A discussed the documents its clients needed to submit in order to process the investment. It doesn't appear that this conversation was specific to any particular consumer, instead it related to a number of clients Firm A was arranging the investments for, which included Mr P. Firm A mentioned that it had written on some forms that the investments to be made through the SIPP were off panel investments on an execution only basis – as it had written on Mr P's application form. Firm A was informed that it needed to provide an off panel investment declaration for each client, and then off panel investment instruction forms that it could sign on behalf of clients. Firm A also needed to sign an adviser declaration for off panel investments, which AJ Bell would email to it. Firm A said it was doing this without giving advice and asked whether there was somewhere it could state this on the forms. Firm A said it would write a note to this effect and the AJ Bell agent agreed Firm A should do what it thought it needed to do to cover itself. AJ Bell said that from the call, its agent appears to have accepted this arrangement, but points out that this was not the position of AJ Bell.

I think it's evident from the call that Firm A wasn't aware of AJ Bell's policy to only accept advised business. Had Firm A understood it, I think it's unlikely it would have been so forthcoming with AJ Bell's agent that it wasn't providing its clients with any advice.

With this in mind, I think that if AJ Bell had been acting in line with the Principles and good industry practice it would have made appropriate enquiries with Firm A about the business it intended to introduce, when Firm A registered with it in September 2009. I think Firm A would've been up front with it and explained that it was not providing the group of investors with any pension or investment advice. I say this because of how forthcoming Firm A was with the AJ Bell agent on the phone. And the fact Firm A had made it plainly clear to Mr P, and other investors like him, that it wasn't providing them with advice and Mr P understood that. So, I've no reason to doubt that Firm A would've been honest with AJ Bell about its intention not to provide those clients with advice.

This all means that I think that AJ Bell ought to have refused to accept Mr P's SIPP application form in February 2010. By this time, I think AJ Bell ought to have established that Firm A was not providing Mr P with any pension or investment advice and intended to simply arrange the pension transfer and subsequent investments on an execution only basis. As this was contrary to AJ Bell's own policy, I think AJ Bell ought reasonably to have refused the introduction of Mr P's business.

However, that doesn't automatically mean that it is fair and reasonable to uphold this complaint and hold AJ Bell liable for Mr P's loss to his pension. I have to consider what would have happened if AJ Bell had refused Mr P's application to open a SIPP with it for the purpose of using his pension monies to make the investment.

And on balance, having considered the evidence in this complaint, and evidence that I've seen on other similar complaints brought by investors in the group, I think Mr P would have sought out another SIPP operator which was prepared to accept execution only instructions. And I'm satisfied that such SIPP operators existed at the time; there was no general requirement for customers to take advice before transferring a personal pension and/or making an investment. So, I think Mr P would've most likely found an alternative SIPP operator through which he could make the investment and proceeded regardless.

Mr P says there is no evidence to substantiate this. Of course, I cannot be certain that this would have definitely happened. But I am required to make my determination based on what I think is most likely to have happened, i.e. on the balance of probabilities. And I think it's

more likely than not that Mr P would have proceeded to find an alternative SIPP operator to accept his investment. Based on the evidence I've seen, and Mr P's own testimony, he had already decided to make the investment before he was introduced to Firm A – most likely because he'd been persuaded to do so by the introducer, Mr S, and the other members of the investment group. Firm A was clear with Mr P that it would not be advising him on the pension transfer or investment and that didn't deter Mr P from proceeding. So, I don't think the fact AJ Bell would've refused to permit the SIPP application, on the basis that advice hadn't been given to him, would've deterred him either. I think Mr P had already decided to make the investment without him having received advice.

Although I think that Mr P would've likely submitted his application to another SIPP operator who was happy to accept it on an execution only basis, I still have to consider whether it would've been reasonable for another SIPP operator, acting in accordance with the Principles and good industry practice, to accept the investment into the SIPP. If no other SIPP operator should have accepted the investment into the SIPP, then I think it would be fair and reasonable to hold AJ Bell liable for Mr P's loss in any event.

So, I've considered the due diligence checks that I think a reasonable SIPP operator ought to have carried out on the investment before it should've accepted it. And whether the information it ought to have gathered should have led a reasonable SIPP operator acting in line with the Principles to decline to accept the investment into a SIPP.

What due diligence checks should a reasonable SIPP operator have carried out on the investment?

As the regulator has made plain, SIPP operators have a responsibility for the quality of the SIPP business that they administer. So, SIPP operators should undertake appropriate independent enquiries about the nature or quality of an investment proposed before determining whether to accept or decline it into its SIPP, which would mean making checks that go beyond simply reviewing the investment literature. Mr P argues here that this is where AJ Bell failed in its duties. For example, Mr P says that AJ Bell failed to obtain an independent valuation of the land by a suitably qualified surveyor in Spain. And that this was a breach of AJ Bell's duty to interrogate the viability of the investment.

But as I've said above, I'm not considering what AJ Bell did or didn't do here. Instead, I'm considering what a reasonable SIPP operator should have done before accepting the investment into a SIPP. And I think that would've included being satisfied in respect of the following points:

- that the investment was a genuine asset and was not part of a fraud or a scam or pensions liberation;
- that the persons with significant control over the investment had a clear disciplinary history;
- that the investment was safe/secure;
- that the investment could be independently valued and that it wasn't impaired.

Having considered the evidence provided and Mr P and AJ Bell's comments, I'm satisfied that it would've been appropriate for a reasonable SIPP operator acting in line with the Principles to accept Mr P's investment into a SIPP.

I think that as an initial starting point, a reasonable SIPP operator ought to have checked whether the nature of the investment was such that it was permitted to be held in the SIPP under HMRC rules. And I think this could've been ascertained by requesting and reviewing the Investment Memorandum ('IM'). The IM provided significant detail about how the

investment was valued, the arrangements for buying and selling shares, the custody arrangements and the restrictions on the type of client who could invest in the scheme.

The IM confirmed the structure of the investment was a genuinely diverse commercial vehicle ('GDCV'). So, I think a reasonable SIPP operator would've fairly considered the investment to be a GDCV, which could be permitted to be held in a SIPP.

I think there were limited investigations a SIPP operator could carry into the investment to understand the nature and operation of it given the stage the investment was at. But from reviewing the IM, a SIPP operator would've understood the investment offering was shares and bonds in a GDCV, the purpose of which was to raise funds in order to invest in shares in a Spanish Holding Company, which would then use the funds to acquire land to be developed in Spain. The executive summary of the IM stated:

"Current market conditions provide an opportunity to purchase land in this particular region of Spain and to acquire planning permission to develop/build properties at a significant discount to the land values prevailing in November 2008. A report was prepared by [Firm B - a chartered surveyor registered in Gibraltar] in November 2008, where the report valued each plot… at approximately €261,000. Due to a fall in the market for such development properties as a result of lower demand due to the economic recession, the opportunity exists today to acquire these plots for approximately €110,000. Negotiations have taken place regarding the purchase of the plots… and therefore the proposed pricing is not purely speculative, although remains subject to contract and there is no binding contract for the acquisition of the Land at this price or at any price.

The intention is initially for the Spanish Holding Company to acquire 4 land plots with an estimated purchase price of €440,000 (excluding the costs of acquisition) with the option to acquire additional plots if further monies are raised at a later date.

The Spanish Holding Company will hold the land for the foreseeable future with the intention to either:

- *a) sell on the land at a later date for profit;*
- *b) to develop out the project when market conditions improve and sell on the completed properties, or retain the properties and rent the properties out to third parties. If this route is followed, it is anticipated that no building will take place within the first four years of the holding…*

[The investment company] aims to raise a minimum of £600,000 with the intention of investing that cash in the Spanish Holding Company which in turn will acquire 4 plots of land described above. Due to current market conditions, [Firm W] believe the land can be acquired for approximately 50% less than valuations as of November 2008. Planning permission will be sought to develop out the 4 plots with the intention of building 3 to 4, four bedroom luxury villas. The development will benefit from an extremely high quality finish, with luxury features throughout… It is believed that, dependent on market conditions, but based on valuations for properties previously constructed of this nature and in a similar location, sales values could exceed €800,000 each…"

So, I think it was clear from the IM that the investment, at the stage at which Mr P was proposing to invest, was highly speculative. It was essentially at the point where the investment was seeking 'seed' money. So, the company had no assets into which a SIPP operator could reasonably be expected to investigate further. And as the Spanish Holding company did not yet exist or own the land, it wasn't unreasonable that no property developer or architect was attached to the project, particularly as developing the land was only one of

the routes set out in the IM. It was possible the land, once acquired, would simply be sold on for profit.

Although the IM referred to a valuation of the land which had been carried out by Firm B in November 2008, this was not part of the IM. So I think requesting sight of this valuation would've been good practice, but ultimately by the time Mr P sought to invest, this valuation was over a year old. And in any event, the aim of the investment scheme was to purchase the land at a price below the valuation. And that there was no guarantee the price quoted in the IM would be the price at which the land would be acquired. So, I don't think that the absence of the earlier valuation or an additional current independent valuation would've been a barrier to a SIPP operator accepting the investment into the SIPP. Ultimately, the price of the land to be purchased was to be negotiated once the investment company had raised the necessary starting capital. And although there was no current valuation, I'm satisfied that the investment could be independently valued in future because it was tied to the value of land for development.

I also note that the IM contained numerous warnings about the risks involved in investing in the scheme. For example, in the general section at the beginning of the IM, it stated that an investment in the company was speculative and involved a high degree of risk. And that investing in the company might expose the investor to a significant risk of losing all of the amount invested. A further section entitled 'Risks/Taxation' set out the numerous risks attached to the scheme in detail. Mr P seems to suggest that because the investment was so high-risk, it should not have been permitted. But the fact that the scheme was speculative and carried a high degree of risk does not mean that AJ Bell or any other SIPP operator acting in line with the Principles and guidance should not have permitted the investment to be held in the SIPP, particularly as the IM was very up front about the risks involved. And the structure of the investment was not an unusual one in view of its aim. The risks, too, were generally akin to those that should reasonably be expected with an investment of this nature.

Mr P appointed Firm A to act on his behalf in setting up the SIPP and making the investment. And when Firm A applied to make the investment through Mr P's SIPP, AJ Bell required it to complete a 'Collective Investment Schemes – Declaration for non-UK regulated and/or illiquid investments' form. This form set out the various risks involved with an investment of this nature and included an adviser declaration which said:

"I confirm that I have made the client aware of the risk factors and terms and conditions for the investment named above, set out in the key features and/or prospectus and other documentation provided, and the issues set out above.

I confirm that the client has been made aware of the above issues and notwithstanding, still wishes to proceed with the investment.

I confirm neither AJ Bell Management Limited nor Sippdeal Trustees Limited has provided any advice to the client on the suitability of this investment for their pension arrangement. I understand that neither AJ Bell Management Limited nor Sippdeal Trustees Limited accept any liability for any issues that may arise in respect of the investment."

I think it's likely that another SIPP operator in the position of AJ Bell would've had a similar requirement where non-standard investments were being made through the SIPP, particularly where accepting business on an execution only basis.

I'm also aware that Mr P signed the investment application form declaration submitted in September 2010, which confirmed he had read and understood the terms and conditions relating to the investment.

So, even though the investment scheme was in its very early phases and clearly carried a high degree of risk, I think it would've been fair for a reasonable SIPP operator to believe that Mr P had seen the IM and understood and accepted the risks involved. That is regardless of whether it believed Mr P had been advised to invest in the scheme or not.

I don't think the investment contained any other concerning features that should've led a reasonable SIPP operator to question it further. While it was an illiquid investment, and was highly speculative, I don't think the specific investment proposed any additional risks such that a reasonable SIPP operator ought to have refused to permit it to be held in the SIPP. And, overall, I think that reasonable checks into the investment would've established the investment was genuine and could be independently valued.

Mr P has raised concerns about Mr D, who Mr P believed to be the Director of the investment company, and his conflict of interest. Mr P also believes that the investment scheme was fraudulent from the start.

I think that carrying out checks into the persons of significant control within the investment scheme before accepting the investment into a SIPP would've been good practice at the time. So, I've thought about what such checks would've revealed.

The IM explained that a 'Ms A' was Director of the investment company and Mr D was in fact the Secretary of it. The IM didn't say who the Director of the project manager, Firm W, was, but according to Companies House it was the same arrangement as with the investment company; Ms A was Director and Mr D was Secretary. The IM also set out that the Directors of the Spanish Holding Company were to be Ms A and Mr D.

Mr P says that this was an inherent conflict of interest. The IM acknowledged that certain inherent conflict of interest arose from the relationship between the investment company and the project manager. But the IM said:

"No transaction is permitted to take place in relation to the sale or other disposal of any of the Plots or the developed land between the Company, the Spanish Company or the Project Manager or any member of the Project Manager's Group or with any director or shareholder of the Project Manager unless that transaction is approved by a Special Resolution of the shareholders so as to ensure that such transaction proceeds only on arm's length terms and a fair valuation save to the extent that investors may by such resolution otherwise approve."

So, I think protections were in place to manage the conflict of interest between those parties. And I don't think there were any more concerning conflicts of interest, such as a connection between Firm A or the introducer, Mr S, and the investment company or the project manager.

I think a reasonable SIPP operator should have been expected to carry out checks into Ms A and Mr D. But I don't think any checks on those individuals would've given them any cause for concern. Ms A and Mr D were involved with several companies together but none of those companies had any adverse notices attached to them which should otherwise have given a reasonable SIPP operator cause for concern. So, I don't think carrying out checks into the persons of significant control would've led a reasonable SIPP operator refusing to permit the investment in the SIPP.

I'm also not persuaded that there were any signs or indications that the investment scheme was fraudulent. The land existed and I understand that members of the investment group (though I'm not sure whether this included Mr P), had been out to visit the land before making the investment.

It appears that Mr P's concerns that the investment scheme is/was fraudulent, stems from the failure of it to realise any profit – Mr P says the funds invested have been appropriated by the project manager. But I haven't seen any evidence to suggest that the scheme was fraudulent from the outset, or that AJ Bell or any other reasonable SIPP operator ought to have considered that to be the case.

I appreciate Mr P has legitimate concerns about what has happened to the invested funds, but based on the company accounts for the year ending September 2012, it appears that the investment company did use the invested funds to acquire shares in the Spanish Holding Company. And according to Mr P, I understand the land was acquired as planned. So, I don't think that this demonstrates the investment scheme was fraudulent from the outset, as the investment initially proceeded as explained in the IM.

Lastly, I note that the IM set out that the investment could only be promoted to certain individuals. The IM said that the shares and bonds were not units in an unregulated collective investment schemes for the purposes of the Financial Services and Markets Act 2000 ('FSMA'). It said their lawful promotion is governed by the FSMA (Financial Promotion) Order 2005 (''FPO'). It further stated that the categories of persons to whom promotion of shares and bonds could be made included investment professionals; certified high net worth individuals, certain high net worth companies, trusts and partnerships, certified sophisticated investors and self-certified sophisticated investors.

I don't think that a reasonable SIPP operator would've needed to satisfy itself that Mr P fell within one of these categories, as it appears the unregulated introducer promoted the investment to Mr P. But I'm mindful that the regulator set out, in the guidance I've referred to above, that SIPP operators were expected to be able to identify possible instances of financial crime and consumer detriment under the Principles. The application form that Mr P completed for AJ Bell stated that he was a self-employed shop owner. And it's reasonable to assume that information would've been disclosed in an application form for any other SIPP. As such, I think that could've alerted another SIPP operator to the possibility that Mr P may not have been eligible for promotion of the investment. It's evident that Mr P went on to invest all of the money he transferred to the SIPP in this particular investment, which wasn't a standard investment and as such carried a higher degree of risk. So, I think a reasonable SIPP operator considering whether to accept Mr P's investment instructions ought to have been alive to the potential for consumer detriment here.

As such, I think it would've been reasonable for the SIPP operator to have asked Firm A to provide confirmation that Mr P was eligible to invest in the scheme. And indeed, I've seen instances where SIPP operators have asked customers in a similar position to sign, for example, high net-worth or sophisticated investor declarations, to confirm their eligibility despite the SIPP operator not having promoted the investment. So, I think it is fair to say this would constitute good practice and would be acting in customers' best interests.

While I think a reasonable SIPP operator ought to have taken this extra step before accepting Mr P's investment, ultimately I'm not persuaded it would have made a difference to the investment proceeding.

I say this because I think Mr P would most likely have met the criteria for at least one of the categories of investor, that being a 'self-certified sophisticated investor'. Mr P questions why he has been described as an experienced investor. But in bringing the complaint, Mr P told us that he'd invested in overseas property and land developments for a number of years before being introduced to this investment. So, I don't think it's unreasonable to say Mr P was already experienced in the type of investment he was going on to make here. And I think, if asked by AJ Bell or any other reasonable SIPP operator, Mr P would've most likely signed the self-certified sophisticated investor statement. And I think this would've satisfied a

reasonable SIPP operator acting in line with the Principles that it was accepting an investment that had been promoted to Mr P because he was eligible to invest in it.

Summary

Overall, although Mr P was seeking to invest in a speculative land development opportunity, which the IM highlighted was very high risk, I'm not persuaded that AJ Bell, or any other reasonable SIPP operator, should've declined to accept the investment into Mr P's SIPP. The investment was not overly complex and Mr P had been made aware of the risks involved. So even though I don't think AJ Bell ought to have accepted the introduction from Firm A – for the reasons given above – I think that it is fair to say that Mr P would've most likely found an alternative SIPP operator to accept the execution only pension transfer and investment instruction. And I think that it is fair to say that any SIPP operator acting in line with the Principles and regulatory guidance would have permitted the investment to be held in the SIPP. So, I don't think it would be reasonable to hold AJ Bell responsible for Mr P's loss to his pension as a result of him making the investment.

My final decision

For the reasons set out above, I'm not upholding this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 26 January 2024.

Hannah Wise
Ombudsman