DRN-5032060

The complaint

Mr B has complained that he was advised to consolidate existing personal pensions into a self-invested personal pension ('SIPP') with AJ Bell Management Limited ('AJ Bell'). He was then advised to make an investment in his pension which he says has lost value. Mr B's complaint is that AJ Bell did not carry out adequate checks before accepting that investment in his SIPP.

What happened

In 2008 Mr B was contacted by the independent financial adviser who helped him with his mortgage, a business I'll call 'Firm M'.

Firm M was regulated by the Financial Conduct Authority ('FCA' – then known as the Financial Services Authority 'FSA') until 16 December 2009 when its authorisation was revoked by the FCA as a result of enforcement action. Prior to this, Firm M was regulated to provide pension and investment advice.

Firm M arranged a meeting to discuss Mr B's pensions and he was advised to consolidate his four existing pensions into a SIPP with AJ Bell. Firm M told him that by doing so he would receive much better returns. Firm M specifically recommended an investment in Stirling Mortimer's No.8 Coratina fund ('Coratina'), which Mr B says he was told involved the development of overseas properties and that it was a safe, low-risk investment.

Mr B completed a SIPP application form in January 2009 and this was received by AJ Bell on 2 February 2009. Mr B included the details of four personal pension plans he wished to transfer to the SIPP, with a total value of approximately £45,000.

The SIPP application form had an 'Investment Options' section, where Mr B was asked to specify his chosen Investment Partner, but this was left blank. Mr B was asked to confirm whether it was his intention to hold investments outside of AJ Bell's panel of investment partners – the 'yes' option was ticked.

In the 'Adviser Details' section, a 'Mr K' of Firm M's details were given. And the application stated that Firm M should receive 3% of the pension transfer value. Mr B signed the application declaration on 20 January 2009. The SIPP application included an 'Off Panel Investment Declaration', which Mr B also signed on 20 January 2009. By signing this, Mr B agreed that he authorised AJ Bell to accept investment instructions from Firm M.

The SIPP was opened and AJ Bell received the funds from Mr B's existing pensions into the SIPP between 13 February and 10 March 2009.

AJ Bell received an 'Off Panel Investment Instruction' from Firm M on Mr B's behalf to invest £42,000 of Mr B's pension monies in the Coratina fund. This was signed on 11 March 2009.

AJ Bell also received an application form for the Coratina investment, and Mr B signed a declaration on 20 January 2009 confirming he had read and understood the terms and conditions of the Coratina Offer Document dated 7 August 2008. He also confirmed he

understood and accepted the risk factors set out in the Offer Document and had read and understood the disclosure statements.

Coratina was described in the Offer Document as a registered closed-ended investment company incorporated in Guernsey. The intention was for the company to invest substantially all of its assets in Right to Purchase Contracts relating to property developments within Mexico. Right to Purchase Contracts were explained as follows:

"A Right to Purchase Contract gives the Company the right and obligation to purchase a property from the Developer when it is completed (a "Right to Purchase Contract"). The cost of the Right to Purchase Contract (which is also a deposit on the completion value of the underlying property) is between 30% and 50% of the "off-plan" completion price of the same property (the "Deposit"). As part of the Right to Purchase Contract, a Developer provides a commitment to complete the property to an agreed specification. Developers use "off-plan" sales and Right to Purchase Contracts to finance the development and to provide certainty to the financial outcome of the development.

The purchase price specified in the Right to Purchase Contract is normally set at a discount to the current market value of similar properties. Historically this discount in past projects in Mexico and elsewhere has typically been between 10% and 30% of the current market value at completion. During the course of construction, which can be anything up to 3 years, the Directors expect the value of the Right to Purchase Contract to increase as the discount to market value narrows to zero at completion. In addition, if valuations in the local property market increase, the Directors expect the value of the completed property and therefore the value of the Right to Purchase Contract to increase.

The Right to Purchase Contracts are tradable. This means that the Company has the right to sell the contract (including the obligations in relation to it, as well as the benefits attached) to a third party rather than complete the purchase of the completed property. It is the intention of the Company to sell the Right to Purchase Contracts rather than complete on the purchase of the properties."

AJ Bell was also sent a 'Collective Investment Schemes – Declaration for non-UK regulated and/or illiquid investments' form completed for Mr B, 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 M signed this declaration on 11 March 2009.

AJ Bell sent £42,000 to be invested in the Coratina fund on 12 March 2009. Mr B's investment in the Coratina fund was settled on 24 March 2009.

The FSA issued a Final Notice against Firm M on 16 December 2009, explaining that the FSA had given Firm M a Decision Notice on 2 October 2008 which notified it that the FSA had decided to cancel its permissions. The Final Notice said Firm M had referred the decision to a Tribunal, and the Tribunal's written decision of 14 December 2009 determined that Firm M's permissions should be cancelled on the grounds that it was not fit and proper by reason of its connection with Mr K, its Director and sole shareholder.

The Tribunal decision said in summary, the FSA's case against Mr K was that he deliberately misled the FSA about how Firm M operated its business, at first during a supervisory visit in November 2005, and thereafter until May 2007, in the course of various communications and interviews with the FSA.

"The FSA contended that:

(1) *During a supervisory visit in November 2005,* [Mr K] *told the FSA that* [Firm M] *did not use unapproved persons to visit and liaise with its clients, but rather that* [Mr K] *and a* [Mr E - another director of Firm M] *visited and advised each client personally. He made no mention of any relationship between* [Firm M] *and a Nevis company,* ("[MSL]"). *In fact the true position was that* [Firm M] *used unapproved persons to visit all clients, collect information, explain products and assist them in filling out application forms. These persons were as a matter of form employed by* [MSL] *which provided their services to* [Firm M]. *However as a matter of substance they were under the control of* [Mr K] *and* [Firm M];

(2) During the FSA's investigation, and after the FSA discovered that [Firm M] *did use unapproved persons and the existence of MSL,* [Mr K] *represented first that he was not personally involved in and had no connection with MSL, and then when that story was exposed as untrue that* [MSL] *was owned and operated by a* "[JG]". *In fact the true position was that* [Mr K] *arranged for the incorporation of* [MSL]*, opened and operated its bank account, and was the sole director of its operations.* [JG] *does not exist and was a fictitious invention of* [Mr K] *(whose middle names are* "[JG]") *in a deliberate and dishonest attempt to deceive the FSA."*

The Tribunal accepted the FSA's evidence and found Mr K had demonstrated a lack of honesty and integrity, had failed to be open, candid and truthful with the FSA and was not a fit and proper person to perform any function in relation to any regulated activity. It also fined him £75,000.

On 28 June 2013 the Coratina Fund was put into shareholders voluntary liquidation and its listing on the Guernsey Stock exchange was cancelled. Liquidators were appointed.

Another personal pension worth around £300 appears to have been transferred into Mr B's SIPP in February 2014.

On 20 October 2016 Mr B received an update from AJ Bell, explaining the Joint Liquidators of the Coratina fund had confirmed they were in a position to conclude the liquidation as there were no assets to realise. As such, AJ Bell concluded the investment was likely to have no discernible value and there was little prospect of recovery, so it had removed the investment from Mr B's SIPP. AJ Bell further explained:

"We understand that the Financial Services Compensation Scheme (FSCS) may be accepting claims in relation to this investment. Should you require any further information, their contact details can be found on their website- www.fscs.org.uk/contact-us

If you believe you were advised by a UK-regulated financial adviser to invest in this investment, you may wish to speak with them directly to establish whether any compensation might be due. If they are no longer in business, you may wish to contact the FSCS directly."

The SIPP was subsequently closed in 2017, with the remaining cash balance used to offset outstanding fees.

Mr B made a claim to the Financial Services Compensation Scheme ('FSCS') about Firm M in 2018. In early 2019 the FSCS accepted his claim and paid the maximum compensation of £50,000, although it had calculated his total loss to be around £116,000 at that time.

Mr B complained to AJ Bell, via a representative, in January 2019. He said he'd been put in touch with Firm M when he was re-mortgaging and was advised to amalgamate his existing pensions in a SIPP and invest in the Coratina fund. Mr B says he was told he'd get better returns and it was a safe investment, but in fact, it was high risk and wholly unsuitable. Mr B said AJ Bell had failed to carried out sufficient checks before allowing him to make the investment, contrary to the Regulator's Principles and good industry practice. Mr B said had AJ Bell carried out sufficient checks it would've found the investment could only be promoted to 'Qualified Investors' and he clearly didn't meet the criteria. Further, the returns promised were high and there was a clear liquidity risk, features that could pose a high risk of detriment.

AJ Bell issued a final response in March 2019. It said the AJ Bell SIPP was an adviser-led SIPP product and it does not provide advice of any kind. So, it said it wasn't responsible for checking whether the investment was suitable for Mr B, this was the responsibility of the adviser he'd appointed – Firm M, which was regulated by the FCA at the time. AJ Bell ultimately didn't uphold the complaint, saying that the Stirling Mortimer investment met HMRC permitted investment rules at the time. Furthermore, it had reviewed the product literature to ensure the investment was genuine, that it was safe and secure and could be valued at the point of purchase and subsequently.

Mr B referred his complaint to the Financial Ombudsman Service in May 2019. He said Firm M didn't give him any alternative investment options; so he was unable to make an informed decision as to whether the proposed investment, or any other was the most suitable for him. Mr B also said the risks involved in the investment were never discussed; he wasn't aware that the investment was in fact high-risk and would never have transferred his funds had he known. Mr B said he had no other savings and a repayment mortgage; he didn't have any capacity for loss and certainly would not have ever risked jeopardising funds critical to funding his retirement.

Mr B added that Stirling Mortimer had been investigated by the Serious Fraud Office ('SFO') in relation to some of its investments. He said he had suffered significant losses in comparison with the position that he would have been in had AJ Bell refused to facilitate the unsuitable transfer of his pension funds into a high-risk and inappropriate investment.

The FSCS subsequently gave Mr B a reassignment of rights in which, amongst other things, the FSCS explained it was transferring back to Mr B any legal rights it held against AJ Bell.

The complaint was considered by one of our Investigators, who asked AJ Bell for information about the due diligence checks it carried out on Firm M and the Coratina investment. AJ Bell said:

- When advisers requested to use AJ Bell SIPP, they first had to be registered as an adviser with AJ Bell. To register, they had to be authorised and regulated by the FCA (formerly FSA).
- Firm M registered with AJ Bell on 6 February 2008. AJ Bell sent Firm M its Adviser Handshake Agreement, which Firm M agreed to in order to place business with it.
- Firm M was associated with 112 customers of AJ Bell between 2008 and 2009, either as a result of being introduced by Firm M or changing their agency to Firm M.
- Mr B was the 54th client associated with Firm M.
- Of the customers associated with Firm M between 2008 and 2009:
    - 77 invested in the Coratina Fund, including Mr B.
    - 7 invested in the Stirling Mortimer Number 7 Cape Verde II fund ('SM7').
    - 40 invested in the Stirling Mortimer Number 8 UK Land fund ('SM8').
- Although all of the customers introduced by Firm M were invested in unregulated collective investment funds, it did not believe the volume of business overall was significant, nor was it such that it would've given cause for concerns about Firm M's business model
- Mr B's SIPP was set up on an advised basis by Firm M, as confirmed in his SIPP application form.
- Mr B signed a Collective Investment Schemes - Declaration for non-UK regulated and/or illiquid investments before investing in Coratina.
- AJ Bell didn't request a copy of the suitability reports issued to Mr B. AJ Bell isn't responsible for advice given by an authorised firm and its staff don't have the skills to assess such advice.
- It isn't good industry practice, nor is it reasonable to expect SIPP operators to request copies of suitability reports because doing so could give the impression of approval of the advice.
- Before permitting SIPP investments in the Stirling Mortimer funds, AJ Bell undertook what it considered to be reasonable due diligence which was in line with good industry practice for a SIPP operator at that time 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 it could obtain valuations at the point of purchase and subsequently.
- AJ Bell said its normal custom and practice at the time in relation to the approval of unregulated collective investment schemes, such as the Coratina fund, was to review the related product literature and related application form, and to have an information request completed by the manager of the investment. It provided copies of the documents it reviewed.
- On review of the information AJ Bell received, it was satisfied that the investments would be considered an acceptable SIPP investment under HMRC's rules at the time.
- The investment was listed on the Channel Islands Stock Exchange, an HMRC recognised stock exchange, and was regulated by the Guernsey Financial Services Commission.

AJ Bell added that Mr B's Coratina investment was removed from his SIPP in October 2016 after the closure of the fund. Following this, it said Mr B's account was closed.

The Investigator upheld the complaint. He thought that by the time AJ Bell received Mr B's application, it had received a significant number of SIPP applications from customers, all of whom went in to invest in Stirling Mortimer funds, which were unregulated collective

investment schemes ('UCIS'). As UCIS were only suitable in any significant proportion of a portfolio/fund for consumers with a high appetite for risk and capacity for loss, it ought to have been alive to the risk of consumer detriment. The Investigator said it'd be exceptionally rare for it to be suitable for a retail client to invest the entirety of a pension in an unregulated investment but almost all of Mr B's funds were to be invested in the Coratina fund. He said AJ Bell ought to have refused to deal with Firm M before it accepted the introduction of Mr B's business. As such, it should put him back into the position he would've been in if AJ Bell had refused the applications and pay Mr B £500 for distress and inconvenience caused by the loss of his pension.

AJ Bell didn't agree. It said the volume of business it received from Firm M wasn't significant – it amounted to only 1% of the business introduced during the same period. It said it wasn't anomalous that all Firm M's customers involved investments in UCIS as AJ Bell only offered SIPPs (as opposed to other investment wrappers which didn't permit UCIS). It wasn't unusual in the context of AJ Bell's business overall. There were no other concerning features, such as transfers in from defined-benefit occupational pension schemes or the involvement of unregulated introducers, that would point to an enhanced risk of consumer detriment. Notwithstanding this, AJ Bell said the Investigator hadn't provided any details of the scope of the enhanced due diligence which he though AJ Bell should have undertaken on Firm M and what it should have identified if AJ Bell had undertaken it that would have caused it to refuse to accept any further referrals from Firm M.

AJ Bell acknowledged that the investment of the entirety of a retail customer's pension in a UCIS was not a strategy which would be suitable for all retail investors, but it was not a strategy that could not possibly be suitable for a retail customer, and that would inevitably result in customer detriment. And ultimately, it was not party to information about any of Mr B's other pension provisions or investments, and making any judgment on the proportion of his pension funds to be invested in the UCIS would've strayed into advice territory.

As no agreement could be reached, the complaint was passed to me to make a final decision.

I asked Mr B for some extra information about his recollections of Firm M's recommendation that he switch his existing pension in order to invest in the Coratina fund. Mr B told us that he recalls speaking to an adviser but it wasn't Mr K. Mr B confirmed he didn't receive any paperwork from Firm M setting out the advice he received.

I issued a provisional decision on 31 July 2024, upholding Mr B's complaint on the grounds that AJ Bell had failed to carry out adequate due diligence on Firm M before accepting the introduction of Mr B's SIPP business. I thought if AJ Bell had done so, it should've refused to accept the application from Mr B. And it was fair and reasonable to conclude that if AJ Bell had refused to accept Mr B's SIPP application then Mr B would've retained his existing pensions and wouldn't have switched them to a SIPP or subsequently made the investment that he did. So I recommended that AJ Bell should put Mr B back in the position he would have been in if he hadn't transferred his pensions to the AJ Bell SIPP. I also recommended that it pay him £500 for the distress and inconvenience caused by the loss to his pensions.

Mr B accepted my provisional decision.

AJ Bell responded and made the following points:

- It had identified that the Stirling Mortimer funds were more high risk and as such wouldn't be suitable for all retail customers. For this reason, it only permitted customers to invest in those funds if they had appointed a regulated and authorised adviser.
- Firm M was authorised and regulated by the FSA and AJ Bell had a terms of business agreement in place governing its relationship with it.
- The Ombudsman had not considered whether Firm M would've been truthful with AJ Bell had it made enquiries with Firm M about its business model and asked questions about the suitability of the investments it had recommended for its customers.
- It pointed to the Tribunal's written decision of 14 December 2009 which detailed Mr K's deception – AJ Bell considers that Mr K would've likely responded in a similar way to any questions it asked and allayed any concerns that it raised. This included Firm M producing forged documentation if AJ Bell had asked for documents such as suitability reports.
- It noted that the 2009 Thematic Review suggested that SIPP operators could contact firms or consumers for information about the advice provided, but it considered that the FSA did not expect a SIPP operator as a matter of course to contact both the customer and the firm giving the advice.
- It said it would have been both common and good market practice at the time for enquiry initially to have been made of the firm, not the customer. As a consequence, AJ Bell considered it would only be in circumstances where a SIPP operator was not satisfied with the outcome of the initial enquiries it made of a firm of advisers that it would have been good market practice for it also to contact some of the customers. And in this case it believed Firm M would've responded in such a way that allayed any concerns it might have had.
- It noted that there wasn't any indication from the Tribunal decision that the FSA, when investigating Mr K and Firm M, approached any customers directly despite the risk of detriment to them continuing to engage with Firm M. As such, it didn't think it was reasonable for the Ombudsman to impose a higher standard of conduct on it as a SIPP operator than the FSA displayed itself.
- Contrary to the findings in the decision, AJ Bell did not ask Mr B to sign any declaration indemnifying AJ Bell of potential liability.
- As an additional point, it said the Stirling Mortimer funds were quite widely recommended by firms of FSA authorised and regulated advisers, with 55 firms of advisers having introduced customers to AJ Bell who invested in them. So this was not a case where only a single firm recommended the funds to their customers.
- As a consequence, that Firm M only introduced customers who invested in the Stirling Mortimer funds was not something that it considered was an obvious risk of enhanced consumer detriment. That a significant number of other firms were also recommending the funds to their customers provided additional comfort to AJ Bell because Firm M did not appear to be an outlier.
- AJ clarified that the actual number of introductions received from Firm M was 108 and Mr B was the 53rd customer introduced.
- In the event that I wasn't persuaded to change my decision, AJ Bell didn't think the temporary notional deduction of £50,000 adequately reflected the impact of the receipt of the FSCS award. That is because to receive £50,000 net of tax, Mr B would have had to withdraw £57,500 from his pension, after taking account of his entitlement to 25% tax free lump sum and on the assumption he was a basic rate taxpayer at the time. Accordingly, AJ Bell considered the amount of benefit of the temporary notional deduction should be £57,500.

As both parties have responded, I'm now proceeding with my final decision.

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.

Mr B accepted my provisional decision. AJ Bell didn't accept it and made further points in appeal. I've considered AJ Bell's submissions carefully, but I've still decided to uphold the complaint for mainly the same reasons I gave in my provisional decision. As such, I've largely repeated my findings, as per my provisional decision, below. But I have addressed AJ Bell's points as appropriate.

When considering what's fair and reasonable in the circumstances, I need to take account of relevant law and regulations, Regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

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

Relevant considerations

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

I think the FCA's Principles for Businesses – which are set out in the FCA's Handbook – are of particular relevance. These "*are a general statement of the fundamental obligations of firms under the regulatory system*" (PRIN 1.1.2G – at the relevant date). And Principles 2, 3 and 6 provide:

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

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

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

I've carefully considered the relevant law and what this says about the application of the FCA's Principles.

In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) ('*BBA*') Ouseley J said at paragraph 162:

"*The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular 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 *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 s.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 judgments when making this decision on Mr B'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 judgment said 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 B'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 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 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 he 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.*"

I note 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 B's complaint. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened after the contract was entered into. And he wasn't asked to consider the question of due diligence before Options SIPP agreed to accept the investment into its SIPP.

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

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 B's case.

However, it's important to emphasise that I must determine this complaint by reference to what I think is 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. There 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 B on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mr B on the merits of the SIPP and/or the underlying

investments. But I am satisfied AJ Bell's obligations included deciding whether to accept an introduction from a firm and whether to accept particular investments into its SIPP. And I don't accept that it couldn't make such an assessment without straying into giving the member advice.

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 the relevance of these publications. And I've set out material parts of the publications here, although I've considered them in their entirety.

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 Businesses ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

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

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

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

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

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

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

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

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

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

The later publications

In the October 2013 Finalised SIPP Operator Guidance, the FCA stated:

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

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

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

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

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

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

unauthorised business warnings.

- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*

- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*

- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*

- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers. Examples of good practice we have identified include:

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*

- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*

- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from nonregulated introducers*

In relation to due diligence, the October 2013 Finalised SIPP Operator Guidance said:

*"**Due diligence***

Principle 2 of the FCA's Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers as well as assessing that investments are appropriate for personal pension schemes) to help them justify their business decisions. In doing this SIPP operators should consider:

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*

- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*

- *having checks which may include, but are not limited to:*

- *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
- *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*

- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*

- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm"*

The July 2014 "*Dear CEO*" letter provides a further reminder that the Principles apply and an indication of the FCA's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles. The "*Dear CEO*" letter also sets out how a SIPP operator might meet its obligations in relation to investment due diligence.

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 the importance of these should be underestimated. These 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 these into account.

It's relevant that when deciding what amounted to good industry practice in the *BBSAL* case, the Ombudsman found that "*the regulator's reports, guidance and letter go a long way to clarify what should be regarded as good practice and what should not*." And the judge in *BBSAL* endorsed the lawfulness of the approach taken by the Ombudsman.

At its introduction the 2009 Thematic Review Report says:

"*In this report, we describe the findings of this thematic review, and make clear what we expect of SIPP operator firms in the areas we reviewed. It also provides examples of good practices we found*."

And, as referenced above, the report goes on to provide "…*examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms*."

So, I'm satisfied that the 2009 Report is a reminder that the Principles apply and it gives an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. The Report set out the Regulator's expectations of what SIPP operators should be doing and therefore

indicates what I consider amounts to good industry practice at the relevant time. So I remain satisfied it's relevant and therefore appropriate to take it into account.

I think the 2009 Report is also directed at firms like AJ Bell acting purely as SIPP operators, rather than just those providing advisory services. The Report says that "*We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses*…" And it's noted prior to the good practice examples quoted above that "*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*."

The remainder of the publications also provide a *reminder* that the Principles apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and to produce the outcomes envisaged by the Principles. In that respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I therefore remain satisfied it's appropriate to take them into account too.

I'm mindful that the majority of the publications I've referred to above were published after Mr B's SIPP was set up. But, like the Ombudsman in the *BBSAL* case, I don't think the fact that some of the publications post-date the events that took place in relation to Mr B'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 these 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 Thematic Review 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 Regulator's 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.

While I'm taking the above publications into account here, 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.

To be clear, I don't say the Principles or the publications obliged AJ Bell to ensure the transactions were suitable for Mr B. It's accepted AJ Bell wasn't required to give advice to Mr B, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But as I've said above these are evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles. So it's fair and reasonable for me to take them into account when deciding this complaint.

It's also important to keep in mind the judge in *Adams v Options SIPP* didn't consider the regulatory publications in the context of considering what's fair and reasonable in all the circumstances, bearing in mind various matters including the Principles (as part of the regulator's rules) or good industry practice.

I'm making a decision on what's fair and reasonable in the circumstances of this complaint – and for all the reasons I've set out above I'm satisfied that the Principles and the publications listed above are relevant considerations to that decision. And taking account of the factual context of this case, it's my view that in order for AJ Bell to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into Firm M/the business Firm M was introducing and undertaken sufficient due diligence into the investments it made *before* deciding to accept Mr B's applications.

Ultimately, what I'll be looking at is whether AJ Bell took reasonable care, acted with due diligence and treated Mr B fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mr B's complaint is whether it was fair and reasonable for AJ Bell to have accepted Mr B's applications in the first place. So, I need to consider whether AJ Bell carried out appropriate due diligence checks before deciding to accept Mr B's applications.

And the questions I need to consider are whether AJ Bell ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by Firm M and/or investing in Stirling Mortimer were being put at significant risk of detriment. And, if so, whether AJ Bell should therefore not have accepted Mr B's applications for the AJ Bell SIPP and/or the investments.

The contract between Mr B and AJ Bell

AJ Bell has explained that it is a SIPP administrator, and the SIPP is an adviser-led SIPP product. This means AJ Bell only acts on the instruction of registered advisers who had authority to make an instruction on the investor's behalf.

As such, this decision is made on the understanding that AJ Bell acted purely as a SIPP administrator. So, I don't say AJ Bell should (or could) have given advice to Mr B or otherwise have ensured the suitability of the SIPP or the investments for him. I accept that the terms and conditions of the SIPP (which Mr B confirmed he'd read and understood in his application form) made it clear that AJ Bell wasn't able to give advice and that it played an execution-only role in his SIPP investments.

I've therefore not overlooked or discounted the basis on which AJ Bell was appointed. And my decision on what's fair and reasonable in the circumstances of Mr B's case is made with all of this in mind. So, I've proceeded on the understanding that AJ Bell wasn't obliged – and wasn't able – to give advice to Mr B on the suitability of the SIPP, or the subsequent investment.

However, 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 M 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 B fairly and to act in his best interests.

What did AJ Bell's obligations mean in practice?

In this case, the business AJ Bell was conducting was its operation of SIPPs. And I'm satisfied that, to meet its regulatory obligations, when conducting its operation of SIPPs business, AJ Bell had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind.

The Regulators' reports and guidance provided some examples of good practice observed by the FSA and FCA during its work with SIPP operators. This included being satisfied that a particular introducer is appropriate to deal with and that a particular investment is appropriate to accept. That involves conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.

As set out above, to comply with the Principles, AJ Bell needed to conduct its business with due skill, care and diligence; organise and control its affairs responsibly and effectively; and pay due regard to the interests of its clients (including Mr B) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

It appears that AJ Bell understood it was required to carry out some checks on the investment proposal before accepting it into the SIPP. It has explained the process that it followed and was satisfied that the Stirling Mortimer investments were appropriate to be held in its SIPPs. It's also apparent that AJ Bell required Firm M to register with it and accept its Adviser Handshake prior to introducing customers. But I think that AJ Bell also ought to have understood that its obligations meant that it also had a responsibility to carry out appropriate checks on introducers to ensure the quality of the business it was introducing.

Due diligence checks on Firm M

I should first say here that although a Decision Notice had been issued against Firm M in October 2008, it doesn't appear AJ Bell would've been alerted to this or could've reasonably found out about this at that time. I haven't found any announcements or articles relating to the Decision Notice against Firm M until the Final Notice was issued in December 2009. So, it doesn't appear the Decision Notice was made public when it was issued. As the Final Notice was published after AJ Bell had accepted Mr B's SIPP business, I don't think it could've reasonably been expected to reject the introduction of Mr B's SIPP business on the basis of the enforcement action being taken against Firm M.

As I've said above, AJ Bell only accepted introductions from FCA authorised and regulated financial advisers who had registered with it. And I'm satisfied AJ Bell carried out some checks before it accepted business from Firm M. Amongst other things, I'm satisfied this included:

- Checking that Firm M was regulated and authorised by the FCA to give financial advice, as evidenced by a copy of a print out of Firm M's FSA register entry from January 2008.
- Requiring Firm M to agree to its Adviser Handshake agreement.

So, from the information that has been provided, it appears that AJ Bell did take *some* steps towards meeting its regulatory obligations and good industry practice. However, I don't think those steps that I've seen evidence of went far enough, or were sufficient, to meet AJ Bell's regulatory obligations and good industry practice. I think AJ Bell was aware of, or should have identified, potential risks of consumer detriment associated with business introduced by Firm M *before* it accepted Mr B's application.

As I explain below, based on the available evidence and what AJ Bell has told us, I'm satisfied that all of the SIPP business introduced to AJ Bell by Firm M prior to it receiving Mr B's application was business where consumers would be investing in Stirling Mortimer funds.

Both AJ Bell and Mr B's representative have referred to the Stirling Mortimer funds as UCIS. However, having considered the prospectus and brochures for each of the Stirling Mortimer funds that Firm M-introduced customers invested in, I don't think the funds qualified as UCIS. That's because each of the funds are described in the corresponding brochures as closed-ended investment companies, and a body corporate that is not an open-ended investment company cannot be a collective investment scheme ('CIS') or a UCIS. That's because of an exemption in the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001.

Nevertheless, even though the funds were not likely to be classified as UCIS, I think they could still reasonably be described as unusual/non-mainstream offshore investments. And it's evident that AJ Bell treated the investments as such. In response to my provisional decision, AJ Bell said that it recognised the Stirling Mortimer funds were more high risk, such that they wouldn't be suitable for all retail customers. For this reason it only permitted customers to invest in those funds if that had appointed an FSA authorised and regulated adviser. And it asked the adviser to complete its Collective Investment Schemes' – Declaration for non-UK regulated and/or illiquid investments' form.

Furthermore, the brochures I've reviewed explicitly state that investment in the funds would only be suitable for certain types of investor. For example, the brochure for SM7 says that the investment could only be offered to "Qualified Investors" within the meaning of Section 86(7) of the Financial Services and Markets Act 2000. The SM8 prospectus stated that the investment was only suitable for sophisticated investors and high net-worth individuals. And similarly, the Coratina fund brochure said it was only suitable for experienced investors who appreciate the risks involved. So, while AJ Bell appears to have recognised the risk associated with the investments and it took some steps to address this, I think AJ Bell needed to ask further questions of Firm M about the customers it was introducing through asking questions and making independent checks.

Further, I'm satisfied such steps would have confirmed there was a significant risk of consumer detriment associated with introductions of business from Firm M. And I think AJ Bell should have concluded it shouldn't continue to accept introductions from Firm M and *before* it accepted Mr B's SIPP application.

Based on the evidence provided, I'm of the view AJ Bell failed to conduct sufficient due diligence on Firm M *before* accepting Mr B's business from it, or draw fair and reasonable conclusions from what it did know, or ought to have known, about the business it was receiving from Firm M. And that AJ Bell ought reasonably to have concluded it should not continue to accept business from Firm M, and have ended its relationship with it, *before* it received Mr B's application. I've set out some more detail about this below, the points I make below overlap, to a degree, and should have been considered by AJ Bell cumulatively.

Volume of business and the type of investments being made by Firm M-introduced consumers

We asked AJ Bell about the number of introductions it received from Firm M, the number of the introductions it received from Firm M where applicants invested in Stirling Mortimer investments and what number Mr B was amongst the introductions AJ Bell received from Firm M. Based on earlier responses to information requests and in response to my provisional decision, AJ Bell has confirmed to us that:

- Firm M registered with AJ Bell on 6 February 2008.
- Firm M introduced 108 customers to AJ Bell between October 2008 and November 2009.
- Mr B was the 53rd customer introduced to it by Firm M.

- Of the customers associated with Firm M between 2008 and 2009:
    - 77 invested in the Coratina Fund.
    - 7 invested in SM7.
    - 40 invested in SM8.

An example of good practice identified in the FSA's 2009 Thematic Review Report was:

"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."

I think AJ Bell either had, or ought to have had, access to information about the number and type of introductions that Firm M made. I say that because AJ Bell has, when asked by us, been able to provide us with information about the volume and type of business that Firm M was introducing to it.

I don't think simply keeping records about the number and nature of introductions that Firm M made without scrutinising that information would have been consistent with good industry practice and AJ Bell's regulatory obligations. As highlighted in the 2009 Thematic Review Report, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

As I've mentioned above, AJ Bell has said all of the customers introduced by Firm M were invested in the Stirling Mortimer funds. And although that was the case, it did not believe the volume of business overall was significant, nor was it such that it would've given cause for concerns about Firm M's business model. It also felt that it took sufficient caution by only permitting investments from customers who had authorised and regulated advisers.

I appreciate that AJ Bell says the volume of business was small overall compared to the number of introductions it received in total during the same period. But I think that this pattern of business, which involved every customer Firm M introduced to AJ Bell investing the entirety of their pension monies transferred (except for a nominal sum to cover fees) in three non-mainstream property investment funds ought reasonably to have given it cause for concern. Investment in those particular funds in such proportions should've been flagged as posing a high risk of consumer detriment.

I think it's highly unusual for all of a regulated advice firms' introductions to a SIPP provider to involve pension switches so as to invest wholly in two to three non-mainstream property investment funds provided by the same investment manager. I think it's fair to say that most advice firms certainly don't transact this kind of business in significant volumes.

AJ Bell has said that the Stirling Mortimer funds were listed on the CISX and so would've been considered as standard investments which were appropriate to be held in SIPPs. And as 55 firms of advisers had introduced customers to it who also invested in Stirling Mortimer funds, there was no obvious risk of enhanced consumer detriment as Firm M was not an outlier.

But I'm only considering what AJ Bell ought to have recognised and addressed based on the introductions Firm M made to it. And I still think the pattern of business being introduced by Firm M was unusual. As AJ Bell has recognised, the investments are unlikely to be suitable for the vast majority of retail clients, particularly in such proportions. As per the fund brochures, the funds would only be suitable for a small proportion of the population – sophisticated/experienced and/or high net worth investors. So, while AJ Bell may say the volume and type of business that Firm M introduced overall wasn't significant, I think the

number of pension switches being effected through Firm M in order to invest in the essentially the same non-mainstream property investment funds ought to have been a cause for concern. Particularly in the absence of any information from Firm M about the type of customers it dealt with, which could explain the pattern of high-risk business it was introducing.

Having regard to the pattern of high risk business I think it's more likely than not that AJ Bell received from Firm M prior to Mr B's business being accepted; I think that AJ Bell should have been concerned that the quantity of introductions, relating to consumers investing wholly in similar non-mainstream property investment funds provided by the same investment manager, was unusual – particularly from a small IFA business. And it should have considered how a small IFA business introducing this amount of higher-risk business was able to meet regulatory standards. I think this was a clear and obvious potential risk of consumer detriment.

What fair and reasonable steps should AJ Bell have taken in the circumstances?

AJ Bell could simply have concluded that, given the potential risks of consumer detriment from the pattern of business being introduced to it by Firm M – which I think should have been clear and obvious at the time – it should not continue to accept applications from Firm M. That would have been a fair and reasonable step to take, in the circumstances. Alternatively, AJ Bell could have taken fair and reasonable steps to address the potential risks of consumer detriment, such as those I've set out below.

Requesting information directly from Firm M

Given the potential risk of consumer detriment, I think that AJ Bell ought to have found out more about how Firm M was operating before it received Mr B's application. And, mindful of the type of introductions I think that it's more likely than not that AJ Bell was receiving from Firm M from the outset, I think it's fair and reasonable to expect AJ Bell, in line with its regulatory obligations, to have made some specific enquiries and carried out independent checks.

As set out above, the 2009 Thematic Review Report explained that the Regulator would expect SIPP operators to have procedures and controls, and for management information to be gathered and analysed, so as to enable the identification of, amongst other things, *"consumer detriment such as unsuitable SIPPs".* Further, that this could then be addressed in an appropriate manner *"…for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification."*

The October 2013 finalised SIPP operator guidance, also gave an example of good practice as:

"Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with."

And I think that AJ Bell, and long before it received Mr B's SIPP application, should have checked with Firm M and asked about things like: how it came into contact with potential clients, what agreements it had in place with its clients, what its relationship to Stirling Mortimer was, and how and why all of the retail clients it was introducing were interested in investing specifically all of their pension monies in only those Stirling Mortimer funds.

I think it's more likely than not that if AJ Bell had checked with Firm M and asked the *type* of questions I've mentioned above that Firm M would have provided a response. In the alternative, if Firm M had been unwilling to answer such questions if they'd been put to it by AJ Bell, I think AJ Bell should simply then have declined to accept introductions from Firm M.

AJ Bell says that given what is detailed in the Tribunal's written decision about Mr K's behaviour during the FSA's investigation, it doesn't think it is likely that Firm M would've provided truthful information to any questions asked of it.

Although the FSA's investigation started several years before Firm M began to introduce customers to AJ Bell, I recognise that there is a possibility Firm M wouldn't have been truthful with AJ Bell had it made enquiries with it. But I think the pattern of business, which involved every customer investing the entirety of their pension funds in investments that AJ Bell recognised would not be suitable for all retail customers, only emphasised the need for independent checks. By the time AJ Bell received Mr B's application, it would've had over 50 customers introduced to it by Firm M who went on to invest only in Stirling Mortimer funds. And I think it ought to have questioned long before this point whether it was possible that all of these customers were likely to have been suitable candidates to invest their whole pension funds in this way.

So I still think AJ Bell ought to have asked the types of questions I've set out above, given the real risk of consumer detriment resulting from Firm M's abnormal approach. And I don't think it's likely that Firm M would have been able to give answers that AJ Bell would've reasonably found plausible and acceptable, such that AJ Bell would've been convinced that all was in order and that the concerns it should reasonably have had were baseless.

AJ Bell has said that expecting it to contact customers, when the FSA didn't appear to do so during its investigation, was expecting a higher standard of conduct than the FSA displayed itself. But I'm considering what steps would've been reasonable for AJ Bell to take in order to meet its obligations under the Principles and in accordance with good industry practice before AJ Bell accepted the introduction of Mr B's SIPP business. And I don't think the action the FSA took in its own enforcement investigation against Firm M is a relevant comparison here.

Making independent checks

The 2009 Thematic Review Report said that:

"…we would expect (SIPP operators) *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*** (my emphasis in bold)*, or by contacting the firm giving advice and asking for clarification."*

I accept that AJ Bell wasn't required to carry out independent checks of consumers under the Regulator's guidance. But given the potential risks of consumer detriment from the pattern of business being introduced to it by Firm M – which I think should have been clear and obvious at the time – I think it would have been fair and reasonable for AJ Bell, to meet its regulatory obligations and good industry practice, to have taken independent steps to enhance its understanding of the introductions it was receiving from Firm M. And, given the unusual pattern of business it was receiving from Firm M, I think it would have been fair and reasonable for AJ Bell to speak to some applicants, like Mr B, directly.

And I think it's more likely than not that if AJ Bell had done this, AJ Bell would have been told by some applicants that they had simply been told by Firm M they could get a better return by investing in Stirling Mortimer funds and that the funds were low risk. Indeed, Mr B has told us that Firm M described the investment in the Coratina fund as low risk and he was led to believe it provided guaranteed benefits. But it's evident that the property investment funds were non-mainstream, speculative, high-risk investments.

As I think that it would've been reasonable for AJ Bell to contact some customers directly, I think it would've also been reasonable for AJ Bell to request sight of the associated suitability report they received from Firm M. And had it done so I think AJ Bell would've likely found that Firm M was not providing any advice to customers in writing, contrary to their obligations in COBS. Mr B, and other consumers whose complaints I have reviewed, say they were not given any paperwork by Firm M setting out the recommendation it had made to them and it did not carry out a proper assessment of their attitude to risk. This ought to have given AJ Bell significant cause for concern given the potential for consumer detriment, which could result in customers losing their pension savings.

I appreciate that AJ Bell might say that it couldn't comment on advice without potentially being in breach of its permissions. Again, I accept AJ Bell couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps should have included addressing a potential risk of consumer detriment by speaking to applicants, and/or requesting sight of suitability reports, as these steps could have provided AJ Bell with further insight into Firm M's business model and what it was telling consumers. This would've gone some way to address the clear and obvious risks of consumer detriment from Firm M-introduced business that I've mentioned above.

Had it taken these fair and reasonable steps, what should AJ Bell have concluded?

As mentioned above, premised on the pattern of Firm M-introduced business alone I think AJ Bell could simply have concluded that, given the clear and obvious potential risks of consumer detriment, it should not continue to accept business from Firm M. I think that would have been a fair and reasonable conclusion for AJ Bell to have reached. But I also think it's more likely than not that if AJ Bell had undertaken *independent* checks into the business it was receiving from Firm M that such checks would only have served to further reinforce the clear and obvious potential risks of consumer detriment associated with introductions from Firm M. If AJ Bell had undertaken adequate independent checks I think it's more likely than not that it would have identified, that:

- Firm M was explaining to some consumers that they could get a better return by transferring to AJ Bell and investing in Stirling Mortimer and that they were not being made aware of the risks involved.
- Firm M was not providing customers with suitability reports setting out the recommendations it made to them, contrary to its regulatory requirements.

As I've said above, I accept that Firm M might not have given a full and honest response to questions AJ Bell asked. Which I think only serves to highlight the importance of undertaking adequate ongoing due diligence, including independent checks, when receiving such an unusual pattern of predominantly high risk business from a single introducer.

Either of these points would have been significant in isolation and should have further demonstrated that there was a significant risk of consumer detriment associated with introductions from Firm M. I think either of the two points ought to have been a clear red flag to AJ Bell, especially when considered alongside the pattern of business it was receiving from Firm M.

I think AJ Bell ought to have viewed the pattern of business as a serious cause for concern which raised serious questions about the motivation and competency of Firm M. And if AJ Bell had undertaken adequate initial and ongoing due diligence into Firm M and the business being received from it, I think AJ Bell should have concluded, and *before* it accepted Mr B's business from Firm M, that it shouldn't continue to accept introductions from Firm M.
I therefore conclude that it's fair and reasonable in the circumstances to say that AJ Bell shouldn't have accepted Mr B's application from Firm M.

In my view, AJ Bell didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr B fairly by accepting his application from Firm M. To my mind, AJ Bell didn't meet its obligations or good industry practice at the relevant time, and allowed Mr B to be put at significant risk of detriment as a result.

To be clear, I'm not saying here that AJ Bell should have been aware of, or identified, everything that has subsequently come to light about Firm M. I only say that, based on the information I think would have been available to AJ Bell at the relevant time had it undertaken adequate due diligence, it ought to have been apparent that there was a significant risk of consumer detriment associated with Firm M-introduced business. And that it's more likely than not that the *type* of independent checks it would have been fair and reasonable for AJ Bell to undertake in the circumstances would have revealed issues which were, in and of themselves, sufficient basis for AJ Bell to have declined to continue to accept introductions from Firm M before AJ Bell had accepted Mr B's business. Further, that it's the failure of AJ Bell's due diligence that's resulted in Mr B being treated unfairly and unreasonably.

For the reasons given above, AJ Bell shouldn't have accepted Mr B's business from Firm M.

Due Diligence checks on the investment

In light of my conclusions about AJ Bell's regulatory obligations to carry out sufficient due diligence on introducers, and given my finding that in the circumstances of this complaint AJ Bell failed to comply with these obligations, I've not considered AJ Bell's obligations under the Principles in respect of carrying out sufficient due diligence on the underlying investment.

It's my view that had AJ Bell complied with its obligations under the Principles to carry out sufficient due diligence checks on Firm M, then this arrangement wouldn't have come about in the first place. So, I've not considered the due diligence checks AJ Bell carried out on the Coratina fund any further. And I make no findings about that.

Was it fair and reasonable in all the circumstances for AJ Bell to proceed with Mr B's application?

For the reasons given above, I don't think AJ Bell should have accepted Mr B's business from Firm M. So things shouldn't have got beyond that.

AJ Bell ought to have known that Mr B had signed investment application forms intended to acknowledge, amongst other things, his awareness of some of the risks involved with investing. And it also required Firm M to confirm it had made Mr B aware of the risks. Furthermore, by accepting the terms of the SIPP, Mr B had agreed to indemnify AJ Bell against all costs and losses that AJ Bell may incur in exercising their lawful duties and responsibilities or performing their functions in relation to his SIPP. And he also agreed that AJ Bell would not be liable for loss or damage caused by an Investment Partner.

In my opinion, asking Mr B to complete such forms and agree to such clauses when AJ Bell knew, or ought to have known, that the type of business it was receiving from Firm M would

put investors at significant risk of detriment, isn't the fair and reasonable thing to do. Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing for AJ Bell to do by the time it received Mr B's application would have been to decline to accept Mr B's business from Firm M.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr B signed meant that AJ Bell could ignore its duty to treat him fairly. I'm satisfied that indemnities contained within the contractual documents don't absolve AJ Bell of its regulatory obligations to treat customers fairly when deciding whether to accept or reject investments or business.

So, I'm satisfied that Mr B's AJ Bell SIPP shouldn't have been established. And that the opportunity for AJ Bell to execute instructions to invest Mr B's monies with Stirling Mortimer, or proceed in reliance on an indemnity and/or risk disclaimers, shouldn't have arisen at all. I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for AJ Bell to accept Mr B's business from Firm M and carry out the investment instructions.

Is it fair to ask AJ Bell to pay Mr B compensation in the circumstances?

The involvement of other parties

In this decision I'm considering Mr B's complaint about AJ Bell. However, I accept that other parties were involved in the transactions complained about – including Firm M and Stirling Mortimer.

I also accept that Mr B pursued a complaint against Firm M with the FSCS. The FSCS upheld Mr B's complaint, and paid him the maximum compensation of £50,000, although it had calculated his total loss to be around £116,000 at that time. Following this the FSCS provided Mr B with a reassignment of rights.

AJ Bell may say that it should not be liable for the full extent of Mr B's loss because of the involvement of these other businesses and to make no allowance for this in the redress is neither fair nor reasonable.

The DISP rules set out that when an Ombudsman's determination includes a money award, then that money award may be such amount as the Ombudsman considers to be fair compensation for financial loss, whether or not a Court would award compensation (DISP 3.7.2R).

In my opinion it's fair and reasonable in the circumstances of this case to hold AJ Bell accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mr B fairly. The starting point, therefore, is that it would be fair to require AJ Bell to pay Mr B compensation for the loss he's suffered as a result of its failings.

I've carefully considered if there's any reason why it wouldn't be fair to ask AJ Bell to compensate Mr B for his loss.

I accept that other parties, including Firm M, might have some responsibility for initiating the course of action that led to Mr B's loss. However, I'm satisfied that it's also the case that if AJ Bell had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr B wouldn't have come about in the first place, and the loss he's suffered could have been avoided. So, I'm not asking AJ Bell to account for loss that goes beyond the consequences of its failings. Overall, it's my view that it's appropriate in the circumstances for AJ Bell to compensate Mr B to the full extent of the financial losses he's suffered due to AJ Bell's failings. And, having carefully considered everything, I don't think that it would be

appropriate or fair in the circumstances to reduce the compensation amount that AJ Bell's liable to pay to Mr B.

I'm not making a finding that AJ Bell should have assessed the suitability of the SIPP or investments for Mr B. I accept that AJ Bell wasn't obligated to give advice to Mr B, or otherwise to ensure the suitability of the pension wrapper or investments for him. Rather, I'm looking at AJ Bell's separate role and responsibilities – and for the reasons I've explained, I think it failed in meeting those responsibilities.

I think it is fair to make an allowance in the redress to take account of the £50,000 compensation Mr B received from the FSCS. And I set out in my provisional decision how AJ Bell should account for this in the calculation by way of a temporary notional deduction.

AJ Bell has made comments on the amount it believes would be fair to notionally deduct to reflect the correct position, bearing in mind that if making a withdrawal from a pension, Mr B would usually pay tax. And Mr B's representative has had an opportunity to comment on this.

I've considered both sides' comments, but overall, I remain of the view that it is fair and reasonable to use the sum Mr B actually received from the FSCS in the calculation. I say this bearing in mind that this is not in fact a pension withdrawal and contribution, it is simply a means of acknowledging that Mr B has had the use of some money from the FSCS during the period of time that AJ Bell is being asked to compensate him for. The notional deduction and addition reflects this position and ensures that Mr B isn't compensated for lost growth on that sum during the time that he had enjoyment of those monies.

Mr B taking responsibility for his own investment decisions

In reaching my conclusions in this case I've thought about section 5(2)(d) of the FSMA (now section 1C). This section requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions.

I've considered this point carefully and I'm satisfied that it wouldn't be fair or reasonable to say Mr B's actions mean he should bear the loss arising as a result of AJ Bell's failings.

In my view, if AJ Bell had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr B's business from Firm M *at all*. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr B wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

As I've made clear, AJ Bell needed to carry out appropriate initial and ongoing due diligence on Firm M and reach reasonable conclusions. I think it failed to do this. And just having Mr B sign forms containing declarations wasn't an effective way of AJ Bell meeting its obligations, or of escaping liability where it failed to meet its obligations.

Firm M was a regulated firm with the necessary permissions to advise Mr B on his pension provisions and Mr B also then used the services of a regulated personal pension provider in AJ Bell. I'm satisfied that in his dealings with these parties, Mr B trusted each of them to act in his best interests.

So, overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair and reasonable to say AJ Bell should compensate Mr B for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr B should suffer the loss because he ultimately instructed the transactions be effected.

Had AJ Bell declined Mr B's business from Firm M, would the transactions complained about still have been effected elsewhere?

AJ Bell may say if it hadn't accepted Mr B's application from Firm M, that the transfer of Mr B's pensions and the investment would still have been effected with a different SIPP provider. But I don't think it's fair and reasonable to say that AJ Bell shouldn't compensate Mr B for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr B's application from Firm M.

Furthermore, if AJ Bell had declined to accept Mr B's business from Firm M, I think it's unlikely Mr B would've sought advice from a different adviser, given that he wasn't previously interested in moving or changing his pension before he was contacted by Firm M. But even if I thought Mr B would have sought advice from another adviser (which I don't) I think it's unlikely that another adviser, acting fairly, would have advised Mr B to transfer his pension to a SIPP and to invest it entirely in a non-mainstream property investment fund, given his personal circumstances.

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if AJ Bell had declined to accept Mr B's application from Firm M, the transactions complained about wouldn't still have gone ahead and Mr B would have retained his existing pensions and Mr B's monies wouldn't have been transferred into the AJ Bell SIPP.

In *Adams v Options SIPP*, the judge found that Mr Adams would have proceeded with the transaction regardless. HHJ Dight says (at paragraph 32):

"The Claimant knew that it was a high risk and speculative investment but nevertheless decided to proceed with it, because of the cash incentive."

But, I don't think these circumstances apply to Mr B. Mr B was not provided with an incentive; he was contacted by Firm M and otherwise had no reason to review his pension. Mr B says he was simply told by Firm M he could get better returns if he amalgamated his existing pensions and invested in Stirling Mortimer. And, based on the evidence I've seen to date, I'm not satisfied that Mr B understood the risks involved in the transactions.

On balance, I'm satisfied that Mr B, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams. And having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if AJ Bell had refused to accept Mr B's application from Firm M, the transactions this complaint concerns wouldn't still have gone ahead. That's because Mr B didn't seek out advice about his pension, he was cold-called by Firm M and wasn't otherwise interested in making changes to his pensions.

Summary

Overall, I think it's fair and reasonable to direct AJ Bell to pay Mr B compensation in the circumstances. While I accept that other parties might have some responsibility for initiating the course of action that's led to Mr B's loss, I consider that AJ Bell failed to comply with its own regulatory obligations and didn't put a stop to the transactions proceeding by declining to accept Mr B's application when it had the opportunity to do so. I say this having given careful consideration to the *Adams v Options SIPP* judgments but also bearing in mind that my role is to reach a decision that's fair and reasonable in the circumstances of the case having taken account of all relevant considerations.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr B. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against AJ Bell that requires it to compensate Mr B for the full measure of his loss. AJ Bell accepted Mr B's business from Firm M and, but for AJ Bell's failings, I'm satisfied that Mr B's pension monies wouldn't have been transferred to AJ Bell at all.

As such, I'm not asking AJ Bell to account for loss that goes beyond the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter which I'm not able to determine. However, that fact shouldn't impact on Mr B's right to fair compensation from AJ Bell for the full amount of his loss. The key point here is that but for AJ Bell's failings, Mr B wouldn't have suffered the loss he's suffered. As such, I'm of the opinion that it's appropriate and fair in the circumstances for AJ Bell to compensate Mr B to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by other firms involved in the transactions.

Putting things right

My aim is to return Mr B to the position he would now be in but for AJ Bell's failure to carry out appropriate due diligence checks on Firm M before accepting his SIPP application.

As I've already mentioned above – if AJ Bell had refused to accept SIPP business from Firm M before it received Mr B's SIPP application, I'm satisfied the investment would not have gone ahead and Mr B would've retained his existing pension plans.

In light of the above, AJ Bell should calculate fair compensation by comparing the current position to the position Mr B would be in if he hadn't transferred his existing pension plans to the AJ Bell SIPP.

Based on the evidence I've seen, Mr B's AJ Bell SIPP was closed in March 2017 with a nil value. So, AJ Bell should:

1) Obtain the current notional values, as at the date of this decision, of Mr B's previous pension plans, if they hadn't been transferred to the AJ Bell SIPP.

2) If Mr B still has a pension plan, it should pay an amount into Mr B's pension, so that the transfer value of the pension is increased by an amount equal to the notional values of his previous pension plans as calculated in step 1). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

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

I've explained how AJ Bell should carry out the calculation, set out in steps 1 - 3 above, in further detail below:

1) *Obtain the current notional values, as at the date of this decision, of Mr B's previous pension plans, if they hadn't been transferred to the SIPP.*

   AJ Bell should ask the operators of Mr B's previous pension plans to calculate the current notional value of Mr B's plans, as at the date of this decision, had he not transferred them into the SIPP. AJ Bell must also ask the same operators to make a

notional allowance in the calculations, so as to allow for any additional sums Mr B has contributed to, or withdrawn from, his AJ Bell SIPP since the outset. To be clear this doesn't include SIPP charges or fees paid to third parties like an advisor.

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

If there are any difficulties in obtaining notional valuations from the operators of Mr B's previous pension plans, AJ Bell should instead calculate a notional valuation by ascertaining what the monies transferred away from the plans would now be worth, as at the date of this decision, had they achieved a return from the date of transfer equivalent to the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index).

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

I acknowledge that Mr B has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr B's reassignment of rights require him to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required. So, I think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the compensation Mr B received from the FSCS. And it will be for Mr B to make the arrangements to make any repayments he needs to make to the FSCS. However, I do think it's fair and reasonable to allow for a *temporary* notional deduction equivalent to the payment Mr B actually received from the FSCS for a period of the calculation, so that the payment ceases to accrue any return in the calculation during that period.

As such, if it wishes, AJ Bell may make an allowance in the form of a notional deduction equivalent to the payment Mr B received from the FSCS following the claim about Firm M on the date the payment was actually paid to Mr B. Where such a deduction is made there must also be a corresponding notional addition at the date of my final decision equivalent to the FSCS payment notionally deducted earlier in the calculation.

To do this, AJ Bell should calculate the proportion of the total FSCS payment that it's reasonable to apportion to each transfer into the SIPP, this should be proportionate to the actual sums transferred in. And AJ Bell should then ask the operators of Mr B's previous pension plans to allow for the relevant notional deduction in the manner specified above. The total notional deductions allowed for shouldn't equate to any more than the actual payment from the FSCS that Mr B received. AJ Bell must also then allow for a corresponding notional addition as at the date of my final decision, equivalent to the accumulated FSCS payment notionally deducted by the operators of Mr B's previous pension plans.

Where there is any difficulty in obtaining notional valuations from the previous operators, AJ Bell can instead allow for both the notional deduction and addition in the notional calculation it performs, provided it does so in accordance with the approach set out above.

2) *If Mr B still has a pension plan, it should pay an amount into Mr B's pension, so*

that the transfer value of the pension is increased by an amount equal to the notional values of his previous pension plans as calculated in step 1). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

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

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

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

It's reasonable to assume that Mr B is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%. However, if Mr B would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

3) *Pay Mr B £500 for the distress and inconvenience the problems with his pension have caused him.*

In addition to the financial loss that Mr B has suffered as a result of the problems with his pension, I think that the loss suffered has caused him distress. And I think that it's fair for AJ Bell to compensate him for this as well. I think £500 is a reasonable sum given that AJ Bell's actions led to a significant loss to Mr B's pension, which will have been a great source of worry for him in retirement.

SIPP fees

AJ Bell has told us that Mr B's investment in the Coratina fund was closed and removed from the SIPP in late 2016. The SIPP was then subsequently closed in March 2017. So, I haven't made any provision in this decision for compensation to cover future SIPP fees.

Interest

The compensation resulting from this loss assessment must be paid to Mr B or into his SIPP within 28 days of the date AJ Bell receives notification of Mr B's acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation isn't paid within 28 days.

My final decision

Where I uphold a complaint, I can make an award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend that AJ Bell Management Limited pays the balance.

Determination and award: For the reasons set out above, I'm upholding Mr B's complaint.

My decision is that AJ Bell Management Limited must calculate and pay Mr B the compensation amount produced by the calculation, as set out in the steps above, up to the maximum of £160,000.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that AJ Bell Management Limited pay Mr B the balance.

My recommendation would not be binding. Further, it's unlikely that Mr B could accept a final decision and go to court to ask for the balance. Mr B may want to get independent legal advice before deciding whether to accept any final decision.Your text here

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 17 October 2024.

Hannah Wise
Ombudsman