DRN-5416236

The complaint

Mr B's complaint concerns a property investment made in his self-invested personal pension (SIPP), which was provided by Attivo Financial Services Limited (Attivo FS), and the transfers made into his SIPP from his previous pension schemes. Mr B is represented by a Claims Management Company (CMC). The CMC says, by accepting Mr B's application to transfer into the SIPP and make the property investment, Attivo FS acted contrary to its regulatory obligations and standards of good practice. The CMC says, if Attivo FS had acted in way which was consistent with its regulatory obligations and standards of good practice, Mr B's application would not have been accepted, and he would have remained in his existing pension schemes.

What happened

I have first set out brief details of the parties involved with the events subject to complaint.

Attivo FS

Attivo FS is a SIPP provider and administrator. At the time of the events in this complaint, Attivo FS was called MYSIPP Limited (MYSIPP) and was regulated by the Financial Services Authority (FSA). Attivo FS was authorised, in relation to SIPPs, to arrange (bring about) deals in investments, to deal in investments as principal, to establish, operate or wind up a pension scheme, and to make arrangements with a view to transactions in investments. It provided Mr B's SIPP.

Attivo Financial Planning Limited

Attivo Financial Planning Limited (Attivo FP) is an Independent Financial Advisor (IFA), which was called Fountain Independent Limited, and an appointed representative of Sage Financial Services Ltd ("Sage"), at the time of the events in this complaint. Attivo FP acted as Mr B's financial advisor, in relation to the SIPP.

At the time of the events subject to complaint, the Managing Director of Attivo FP was also the Chief Executive of the Attivo Group, which included Attivo FS.

Calverley Road Property Fund LP

Mr B invested in the Calverley Road Property Fund LP, within his SIPP. An Information Memorandum (IM) dated 5th February 2008 confirms the fund was an Unregulated Collective Investment Scheme (UCIS). The IM explains the fund was being established to purchase a town centre property for £3.25m. It explained the property was let to a bank on a 35 year term lease which had begun in 1980, and offered a 5.38% yield at the purchase price. The IM said:

"*Investors are being invited to apply to commit a total of approximately £1,700,000 with a minimum individual participation of £25,000 (unless otherwise agreed by the General Partner) in order to acquire the Property. The balance of the £2,030,000 required to acquire the Property is to be raised through a loan facility with the Bank.*

The objective of the fund is long term capital growth."

The IM confirms the involvement of the following Attivo Group businesses, which were each to earn fees from the investment:

- Asset Manager - Attivo Asset Management Limited
- General Partner - Attivo General Partner (2006) Limited.
- Property Manager - Attivo Property Limited.

Mr B's dealings with the parties

Mr B had two existing pensions – a personal pension and a defined contribution occupational pension scheme which was linked to his business. They had a combined transfer value of around £140,000. The file notes Attivo FS has provided to us show Mr B was introduced to Attivo FP as a "lead". It seems Mr B first met with Attivo FP around June 2007. When we asked the CMC for Mr B's recollection of events, it said:

- Although Mr B cannot remember exactly how the events occurred, he believes the initial contact to have been via cold call. After which, he says that a visit was arranged with Attivo FP's advisor at his office, then he was advised to transfer.

- Changing his pension wasn't on Mr B's mind at the time.

- Mr B was attracted by the pitch and professionalism, and was convinced by them that the investment would be safe. He was attracted to the investment in the sense that he was promised rewarding returns (Mr B did not specify here whether his recollection related to Attivo FS, Attivo FP, or both).

The CMC also said the following, when making the original complaint:

- Mr B was not a sophisticated or experienced investor. He describes himself as a "medium" risk investor at the highest. His primary goal was to ensure his pension fund was secure and that he could access it freely, as the pension rules allow, as and when required.

- Attivo FP's adviser told him that his existing pensions would perform better if transferred as he recommended. Mr B was told that if he were to transfer his funds from his existing pensions to a SIPP, the projected value and income would increase because it would be invested in a commercial retail property which was very lucrative.

- Mr B was initially sceptical but Attivo FP's adviser dismissed his concerns and persisted with his recommendation to invest in commercial property. Mr B eventually capitulated having been given the assurance his capital investment would be entirely safe.

Attivo FS says Attivo FP did not give any advice on the Calverley Road fund – only the transfer to the SIPP - and Mr B made his own decision to invest, once he had transferred to the SIPP.

The timeline of the main events is as follows:

- 11 June 2007 – Mr B signs forms of authority, authorising Attivo FP to obtain information from the providers of his existing pension schemes.

- 18 September 2007 – Attivo FP sends a conflicts of interest letter to Mr B.

- 26 September 2007 – Attivo FP sends a suitability report to Mr B, recommending a transfer from his existing schemes to the Attivo FS SIPP, and investment in "cash". This confirms Mr B's advisor is the Managing Director of Attivo FP.

- 26 September 2007 – A "*Pension Review Report – Occupational Pension Supplementary Letter*" is sent to Mr B by Attivo FP. This was written by a different advisor at Attivo FP, on the basis the Managing Director of Attivo FP did not have regulatory permissions to give advice on occupational pension schemes. It confirms the advice has been reviewed by a pension transfer specialist.

- 2 April 2008 – Attivo FP submits an application for Mr B to open a SIPP to Attivo FS.

- 3 April 2008 – Attivo FS confirms Mr B's SIPP has been opened.

- 9 April 2008 – The IM for the Calverley Road fund is emailed to Mr B by the Managing Director of Attivo FP.

- 24 April 2008 – Mr B applies to invest his SIPP money in the Calverley Road investment. £128,000 was invested – the total amount transferred into the SIPP, less the commission taken by Attivo FP (£3,480.04) and the initial charges for setting up the SIPP.

- 25 May 2023 - £27,352.28 is paid into Mr B's SIPP, following the sale of the property held by the Calverley Road Property Fund. Attivo FS's outstanding fees (which it seems had been deferred over the period of the investment, as insufficient cash had been left in the SIPP to cover them) were taken from this, leaving £18,521.48 cash in Mr B's SIPP.

Mr B's complaint to Attivo FS

Attivo FS did not uphold Mr B's complaint. It said, in summary:

- Mr B took the decision to invest in the commercial property without advice and nothing about the investment suggested that it should have been rejected.

- Clearly the performance of the investment has not been what anyone would have hoped, however performance in isolation is no basis for upholding the complaint.

- It took reasonable steps to ensure that the investment was secure, not fraudulent and did exist.

- It was not responsible for the suitability of the investment for Mr B.

The CMC also made a claim to the Financial Services Compensation Scheme (FSCS) on Mr B's behalf about the advice he received from Attivo FP (this claim was against Attivo FP's former principal, Sage Financial Services Ltd). The FSCS accepted Mr B's claim, and calculated his loss to be more than the applicable limit on what it could pay; accordingly, the FSCS paid Mr B an amount equal to that limit (£50,000).

Due diligence carried out by Attivo FS

When responding to Mr B's complaint, Attivo FS said the following about the due diligence it had carried out;

- The incorporation of the Limited Partnership created the fund to facilitate the purchase of the Calverley Road property. The method of creating a Limited Partnership is a common vehicle for property funds established in the UK, not least due to its tax transparency.

- Commercial property on a full repairing and insuring term lease to a blue-chip tenant forms part of the mainstream investment sector for pension funds. It was not considered high-risk, speculative and non-standard.

- The investment was deemed suitable for a pension scheme. This type of investment was acceptable as a SIPP investment by HMRC.

- The Limited Partnership held the freehold title of the property, subject to a lease to the bank, until September 2025.

- When acquiring the asset of the Limited Partnership, a legal pack was prepared by an independent legal firm, which included a report on title. There was no evidence that the investment was a scam or linked to fraudulent activity.

- Prior to acquisition the property was independently physically inspected by a Chartered Surveyor and Fellow of the Royal Institution of Chartered Surveyors.

- As a commercial property the asset could be readily valued and was done so prior to acquisition of the property and incorporation of the Limited Partnership. It has been routinely valued post-acquisition.

Following my provisional decision, Attivo FS has submitted further evidence about the due diligence it carried out on the investment including, for example, verification notes produced by a law firm and correspondence with a surveyor firm setting out key data about the property which was the subject of the investment. There is extensive documentation and I have considered it all – but I do not think it is necessary to set it out in any further detail here.

After the CMC referred the complaint to us, Attivo FS said the following about our jurisdiction to consider it:

- We do not have any jurisdiction over the complaint as the SIPP is a Trust Based Pension Scheme.

- The due diligence for the investment was undertaken in 2007, which is well outside the six year statute time limit (DISP 2.8.2R). Given the performance of the investment deteriorated from 2012, which Mr B would have known about, it is also outside the three year period from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint.

- Whilst the Berkley Burke court case has proved to be the catalyst for complaints, that decision was, fundamentally, based on regulations in place at the time, therefore nothing has changed in that regard. If Mr B felt as he does now, he should have been making the complaint from 2012 onwards.

Attivo FS said, for these reasons, it did not believe we had jurisdiction to look at Mr B's complaint. Attivo FS has made further submissions on time limits following my provisional decision.

Our investigator's view

Our investigator concluded Mr B's complaint was one we could consider, as it related to an act or omission by a firm in carrying on regulated activities and had been made within the relevant time limits. Turning to the merits of the complaint, our investigator concluded it should not be upheld. The investigator said the following, in summary:

- There is a clear conflict of interests in this instance. However, it seems Attivo FP made no attempt to conceal it from Mr B. The Managing Director of Attivo FP informed Mr B of his roles in the conflict of interests letter dated 17 September 2007 and the disclosure was repeated in the suitability report of 26 September 2007. It also appears there were sufficient controls in place to manage the potential conflicts.

- Attivo FP assessed Mr B as a "Category 2 Person" to whom the IM could be sent. However, Attivo FP did not advise Mr B to invest into the Calverley Road investment.

- Attivo FS should have queried why Attivo FP had assessed Mr B under the Category 2 exemption if he hadn't been advised on the Calverley Road investment. However, even if Attivo FS had done so it would not have led to the investment not being made as Attivo FP would have likely classified Mr B under a different exemption, for example high net worth client, based on his circumstances.

- Attivo FS wasn't under any duty to ensure the Calverley Road investment was a suitable recommendation for Mr B. However, it had a responsibility to ensure customers only invested in assets which were acceptable for a pension.

- Attivo FS undertook checks to ensure the investment structure for Calverley Road Fund was acceptable for a SIPP, in line with what it considered to be good industry practice at the time.

- The UK commercial property market has experienced difficulties over the past 15 years and Mr B's investment probably has not performed as expected. However, he did not think the under-performance was due to any failure by Attivo FS in carrying out its due diligence responsibilities in 2008.

The CMC's response to the investigator's view

The CMC did not accept the view. It said, in summary:

- There were a number of fundamental problems with the introduction method which ought to have led any reasonable SIPP operator acting in compliance with the Principles, rules and guidance to have significant concerns.

- The conflict of interest represented a significant concern – the CEO of the Attivo Group was involved in the advice process, the SIPP, and the investment itself. This is a highly unusual scenario and lacks any element of independence.

- The position presented to Attivo FS was that it was being asked to accept an application from Attivo FP in circumstances where Attivo FP purported not to have

advised its client about the investment to be made within the SIPP, even though it had clearly introduced the client to that investment.

- A high level analysis by Attivo FS would have clearly identified that clients introduced to the SIPP by this method were ending up in unregulated, non-diversified, illiquid investments.

- Attivo FP was relying on the Category 2 Exemption to provide information on a UCIS, a category of investment which could not be promoted to the general public unless an exemption applied.

- It does not have access to Attivo FS's records on the extent of business introduced to it through this introduction method, but thinks it was likely significant.

- The investment was, from the outset, clearly illiquid, which made it inappropriate for a SIPP.

- The entire pension funds transferred in were to be invested in just one product. This represented a fundamental indicator of likely consumer detriment.

- The investment risk was focused on just one property and subject to very specific and localised risk factors, which compounded the effect of the subsequent negative economic factors.

- There was a lack of prior performance data for the General Partner – it had been incorporated only in 2006.

- The fund used a high level of gearing (borrowing) - around 60%. This structure meant that in the event that there was a valuation loss at the end of the period, the investors would take a disproportionate level of risk – the bank would be paid in full and the investors would shoulder the entire residual loss.

Further information provided by Attivo FS

Before I issued my provisional decision, I asked Attivo FS some questions. I asked about the role of an individual (Mr S) at Attivo FS who, from the available evidence, appeared to have had a lot of involvement in Mr B's application to invest in the Calverley Road investment, and had the title Sales Relationship Manager. In response to this, Attivo FS said "[Mr S] *was not a certified advisor and wouldn't have been authorised to provide advice.* [Mr S]*'s role would have been one of an administrative nature*."

I also asked how many applications to invest in the Calverley Road investment were made by Attivo SIPP clients, how many of those applications had been introduced by Attivo FP, and the amount of these which pre-dated Mr B's application. Attivo FS said it did not have any of this information. I have since checked Companies House and note it records that £1,577,000 had been contributed to Calverley Road Property Fund LP by MYSIPP Trustees Ltd as at May 2008.

Finally, I asked Attivo FS if it had a general policy at the time on accepting "restricted advice" applications i.e. applications where advice had only been given on the switch or transfer to the SIPP, and not the underlying investment. In response to this, Attivo FS said "*We aren't aware that there was a policy of accepting restricted advice applications*."

My provisional decision

I recently issued a provisional decision. I concluded that Mr B's complaint was one I could consider and that it should be upheld. My provisional findings, in summary, were as follows:

- The Calverley Road investment was, by any reasonable measure, a high risk investment. It involved high gearing (borrowing), and was based on a single property.

- But it would not, in my view, be fair and reasonable to say that meant Attivo FS should simply not have allowed the investment at all. It was a genuine investment, based on UK commercial property - which was not an usual investment for a SIPP - and reasonable enquires as to security, title etc would all have been satisfied.

- The introduction of applications relating to the investment should however have been treated with caution, given it was a high risk investment which was subject to restrictions on its distribution (promotion); particularly where an entire pension scheme was going to be invested in it.

- In this case, there were a number of anomalous features associated with the introduction, which ought to have led Attivo FS to reasonably conclude there was a significant risk of consumer detriment:

    - Attivo FP said it had not given Mr B advice on the investment, despite it clearly having introduced Mr B to it and having recommended the transfer to the SIPP with the investment in mind.

    - The investment was a UCIS – meaning there were restrictions on who it could be promoted to. It was promoted to Mr B by Attivo FP on the basis Mr B was a Category 2 Exempt Person, meaning Attivo FP had concluded it was a suitable investment for Mr B – which is in conflict with it saying no advice had been given.

    - There was a clear conflict of interest. Several businesses in the Attivo Group stood to benefit from Mr B investing. Attivo FP declared this conflict, but did not then take the steps it described, when declaring the conflict, to manage it.

    - Attivo FS says it does not have information about how many applications it received, but I think it was likely a high number, and many would have had similar characteristics to Mr B's.

- Rather than take steps to address these risks of consumer detriment, Attivo FS appears to have put the interests of the Attivo Group above those of Mr B and acted in concert with Attivo FP to ensure Mr B completed the transfer and made the investment.

- Overall, if Attivo FS had acted in a way which was consistent with its regulatory obligations it is fair and reasonable to say Attivo FS should either have simply refused the application, or have required Mr B to take independent advice on it – and that advice should have encompassed both the transfers to the SIPP and the investment itself.

- In either event, I was satisfied the application would not have proceeded. It was therefore fair and reasonable to ask Attivo FS to compensate Mr B for the losses he has suffered.

Responses to my provisional decision

Attivo FS did not accept my decision. It appointed a representative to respond on its behalf (although I will continue to refer to Attivo FS in this decision, for consistency). The key points it made were, in summary:

- I was not fully aware of the due diligence carried out in relation to the Calverley Road investment (it provided further information about this).

- As a result of the Attivo Group business structure, Attivo FS staff had access to, and considered, very detailed information about the nature and suitability of Mr B's investment. It was also closely affiliated with Mr B's adviser at Attivo FP, which Attivo FS therefore knew very well. This not only complied with the requirements of the relevant law, regulations, regulatory guidance and industry practice at the time but far exceeded them.

- Mr B's investment in Calverley Road was an objectively reasonable investment.

- Commercial property investments were capable of being suitable investments for a SIPP and Mr B's objective, and instructions to Attivo FP, were that he wanted to use his SIPP for a commercial property investment, and in fact he already owned a commercial property in his business. Mr B's pension was only a very small part of his overall assets and he was not relying on his pension for his retirement plan.

- Calverley Road was a blue-chip commercial property investment, towards the upper end of available commercial property investment opportunities.

- The Calverley Road investment performed poorly due to the unexpected, unpredicted and unpredictable consequences of the Brexit referendum and the COVID-19 pandemic.

- There was nothing about Mr B's investment or the other circumstances of the case that should have caused concern to Attivo FS, the rest of the Attivo Group, or Attivo FP.

- Attivo FP's decision to treat Mr B as a Category 2 investor was appropriate and in accordance with regulatory requirements, even though Attivo FP did not advise him on the merits of the Calverley Road investment.

- In addition, even if Attivo FP had advised Mr B on the merits of investing in Calverley Road, it is difficult to believe that it would not have advised him to invest, or that Mr B would have chosen not to.

- It also believes Mr B's complaint is time-barred and that the provisional decision was wrong to decide that this turned on the publication of the court's decision in the Berkeley Burke case.

The CMC accepted my decision but did not agree with my assumption, made when setting out how fair compensation should be calculated, that Mr B would be a higher rate taxpayer. It submitted further evidence on this point.

What I've decided – and why

Jurisdiction

I have first reconsidered whether Mr B's complaint is one that falls within our jurisdiction. And I remain satisfied it is.

We cannot consider all of the complaints we receive. We may only consider the complaints that are within our jurisdiction. And our jurisdiction rules are set out in the DISP section of the Financial Conduct Authority's Handbook.

There are a number of points to consider, to establish whether a complaint is within our Compulsory Jurisdiction. Broadly speaking, the complaint needs to be against an authorised business, to relate to a regulated activity (or be ancillary to one), and carried on from an establishment in the United Kingdom; and it needs to be a brought by an eligible complainant within specified time limits.

In this case, Attivo FS was an authorised business at the relevant times, there is no dispute Mr B is an eligible complainant, and the activities in question were all carried on from an establishment in the United Kingdom. But the two remaining points need consideration – whether the complaint relates to a regulated activity (or something ancillary to one) and whether the complaint was brought in time.

Having reconsidered these points, my decision, in summary, remains that Mr B's complaint does relate to a regulated activity carried on by Attivo FS, and has been made within the relevant time limits. It is therefore a complaint I can consider.

I have set out my findings in more detail below.

To consider the points, i.e. the questions of whether the complaint relates to a regulated activity and was brought within the relevant time limits, it first needs to be established what the complaint is about. Mr B's complaint is about the due diligence undertaken on the investment and, generally, Attivo FS's acceptance of his applications to open the SIPP and invest in the Calverley Road investment.

In respect of regulated activities, the relevant rule says:

DISP 2.3.1:

"The Ombudsman can consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on one or more of the following activities:

regulated activities (other than auction regulation bidding and administering a benchmark);…

or any ancillary activities, including advice, carried on by the firm in connection with them."

So, what I need to consider is what (if any) regulated activities (or activities ancillary to regulated activities) the complaint relates to.

I remain satisfied the complaint relates to the regulated activity of establishing, operating or winding up a personal pension scheme. I am satisfied Attivo FS's SIPP was a personal pension scheme at the time of the events the complaint relates to. A SIPP fell within the definition of a personal pension scheme at this time, and there was no exemption based on the scheme in question being trust based.

I have therefore also reconsidered whether the complaint has been made within the relevant time limits.

At the time we received Mr B's complaint the rules provided:

"*DISP 2.8.2R*

The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

(1) …

(2) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;

unless:

(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R … was as a result of exceptional circumstances; or

(4) … or

(5) the respondent has consented to the Ombudsman considering the complaint where the time limits in DISP 2.8.2 R … have expired …"

As Attivo FS has not consented to us considering the complaint the time bar rules have to be considered.

It is clear from the above that certain factors need to be identified in order to apply the rules to the facts:

- when were the events the complaint is about? And,
- when was the complaint first referred to the Financial Ombudsman Service or Attivo FS, if earlier, and that complaint was acknowledged or there is some other record of the complaint having been received?

In this case the events are the SIPP application, which the evidence now available show was made on 2 April 2008, and the investment application, which was made on 24 April 2008. The complaint to Attivo FS was made by the CMC acting for Mr B on 18 April 2019.

It therefore follows that the complaint was referred to Attivo FS more than six years after the events. And that the question is therefore whether Mr B made it to Attivo FS within three years of the time when he was aware, or should reasonably have been aware, he had cause for complaint about Attivo FS. Or put another way, did Mr B have relevant awareness before 18 April 2016 i.e. more than three years before he made his complaint to Attivo FS?

On this question Attivo FS said, in its response to my provisional decision:

- "Cause for complaint" in DISP 2.8.2R does not mean the complainant needs to know

the law relating to their complaint. It does not for example require knowledge of case law, such as the decision in R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service. It means what it says: the customer must have a cause for "complaint", as defined under the DISP rules.

- In this case, Mr B first expressed dissatisfaction about the performance of the Calverley Road investment in May 2013. At that stage, Mr B elected not to take the issue further, perhaps because the value of the property subsequently started to increase.

- It is not clear what changed materially between this date and April 2019 when Mr B brought the current complaint against Attivo FS, except that the planned sale of the property fell through, for reasons which were outside the control of Attivo FS or anyone else in the Attivo Group.

- Because Mr B had knowledge of the matters that form the basis of his complaint since 2013 and did not bring a complaint within 3 years of that date, his complaint is now time-barred for the purposes of DISP 2.8.2R.

Attivo FS provided a copy of an 8 May 2013 internal Attivo Group email which said:

"[Mr B] *would like to speak to you regarding the loss of 80k in his SIPP. He did not sound happy*."

And a response from Mr B's advisor (sent from an Attivo Group email address) which said:

"*I had a good chat with him and he is fine…I explain* (sic) *that this years value is up and his SIPP had almost doubled in value since last year. I explained gearing and the valuations and he was content with a greater understanding*"

Attivo FS also provided a copy of a further email exchange from March 2014, which shows Mr B understood he had lost £50,000 at that point, and had some questions about the fees involved with the arrangements.

In order for Mr B to have awareness of cause of complaint he needs to be aware, or ought reasonably to be aware:

- of a problem

- that has caused him, or is likely to cause him, some form of loss or harm, and

- that someone else has caused that problem – and who that is.

And in this case, which is a complaint about Attivo FS, that means awareness that Attivo FS had, or was likely to have, caused the problem the complaint is about.

I remain of the view Mr B would likely have been aware of problem, and at least the possibility of him suffering a loss, before 18 April 2016.

In my view, Mr B should reasonably have known there was a problem with his investment in the Calverley Road investment before 18 April 2016, as he knew before then the investment was not performing well. I also think Mr B should reasonably have known, before 18 April 2016, that the problem had caused him, or was likely to cause him, loss. It was not certain that his investment would not recover its value but it was also not certain that it would. So, he should reasonably have been aware he may suffer a loss.

That is supported by the evidence Attivo FS has provided in its response. However, I am not persuaded that evidence shows Mr B knew, or ought reasonably to have known, of cause for complaint against Attivo FS at this time. The fact of the poor performance of the investment, in my view, was not sufficient basis for Mr B to become reasonably aware that Attivo FS had caused (or contributed to) the problem.

Although the emails show Mr B expressed concerns about a valuation, it is not clear any concern was expressed specifically about Attivo FS. And I have not seen any evidence otherwise which shows Mr B should reasonably have connected the poor performance to the activities of the SIPP operator, Attivo FS, at this time.

I have still not seen any evidence to show Mr B was a particularly experienced or knowledgeable investor, or otherwise might reasonably be considered to have a higher than average understanding of the issues in this complaint. I note Attivo FS, in its response to my provisional decision, infers Mr B had some expertise in commercial property, because he worked in construction. Whilst that might have given him some general knowledge about commercial property, I do not think it necessarily gave him any expertise in commercial property investment; and certainly no expertise in the responsibilities of SIPP operators.

I remain of the view Mr B was an average retail client. And I consider it unlikely an average retail client such as Mr B would have (or have reasonably obtained) an understanding of any causal connection between the poor performance and the SIPP operator before the publicity surrounding the unsuccessful judicial review challenge in Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service, which was published on 30 October 2018.

Before this date, at least some of the industry maintained that the obligations on a SIPP operator were very limited. And if some of the firms within the industry did not fully understand what their regulatory obligations meant in practice before this date, it would not be reasonable to say that an average retail customer like Mr B would.

So, I remain of the view Mr B would not have become aware, or reasonably been aware, of cause for complaint against Attivo FS until some time after 30 October 2018. The Berkeley Burke ruling would have needed some time to filter through and receive comment in the press before a reasonable consumer would have worked out the implications for themselves. So, it would be fair to say a consumer in Mr B's circumstances should complain within, say, three years of the start of 2019. The CMC complained on Mr B's behalf on 18 April 2019, as mentioned.

To be clear, I am not making a general finding that a reasonable consumer, acting reasonably, needs to acquire knowledge of any relevant case law to become aware, or reasonably aware, of cause for complaint. Rather, my finding is that in the circumstances of this case, the Berkeley Burke judgement and the publicity surrounding it marked a turning point at which a reasonable consumer, acting reasonably would have been able to discover there might be basis for a complaint to a SIPP operator about the acceptance of investments and/or introductions of business.
In all the circumstances it remains my view that Mr B's complaint was made in time, and is therefore one which falls under our jurisdiction. So, I will go on to reconsider the merits of Mr B's complaint.

Merits

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

I should say at the outset that I have not been persuaded to substantively depart from my provisional findings and I have, therefore, adopted the wording used in my provisional findings, where appropriate.

As a preliminary point, I wish to again highlight that the purpose of this decision is to set out my findings on what is fair and reasonable, and explain my reasons for reaching those findings, not to offer a point-by-point response to every submission made by the parties to the complaint. And so, whilst I have again carefully considered all the submissions made by both parties – including the lengthy response Attivo FS made to my provisional decision - I have focussed here on the points I believe to be key to my determination of what is fair and reasonable in the circumstances.

In a similar vein, I confirm I have read – and carefully considered – everything the parties have said and submitted. But the summary I have set out above is not intended to be exhaustive; rather, it is intended to be a summary of what I consider to be key.

I am required to determine this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable, I am required to take into account: relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time.

With that in mind I will start by again setting out what I have identified as the key relevant considerations to deciding what is fair and reasonable in this case.

Relevant considerations

The Principles

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

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

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

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

I have 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 requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules*."

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

The BBSAL judgment also considers section 228 Financial Service and Markets Act (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 have 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 view on a complaint without taking the Principles into account in deciding what is 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 and I will consider them in the specific circumstances of this complaint.

In its response to my provisional decision, Attivo FS says it accepts Principles 2, 3 and 6 are relevant considerations that I must take into account, but that they do not exist in a vacuum – they need to be considered alongside the law, the other rules, standards of good practice etc - and must be considered in the context of the time the events they are being applied to occurred – what was fair in 2008 is not the same as what is fair now. I confirm, as I set out in my provisional decision, that is the basis on which my decision has been made, and I have considered the Principles alongside the other relevant considerations I have set out.

The *Adams* court cases and COBS 2.1.1R

On 18 May 2020, the High Court handed down its judgment in the case of *Adams v Options SIPP* [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. I've taken account of both these judgments and the judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 1188 when making this decision on Mr B's case. I note the Supreme Court refused Options permission to appeal the Court of Appeal judgment.

In its response to my provisional decision Attivo FS has noted, as I did in my provisional decision, that although the Court of Appeal ultimately overturned HHJ Dight's judgment, it rejected that part of Mr Adams' appeal that related to HHJ Dight's dismissal of the COBS claim on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal did not 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.

On this basis, Attivo FS has submitted that the findings of law which are relevant to the present case are set out in the High Court's judgment, not in the Court of Appeal's judgment. I have considered this but remain of the view that both the judgements of the High Court and Court of Appeal are relevant considerations.

I have again considered whether *Adams* means that the Principles should not be taken into account in deciding this case. I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Options SIPP. And, HHJ Dight didn't consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of the judgments say anything about how the Principles apply to an Ombudsman's consideration of a complaint. But, to be clear, I do not say this means *Adams* isn't a relevant consideration at all. As noted above, I've taken account of the *Adams* 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 SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ("the COBS claim"). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

I note that 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 para 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 therefore need to construe the duties Attivo FS owed to Mr B under COBS 2.1.1R in light of the specific facts of Mr B's case. So, I've considered COBS 2.1.1R – alongside the remainder of the relevant considerations, and within the factual context of Mr B's case, including Attivo FS's role in the transactions.

However, I want to again to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing

that, I'm required to take into account relevant considerations which include law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in *Adams v Options SIPP*. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I also want to again emphasise that I don't say that Attivo FS was under any obligation to assess Mr B's personal financial circumstances or to advise Mr B on the suitability of the SIPP and/or the underlying investment. Refusing to accept an application, having given the introducer and the investment proper scrutiny and identifying concerning issues, is not the same thing as advising Mr B on the merits of the SIPP and/or the underlying investment.

Overall, 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.

Court of Appeal case

I have also considered the Court of Appeal's judgment in Options UK Personal Pensions LLP v Financial Ombudsman Service Limited [2024] EWCA Civ 541, which refers to the case law I mention above and approved the decision of the ombudsman in the case in question.

Regulatory publications

The FCA (and its predecessor, the FSA) has issued a number of publications which remind SIPP operators of their obligations and 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. I acknowledge all were published after Attivo FS's acceptance of Mr B's SIPP application and application to invest in Calverley Road. But, for the reasons I set out, they are in my view nonetheless relevant considerations. And I've set out material parts of the publications here.

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 customers 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 member 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.*"

<u>The later publications</u>

In the October 2013 finalised SIPP operator guidance, the FCA states:

"*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. It says those obligations could be met by:

- *Correctly establishing and understanding the nature of an investment*
- *Ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*
- *Ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*
- *Ensuring that an investment can be independently valued, both at point of purchase and subsequently*
- *Ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc)*

Although I have referred to selected parts of the publications, to illustrate their relevance, I have considered them in their entirety.

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

It is 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 remain 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 is relevant and therefore appropriate to take it into account.

The remainder of the publications also 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 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 am therefore remain satisfied it is appropriate to take them into account too.

The obligation to act in accordance with the Principles existed throughout the events in this case. It is 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 is clear the standards themselves had not changed.

I note that HHJ Dight in the *Adams* case did not consider the 2012 Thematic Review Report, 2013 guidance and 2014 "Dear CEO" letter to be of relevance to his consideration of Mr Adams' claim. But it does not follow that those publications are irrelevant to my consideration of what is fair and reasonable in the circumstances of this complaint. I am required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time.

That does not mean that, in considering what is fair and reasonable, I will only consider Attivo FS's actions with these documents in mind. The reports, Dear CEO letter and guidance gave non-exhaustive examples of good industry practice. They did not 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 confirm, I do not say the Principles or the publications obliged Attivo FS to ensure the transactions were suitable for Mr B. It is accepted Attivo FS was not required to give advice to Mr B, and could not give advice. And I accept the publications do not alter the meaning of, or the scope of, the Principles. But, as I've said above, they 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.

With what Attivo FS has said about the Adams High Court judgement in mind, I think it should again be highlighted that it is important to keep in mind the Judge in *Adams v Options* did not 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.

In determining this complaint, I need to consider whether, in accepting Mr B's application to establish a SIPP and invest in the Calverley Road fund investment, Attivo FS complied with its regulatory obligations: to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and treat them fairly; and to act honestly, fairly and professionally. In doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Attivo FS should have done to comply with its regulatory obligations and duties.

What did Attivo FS's obligations mean in practice?

As noted above, Mr B's applications to open the SIPP and invest in the Calverley Road investment predate all the regulatory publications. But they do not pre-date Attivo FS's being an FSA or FCA authorised firm and it was, at all material times, subject to the regulatory obligations I have set out.

As also noted above, I acknowledge Attivo FS was not required to give advice to Mr B (and

did not have permissions to do so). This was a non-advisory, execution only relationship. The business Attivo FS was conducting was its operation of SIPPs. I am satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject referrals of business and/or particular investments.

Taking account of the factual context of this case, it's my view that in order for Attivo FS to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into the Calverley Road investment and Attivo FP at all relevant times.

What I'm considering here is whether Attivo FS 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 Attivo FS to have accepted his SIPP application and to allow the investment in the Calverley Road investment in the circumstances in which the application was made. So, I need to consider whether Attivo FS carried out appropriate due diligence checks on the Calverley Road investment and Attivo FP when deciding to accept Mr B's application and/or instructions to invest in the Calverley Road investment. And I need to consider this in the context of the circumstances of this particular complaint.

The questions I need to consider include whether Attivo FS ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, to have identified that consumers introduced by Attivo FP and/or applying to invest in the Calverley Road investment were being put at significant risk of detriment. And, if so, whether Attivo FS should therefore not have accepted Mr B's SIPP application or his application to invest in the Calverley Road investment.

Summary of findings

As noted above, Attivo FS has responded at length to my provisional decision. I have carefully considered all it has to say. But I have not been persuaded to depart from my provisional findings, and my final findings are therefore substantively the same. My findings, in summary, are as follows:

- I note Attivo FS's submissions about the quality of the Calverley Road investment. I remain of the view it was, by any reasonable measure, a high risk investment. It involved high gearing (borrowing), and was based on a single property. That does not mean my view is that it was a poor quality investment; simply that the investment risk was high.

- It remains my view that it would not be fair and reasonable to say that meant Attivo FS should simply not have allowed the investment at all. It was a genuine investment, based on UK commercial property - which was not an usual investment for a SIPP. And I note from Attivo FS's response to my provisional decision that reasonable enquiries were made as to property value, title etc and reputable professional third parties were involved in the arrangements, all of which was consistent with good practice at the relevant time.

- The introduction of applications relating to the investment should however have been treated with caution, given it was a high risk investment which was subject to restrictions on its distribution (promotion); particularly where an entire pension scheme was going to be invested in it. It was, simply put, the kind of investment which could result in consumer detriment if not appropriately distributed.

- I remain of the view that, in this case, there were a number of anomalous features

associated with the introduction to Attivo FS, which ought to have led it to reasonably conclude there was a significant risk of consumer detriment:

  - The investment was a UCIS – meaning there were restrictions on who it could be promoted to. It was promoted to Mr B by Attivo FP on the basis Mr B was a Category 2 Exempt Person, meaning Attivo FP had concluded it was a suitable investment for Mr B. I note Attivo FS's point that Attivo FP could have carried out a "suitability assessment" without giving a personal recommendation but nonetheless remain of the view Attivo FS should have identified the promotion as a point of concern, in the circumstances.

  - In its suitability report and promotion Attivo FP did not give Mr B a personal recommendation to make the investment, despite it clearly having introduced Mr B to it and having recommended the transfer to the SIPP with the investment in mind.

  - I remain of the view there was likely a high number of applications relating to the Calverley Road investment sent to Attivo FS, and that many would have had similar characteristics to Mr B's. And I note Attivo FS has not challenged the assumptions I made about this in my provisional decision in its response.

  - There was a clear conflict of interest. Several businesses in the Attivo Group stood to benefit from Mr B investing. Attivo FP declared this conflict, but did not then take the steps it described when declaring the conflict to manage it. The submissions Attivo FS has made about the closeness of the entities within the Attivo Group, in my view, add weight to this finding.

- I have still not seen sufficient evidence to show Attivo FS took reasonable steps to address these risks of consumer detriment. I remain of the view Attivo FS instead appears to have put the interests of the Attivo Group above those of Mr B and acted in concert with Attivo FP to ensure Mr B completed the transfer and made the investment. Again, the submissions Attivo FS has made about the closeness of the entities within the Attivo Group, in my view, add weight to this finding.

- I remain of the view that overall – taking into account the points I have mentioned individually and cumulatively - if Attivo FS had acted in a way which was consistent with its regulatory obligations it is fair and reasonable to say it should either have simply refused the application, or have required Mr B to take independent advice on it – and that advice should have encompassed both the transfers to the SIPP and the investment itself.

- In either event, I remain satisfied the application would not have proceeded, and it is fair and reasonable to ask Attivo FS to compensate Mr B for the losses he has suffered.

I have again set out some further detail of my findings below.

The Calverley Road investment

As I set out in my provisional decision, I am satisfied the Calverley Road investment was a genuine one and that it was fair and reasonable, in principle, for Attivo FS to conclude it was an appropriate investment for its SIPP.

I note the further submissions Attivo FS has made, in its response to my provisional decision, about the Attivo Group being a single set of affiliated companies, which had a small

total number of staff sharing the same premises, who shared information and knowledge. And that this meant Attivo FS was able to carry out due diligence which went beyond its regulatory obligations and standards of good practice at the time. Attivo FS also highlights that it used independent third parties to structure commercial property investments. It has provided further contemporaneous documentation relating to this.

As I set out in my provisional decision, I accept the fund was to acquire title to the Calverley Road property, and secure arrangements were in place, with independent parties involved. And I remain of the view it would not be fair and reasonable to say that Attivo FS ought to have concluded it should simply not allow the investment in its SIPP at all. I make no finding that Attivo FS should not have allowed the investment on the basis it was poor quality or impaired.

However, I remain of the view it was a high risk investment. The investment was based on a single town centre property, which was on a relatively short term lease, and relied on 60% borrowing, the repayment of which ranked ahead of any returns to investors. The significant loss of capital Mr B suffered, whilst perhaps due at least in part due to exceptional events, was therefore a foreseeable outcome of the investment.

So, I remain of the view that Attivo FS, with its regulatory obligations in mind, should have been mindful that an investment of this type would only likely be suitable for a small portion of retail clients, and generally as a small part of a diversified portfolio of investments. In short, it should have been aware of a potential risk of consumer detriment associated with investments of this type.

Attivo FS should also have been (and clearly was) aware that the investment was a UCIS and therefore the promotion of it was subject to restrictions. And it should have been aware that those restrictions had been put in place to protect retail clients from making investments which were likely to be unsuitable for them.

I also remain of the view, with its regulatory obligations in mind, Attivo FS should also have been mindful of the importance of it acting independently to meet its regulatory obligations. In my view this was of particular importance here, given Attivo FS was part of a wider group of businesses working closely together (as Attivo FS puts it, in its response “a single set of affiliated companies”), a number of which were associated with the Calverley Road investment, which gave rise to clear conflicts of interest. A number of businesses in the Attivo Group stood to benefit from Mr B opening the SIPP and making an investment in the Calverley Road investment; it was therefore important that Attivo FS did not allow this to influence its actions, when dealing with Mr B’s application.

With all the above in mind, I have again considered what Attivo FS ought to have concluded about Mr B’s application and what actions it should reasonably have taken, in the light of those conclusions.

Anomolous features of the introduction of Mr B’s application from Attivo FP

It is in my view fair and reasonable to say Attivo FS should have carefully considered whether it should accept Mr B’s application from Attivo FP, with the above in mind, in order to meet its regulatory obligations. And, when doing so, it should, in my view, have noted a number of anomalous features which presented a risk of consumer detriment.

I remain of the view that these anomalous features should reasonably have led Attivo FS to have had significant concerns about whether Mr B was being treated fairly and his best interests were being served. In short, Attivo should, in my view, have identified a clear risk of consumer detriment arising from the anomalous features associated with the introduction.

I will again set out the features Attivo FS should have noted, and the reasons it ought to have done so.

Promotion

I will quote again from Attivo FP's 9 April 2008 email to Mr B, attaching the IM for the Calverley Road investment, which included the following (the emphasis is from the original email):

"Please find attached a commercial property investment Information Memorandum you can access. This one relates to the ***Calverley Road Property Fund LP****, an offering from Attivo Group Limited. "*

"The fund is an Unregulated Collective Investment Scheme (UCIS), the marketing of which is restricted under the Financial Services and Marketing Act (FSMA) 2000 and hence promotion is limited to certain Exempt Persons."

"I am required legally to ensure that you are an Exempt Person and so able to receive this sort of promotional material. From my assessment of your personal circumstances as previously discussed between us, I consider you to be a Category 2 Person to whom this Information Memorandum can be sent. In coming to my decision, I have taken account of your current personal circumstances and investment objectives including your age, time to retirement, attitude to risk and investment experience. You have previously confirmed to me that you understand the principles and risks of investing into commercial property."

"Please note sending the Information Memorandum to you does not constitute a specific recommendation for you to invest in this fund."

At the time, a "Category 2" person was defined in COBS 4.12R as (a person) "*for whom the firm has taken reasonable steps to ensure that investment in the collective investment scheme is suitable*".

Attivo FS says there are two "regulatory concepts" at play here – a "personal recommendation" and a "suitability assessment", and the latter is what Attivo FP undertook here and relates to a situation, such as promotion under COBS 4.12R, where a firm was required to take reasonable steps to ensure an investment was suitable but not making a personal recommendation.

However, even if I accept it was possible to meet the requirements of COBS 4.12R without giving a personal recommendation, I am not satisfied that Attivo FS could reasonably have concluded here that the Calverley Road investment had been compliantly promoted to Mr B.

Attivo FS was aware of the 9 April 2008 email as the file notes I mention refer to it. So, Attivo FS knew Attivo FP had promoted the investment to Mr B on the basis he was a "Category 2" person but was not giving him a personal recommendation (as per the bold writing at the conclusion of the email).

In my view, that should have led to Attivo FS making enquiries about how Mr B had been assessed as being a "Category 2" person. It should, in my view, have been identified as anomalous that an advice business was assessing the suitability of investment for a consumer, concluding it was suitable, but then setting out in bold lettering that it was not recommending the investment to them. With its regulatory obligations in mind, that should have prompted further enquiries from Attivo FS to Attivo FP about the nature of the advice given and the steps taken to ensure the investment was suitable. And I have not seen sufficient evidence to show Attivo FS could reasonably have concluded Attivo FP had "*taken*

reasonable steps to ensure that investment in the collective investment scheme is suitable" had it made such enquiries.

In its response to my provisional decision, Attivo FS has provided a copy of the fact-find completed by Attivo FP. In the fact find no income and expenditure for Mr B is recorded. The sole personal asset recorded (other than Mr B's pension) was a £3m home, jointly owned by Mr B and his wife, with no details of any mortgage. There is no record of Mr B having any investment experience (other than through his pension). The only other significant details recorded were that Mr B was the sole shareholder of two construction companies, with a £2.5m turnover and a £300,000 profit, that his wife was a company secretary/housewife, and he had three young children.

So, had Attivo FS had regard to these details, I do not think there is any basis on which it could reasonably have concluded Attivo FP had taken reasonable steps to ensure the investment was suitable. Limited information about Mr B's circumstances was recorded and what was recorded, whilst it shows Mr B might have been reasonably wealthy (although I do not think that conclusion can be reasonably drawn without any details of his liabilities and general expenditure), does not show he had any investment experience (other than through his pension) or any assets, save his family home and his businesses, other than his pension scheme. Nor, as I have set out above, could it reasonably have concluded the fact Mr B ran construction companies made him an expert in commercial property investment. The evidence does not therefore demonstrate Mr B was a sophisticated investor, as Attivo FS has submitted in its response to my provisional decision. And Attivo FS should, in my view, have concluded there was insufficient evidence to show Attivo FP had taken reasonable steps to ensure the investment was suitable; and that it should not therefore have been promoted to Mr B on that basis.

But even if it is the case that the promotion was compliant, or that Attivo FS should not have been expected to draw the conclusion it was not compliant, that, in my view, does not mean Attivo FS could reasonably have had no concerns about Mr B's application. There were other anomalous features Attivo FS should reasonably have identified.

Restricted advice

I will again quote from the suitability report sent to Mr B by Attivo FP, which included the following:

"*Your Aims and objectives are:*

You would like me to undertake a review of your pension arrangements as you would like to assess the viability of self investing your accumulated pension monies into a commercial property syndicate.

You are aware that investment in commercial property can be achieved in a variety of ways including the use of traditional property funds or by self investment through the direct purchase of a specific property either on your own, as part of syndicate or via some form of Unregulated Collective Investment Scheme (UCIS). That said, irrespective of the method chosen, we recommend that professional advice is taken prior to committing funds to any of these ventures."

"*Risk category*

We discussed that you are currently in the construction industry and that you would like to have a tangible asset within your pension portfolio. You have also mentioned that self investment is of interest to you and that you would like to retain control over your investment.

Having considered all these points and reviewed our standard risk definitions you felt that your attitude to risk was 'fairly adventurous'. In generic terms this means "You are happy to invest in predominantly equity based assets where the risk is spread across a variety of investments – some of which may be specialist investments. The fund is managed on your behalf with the aim of achieving potentially higher returns. You accept the increased risk of loss of the value of your investments".

We also discussed in detail the various risks associated with using your pension fund to purchase commercial property. These discussions covered the specific risks associated with borrowing to fund such a purchase and also syndicating your fund with other individuals to purchase a higher value property."

"*I recommend the following investment choice for your initial transfer values:*

Cash: 100%

This is a cautious investment, the standard definition of which is that capital invested is guaranteed not to decrease in value but is not necessarily readily accessible. The rate of return may or may not be guaranteed.

The primary intention of the pension transfer is to invest in commercial property. However, to ensure adequate funds are immediately accessible once you have selected an appropriate investment property/vehicle a cash fund is used. This also ensures that fund values are not adversely affected should markets drop in value thus guaranteeing adequate funds are available when required. The use of a cash fund is a transitory measure; hence although it does not accord with your specified attitude to risk it is appropriate in the short term."

I remain of the view it is likely Attivo FS was aware of the details of the advice which had been given to Mr B by Attivo FP. It seems likely Attivo FS had access to Attivo FP's files (or at the very least, persons with significant control at Attivo FS were also persons of significant control at Attivo FP and would therefore have been privy to the details of the business of both). In any event, as I set out above, if Attivo FS was not privy to the details of the advice given it should have made enquires that ensured it was, had it acted in a way which was consistent with its regulatory obligations.

The contents of the suitability report should, in my view, have given Attivo FS cause to conclude there was a risk of consumer detriment. The report shows Attivo FP recommended a cash fund investment, but only on a "*transitory*" basis, and at the same time referred to Mr B having a "*fairly adventurous*" risk profile and to his intention to invest in commercial property. And, in relation to the latter, Attivo FP described some of the characteristics of the Calverley Road investment (or a similar one, at least). The 9 April 2008 email promoting the investment, quoted above, follows a similar theme – it says the Calverley Road investment is not being recommended but also refers to Mr B's investment objectives and personal circumstances. So, Attivo FP was clearly steering Mr B towards the Calverley Road investment but not making a personal recommendation to him.

It seems Attivo FP was going to some lengths to set out on record that it was not giving a personal recommendation to Mr B, despite it having introduced Mr B to the investment, having recommended the transfer to the SIPP to facilitate it and, apparently, assessing the suitability of the investment for Mr B and concluding it was suitable for him.

Mr B clearly did not find the Calverley Road investment independently. He remembers the Calverley Road investment being recommended to him by Attivo FP; a recollection which, in

my view, is plausible. And Attivo FS should, in my view, have been aware there was a risk Attivo FP was giving personal recommendations verbally, contrary to what it had set out in writing.

In my view, considering the above, Attivo FS should have called into question the competence and motivations of Attivo FP. Attivo FS was, or ought to have been, aware, had it carried out reasonable due diligence, that either Attivo FP was effectively giving a personal recommendation, but did not want to put on record that it had. Or, (although I think it unlikely reasonable due diligence would have led it to this conclusion) that it was not giving a personal recommendation, despite recommending the transfer to the SIPP with the investment in mind.

In my view this was a clear anomalous feature and risk of consumer detriment. Attivo FS, with its regulatory obligations in mind, should have considered Attivo FP's competence and motivations. Attivo FP was clearly not acting in accordance with its regulatory obligations and the process appears to have been contrived to get Mr B to invest his whole pension in the Calverley Road investment without setting out on record that a personal recommendation had been made.

Volumes of business

In my provisional decision I said:

"*…although Attivo FS has not been able to provide details of the volume of business it received from Attivo FP in relation to the Calverley Road investment I think it likely Mr B's application was one of a significant number introduced by Attivo FP in relation to the Calverley Road investment. Given the clear motivation of Attivo FP to obtain investors for the Calverley Road investment and the close collaboration here between it and Attivo FS (a point I consider further below) I think it likely there were many more applications to Attivo FS involving Attivo FP. This is supported by the Companies House records I refer to in the background of this decision, which show over £1.5m had been invested in the Calverley Road investment as of May 2008 by the trustee of Attivo FS's SIPP.*

….I note Attivo FS says it no longer has records of introductions. But the Calverley Road investment was only recently wound up and Attivo FS must therefore at least have records of how many consumers held the investment in its SIPP (and, I assume, records of the IFAs associated with those SIPPs). I therefore think Attivo FS should be able to make further submissions on this point, if it feels my assumptions about the overall volume of business are unreasonable."

I remain of the view it is likely Mr B's application was one of a significant number introduced by Attivo FP in relation to the Calverley Road investment. I note Attivo FP has not commented on this finding in its response to my provisional decision, or suggested it does not have sufficient information available to it to enable it to comment.

As set out in my provisional decision, the Companies House records I refer to in the background of this decision show over £1.5m had been invested in the Calverley Road investment as of May 2008 by the trustee of Attivo FS's SIPP. That suggests nearly *all* of those who invested in the Calverley Road investment did so through Attivo FS's SIPP.

This, in my view, should have been considered by Attvio FS, had it acted reasonably to meet its regulatory obligations, to be a further anomalous feature and risk of consumer detriment. The investment was, as mentioned, a high risk UCIS and it was highly unlikely to be suitable for the majority of retail clients. Attivo FS should therefore have identified a significant risk of consumer detriment arising from a large number of applications (likely with common features

to Mr B's application) all relating to the investment. It should have noted it was highly unlikely the investment would be a suitable one for all the consumers involved.

Conflict of interest

It is clear from the file notes we have been provided (which I quote below) – and the further submissions Attivo FS has sent, following the provisional decision, that there was, in practice, very little, if any, separation between Attivo FP and Attivo FS during the dealings with Mr B. As noted above, the Managing Director of Attivo FP was also the Chief Executive of the Attivo Group, which included Attivo FS. And it seems all the Attivo Group businesses worked in one office, with a relatively small number of total staff.

A transfer to the SIPP, and the investment in the Calverley Road fund, stood to benefit Attivo FP, Attivo FS and a number of other businesses in the Attivo Group, which were, as Attivo FS has described it in its response to my provisional decision, a single set of affiliated companies. In such circumstances Attivo FP should have set out why Attivo FS's SIPP (to facilitate investing in an investment associated with several Attivo Group businesses) had been selected ahead of alternatives.

Attivo FP declared the conflict, and gave a commitment to manage it, in its 17 September 2007 letter to Mr B, which included the following:

"*Although this was discussed during our conversation, in providing recommendations as an Independent Financial Adviser of Fountain Independent Limited I feel it important to make you aware of my capacity as Managing Director of Fountain Independent Limited and Chief Executive of the Attivo Group which includes Attivo Property, Attivo Asset Management Limited and MYSIPP.*

That said, Fountain Independent Limited remains committed to providing fully independent financial advice. Hence, any recommendation for use of these companies will be specifically justified in my report. You retain the option to decline any recommendation or nominate an alternative."

So, Attivo FP undertook to manage any conflict by specifically justifying its recommendation of an Attivo Group product. However, in this instance it clearly did not do so. Attivo FP simply said the Attivo FS SIPP was being recommended because it would allow Mr B to make a commercial property investment (with the Calverley Road investment clearly in mind). In other words, the justification in this instance was that the use of one Attivo Group product would allow investment in another Attivo Group product. That does not, by any reasonable measure, demonstrate "*fully independent financial advice*" was being given. This was not reasonable management of a conflict of interest. Rather, it seems Attivo FP was putting its own interests above those of consumers by using the Attivo FS SIPP as a vehicle to access Mr B's pensions to bring investment into the Calverley Road fund, for the benefit of the Attivo Group.

This, in my view, was a further anomalous feature and an additional basis on which Attivo FS ought reasonably to have concluded, with its regulatory obligations in mind, that there was a significant risk of consumer detriment.

Attivo FS's acceptance of Mr B's application

In my view, with its regulatory obligations in mind, Attivo FS should have identified the anomalous features and resultant risks of consumer detriment I mention above. And, in my view, it is fair and reasonable to say, with its regulatory obligations in mind, that Attivo FS should have declined to accept Mr B's application, given the clear conflict of interest which

had not been reasonably managed and the risks of consumer detriment otherwise. Attivo FS should have concluded it would not be acting in Mr B's best interests or treating him fairly by accepting the application in such circumstances; or conducting its business with due skill, care and diligence, and taking reasonable care to organise and control its affairs responsibly and effectively.

Alternatively, Attivo FS could have taken steps consistent with its regulatory obligations to address the risks. In my view the only reasonable step here would have been to require Mr B to take genuinely independent advice i.e. take advice from an authorised IFA with no connection to the Attivo Group on the full arrangement - both the transfer from his existing pension schemes and the Calverley Road investment. That, in my view, would have been a reasonable step to address the conflict of interest and the risks of consumer detriment otherwise (and I consider this further below when I turn to the question of whether it is fair to ask Attivo FS to compensate Mr B).

However, rather than taking such a step to address the risks, the available evidence shows Attivo FS appears to have put the interests of the Attivo Group above those of Mr B and acted in concert with Attivo FP to ensure Mr B completed the transfer and made the investment.

A note dated 12 September 2007 on Attivo FS's file says the following about Mr B:

"*This is a lead of* [Mr B's existing financial advisor]*, really good guy, works central London …… very successful, just bought a crib worth prob 3 million. Very excited ref attivo, need to get* [Attivo FP advisor] *to deal with this in central London, I'd like to be there as I'm going do some other business with him afterwards. He spoke to me today. …..wants to put in a scheme with self investment options both to lure new guys and retain existing guys, top level*".

The subsequent notes are as follows:

Date	*Initials*	*Notes*
09/04/08	[Mr S]	[Attivo FP advisor] *has promoted the Calverley Road Property Fund via email. I have followed if* (sic) *an email.*
15/04/08	[Mr S]	*I called and left a message.*
16/04/08	[Mr S]	*I called and* [Mr B] *is overseas.*
21/04/08	[Mr S]	[Mr B] *called and said that he was interested in investing all his funds into Calverley Road. I said that he should read the IM and call be* (sic) *at any time if he has questions.*
23/04/08	[Mr S]	*I have called and left a message.*
23/04/08	[Mr S]	*I have called again and spent ages and ages going through the IM with him and talking about every aspect of the property. He was not happy about the fees but said that it I meet him for lunch we will sign up.*
24/04/08	[Mr S]	*I went to his office and picked up the app and the ID and three forms that* [unknown Attivo Group staff member] *needed.*
29/04/08	[Mr S]	*Had a meeting with* [Attivo FP advisor] *and he confirmed the investment amount and wrote it on the app.*

It is clear from these notes that there was, in practice, little or no dividing line between Attivo FS's and Attivo FP's businesses when dealing with Mr B's application. It is clear that, collectively, they viewed Mr S as a "lead" whom they could sell Attivo Group products to and use to lure others to sell Attivo Group products to and their primary objective was to get Mr B's pension fund invested in the Calverley Road investment.

Rather than acting independently to meet its regulatory obligations, Attivo FS instead worked to push the application through - it seems it spent a lot of time and trouble in encouraging Mr B to invest in the fund. It's sales manager repeatedly called Mr B once he had been sent the IM for the investment, spent "*ages and ages*" going through the investment with him and met him to ensure the application was completed. In my view, given the circumstances, this suggests Attivo FS was putting its own interests (and those of the wider Attivo Group) ahead of Mr B's.

I recognise Attivo FP said Mr B could seek advice from a UCIS specialist. But at the same time it and Attivo FS were clearly making significant efforts to encourage Mr B to invest in the Calverley Road investment. So, in my view, Attivo FS could not reasonably have concluded that Attivo FP simply mentioning that Mr B could seek advice from elsewhere was sufficient, in the circumstances, to address the risks of consumer detriment here.

It is, in my view, fair and reasonable to say this was not treating Mr B fairly, or acting in his best interests; and was therefore inconsistent with Attivo FS's regulatory obligations.

Is it fair to require Attivo to compensate Mr B?

When considering this from the perspective of fair compensation, I do not have to be satisfied that there is no possibility that things wouldn't have progressed as they did if Attivo FS had done what I think it ought to have. I must only be satisfied that, on balance, it is more likely than not Mr B would have made an alternative investment (or retained his existing arrangements).

I note Attivo FS, in its response to my provisional decision, says that even if Attivo FP had advised Mr B on the merits of investing in Calverley Road, it is difficult to believe that it would not have advised him to invest, or that Mr B would have chosen not to.

Given the findings I have set out, I do not think it would be fair and reasonable to say that Attivo FP giving advice was a basis on which Attivo FS could reasonably have concluded it would be consistent with its regulatory obligations to accept Mr B's application. Attivo FS should either have declined to accept the application or required Mr B to take independent advice on both the transfer to the SIPP and the Calverley Road investment.

Had Attivo FS declined to accept the application that, in my view, would have been the end of matters. Had it instead required Mr B to take independent advice, such advice, in my view, would not have recommended Mr B proceed. Mr B may have been wealthy; and he may have been keen on commercial property investment and tolerant of some risk. But it was clearly not suitable for him to invest his entire pension in a single commercial property with high gearing. And any competent advisor would likely have pointed out not only that but that Attivo FS's SIPP was likely being used as a vehicle to obtain investment in Attivo Group products when there were other, cheaper ways to invest in commercial property in a more diversified way (likely including through Mr B's existing occupational scheme, which was a personal pension). I think it likely Mr B would have accepted independent advice and therefore would not have proceeded, had he received such advice.

So, I remain satisfied it is more likely than not the transaction would not have proceeded, had Attivo FS not accepted the application or, alternatively, had required Mr B to take independent advice. By that I mean Mr B would have likely stayed in his existing pension schemes.

Whilst I accept that Attivo FP may be responsible for initiating the course of action that has led to Mr B's loss, I consider that Attivo FS failed unreasonably to put a stop to that course of action when it had the opportunity and obligation to do so. I'm satisfied that if Attivo FS had complied with its own distinct regulatory obligations as a SIPP operator, the investment would not have come about in the first place, and the loss Mr B has suffered could have been avoided.

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 Attivo FS 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 Attivo FS to pay Mr B compensation for the loss he's suffered as a result of its failings. I have carefully considered if there is any reason why it would not be fair to ask Attivo FS to compensate Mr B for his loss.

It's my view that it is appropriate and fair in the circumstances for Attivo FS to compensate Mr B to the full extent of the financial losses he has suffered due to its failings. Having carefully considered everything, I do not think that it would be appropriate or fair in the circumstances to reduce the compensation amount that Attivo FS is liable to pay to Mr B.

Fair compensation

My aim is that Mr B should be put as closely as possible into the position he would probably now be in if he had he not transferred to the SIPP.

I think Mr B would have remained with his previous providers, however I cannot be certain that a value will be obtainable for what the previous policies would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given Mr B's circumstances and objectives when he invested.

What must Attivo do?

To compensate Mr B fairly, Attivo FS must:

Compare the performance of Mr B's investment with the notional value if it had remained with the previous providers. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.

Attivo FS should also add any interest set out below to the compensation payable.

If there is a loss, Attivo FS should pay into Mr B's pension plan to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

If Attivo FS is unable to pay the compensation into Mr B's pension plan, it should 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. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr B won't be able to reclaim any of the reduction after compensation is paid.

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

In my provisional decision I said it was reasonable to assume that Mr B is likely to be a higher rate taxpayer at the selected retirement age, so the reduction would equal 40% (and 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 30%). The CMC says Mr B will be a basic rate taxpayer in retirement. In support of this it has provided a letter from Mr B's tax advisor firm which says Mr B has only taken income of £50,000 or less since 2019 and has therefore been a basic rate taxpayer since then. It adds that it intends to continue to support Mr B in organising his affairs in a way which allows him to maintain payment of income tax at that rate. It says that, as things stand in relation to legislation and income needs, Mr B is and will be a basic rate taxpayer in the future.

In response to this I should first emphasise what I say above; Attivo FS should pay compensation into Mr B's SIPP, if it can. The question of a reasonable rate of notional tax only arises if the compensation simply cannot be paid into Mr B's SIPP.

If the compensation cannot be paid into Mr B's SIPP, whilst I note he currently employs the services of a tax advisory firm to manage his business affairs, I am not persuaded, based on the available evidence, that he will be a basic rate taxpayer in retirement. Mr B is likely to have significant assets in retirement and I think it likely that he will be a higher rate taxpayer. It is of course not possible to say this with certainty and this is, ultimately, an assumption; but I think it is a reasonable one, in the circumstances.

To confirm, any notional reduction for tax should equal 40%, and 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 30%.

Attivo FS should also pay Mr B £500 for the distress and inconvenience caused by the arrangements, which have clearly caused him significant worry.

Income tax may be payable on any interest paid. If Attivo FS deducts income tax from the interest, it should tell Mr B how much has been taken off. Attivo FS should give Mr B a tax deduction certificate in respect of interest if Mr B asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Attivo SIPP	Complete	Notional value from previous providers	Date of transfer	Date of my decision	8% simple per year from date of my final decision to settlement, if not paid within 28 days of Mr B's acceptance of my final decision

Actual value

This means the actual amount payable from the investment at the end date.

Notional Value

This is the value of Mr B's investment had it remained with the previous providers until the end date. Although one of Mr B's pervious schemes was an occupational scheme, I understand it was a defined contribution personal pension, so a notional value appears to be a fair way of redressing the loss Mr B has suffered in relation to that scheme. Attivo FS should request that the previous providers calculate these values.

If the previous providers are unable or unwilling to calculate notional values, Attivo FS will need to determine a fair value for Mr B's investment instead, using this benchmark: FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index). The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

I understand the Calverley Road investment is now complete. I therefore assume the SIPP can be closed, if it has not already been closed, and any further fees/charges can be prevented. I do not therefore think I need to make any award of compensation for future fees due on the basis the SIPP cannot be closed.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr B wanted to achieve a reasonable return with some to his capital.

- If the previous providers are unable to calculate a notional value, then I consider the FTSE UK Private Investors Income Total Return Index would be a fair measure given Mr B's circumstances and objectives. It is the sort of investment return a consumer could have obtained with some risk to their capital.

FSCS compensation

I acknowledge that Mr B has received a sum of compensation from the FSCS, and that he has had the use of the money he 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 is 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, Attivo FS may make an allowance in the form of a notional withdrawal (deduction) equivalent to the payment Mr B received from the FSCS following the claim about Sage, Attivo FP's former principal, and on the date the payment was actually paid to Mr B. Where such a deduction is made there must also be a corresponding notional

contribution (addition), at the date of my final decision, equivalent to all FSCS payment(s) notionally deducted earlier in the calculation.

To do this, Attivo FS should calculate the proportion of the total FSCS payment(s) that it is reasonable to apportion to each transfer into the SIPP, based on the sums transferred in. And Attivo FS should then ask the operators of Mr B's previous pension policies to allow for the relevant notional deductions in the manner specified above. Attivo FS must also then allow for a equal notional addition as at the date of my final decision.

Where there are any difficulties in obtaining notional valuations from the previous operators, Attivo FS can instead allow for both the notional deduction(s) and addition(s) in the notional calculation it performs, provided it does so in accordance with the approach set out above.

My final decision

Where I uphold a complaint, I can make a money 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 Attivo Financial Services Limited pays the balance.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Attivo Financial Services Limited should pay the amount produced by that calculation up to the maximum of £160,000 (including distress or inconvenience but excluding costs) plus any interest on that amount as set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Attivo Financial Services Limited pays Mr B the balance plus any interest on the balance as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 18 April 2025.

John Pattinson
Ombudsman