complaint

Mr A has complained about various investments he made into the R2i schemes in 2005 and 2006. Mr A's complaints against Burlington Associates Ltd (BAL) concern the investment he made into the R2i Special Opportunities PCC Ltd Sveti Stefan Cell in 2006.

Mr A and his former representative, Harcus Sinclair, have made lengthy submissions; I believe Mr A's complaints can be fairly summarised as follows:

complaints about the promotion of the investments

- A major fraud was committed in the UK when three unauthorised firms (Equity Trust, Burlington Associates Ltd and Ready2invest) co-promoted the schemes.
- The so called 'High Net Worth' and 'Sophisticated Investor' forms only permitted promotion by authorised firms and it was Leslie & Nuding at the outset, who lent its authorisation for purposes of the fraud.
- When the investments were promoted to Mr A in 2006 it was known that the funds and land developments had not received sufficient investment to be viable. Because of this BAL failed to treat its customers fairly in allowing customers to invest when the funds had little prospect of success.
- A director of BAL (I shall call him director B) procured the services of Leslie & Nuding to make the investment arrangements in the UK (in 2005) and a Jersey regulated entity to handle investor monies in Jersey.
- Overall the involvement of BAL gave the investors a false sense of security and implied that the business was complying with FSA regulations when this was not the case.

complaints about the management of the investment

- The investments were poorly managed, chaotic and *doomed to failure*. The funds did not raise anywhere near the capital needed to be successful. None of the R2i Property Funds raised sufficient monies to purchase the underlying land and seek planning permission as required.
- Director B established various businesses to manage these funds and the land developments. This was a clear conflict of interest with his role within BAL as promotor of the funds. Considerable amounts of investor monies have been used to pay the co-promoters in their various conflicted guises, resulting in almost total loss.
- The information in the fund prospectus has not been adhered to such as the principles given about valuations and the restriction on the fees payable by the funds.
- Valuations were not carried out correctly and were carried out by businesses related to BAL or director B.
- The raising of public money under the R2i Property Funds prospectuses was fundamentally flawed and BAL implemented a plan to deceive investors into thinking that they were making an investment through properly authorised FSA regulated bodies.
- Mr A says that the scam is not complicated. Director B was a founder and managing director of Burlington Associates Ltd, an appointed representative of Sesame, which subsequently became authorised in its own right. Director B set up a suite of other unregulated companies in the UK and in Jersey which extracted large amounts of the proceeds through alleged services. The fees and commission BAL took were very high which reflected its key role in the investments and is a reason why the funds failed.

- Investor monies were then used to make improper payments and are used to cross-fund against ailing projects, which was outside the terms of the prospectus.
- The structure of the investments and its relationship to the trusts involved may not be valid or legal.

complaints about the information provided to consumers

- The information provided at the point of sale was misleading. In particular Mr A says that the land valuations were incorrect and based on misleading assumptions.
- He says that spurious profit forecasts were handed out at roadshows attended by "Burlington" (including Director B) and used to induce investors. Also, false property valuations (outside the methodology stated in the R2i Property Fund prospectuses) were provided to make investors believe that their investments were sound.

background

The background to this complaint is outlined in my provisional decision issued on 26 April 2016. A copy of this is attached and forms part of this final decision. However, briefly, I concluded in my earlier decision that:

- In Mr A's case, because of his circumstances, he was suitable for the promotion of this UCIS, even if there were any deficiencies in the process in which that assessment was made. So any failings did not lead to Mr A's loss.
- The risk of the investments was made known to Mr A. He was clearly informed that he could lose all of the capital that he invested.
- It was likely that he was prepared to take the risk of the UCIS in return for the potential of a much higher return.
- BAL was not in breach of the regulatory rules in respect of the information it provided about the general risk and nature of the investment.
- It could be said that some aspects of the literature provided was misleading and ambiguous such as the costs and fees payable. But this did not alter my findings in respect of the information provided about the material risks and nature of the investment.
- The likely cause of Mr A's loss was the failure of speculative land developments.
- It may be that the managers and trustees of the scheme made errors in the development and funding of the investment. However these actions took place outside of the UK and by non-regulated businesses. Because of this they were not within my jurisdiction.
- Overall I did not conclude that BAL was materially responsible for Mr A's financial loss.

Mr A made several submissions in response. He did not agree with my provisional decision. He said that the outstanding critical matter was that *"the terms of this promotion were misleading because the money raised was always and knowingly destined for other uses when the promotion was made"*. He said that the ombudsman had evidence that showed this but he provided more detail as follows:

- All of the promotions led investors to believe that their money was being invested directly or indirectly in the relevant property projects. This did not take place. The money was wilfully diverted elsewhere from the outset.
- The money was not invested in the developments and it was never intended to be.

- The promotion promised a return of capital plus a multiple of the profits. The profit shares were different for each investment. This was confirmed by director B in an email exchange.
- These profit multiples were arbitrary and not based on fact. And in the case of the Karelia and PCC investment they were based on an initial nil return of capital. In most cases consumers lost their money immediately and this was contrary to the promotional material.
- Planning permission was not received for the developments and some of them are unable to be developed. However the promotion said that planning permission was guaranteed. BAL would have been aware of this but failed to disclose it.
- An independent report has outlined that investor monies were diverted because the trustees "over-committed themselves before raising funds". It shows that director B had a 'wilful intent' to do this from the start and the situation arose because funds were overcommitted elsewhere. It also showed that the funds were facing problems and it was likely that investors would lose capital.
- Director B would have been aware of this report which was being produced at the time of promotion of the PCC investment.
- BAL and Director B were involved in every aspect of the investments and the promotion of them. They would have known that the monies and profit shares were not allocated as in the promotional material.
- The ombudsman's comment that 'the literature and information provided to Mr A was provided by a third party and it was reasonable for BAL to rely on it' should be withdrawn as this statement is demonstrably not correct.
- Another company prepared the prospectuses on behalf of BAL and assisted with the marketing of the funds. Mr A provided evidence of communications and arrangements between that company and BAL.
- Mr A's high net worth certificate was not presented to BAL in 2005. In 2006 BAL promoted investments to him without certifying him as suitable for this beforehand. This was a breach of regulatory rules and should not be tolerated.
- BAL received significant remuneration from, and was heavily dependent on, these projects. Because of this it was conflicted.
- Mr A requested confirmation that BAL notified this service of its multiple conflicts.
- Mr A says that if correct information had been provided to consumers no one would have invested in the UCIS. These schemes were unfit for purpose and not suitable for anyone.

BAL did not respond to my provisional decision.

After I issued the provisional decision and in response to his further submissions, I asked Mr A for his comments about the existence of a 'high net worth' certificate from 2005. I suggested that this and the fact that he had already made some UCIS investments might have caused BAL to believe that he was suitable for further promotion of UCIS.

Mr A said that he does not believe BAL should be able to rely on anything obtained before it became regulated in its own right in January 2006. He says it obtained another certificate in March 2006, after the promotion had been made to regularise the position. He believes therefore that BAL did not meet the requirements of the legislation before promoting the UCIS to him. Mr A also reiterated his comments about a previous director of BAL's involvement in the R2i Special Opportunities scheme and the fact that any shares the R2i scheme had were worthless.

my findings

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

I would confirm, as I did in the provisional decision, that I am considering here the merits of Mr A's complaint about the PCC investment – for the reasons discussed in my provisional decision. I would also state that I have read in full Mr A's submissions (which are significant) and will address what is material to the outcome – I will not necessarily address every point that has been made.

BAL did not advise Mr A to take out the PCC – and I do not believe Mr A has said it did. However it did promote the PCC to him. In the provisional decision I set out that the legislation that applied to that promotion:

S238 of the Financial Services and Markets Act (FSMA); this prohibits authorised firms from promoting UCIS except where:

i. An exemption in the FSMA 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 ("the Order") applies; or

ii. An exemption in COB 3.11.2 (in the former FSA Handbook) applies.

'Promoting', in this context, means the communication, in the course of business, of an invitation or inducement to engage in investment activity in relation to UCIS.
The Order permits promotion to certain individuals, including the following:

- Certified high net worth individuals (art 21);
- Certified sophisticated investors (art 23);
- Self-certified sophisticated investors (art 23A)

Mr A had already completed a 'High Net Worth' (HNW) statement in 2005; dated 29 April 2005. He also completed such a statement on 5 March 2006. I have included detail of the close relationship between BAL and a director of BAL and the business prior to 2006 that was involved in certifying individuals as suitable for promotion, in the provisional decision.

Because of that arrangement, BAL likely had sight of the 2005 document in 2006 and did have a copy in its files. So it had reason to believe that it could promote the UCIS to Mr A. In addition Mr A had already invested in several similar UCIS in 2005 whilst BAL was a promoter or co-promoter of these schemes and had been corresponding with BAL (or a director of BAL) about them.

So I believe an exemption existed and BAL could reasonably believe Mr A was suitable for promotion.

I appreciate that Mr A says that BAL should not be able to use that exemption or assume he was suitable for promotion because BAL was not authorised in its own right when the statement of 2005 was completed. I understand what Mr A is saying but Article 21 of The Order only states that the individual needs to have completed such a high net worth statement in the previous 12 months (before the promotion), which he did.

Furthermore I believe Mr A has accepted he qualified as a HNW individual for the purposes of the legislation. The email Mr A was sent on 21 January 2006 informing him of the PCC said that the investment was only open to HNW and Sophisticated investors (something that was repeated in the promotional literature for the PCC). As I say, Mr A then completed another HNW certificate in 2006.

So, as I said in the provisional decision, I do not uphold the complaint on the basis that BAL promoted the UCIS to an individual without an exemption or was unsuitable for that promotion. I believe such an exemption existed.

I would say here that even if I am wrong in that finding, it is clear that Mr A was suitable for promotion of a UCIS. Given my requirement to reach a decision that is fair and reasonable in all the circumstances I believe it would be unreasonable to treat Mr A as unsuitable for promotion on the basis of a breach of the legislation in a situation where he *was* suitable but the error was that the correct protocol was not followed (on the basis the 2005 certificate was not 'valid' and the 2006 certificate was obtained after the promotion). I do not 'condone' breaches of legislation but that breach, if one occurred, has to be considered in light of all the circumstances. In this case, even if such a breach occurred, Mr A was suitable for such a promotion and I believe it would be fair to treat him as suitable for that promotion.

Having reached a finding that Mr A was suitable for promotion I have then gone on to consider the further submissions about the literature and promotion and how Mr A says he was misled.

In my provisional decision I said that COB 2 applied to the promotion because the PCC was a UCIS. To be clear this was because (as discussed above) the PCC was a UCIS and an exemption under the Order applied to Mr A because he was a HNW individual. Because the promotion is exempted under the Order (because Mr A was a HNW individual and had certified himself as such), when considering the promotion itself and the literature Mr A was given, COB 2 applies.

I also explained in my provisional decision that I did believe BAL had a deep knowledge of the prospective investment because of the involvement of director B. So I judged it to already have knowledge of the investment. With that background I then considered the literature that BAL issued.

As I set out in the provisional decision, the key provision in COB 2 is that:

"when a firm communicates information to a customer, the firm must take reasonable steps to communicate in a way which is clear, fair and not misleading" (COB 2.1.3R).

This is a requirement mirrored in the FSA Principles (which I have also taken into account) at the time.

I think it would be fair to say that this requirement would include whether the information could be understood by Mr A and does it clearly indicate the essential features of the product as well as the risks and benefits?

As I said in the provisional decision I considered the email of 21 January 2006, the Memo and the Cell particulars. I did not believe the Country fund prospectus had material application, and neither did the seminar of January 2006 as Mr A did not attend.

To recap, the risks that were mentioned in the Memo and Cell particulars included:

- Illiquidity: that it was a long term investment.
- Volatility: the price may fluctuate and may not reflect the underlying asset value – which will be influenced by many factors.
- Emerging Market risk: adverse political or economic factors could influence the returns and corruption may be an issue.
- Development risk: that the development may become insolvent, that the necessary finance may not be obtained, that there are risks with property development – legal disputes, building issues or construction constraints.
- Valuation risk: the property may be difficult to value and the sales value may not reflect the asset value.

There are many warnings in the documents that all the investment money could be lost.

Conversely, positive statements are made in the Supplemental Cell Particulars about property values in the area in question increasing and that the development would be in "beachfront property".

I did discuss how the risks were set out and the positive statements that were made in the provisional decision. My finding was that the literature was not materially misleading. I remain of that view. Given the clear risk warnings it is not my view that Mr A was misled about the principle risks or that overall the promotion was unfairly balanced towards positive statements about the investment.

I do not wish to repeat all the content of my provisional decision about the literature here - but I have reviewed some of Mr A's material concerns.

Mr A has said that when the promotion was made it was known by BAL that the money would not be invested as Mr A thought or the promotional literature set out.

I did discuss this in my provisional decision and I said that I had not seen evidence that would establish that this was the intention when the promotion was made. In other words that BAL made the promotion of the PCC knowing that the money was (if it was) going to be used for other purposes than the PCC promotional documents described. That the money may have been subsequently used in other ways in not definitive evidence in itself that this was always the intention at the start.

I do fully note Mr A's comments about how the marketing literature described how his money would be invested and how the return would be calculated. But I would reiterate that subsequent actions taken in the Channel Islands and/or the failure of the scheme cannot necessarily be conflated with the promotion. I do not agree with the premise that the investment was necessarily 'worthless' because of the trustees or managers actions subsequently in apportioning money. Mr A from what I can see had an entitlement to a profit share (if that should occur) based on the fortunes of a particular land development. It is not been evidenced that this would never be or could not be honoured and BAL knew it wouldn't be.

I have given full consideration to Mr A's recent submission on this which included financial data. But that does not demonstrate that BAL knew the money was destined elsewhere when the promotion was made.

I do appreciate Mr A's concerns that BAL or a director of BAL knew that the money was not to be used for the purposes Mr A thought. But as I say the evidence is not sufficient for me to be able to reach a finding that this was the case.

As to what happened to the money when it was placed with the trustees and managers in the Channel Islands; I cannot consider those actions because they do not fall within my jurisdiction. As I said in the provisional decision, the PCC took an interest in the land development and I have not seen that interest was not valid. I am not persuaded that an assumption can be made, based on the evidence, that the investment was 'immediately worthless' as Mr A suggests. The PCC had an interest in the land development and if the land development succeeded it is not clear that Mr A would not receive a return.

If the money was misdirected in some way by the managers or trustees then Mr A may have a cause of action against those parties.

I discussed in the provisional decision the issue of planning permission and the funding of the investments. Mr A says that it was known that the investments would never obtain the money required to fully develop the land and BAL knew planning permission would never be obtained. I explained my view of the ongoing funding of the developments and that it was only with hindsight that such a judgement could be made.

I had not seen persuasive evidence that the investments could never have raised the money required. I also do not believe it has been established that planning permission could never be obtained. Although Mr A has repeated that it was stated that planning permission was guaranteed – I have not seen such a statement in the promotional materials I have referred to. In any event I did say that those risks (planning permission and funding) had been disclosed.

I noted director B's involvement in the investments through other companies and/or advisors to the scheme. It is likely he was gaining benefit through other services provided. But that does not in my view cause the promotion to be necessarily flawed or directly lead to Mr A's losses. I also did note the benefit BAL received in promoting the investments. I would note that many financial businesses receive remuneration for marketing or promoting investments – that does not mean they are somehow acting wrongfully.

It is likely the situation that both director B and BAL had interests in this investment proceeding and in funding being obtained for it (and it being successful given director B's interest in a company taking a share of the profits). Mr A refers to them as 'conflicts' (which I discussed in the provisional decision). And the FSA Principles do require a business to manage those interests fairly. But the issue is whether those interests caused Mr A's losses and I do not believe they did, for the reasons set out in my provisional decision and in this decision.

I also take full account of Mr A's statements about valuation and the differences in valuation between developments. I considered that in the provisional decision and that the literature outlined the risk in valuations and lack of any exactitude about profits and their forecasts.

I did say that the issue of the costs of the investment and how they would be borne was unclear and it could well be that the literature was not clear, fair and misleading in that respect.

But I do not believe that failure was causative of Mr A's loss. As I have said the material risks of investing were disclosed in what I believe was a sufficiently clear, fair and not misleading way. Bearing in mind those risks were accepted by Mr A, I think it unlikely he would have not proceeded had those costs been made clearer. I do not think they were particularly influential in his decision to invest.

conclusions

Taking everything into account, I have to arrive at a decision which I believe is fair and reasonable in the circumstances. In doing so I have considered the FCA Principles in arriving at my decision including that information should be clear, fair and not misleading, that a business must manage its conflicts and that a business should treat its customers fairly.

I accept as I did in the provisional decision that there is evidence from various sources that these investments were not run well and BAL did not perform every function as it was supposed to. But I have to consider if that is causative of Mr A's loss and overall whether it would be fair and reasonable to uphold his complaint and order that BAL pay redress to him.

I so doing I have considered if Mr A was suitable for this promotion and considered to what extent the promotion of the PCC was flawed or misleading and whether then that was causative of Mr A's losses. I have set out in some detail in this decision and my provisional decision what I think of that promotion. Considering that and Mr A's circumstances and knowledge, my view was that he was suitable for promotion and the evidence was not sufficient that the promotion was flawed or misleading to the extent that it caused Mr A to invest when he otherwise would not have done so. It set out the material risks of investing (including that all the money could be lost) and I cannot come to the conclusion it was made knowing that the money would be invested differently (if it was not).

As I said in the provisional decision, I believe Mr A was an individual who could understand the literature and that did set out the essential features, risks and benefits. Mr A was at the very least aware that he was investing in undeveloped land in Eastern Europe and that he was suitable for promotion of this type of investment. It was made clear that there were substantial risks (which I have discussed) with a speculative land development. Mr A was in my view aware it was speculative and could appreciate the kind of risks involved. He decided to proceed on that basis. I believe he could have appreciated that all his money could be lost.

Taking all this into account I remain of the view that BAL has not acted in such a way as to cause Mr A's loss or that it would overall be fair and reasonable to uphold his complaint.

my final decision

I very much appreciate Mr A's strength of feeling in this matter and why he believes Burlington Associates Ltd should be held accountable for his losses. But for the reasons contained in this decision and in my provisional decision, my view is that, on balance, it is not fair and reasonable to hold it liable for those losses.

I do not uphold this complaint or make any award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 10 February 2017.

David Bird
ombudsman

copy provisional decision

complaint

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Mr A and his former representative, Harcus Sinclair, have made lengthy submissions; I believe Mr A's complaints can be fairly summarised as follows:

complaints about the promotion of the investments.

- A major fraud was committed in the UK in 2005 when three unauthorised firms (Equity Trust, Burlington Associates and Ready2invest) co-promoted the schemes, the majority of which involved the subsequent laundering of investor monies through Equity Trust bank accounts in Jersey.
- The so called 'High Net Worth' and 'Sophisticated Investor' forms only permitted promotion by authorised firms and it was Leslie & Nuding at the outset, who lent its authorisation for purposes of the fraud.
- When the investments were promoted to Mr A in 2006 it was known that the funds and land developments had not received sufficient investment to be viable. Because of this Burlington failed to treat its customers fairly in allowing customers to invest when the funds had little prospect of success.
- A director of BAL (I shall call them director B) procured the services of Leslie & Nuding to make the investment arrangements in the UK (in 2005) and a Jersey regulated entity to handle investor monies in Jersey.
- Overall the involvement of BAL gave the investors a false sense of security and implied that the business was complying with FSA regulations when this was not the case.

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- The investments were poorly managed, chaotic and *doomed to failur*e. The funds did not raise anywhere near the capital needed to be successful. None of the R2i Property Funds raised sufficient monies to purchase the underlying land and seek planning permission as required.
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- The information in the fund prospectus has not been adhered to such as the principles given about valuations and the restriction on the fees payable by the funds.
- Valuations were not carried out correctly and were carried out by businesses related to BAL or director B.
- The raising of public money under the R2i Property Funds prospectuses was fundamentally flawed and BAL implemented a plan to deceive investors into thinking that they were making an investment through properly authorised FSA regulated bodies.
- The scam is not complicated. Director B was a founder and managing director of Burlington Associates Ltd, an appointed representative of Sesame, which subsequently became authorised in its own right. Director B set up a suite of other unregulated companies in the UK and in Jersey which extracted large amounts of the proceeds through alleged services. The fees and commission BAL took were very high which reflected its key role in the investments and is a reason why the funds failed.
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- The information provided at the point of sale was misleading. In particular Mr A says that the land valuations were incorrect and based on misleading assumptions.
- He says that spurious profit forecasts were handed out at roadshows attended by "Burlington" (including Director B) and used to induce investors. Also false property valuations (outside the methodology stated in the R2i Property Fund prospectuses) were provided to make investors believe that their investments were sound.

background to these investments

The adjudicator detailed the circumstances surrounding these investments. These facts are not in dispute and so I have reproduced them from the adjudication.

During 2005, Mr A made a number of investments into the R2i schemes initially by the way of short term loans directly to R2i. When these loans matured, rather than redeem them, he was offered favourable terms in the UCIS investments, which he accepted. This process was known as converting the loans.

As I understand it these investments were as follows:

- €75,000 loan - Bulgaria Diversified Fund (conversion in September 2005)
- €75,000 loan - Croatia Diversified Fund (conversion in September 2005)
- €105,000 loan - Montenegro Diversified B Fund (conversion in November 2005)
- €75,000 loan - Arkoutino Fund (conversion in October 2005)
- €150,000 loan - Dubrovnik Fund (conversion in Feb 2006)
- €125,000 – Karelia International Ltd invested in December 2005
- There was a further €50,000 invested by way of a loan to Bacchus Factor Servicing Trust which I understand was not converted.

In 2006, Mr A made the following additional investments:

- €250,000 – R2i Special Opportunities PCC Ltd

The events surrounding these investments are as follows:
Mr A has explained that he had been a reader of a publication called ‘Hot Property Alert’. Having read about an R2i development in Dubrovnik in this publication he contacted R2i in early 2005 by telephone. He was provided with written information about some of these funds which he says he subsequently further discussed with R2i. Mr A corresponded with Burlington Associates Ltd, Lakeside Management Services and R2i at this time.

In February 2005, Mr A completed a ‘Lakeside Financial Review’ document and this confirmed the following:

- He was a partner at a firm of accountants with a salary of £400,000 and his occupation was described as ‘Chartered Accountant’.
- He was 49 years old and was married with 3 children.
- His joint assets with Mrs A amounted to £3,500,000 and they had no liabilities.
- Mr A held around £400,000 in stock-market shares and had around £200,000 in building society and deposit accounts.

On 29 April 2005, Mr A completed a ‘Statement for Certified High Net Worth Individual’.

Mr A attended a roadshow hosted by R2i on 17 August 2005 in which he says director B attended. Mr A says that he looked at the investment prospectuses and raised a number of questions about how the investment was structured. He said that director B was evasive on this point.

On 15 December 2005 Mr A received a brochure from R2i about a Montenegro 'Special Deal'. Mr A corresponded with R2i about this investment over the coming months.

In late 2005 and early 2006, Mr A entered into detailed correspondence with director B of BAL about his existing investments and making further investments. In this correspondence he went into some detail about the fund with director B, and a director of R2i. Mr A said he did not receive wholly satisfactory answers initially and engaged in protracted correspondence about some technical aspects of these investments over this time.

On 21 January 2006 Mr A said that director B of BAL sent him details of the Guernsey based R2i Special Opportunities PCC. He completed the process to make this investment in due course.

On 5 March 2006 Mr A completed a further 'Statement for Certified High Net Worth Individuals'.

background to the complaint

Mr A has made the complaints above to BAL. It has not upheld his complaint and he has brought it to the Financial Ombudsman Service.

After considering the circumstances and the complaint correspondence the complaint has been assessed by an adjudicator. He concluded that Mr A's complaint should not succeed. He said that:

findings about the jurisdiction of the Financial Ombudsman Service and what investments we could consider

- The complaint was brought within the relevant timescales applicable to this service and did not fall outside jurisdiction
- He clarified that our consideration of this complaint would only concern events that took place after 3 January 2006 when BAL was regulated in its own right.
- He saw no evidence that BAL had any involvement in 2006 with the conversion of Mr A's Dubrovnik loan and the Karelia investment. Any material activities with these investments took place in 2005.
- His adjudication concentrated on events that surrounded the arrangement of the R2i Special Opportunities PCC Ltd in early 2006.

findings about the promotion of the investment and the suitability of it for Mr A

- BAL (and businesses owned by one of its directors) was responsible for arranging and promoting this investment in 2006.
- The evidence showed that director B from BAL promoted the PCC investment to Mr A in 2006 – largely by email.
- The application process in this case was also handled by BAL or businesses representing it.
- The adjudicator concluded that BAL had performed a regulated activity in doing this and that Mr A was also an eligible complainant.
- It was not entirely clear if BAL strictly adhered to the legislation and rules relating to the promotion of UCIS. It may not have fully assessed Mr A's suitability for promotion before promoting it to him.
- That said, Mr A would have reasonably been assessed as a 'High Net Worth Individual' and a 'Sophisticated Investor' so the way the promotion took place here did not cause Mr A's loss.

findings about the information provided and the management of the funds

- BAL had a responsibility under COB2 to ensure that the promotion of the UCIS was "clear, fair and not misleading".
- However the literature and information provided to Mr A was provided by a third party and it was reasonable for BAL to rely on it.
- Even though these third parties had some connections by way of director B to BAL, the entities that produced the literature and marketing information are responsible for it. This means that BAL could rely on the literature to meet its requirement to provide information that was clear, fair and not misleading.
- The literature provided (in 2006) fairly explained the risk and nature of the investment. The risks were outlined in a section that ran to over 7 pages.
- It was not clear that the PCC, or the investments in which it took an interest, were 'doomed to failure' in 2006.
- The ombudsman service does not have jurisdiction over many of the businesses that Mr A complains about in relation to the management of the funds, such as Equity Trust, CCAM, Lakeside and R2i.

Mr A did not accept the adjudicator's conclusions. He said that:

- He agreed that the adjudication was correct in saying that he was a High Net Worth Individual or Sophisticated Investor.
- He did *not* agree that the promotion of the UCIS was performed correctly. It was not established that he was a high net worth or sophisticated investor before the promotion took place. The certificates he completed earlier were provided to a different business.
- He considered that the promotion was misleading. Specifically it said that the investment would be made into the relevant property development. This did not take place and investor monies went elsewhere.
- He was given misleading information by director B about the structure of the investment. He was also given incorrect information about the priority return of capital and how the launch costs would be paid.
- He did not consider it reasonable to say that the directors of the PCC took responsibility for the promotional literature. In reality much of the literature was prepared by director B through his related business.
- Due to his business relationships director B would have been aware that the profit forecasts he provided at seminars were incorrect and that planning permission was not guaranteed.
- So it is not reasonable to say that the promotional literature was made by independent parties of BAL as director B was also a director of this business.
- Because of this BAL breached both COB 2 and COB2.3.2R - in relation to the obligation to disclose fee arrangements - and also put BAL in a position of conflict with these third parties.
- It is not clear that third parties managed these investments. Director B was a special adviser to these funds and held significant stakes in them.
- Mr A has been informed that director B moved the shares and cash in the funds. Equity Trust was heavily dependent on him, and his associated companies, for many aspects of the setting up and management of the funds.
- BAL itself was the financial and monetary adviser to the Factor Servicing Trusts and engaged a marketing firm to prepare the PCC product literature.
- BAL also actively managed many aspects of these investments; it assisted in the creation of the trusts and funds. BAL and its managing director were, for example, project consultants and gave its own name to a proposed restructure in 2007.
- The promoter, which Mr A believes to be BAL, diverted and laundered investor's monies. It provided false assurances that investor monies would go to the Montenegrin project but in reality money fulfilled funding needs elsewhere.
- Given the above Mr A considers that BAL was responsible for the literature that he received. It managed the promotion of the investments from 'end to end'.

Mr A provided a great deal of documentation to support what he said. This is as follows:

- The Montenegro Special Deal Prospectuses.
- Bank Statements from the PCC – Sveti Stefan Cell.
- The Beamish Report produced in 2006 which comprises a review of the structure of the trusts, the underlying BVI companies and the funds.
- Information about the authorship of the Burlington Funds Risk Questionnaire, Key Facts, Payment Procedure, some Prospectuses and related information.
- Montenegro Development Company Profit Forecast.
- Correspondence between Mr A and a director of R2i about the financial aspects of the funds in 2012.
- A breakdown of the fees paid to director B's related businesses. This is noted as having originated from a report by a financial services advisory and consultancy firm, BDO Alto.
- Email correspondence between various parties in 2012 about matters relating to the Guernsey trustee of the investments.
- The Burlington proposals about the fund restructure made in 2007.
- Equity Trust letter to all investors dated 8 August 2007.
- Evidence about director B's alleged conflicted roles.

BAL did not respond to the adjudicators findings.

my provisional findings

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

investment being considered

I agree with the adjudicator that I can and should only consider the R2i Special Opportunities PCC Ltd (PCC) investment. BAL only became regulated in its own right (and therefore subject to my jurisdiction) from January 2006. The evidence is that it only promoted and arranged one investment to/for Mr A after 3 January 2006 and that is the PCC. So my findings relate to that investment only.

jurisdiction

The adjudicator explained that we could consider the PCC investment as Mr A had complained in time and BAL had carried out a regulated activity which this service could consider. BAL has not objected to that finding and so I will assume it accepts that I have jurisdiction to consider the complaint. I will not therefore consider this issue further.

I would also confirm that I have no jurisdiction over decisions taken by the trustees and the managers of the PCC, or in fact any of Mr A's UCIS investments, in Jersey or Guernsey. That includes how the property developments were managed or funded or how monies may have been transferred or allocated between the various UCIS property schemes (by businesses in which director B had an interest or otherwise).

I mention this as some of Mr A's submissions relate to how the funds or schemes were managed, how money was allocated between them, how certain developments were progressed, certain activities for the managers and trustees undertaken by businesses in which director B had an interest and the fees charges by such entities. I confirm that I am only considering here the promotion of the PCC investment undertaken by BAL.

Mr A's suitability for promotion of the PCC

The PCC was a UCIS (unregulated collective investment scheme). Particular rules and obligations apply to the promotion of such schemes in the UK. The adjudicator set out those obligations. I will not set them out again in full here because neither Mr A nor BAL has disputed they apply and, for reasons I will explain, I do not believe the process those obligations set out should be followed affect the outcome of this complaint.

In essence the rules and legislation requires that BAL makes sure, before it promotes a UCIS, that the individual is an appropriate person to receive such a promotion. It can do this in several ways but, if it does not assess the individual's suitability by obtaining details of their background and circumstances, this is usually achieved through confirmation that the individual is either a 'sophisticated' investor or 'high net worth' investor. We know that Mr A confirmed he was a high net worth investor, although it is disputed whether BAL could rely on that when it received that conformation or could rely on such confirmation received before it became regulated in its own right.

However, Mr A did confirm he was a high net worth investor and it is clear that he was such an individual and met the requirements to be classified as such under the applicable legislation.

Given his background and resources I agree with the adjudicator that Mr A was a suitable individual for the promotion of a UCIS. It may well be the case that BAL did not carry out the correct procedure under the legislation to confirm that (it is arguable whether it could rely on confirmation completed by Mr A before BAL became regulated in its own right). But I have to consider the complaint based on what is fair and reasonable in the circumstances.

Whether BAL technically breached the requirements or not, my view is that Mr A was suitable for promotion of UCIS and therefore the sequence in which it obtained confirmation of his suitability did not affect whether Mr A invested and did not cause his loss. On a fair and reasonable basis it would also not be right to uphold the case on this basis and order BAL to pay redress when he was otherwise suitable to be promoted such an investment.

So I am not intending to uphold the complaint on this basis.

background to the promotion

Mr A has made significant submissions about the promotion itself – in that what he was told was misleading in several respects. So my interpretation is that Mr A argues that even if he was suitable for the promotion of UCIS, he was misled and if he had been given accurate information he would not have invested.

Before considering the promotion itself I believe it would be relevant to consider BAL's role in this investment and the extent of its 'knowledge' of the investment.

At the time the promotion was made director B was a director of BAL. Director B was acting for BAL in the promotion of this UCIS and, in any event, was a director of BAL when BAL was promoting the PCC. Therefore what director B was aware of in terms of the nature of the PCC, BAL should be deemed to have been aware of too. I say this as it is not in my view tenable to suggest that BAL are separate in this matter from director B and BAL in some way should be deemed to be ignorant of the knowledge of director B.

In arriving at a view as to what knowledge BAL therefore had and to what actions director B, as its director carried out, I think it is relevant to discuss the FCA's findings about director B and BAL. This relates to a period before 2006 (and not to the PCC) but I believe it is illustrative as to what role was played by director B and what role BAL played in the promotion of the UCIS land developments in Eastern Europe. In respect of director B the FCA found:

On the basis of the facts and matters described below, the Authority has concluded that, during the Relevant Period, (director B) *failed to act with honesty and integrity in performing the significant influence function CF1 (Director) at Burlington's principal, with responsibility for Burlington, in breach of Statement of Principle 1 of the Statements of Principle, in that he:*

(a) deliberately involved Burlington in promoting and arranging investments in the Three UCIS, without the knowledge of Burlington's principal and in breach of Burlington's agreement with its principal, which did not permit Burlington to conduct UCIS business; and

(b) recklessly devised a structure and participated in a process for promoting and arranging investments in the Three UCIS that was likely to provide false assurance to customers, potential customers and others with whom he dealt that Burlington's involvement in the Three UCIS was authorised.

2.2. (director B) *stood to derive personal benefit from Burlington's role in promoting and arranging the Three UCIS, through commission and fees received from Burlington and from AdminCo as a director of that company which provided services to the Three UCIS (or to Burlington in relation to them).*
2.3. Burlington's activities, together with the activities of another IFA (Leslie & Nuding) and two non-authorised companies (AdminCo and MarketingCo), resulted in:

(a) unsolicited mailshots being sent by email to approximately 15,000 potential investors; and

(b) prospectuses being sent to 2,900 retail consumers

in each case without adequate systems and processes being in place to assess or establish the potential eligibility of the recipients for investments in the Three UCIS in accordance with regulatory requirements, thereby exposing them to the risk of unsuitable sales and consequent loss.

2.4. Between April and December 2005, approximately 880 investors invested a total of approximately €38 million in the Three UCIS, mainly on a non-advised basis. The Three UCIS fell into financial difficulties from 2006 and the investors' original investments may now be virtually worthless.

2.5. As a consequence of these matters, the Authority considers that (director B) *has failed to meet the minimum regulatory standards in terms of performing a controlled function with integrity. The serious nature of his breaches leads the Authority to conclude that* (director B) *is not a fit and proper person to perform any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm, and that he should be prohibited from doing so.*
In terms of how the UCIS were promoted the FCA found:

(director B) *arranged to involve himself, Burlington and/or AdminCo at everystage in the sales process relating to the investments in the Three UCIS. He caused Burlington to promote and arrange investments in the Three UCIS in a way that he knew was not permitted by its AR agreement with its principal, and put ordinary retail customers at risk.*

Promotion of the Three UCIS

The Three UCIS were promoted to an unrestricted audience of thousands of retail consumers, by e-brochures on MarketingCo's website, unsolicited email mailshots (which were sent to 15,000 consumers on MarketingCo's database) and in person at sales seminars and workshops. (director B) *commented on some of the marketing materials and on the slides that MarketingCo used at the seminars. Along with other staff from Burlington and AdminCo,* (director B) *also attended MarketingCo's sales seminars. At these seminars he was presented to the audience as being there on behalf of Burlington (and sometimes AdminCo).Burlington agreed with MarketingCo and the Jersey-based trustee of the Three UCIS that it would act as the co-promoter of the Three UCIS and was described in the prospectuses for the Three UCIS, and in marketing brochures sent to consumers, as "co-promoter".*

The content of, and the language used at, the seminars was intended to induce consumers to invest in the Three UCIS. After MarketingCo had explained the benefits of the Three UCIS to the audience, (director B) *gave a presentation explaining the structure and nature of the UCIS and the certification process. Consumers were told at some seminars by MarketingCo that the UCIS were promoted in a way that was within the Authority's guidelines, and* (director B) *was aware of and condoned this.* (director B) *answered the audience's questions at the seminars, and afterwards via email and by telephone.*

As to 'Failings', the FCA found that:

Statement of Principle 1

5.2 (director B) *failed to act with honesty and integrity in carrying out the CF1 (Director) controlled function at Burlington.*

5.3 As a CF1 (Director) on behalf of Burlington's principal with responsibility for Burlington, (director B) *was responsible for ensuring that Burlington complied with its AR agreement and the wider regulatory regime. Burlington's principal expressly prohibited Burlington from conducting UCIS business.* (director B) *knew that Burlington's principal did not allow Burlington to conduct UCIS business. He deliberately involved Burlington in promoting and arranging investments in the Three UCIS without the knowledge of Burlington's principal.*

5.4 (director B) *recklessly developed a process for selling the Three UCIS which was likely to cause the true nature of Burlington's role to be misunderstood, and to provide false assurance to customers, potential customers and others with whom he dealt that Burlington's involvement in the Three UCIS was authorised.* (director B)*:*

(a) asked Leslie & Nuding to become involved, which meant that responsibility might be attributed to Leslie & Nuding;

(b) agreed with Leslie & Nuding that it would use the trading name "Burlington

Funds", which meant that:

i. it would appear consistent with information contained in the prospectuses that a "Burlington" entity was a co-promoter; and

ii. it would appear that a "Burlington" entity was in control of the entire process; and

(c) arranged for AdminCo substantially to perform the role that Leslie & Nuding was engaged to do, which meant that (director B) *retained involvement in and oversight over the entire process. This meant that, in practice, an unauthorised firm handed out prospectuses and consumers sometimes believed they were dealing with Burlington when in fact they were not.*

5.5 This process was likely to mislead consumers and others.

5.6 (director B) *understood that UCIS were high risk investments. He knew that the manner in which he and Burlington (together with MarketingCo) promoted and arranged investments in the Three UCIS put ordinary retail consumers at risk of investing in high risk, unsuitable products.*

5.7 As a result of these matters, (director B) *has demonstrated a lack of integrity.*

Impact of (director B's) ***misconduct***

5.8 MarketingCo believed that Burlington's activities in relation to the Three UCIS were regulated by the Authority. MarketingCo suggested to potential investors in emails and at seminars that Burlington's involvement with the Three UCIS would provide investors with extra protection. This was not the case. The Three UCIS were high risk investments that did not afford the statutory protections that would apply to regulated investments. (director B's) *deliberate attempts to circumvent the restrictions under Burlington's AR agreement and the regulatory regime exacerbated the loss caused.*

5.9 In total, approximately 880 investors invested a total of approximately €38 million in the Three UCIS, mainly on a non-advised basis. The Three UCIS fell into financial difficulties from 2006 and the investors' original investments may now be virtually worthless.

Not Fit and Proper

5.10 (director B) *deliberately caused Burlington to play a significant role in promoting and arranging the Three UCIS in breach of its AR agreement and to the detriment of customers, who were left without the benefit of statutory protection. He recklessly devised a structure and participated in a process which was likely to provide false assurance that Burlington's involvement was authorised.*

5.11 (director B) *involved Burlington in promoting and arranging the Three UCIS in a way which he knew created a risk of exposing ordinary retail customers to high risk investments that might not be suitable for them. In particular,* (director B)*:*

(a) promoted the Three UCIS at sales seminars that he knew had been advertised to an unrestricted audience of thousands;

(b) was responsible for Burlington's misuse of risk questionnaires to assess eligibility, a purpose for which they were not intended; and

(c) was aware that the overall effect of the promotional activities was to encourage consumers to invest when there were doubts about whether they were eligible.

5.12 By reason of these matters, the Authority considers that (director B) *lacks honesty and integrity and therefore is not fit and proper to perform any function in relation to any regulated activity carried*

My understanding is that director B also performed other functions in relation to the UCIS (the PCC and other UCIS set up in 2005). Through his directorships of other companies he provided advice to the trustees and managers of the scheme in relation to the purchase of land developments to which this investment relates in Eastern Europe and management services.

One illustration of director B's involvement is contained in the BDO Alto Limited report of 2007. BDO was acting as auditor to the various funds (the funds enabling investment in and development of the land in Eastern Europe) and its report set out in some detail the situation of the investments at the time. The report describes some of what was happening when funding was being sought for the various UCIS. What is described is a conference call between R2i and director B and a third party investor who was considering investing a very large sum of money into one of the Eastern European land developments. It seems clear that other funding was being sought because insufficient funding had been raised through smaller individual investors like Mr A to fully develop the proposed land developments.

It seems clear that director B was not merely promoting the scheme that had been brought to him by a third party but was actually instrumental in the setting up of the various UCIS with R2i and seeking extra funding so that land could be fully developed. Director B and therefore BAL were not at 'arm's length' from the schemes themselves and not, in particular, the PCC – which was to take an interest in them.

Furthermore director B was providing other services to the UCIS schemes. That was advice on the land purchases themselves and development of them. Another company of which director B was a director was listed as project consultants in the PCC Memorandum. That involvement was to such an extent that as well as, per the BDO report, director B's companies taking ongoing fees and payments from the various schemes, that the company of which he was a director also took a 3% equity stake in at least both the Montenegro and Bulgaria developments – also again per the BDO report. The BDO report listed another of director B's companies as project facilitators and structuring adviser.

I also note that director B or BAL seem to have engaged a business to generate promotional literature (including prospectuses) for the UCIS land development schemes and paid its fees. This does tend to indicate at least some involvement in the generation of the literature.

I set this out because BAL's submission is that it only carried out certain administrative tasks in processing the UCIS applications, that it had no background knowledge of the UCIS and did not promote the UCIS. The FCA found that was not correct in relation to promotions it considered and, as I will discuss it was clearly promoting the PCC. Furthermore one of its directors had a deep background knowledge of the UCIS and was one of the main drivers of funding and the developments themselves.

The adjudicator discussed that the accuracy of the promotional materials, save the email issued by director B, were the responsibility of two separate businesses; Threadneedle and Leadenhall. And that BAL was simply using those materials to promote the investment to Mr A and could rely, in normal circumstances, on their accuracy. However, as I have discussed, I believe BAL had a much deeper knowledge of the investments they were promoting.

So in terms of considering the promotion of the PCC and the literature that was issued by director B and BAL and director B's and BAL's ability to know what was contained in that literature was accurate, I have taken this background into account.

the promotion

As I understand it Mr A was sent an email by director B of BAL on 21 January 2006 which promoted the PCC investment. The content was as follows:

"Dear (Mr A),

Thank you for expressing your interest in the R2i Eastern European property developments opportunities. Please note that this private investment offer will only be open to High Net Worth and Sophisticated Investors who have directly expressed an interest in this type of offer. This letter should not be viewed as a recommendation or as providing any advice as to the merit of this potential investment.

Attached are the Information Memorandum for R2i Special Opportunities PCC Limited and the information on the Cells within this Protected Cell Company (PCC).

A PCC is a legal entity that consists of one or more Cells for the purpose of segregating and protecting the assets within those Cells. Each Cell is responsible for its own liabilities, and holders of shares of a particular Cell have no right to the assets and no obligation regarding liabilities of any other Cell. Since the whole PCC is seen as own legal entity, it uses the same Board of Directors and Administrators to manage each Cell. Equity Trust will be the PCC's Directors and Administrators, in addition to being the Trustee and Fund Manager of the existing R2i Property Funds. Equity Trust is part of the Equity Trust Group, which is one of the world's leading trust and fiduciary services groups.

Each of the PCC's cells will be investing into a specific property in Bulgaria, Croatia or Montenegro by acquiring a percentage interest in a specific property development from the Ready2 Rent UK Limited Factoring Services Trust (FST). Once the property development has been completed and the Cell's share of profits has been received, the profits will not be reinvested but passed on to the Shareholders of the Cell by the Administrator, Equity Trust.

The total launch costs, including commission payable, for the PCC will be met by FST, ensuring that you receive 100% value for money. In short, if €200,000 is invested the applicant will receive 200,000 shares. All fees and expenses are disclosed in the Information Memorandum. The PCC's initial purchase offer will be for a minimum investment of €100,000 per Cell. If you take up the initial purchase offer when available, you will acquire the following percentage interest within the individual development for each €100,000 invested:

the individual development for each €100,000 invested:

The PCC is being set up with the help of legal experts from Guernsey, and UK legal experts have provided professional advice on all regulatory and taxation issues.

All application and bank account details will be included in the final Information Memorandum, once the registration of the PCC has been completed, giving you time to study the drafts attached. Once the PCC has been registered, you can, as a High Net Worth Individual or Sophisticated Investor, decide if you would like to own a share of the R2i Special Opportunities PCC Limited. As stated in the attached draft Information Memorandum, the Initial Purchase Offer of this private investment offer is 25 January 2006 with a minimum investment of €100,000. Please note that the minimum investment amount should not include any bank and transfer fees.

The final Information Memorandum and Cell particulars will be sent to you, once they become available. Please feel free to contact us for more information on 020 7329 7800.
Kind regards

*(*director B)*"*

At the end of the email was the address for BAL: "*Burlington Associates Limited, 61 Cheapside London EC2V 6AX, Telephone: 020 7329 7500 / Fax: 020 7329 7501*".

There then followed a Memorandum for the PCC. This listed BAL as 'Promoter' for the PCC. The project consultant was a company of which director B was a director.

The Memo sets out that the intention will be to invest into 'non-diverse property developments'. It also sets out a quite extensive list of the risks of investing in such a scheme. These include problems with liquidity, marketability and development risk. The latter explains the PDC (the company actually 'holding' the land) may become insolvent and "unable to complete the project". It discusses the issue that the development may fail if insufficient bank lending is obtained. It also notes the risk of title disputes.

I have also noted that the Memo discusses some other issues highlighted by Mr A:

Conflicts of interest: It is stated that instances may arise where the interests of the Administrator, Project Consultant or Promoter may conflict with the interests of the Company and Shareholders. The Memo says that each shareholder will be deemed to have waived any claim in relation to such conflicts. The Memo does however later say that there are no such conflicts currently.

Fees and expenses: It is said that "all costs and expenses associated with the organisation of the Company and the initial and subsequent offering of Shares of each cell…. Will be borne by each Cell ……".

It is also explained that the promoter will be entitled to 6% of the monies received by the cells, the project consultant an annual fee of 0.5% of the net asset value of each cell. Other fees will also be chargeable to the cell.

The COB rules in 2006 which are particularly relevant to communication of promotions are COB 3 and COB 2. The requirements of COB 3 do not apply where the promotion is one which falls within the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (the Order). In brief, because the PCC was a UCIS and was being promoted using the exemptions under the Order it fell within the exemption. Consequently COB 3 is dis-applied and COB 2 instead applies.

As the adjudicator considered in his assessment, the key provision in COB 2 is that:

"when a firm communicates information to a customer, the firm must take reasonable steps to communicate in a way which is clear, fair and not misleading" (COB 2.1.3R).

When considering the other requirements of COB 2 it is important to take into account that BAL was not giving tailored advice or a recommendation to Mr A. It was only promoting the investment to him. Bearing that in mind I do not believe that COB 2.3.3R, COB 2.3.4E or COB 2.3.5G, as discussed by the adjudicator, apply to this situation. In my view those obligations arise in situations where the business involved has a requirement to obtain sufficient information about the individual it is advising or to whom it is recommending an investment. It does not in my view apply to the straightforward promotion of an investment such as happened here.

Be that as it may, I do believe that COB 2.1.3R applies. So BAL should have taken reasonable steps to communicate with Mr A in a way that was clear, fair and not misleading. When considering that, as discussed previously, BAL is in my view fixed with director B's general knowledge of the investment. It is not that BAL were simply a conduit for making investors aware of an opportunity provided by an unconnected third party and without any background knowledge of that investment. As discussed, director B, and therefore BAL, more likely had a deep knowledge of the basis of the investment.

So whilst I believe that the adjudicator was technically correct when he said that the Memo states that responsibility for the accuracy of the Memo rests with the Directors of the company (who were not BAL) it is not the case that BAL had no knowledge of the matters underlying the investment.

Bearing all that in mind, as the adjudicator did I have considered the relevant literature referred to upon which Mr A says he based his decision to invest. This is the 'Country Fund Prospectus' for the R2i Montenegro Property Fund, the Memo and the Supplementary Cell Particulars. As the adjudicator said, it doesn't appear that Mr A attended the seminar in January 2006 which has been referred to and Mr A has not disputed that understanding in response to the adjudicators findings.

Firstly I agree that the prospectus has limited application here as it was issued in 2005 when BAL was not regulated in its own right and in a period when I have no jurisdiction against BAL. The prospectus was not issued alongside the email, Memo or Cell Particulars.

With respect to that literature issued in 2006, Mr A originally disputed that he had been given misleading information about whether planning permission had been obtained, the valuation of land and the funding position of the underlying Montenegro investment in which the PCC was to take an interest.

Before considering that I would note that it is not clear from the evidence I have available to me what the exact position of the relevant land developments was in January 2006. There is comment from other sources which I will refer to but a lack of direct evidence, say, in terms of any current status reports from the managers or trustees, as to what state of progress the development or purchase of the land was in at the specific time the PCC was promoted to Mr A.

One of Mr A's main concerns is what the funding position of the development in which the PCC was to take an interest was at the time the PCC was promoted to him. I have referred to the BDO Alto report of 2007 (an independent audit of the funds) which provides relevant detail about the Montenegro developments. This does describe a situation where, until the 'Diatre fund' became an investor, the Sveti Stefan development that the PCC was to take an interest in, did not have the requisite funding to take the development forward – and I think it likely this was the situation when the PCC was promoted.

However, I do not believe the promotional literature for the PCC said that the development in which the PCC was to take an interest was fully funded. It seems to me that with an investment of this nature, where money is being sought to take a land development forward, that there will naturally be points in time where not enough money has been raised – that seems the point of the various fund raising methods employed by the managers of the scheme (of which the PCC seemingly was one).

It does not seem to me that it was envisaged that all the money for development would be raised from individual investors such as Mr A. It was also envisaged that bank funding would be obtained as well as from other sources – such as private equity or institutional investors.

The Memo does set out this kind of risk – that the Property Development Company (PDC) may become insolvent, that sufficient funding may not be raised and that all the investment may be lost. Those would be risks which I would have thought would be expected from the proposed development of 'virgin' land in Eastern Europe.

Like the adjudicator, I do not believe I can make the assumption that the developments were 'doomed to failure' when the promotion was made in 2006. It seems to me that more money would need to be raised and BAL (through director B) would know that but it was by no means certain that extra funding would not be obtained. In fact I note that the Diatre fund investment (the kind of large equity investment discussed and envisaged) did allow the development to continue.

Given that, I have not seen sufficient evidence that BAL misled Mr A in terms of funding or should not have promoted the investment to him because of the funding position. I also believe that sufficient warnings were given in the literature about the PCC that would make it clear that funding sufficient to fully develop the land may not be forthcoming.

Another of Mr A's main concerns is planning permission.

The Memo does not refer to planning permission having been obtained and sets out that there are risks in that respect. The Cell particulars and the email from director B do not state that planning permission had been obtained. I note that in April 2006 the Property Fund Update states the site in Sveti Stefan has been allowed to make a planning application to the local council. Given the proximity to the promotion it seems unlikely that the promotion was made on the understating planning permission had been obtained.

It may be that Mr A relied on other literature, not part of this promotion, to base his assumption as to planning permission. But, in terms of this promotion, the Memo makes it clear that planning permission may not be obtained or planning issues could arise that would delay the project.

As to valuation and profit forecasts the memo explains that there may be difficulty with valuation, marketability and information with which to value the land developments. It says such are subject to "substantial uncertainty".

It seems to me that land in an underdeveloped state and which is subject to obtaining full planning permission, could be valued on several basis none of which would necessarily be wrong. The development was speculative and the nature of any profits would be speculative – that would seem to accord with the nature of the investment. So I am not persuaded that the promotion was necessarily misleading on this basis.

I note that Mr A has drawn attention to conflicts of interest applying to BAL and director B. Given the various interests director B had in businesses carrying out various duties for the developments and the managers of the scheme, it might well be that such conflicts occurred. As previously discussed, the Memo did say such conflicts could occur (and investors had agreed to waive that issue) – although it seems to me it suggests that would be a consideration for later as the Memo said there were presently no such conflicts. The latter appears to me arguable, particularly taking into account director B's various roles.

Be that as it may my view is that such conflicts are not determinative as to the outcome of this complaint. The crucial issue is the nature of the promotion and whether deficiencies in that led to the losses Mr A suffered. I think that director B (and therefore BAL) would most likely have had significant interest in the developments proceeding but that does not mean that the promotion as a whole was misleading or is causative of Mr A's loss. I will discuss that issue later in this decision.

I note reference has been made to the email from director B stating that all the 'launch costs', including commission will be payable by the Factoring Services Trust. 'Launch costs' are not defined further. I note that reference is made to the Memo which describes all costs being born by the Cells themselves. It seems to me that there is considerable ambiguity here and at least on the face of it inconsistency between the Memo and the email issued by director B.

I note that Mr A has said that he thought he was investing in 'beachfront land' and not 'forests'. The PCC Cell particulars say it is 'beachfront' land. That term is open to interpretation and it is very difficult for me to reach any considered finding on that issue given the evidence; what can be termed 'beachfront' and/or what proportion could be classified as such for example. I think that the crucial factor is that this was land in the proximity of sea that was underdeveloped and subject to many risks – which the Memo discussed.

Mr A has made significant submissions about 'cross-funding' between the various land developments schemes and money being diverted from this PCC investment to other schemes as well as money being withdrawn to pay fees to businesses in which director B had an interest and, for example, commission payments to BAL.

Importantly they are primarily management and trusteeship issues which did not take place in the UK and over which I have no jurisdiction. Fees charged to the various funds or investments for services provided by other unregulated business entities would not be something I could consider.

Whether in terms of this promotion it was misleading because the money raised was always and knowingly destined for other uses when the promotion was made – rather than as a direct investment in Sveti Stefan – is not something I can determine from the evidence. The PCC investment took an interest in Sveti Stefan in which Mr A shared. I have not seen evidence that interest was not valid. One of the reasons why the investment may have 'failed' might well be because of management actions in relation to funding and where money was allocated, but as I say I cannot consider those actions here.

Mr A has raised a concern about being misled by director B in terms of the security of the investment. I have not seen any clear evidence that BAL misled Mr A that the investment was more secure than it was. I have not seen any direct communication from director B to Mr A as to how secure his investments would be. In any event the literature for the PCC makes it clear that all the investment could be lost – there was very little security of money with this type of development.

conclusions

It seems clear that, observing the FCA findings in respect of BAL and director B, that there were significant general failures in the promotion of these types of UCIS investments to members of the public. That was materially in respect of the assessment of individuals as to suitability for promotion and the process that was followed. I have taken that into account.

Having said that, I treat each case on its own merits. As discussed, in my view Mr A is a financially sophisticated and high net worth individual to which such a promotion would be suitable. I also believe he would have the necessary expertise and background to understand the principle risks of investing in this scheme.

So taking into account Mr A's particular circumstances and that he was suitable for promotion of a scheme such as this, I have considered the promotion that was made to him. Materially in my view I have taken into account that the literature, primarily the Memo and Cell particulars, discuss at some length the risks of investing in a scheme like this.

What is made clear is the clear possibility that *all* the investment could be lost and this was a high risk scheme. As discussed, it sets out specific risks in relation to funding, volatility, planning permissions and development risk, valuation risk and liquidity. In my view Mr A was likely aware of those risks and willing to take them. I believe that he would have been aware that the investment was speculative but

also the returns because of that could be high. That does appear to be the motivation in investing in a scheme like this.

I have discussed the literature at some length and currently my view is that BAL is not in breach of COB 2.3.1R in terms of the general nature of the investment and the key risks. That said there is ambiguity and the potential to mislead in some respects - such as in terms of the costs and fees payable. But is the literature unclear, unfair and misleading to an extent that would mean Mr A was left with clearly the wrong impression about the risks he was taking and the nature of the investment? I do not believe it was.

Even if I am incorrect in that conclusion I do not believe the primary cause of Mr A's loss is any lack of clarity of the literature, it is the failure of speculative land development which was no doubt affected by the financial crisis of 2007/2008 when funding (which was needed) for this type of scheme would have likely become much more difficult to find.

It was in my view always clear that the PCC investment was a high risk and speculative land development which had no guarantee of success.

It might well be that the managers/trustees of the scheme or entities in which director B had an interest made errors in relation to the development and funding of the land investment itself or its administration that contributed to loss but as I have explained I cannot consider that. It seems a matter of public record – for example by observing the Jersey Financial Services Commissions findings – that these schemes were not run well and I do not make any finding that they were. But I can and am only considering the promotion and not management actions that took place outside the UK and that would not fall within my jurisdiction.

The material issue is that Mr A invested into a speculative scheme that unfortunately failed, but the risks of which I am persuaded he could appreciate, based on his profile as a sophisticated investor and the promotional materials made available to him. I cannot therefore attribute fairly that failure and the consequent losses materially to the promotion of the scheme by BAL in the UK.

my provisional decision

I do not intend to uphold this complaint or make any award.

David Bird
ombudsman