DRN-5005274

## The complaint

Mr P has a self-invested personal pension ('SIPP') with AJ Bell Management Limited ('AJ Bell'). In 2008 he made several investments in his pension which he says have lost all of their value. Mr P's complaint is that AJ Bell did not carry out adequate checks before accepting those investments in his SIPP.

## What happened

Mr P had an existing relationship with an independent financial adviser, a business I'll call 'Firm M'. Firm M was regulated by the Financial Conduct Authority ('FCA' – then known as the Financial Services Authority 'FSA') until 27 February 2014. Firm M was regulated to provide pension and investment advice.

In 2007, Firm M advised Mr P to open a SIPP with AJ Bell (formerly Skandia, then Old Mutual Wealth but I'll refer to AJ Bell throughout this decision). Mr P says Firm M advised him to invest his pension funds in Stirling Mortimer.

Firm M provided Mr P's completed SIPP application form to AJ Bell in October 2007. Mr P's application form showed he was aged 57, employed and that he wanted to transfer an existing personal pension into the SIPP, which had a value of around £107,000. Mr P also indicated that he wished to make a single contribution of £35,000. No investment details were given, although the application form did not ask for this.

In the 'Adviser Details' section, a 'Mr M' of Firm M's details were given. And the application form stated that Firm M should receive initial adviser remuneration of 3% per single and regular contribution, but 0% per pension transfer. It also stated Firm M should receive ongoing adviser remuneration of 1% per year. Mr P signed the application declaration on 15 October 2007.

Mr P's SIPP was established and his personal contribution of £35,000 was received into the SIPP on 24 October 2007. On 5 December 2007 funds amounting to around £107,800 were received from Mr P's existing personal pension.

On 8 January 2008 AJ Bell received an application from Firm M to invest £120,000 of Mr P's pension funds in Stirling Mortimer's No.4 Cape Verde fund ('SM4'). The fund was described in the offer for subscription document as 'a cell of the Stirling Mortimer Global Property Fund PCC Limited'. The latter is 'a registered closed-ended investment company incorporated as a protected cell company with limited liability in Guernsey'. The fund's objectives were to invest in 'right to purchase' contracts in property developments within the islands of Cape Verde.

By signing the application form, Mr P confirmed he had read and understood the investment terms as set out in the 'Supplemental Memorandum' and that he fully understood and accepted the risks associated with the investment. The application form included a sophisticated investor's certificate signed by Mr P. This stated:

*"I, [Mr P]…, make this statement so that I am able to receive promotions which are exempt from the restrictions on financial promotion in the Financial Services and Markets Act 2000. The exemption relates to certified sophisticated investors and I declare that I qualify as such in relation to investments of the following kind:*

*shares or stock (or instruments giving tide to these) in the share capital of a company*
*shares or stock (or instruments giving tide to these) in a partnership*
*units in a collective investment scheme (whether or not the collective investment scheme is an authorised collective investment scheme)*
*rights under a personal pension scheme*

*I accept that the contents of promotions and other material that I receive may not have been approved by an authorised person and that their content may not therefore be subject to controls which would apply if the promotion were made or approved by an authorised person. I am aware that it is open to me to seek advice from someone who specialises in advising on this kind of investment."*

Firm M also stated Mr P was sufficiently knowledgeable to understand the risks associated with the investments described in the certificate.

Firm M included a 'Collective Investment Schemes – Declaration for non-UK regulated and/or illiquid investments' with Mr P's application, which set out the features, including the following:

3. *If there is no 'liquid' market in the investment, selling/encashing the investment to pay benefits, or for re-investment may be very difficult. This could result in delays or restrictions on the benefits payable.*

4. *Also, if there is no liquid market in the investment, it may be difficult for us to obtain a valuation for accounting purposes. If we are unable to obtain an up to date market value from the manager of the investment, it is our standard policy to value such investments at cost (less any amounts already paid out) for accounting purposes.*

Firm M signed this on 7 January 2008 confirming Mr P had been made aware of these issues and still wished to proceed.

Mr P's investment in SM4 was placed on 9 January 2008.

Mr P made an additional personal contribution of £50,000 to the SIPP on 7 April 2008.

In September 2008 the proceeds of another personal pension, with a value of around £73,700, were transferred to the SIPP. And on 8 October 2008, a further sum of around £27,200 was transferred to the SIPP from another personal pension.

On 15 October 2008 AJ Bell received an additional application from Firm M to invest £50,000 of Mr P's pension funds into Stirling Mortimer's No.7 Cape Verde II fund ('SM7'). By signing the application form, Mr P confirmed he had read and understood the investment terms as set out in the 'Supplemental Memorandum', that he fully understood and accepted the risks associated with the investment and that he had read and understood the disclosure statements. Firm M included another 'Collective Investment Schemes – Declaration for non-UK regulated and/or illiquid investments' with Mr P's application, which Firm M signed on 14 October 2008.

The investment was placed on 17 October 2008.

On 15 October 2008 AJ Bell also received an application to open a 'Transact Portfolio Account' ('TPA') to be held within Mr P's SIPP.

AJ Bell wrote to Mr P on 22 October 2008 acknowledging his application form and asking him to sign and return the letter, confirming he agreed to AJ Bell's conditions. This included the following conditions:

- *We will only allow the purchase of an investment if Transact are able to supply us with a reasonable market value, as set out in Sections 272 and 273 of the Taxation of Chargeable Gains Act 1992, upon request.*
- *We will only allow the purchase of an investment if, in your or Transact's professional opinion, it will be possible to realise the investment within 12 months of a request to do so.*
- *Investments in unquoted shares can lead to indirect investment in taxable property, may be difficult to value, and may not be readily realisable. If you or Transact are in any doubt that an investment in unquoted shares will meet the above three conditions then it is not permitted.*

Mr P signed the letter on 28 October 2008, confirming he agreed to act in accordance with AJ Bell's terms when placing investments within the TPA and the account was subsequently opened.

Mr P went on to make an investment in Stirling Mortimer No.9 UK Land fund II ('SM9') via his TPA.

In December 2011 Mr P's new adviser made enquiries about re-registering investments Mr P had made within the TPA so that they would be held directly within his SIPP. This included the investment in SM9.

In July 2012 AJ Bell received Mr P's signed application to invest in SM9, from his new financial adviser, which was required to facilitate the re-registration. The declaration Mr P signed stated that he had fully read and understood the risks associated with the investment detailed in the 'Risk Factors' page of the SM9 Supplemental Memorandum. Mr P's holding in SM9 was re-registered on 15 August 2012.

Mr P emailed AJ Bell in April 2013 explaining that he was taking court action against Firm M as he did not consider the Stirling Mortimer investments to be suitable for his risk appetite.

Mr P made a complaint to the Financial Ombudsman Service about Firm M in 2013, which was upheld. However, Firm M was declared bankrupt and went into administration. Mr P eventually made a claim about Firm M to the Financial Services Compensation Scheme. He recovered £50,000 but he was still significantly out of pocket.

Mr P complained to AJ Bell in February 2018. He said he understood that due to recent reports in the press, and decisions issued by the Financial Ombudsman Service, that SIPP providers owe a duty of care to their members. He thought AJ Bell had failed to carried out sufficient checks before allowing him to make the investments, which were high-risk and wholly unsuitable for him. He said he'd found out that Stirling Mortimer were paying high levels of commission to Firm M as an incentive to sell its investments.

AJ Bell issued a final response in April 2018. It said AJ Bell was an adviser-led SIPP product provider and it does not provide advice of any kind. So, it said it wasn't responsible for checking whether the investments were suitable for Mr P. Furthermore, it said Mr P completed application forms for each investment confirming that he was aware of the risks associated with them. Further, it said Firm M signed its Declaration for non-UK regulated

and/or illiquid investments in respect of his investments into SM4 and SM7, again confirming he was aware of the risks of this type of investment and wished to proceed. AJ Bell said this document wasn't requested for his investment into SM9 as it was purchased via his TPA, and it wasn't party to any of the investments he placed through them. As such, it wasn't aware Mr P had made the investment in SM9 until Firm M asked for it to be re-registered into the SIPP directly in 2011.

AJ Bell ultimately didn't uphold the complaint, saying that the Stirling Mortimer investments met HMRC permitted investment rules at the time and it wasn't required to carry out any additional due diligence checks on them.

Mr P referred his complaint to the Financial Ombudsman Service in July 2018. He said AJ Bell accepted the investments without making any reference to him. Had it done so and explained to him that they were high risk (which Firm M failed to do as it was benefitting from secret commission) then Mr P would not have approved the investments and he wouldn't be in this situation. Mr P said AJ Bell shouldn't have accepted the investments into his SIPP and referenced the judge's comments in the unsuccessful judicial review challenge in R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service [2018] EWHC 2878) ('*BBSAL*').

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

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

AJ Bell said:

- When advisers requested to use AJ Bell SIPP, they first had to be registered as an adviser with AJ Bell. To register, they had to be authorised and regulated by the FCA (formerly FSA).
- Firm M was first registered with AJ Bell in 2003.
- On 2 April 2007 AJ Bell sent Firm M its 'SIPP Adviser Handshake', which it had to agree to in order to place business with AJ Bell. It provided a copy of the Adviser Handshake agreement.
- Firm M set up 27 SIPPs with AJ Bell between April 2007 and 2009 – all were set up on an advised basis.
- Mr P's SIPP was set up on an advised basis by Firm M, as confirmed in his SIPP application form.
- 20 of Firm M's clients were invested in Stirling Mortimer funds, either directly or via their TPA, in some cases alongside other investments. Where investments were held via an account with Transact, AJ Bell was not directly involved in the purchase of the investment.
- It appears around eight clients invested in Stirling Mortimer funds before Mr P invested in SM4.
- Although a relatively high proportion of Firm M's customers invested in the Stirling Mortimer funds, it does not believe that the volume of business overall was significant, nor was it anywhere near the level where it could reasonably have given rise to any concerns about their business model.
- Mr P was a high earner and he signed a certificate in January 2008, confirming he qualified as a certified sophisticated investor.
- For the investments in SM4 and SM7, Mr P signed declarations confirming:

    - He had received, read and understood the Prospectus and/or Supplemental Memorandum for the relevant fund;
    - He had read, fully understood and accepted the risks associated with the investment described as set out in the Risk Factors section of the above documents; and
    - Acknowledged receipt of the above documents which he had carefully considered in advance of the application and the risk factors related thereto.
- Mr P signed a Collective Investment Schemes - Declaration for non-UK regulated and/or illiquid investments before investing in SM4 and SM7.
- AJ Bell wasn't party to the investment made in SM9 which was transacted via his TPA.
- AJ Bell didn't request copies of the suitability reports issued to Mr P. AJ Bell isn't responsible for advice given by an authorised firm and its staff don't have the skills to assess such advice.
- It isn't good industry practice, nor is it reasonable to expect SIPP operators to request copies of suitability reports because by doing so that could give the impression of approval of the advice.
- Before permitting SIPP investments in the Stirling Mortimer funds, AJ Bell undertook what it considered to be reasonable due diligence which was in line with good industry practice for a SIPP operator at that time in order to establish:
    - the nature and legal structure of the investment
    - that it was a genuine investment and not a scam, or linked to fraudulent activity, money laundering or pensions liberation
    - that appropriate custody arrangements were in place in order to ensure that the investment was safe and secure, and
    - that it could obtain valuations at the point of purchase and subsequently.
- AJ Bell said its normal custom and practice at the time in relation to the approval of unregulated collective investment schemes, such as the Stirling Mortimer funds, was to review the related product literature and related application form, and to have an information request completed by the manager of the investment. It provided copies of the documents it reviewed.
- On review of the information AJ Bell received, it was satisfied that the investments would be considered an acceptable SIPP investment under HMRC's rules at the time.
- The investment was listed on the Channel Islands Stock Exchange, an HMRC recognised stock exchange, and was regulated by the Guernsey Financial Services Commission. Investments listed on HMRC recognised stock exchanges have always been considered acceptable investments for SIPPs to make.
- When HMRC maintained a list of permitted and prohibited investments for SIPPs, investments listed on HMRC recognised stock exchanges were on the permitted list.

AJ Bell subsequently made representations that it considered Mr P's complaint to have been made outside of the permitted time limits in the FCA's Dispute Resolution ('DISP') rules. It said it had been contacted by Mr P's solicitor in December 2013 explaining court proceedings had been issued against Firm M. The solicitor explained that the claim had been issued as a protective measure due to a pending limitation date and that was why AJ Bell had been included as a defendant and sought AJ Bell's agreement to an assignment of AJ Bell's rights in respect of the claim to their client.

AJ Bell said Mr P contacted it directly by way of an email of 24 February 2015. In that email, he explained that Firm M had become bankrupt and he was instead looking to pursue a claim against the operator of the Stirling Mortimer funds in respect of undisclosed commission payments which had been made to Firm M. Mr P contacted AJ Bell again in November 2016 as AJ Bell had reduced the value of his Stirling Mortimer investments to nil.

AJ Bell said that in light of the above, the latest Mr P ought reasonably to have been aware of his cause for complaint was December 2013. It said he clearly had knowledge of the loss he'd suffered at the time and was aware of the issues with the investment which formed the grounds for the complaint he made in February 2018.

The Investigator didn't uphold Mr P's complaint. The Investigator thought that AJ Bell had carried out reasonable checks into Firm M and it wasn't unreasonable for AJ Bell to accept the introduction of Mr P's SIPP business given it was FCA authorised and regulated to provide pension and investment advice. She thought that the due diligence checks AJ Bell performed on the Stirling Mortimer funds were also reasonable. The Investigator thought AJ Bell fairly concluded that the investments were genuine and not a scam or linked to pension liberation. And as the funds were listed on the Channel Islands Stock Exchange ('CISX') she was satisfied that AJ Bell determined the shares in the funds could be independently valued and sold.

Mr P didn't agree. He said he was deceived by Firm M into believing the Stirling Mortimer funds were ordinary low-medium risk investments and Firm M was motivated to sell them to Mr P to take advantage of the undisclosed commission. Mr P said the Investigator hadn't considered whether the investments were acceptable for a pension such as his. He said if AJ Bell had made appropriate checks it would've found they were high-risk, not tradeable, offshore and unregulated, and that too much of his pension had been invested in the funds. Mr P said he understood it wasn't AJ Bell's responsibility to determine whether the investment was suitable for him, but it should have been able to ascertain that the investments weren't appropriate to be held in its SIPPs, particularly in view of the high risks involved. Mr P referred to parts of the Ombudsman's decision that was the subject of *BBSAL* to support his position.

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

I issued a provisional decision on 13 August 2024. I said I thought Mr P had made his complaint in time, but I wasn't minded to uphold it. I thought it was reasonable for AJ Bell to accept the introduction of Mr P's SIPP business from Firm M, given it was regulated to provide pensions and investment advice. I also didn't think the pattern of business introduced by Firm M prior to Mr P's introduction ought to have given AJ Bell cause for concern about the potential for consumer detriment, given other investments were being placed alongside Stirling Mortimer investments. And, in any event, I thought if AJ Bell had asked questions about Mr P, AJ Bell would've been satisfied that the investments were not anomalous for a customer like him. And I didn't think AJ Bell would've discovered that Stirling Mortimer was paying undisclosed commission to Firm M for placing investments with it.

Overall, I also wasn't persuaded that AJ Bell ought to have refused to accept investments in these particular Stirling Mortimer funds in its SIPPs.

Mr P didn't accept my provisional decision and made the following points:

- The Stirling Mortimer investments could only be offered to 'Qualified Investors' and Mr P was not a Qualified Investor. Mr P referred to the findings issued by the Adjudicator who considered his complaint against Firm M. In that complaint, the Adjudicator found that Mr P did not meet the definition of a Qualified Investor and upheld his complaint.
- Mr P considers that the same rules apply to AJ Bell, because AJ Bell owes him a duty of care under Principle 6 – *"A firm must pay due regard to the interests of its customers and treat them fairly"*.
- Mr P doubts that Firm M's other clients who invested in Stirling Mortimer funds would meet the definition of Qualified Investor. Mr P believes those customers were like him; keen to grow their pension but wholly reliant on Firm M for investment advice.
- Mr P says AJ Bell failed to conduct any enquiry into the accuracy of his investment experience.
- AJ Bell was required under Principle 6 to pay due regard to his interests and circumstances, which included considering his age and risk profile. As he was relatively close to retirement, this ought to have alerted AJ Bell to a potential problem with the 'acceptability' of the investments for his SIPP, not for their customers' SIPPs in general.
- Mr P says AJ Bell were the protectors of his SIPP and ought to have asked whether the investments were acceptable for a personal pension for a man of this age (close to retirement).
- The fact that investments are HMRC approved does not automatically make them acceptable as per *BBSAL*. The judge noted that a SIPP operator has discretion and would not be in breach of COBS 11 if it ascertained that a particular investment wasn't acceptable for a SIPP and declined to execute a transaction.
- The proportion of Mr P's investment in Stirling Mortimer funds were well in excess of the Regulator's guidance that the Adjudicator quoted in his findings about Firm M, which says that UCIS investment should be limited to between 3% and 5%. Mr P says AJ Bell received payments of around £294,000 into the SIPP and around £170,000 was invested in Stirling Mortimer funds.
- AJ Bell ought to have at least queried this with Mr P and warned him about the imbalance.
- Mr P was unaware that the SM9 investment made through his TPA potentially breached the account terms and conditions, as outlined in AJ Bell's letter of 22 October 2008.

In conclusion, Mr P said that AJ Bell had failed to actively police his SIPP whilst under its administration. He said it failed to check the status of their customer, failed to consider the age risk element and allowed too high a percentage investment into UCIS-type risk investments. Instead, Mr P said AJ Bell had simply relied on forms where signatures had been obtained by a 'dodgy' IFA who has long since gone into bankruptcy.

As both parties have had an opportunity to respond, I'm now proceeding with my final decision.

**What I've decided – and why**

Jurisdiction

Although AJ Bell hasn't disputed my findings in respect of our jurisdiction to consider this complaint, for completeness, I've reconsidered all the available evidence and arguments to decide whether we can consider Mr P's complaint.

The rules I must follow in determining whether we can consider this complaint are set out in the Dispute Resolution ('DISP') rules, published as part of the FCA's Handbook.

The section of the rules that applies to this complaint means that, unless AJ Bell consents, we can't look into this complaint if it's been brought:

- more than six years after the event complained of;
- or, if later, more than three years after Mr P was aware – or ought reasonably to have become aware – he had cause for complaint;
    - unless the complaint was brought within the time limits, and there's a written acknowledgement or some other record of it having been received; or
    - unless, in the view of the Ombudsman, the failure to comply with the time limits was as a result of exceptional circumstances.

Mr P made his complaint to AJ Bell on 15 February 2018. The complaint was that Mr P understood from recent reports in the financial press that SIPP providers such as AJ Bell owed their clients a *"duty of care (diligence)".* He thought AJ Bell ought to have warned him that the investments were unusual, unregulated and illiquid. So, in essence, Mr P complained that AJ Bell should not have permitted the Stirling Mortimer investments to be made within his SIPP.

The investment in SM4 was made in January 2008 and the investment in SM7 was made in October 2008. These investments were made more than six years before Mr P referred his complaint to AJ Bell on 15 February 2018.

An investment in SM9 was made via the TPA within the SIPP. Although I haven't seen any paperwork relating to when the investment was first made, Mr P stated in his complaint letter to AJ Bell that the investment was made in June 2010. And that's consistent with the enquiry Mr P's adviser made with AJ Bell in December 2011 about transferring existing investments made via the TPA to the SIPP directly – this included the investment in SM9.

So, I think all of the investments Mr P has complained about were made more than six years before Mr P referred his complaint to AJ Bell in February 2018. As such, I have to consider when Mr P ought reasonably to have been aware of his cause for complaint. And having established that date, whether Mr P complained to AJ Bell within three years of it. This means if Mr P ought reasonably to have been aware of his cause for complaint before 15 February 2015, he made his complaint to AJ Bell too late under the Regulator's rules.

The term 'complaint 'is defined for the purposes of DISP in the FCA handbook as:

*"…any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service…which:*

*a) Alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and*
*b) Relates to an activity of that respondent, or any other respondent with whom that respondent has some connection in marketing or providing financial services or products …which comes under the jurisdiction of the Financial Ombudsman Service."*

And *respondent* means a regulated firm covered by the jurisdiction of the Financial Ombudsman Service.

So the Glossary definition of 'complaint' requires that the act or omission complained of must relate to an activity of '**that** respondent' or firm (my emphasis).

Accordingly the material points required for Mr P to have awareness of a cause for complaint include:

- awareness of a problem;
- awareness that the problem had or may cause him material loss; and
- awareness that the problem was or may have been caused by an act or omission of AJ Bell (the respondent in this complaint).

It's therefore my view that it's necessary for Mr P to have had an awareness (within the meaning of the rule) that related to AJ Bell, not just awareness of a problem that had caused a loss. Knowledge of a loss alone is not enough. It can't be assumed that upon obtaining knowledge of a loss a consumer had knowledge of its cause. And I don't accept that the three year time limit necessarily means knowledge of a loss means the consumer has three years to make enquiries to discover all parties who might be responsible, failing which they run out of time to make a complaint.

I think that Mr P was aware of a problem with the investments he'd made in the SIPP by December 2013. I say this because he emailed AJ Bell in April 2013 explaining that he was taking court action against Firm M as he did not consider the Stirling Mortimer investments to be suitable for his risk appetite. His solicitors then contacted AJ Bell in December 2013 notifying it of the particulars of Mr P's claim against Firm M. The claim particulars set out that Mr P had, at the time of making the investments, been misled about the maturity dates of the investments and the risk profile of them. He claimed he was unable to realise the investments which had caused him significant losses.

So, by December 2013 I think Mr P was aware of a problem with his investments that had or may cause him a material loss. But, I'm not satisfied that Mr P would have, or ought to have, been aware that AJ Bell had any responsibility for the position he was in.

I note that the claim form submitted to AJ Bell by Mr P's solicitors named AJ Bell as a defendant. However, in the covering letter, the solicitors said:

*"This claim concerns a number of investments made on the instruction of* [Mr P] *in reliance on the advice given by* [Mr M]. *We understand that the investments in Cape Verde No.4 Fund, the Cape Verde No.7 Fund, and the UK Land No.9 Fund were made in the names* of [AJ Bell] *and* [Mr P]. [Mr P] *had no alternative but to issue proceedings on a protective basis due to an approaching limitation date. Accordingly, he had to name you as Defendant as a matter of form.*

*Rather than continue as a party to this litigation, would you be prepared to agree to an absolute legal assignment of your cause of action against* [Mr M] *to* [Mr P]*? This would bring your role in these proceedings to an end.*

*We would be grateful if you could sign the enclosed Deed of Assignment and return to us not later than 27 December 2013."*

The particulars of the claim made it clear that Mr P's claim was based on misrepresentations Firm M had made about the investments it had advised Mr P to make, which were unsuitable for Mr P and had led to losses. The claim particulars stated that the other parties (including AJ Bell) were named as defendants because they had a legal interest in the investments. There was no suggestion from the claim particulars that Mr P or his solicitor considered

AJ Bell to be at fault. It is clear Mr P considered Firm M to be the party at fault, listing numerous breaches of regulations.

There's nothing I've seen that was sent to Mr P more than three years before his complaint was referred to AJ Bell that would have caused Mr P, or a reasonable retail investor in his position, to link AJ Bell to the problems he'd experienced with the pension investment. I think it's worth highlighting that Mr P wasn't advised by AJ Bell about setting up the SIPP or the suitability of investments. And I think the obvious first thought when problems arose would have been that the business that introduced the investment, Firm M, might have misled him or that the people who ran Stirling Mortimer might have caused the issue. And it's clear Mr P considered Firm M to be at fault here, issuing legal proceedings against it.

I'm not aware of anything AJ Bell said or did at the outset of its relationship with Mr P that would have caused him to think it might be responsible if a problem with his pension investments occurred. Nor am I aware of anything AJ Bell said or did that ought to have caused Mr P to think it was responsible once Mr P became aware of a problem.

I don't think Mr P would need to have understood the details of AJ Bell's obligations to have been aware (or be in a position whereby he ought reasonably to have been aware) of his cause for complaint. But I think Mr P would have needed to have actual or constructive awareness that an act or omission by AJ Bell had a causative role in the problem causing him loss or damage. And I don't think Mr P, or a reasonable investor in his position, ought reasonably to have attributed his problem to acts or omissions by AJ Bell more than three years before he complained to AJ Bell.

Although Mr P was unhappy that he had been misled about the investments by Firm M, Mr P says it wasn't until he started to see reports of decisions issued by the Financial Ombudsman Service about SIPP Provider's due diligence obligations that he considered he might have cause for complaint about AJ Bell's role in the transactions. He then promptly complained to AJ Bell in February 2018.

I appreciate AJ Bell has said that the complaint Mr P made in 2018 is essentially the same as the one he made in 2013 – Mr P believed the investments were unsuitable for him and he believed they'd only been recommended to him so Firm M could benefit from undisclosed commission. While I accept Mr P remains unhappy about these points, I don't think he could've been expected to know that AJ Bell owed him any kind of duty before accepting his investment applications from Firm M. It is clear to me that Mr P considered Firm M to be wholly at fault for the position he was in – that isn't unreasonable given Firm M was Mr P's regulated financial adviser and it had advised him to make those investments.

Prior to the High Court's decision in *BBSAL*, the industry's general position was that SIPP providers' obligations to customers were very limited. So, I don't think Mr P could've been expected to know otherwise. So, I don't think Mr P could've reasonably been expected to direct his complaint to AJ Bell before he found the reports on the case that ultimately became the subject of *BBSAL*.

I've carefully considered all the evidence we've been provided and, on balance, I don't think that Mr P was aware (or ought reasonably to have become aware) that he had cause for complaint against AJ Bell more than three years before his complaint was referred to it. So, I'm satisfied this complaint's been brought in time and that it's one we can consider. As such, I've gone on to consider the merits of this complaint below.

Merits of the complaint

I've considered all the available evidence and arguments to decide what's fair and

reasonable in the circumstances of this complaint.

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

When considering what's fair and reasonable in the circumstances, I need to take account of 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.

I confirm that, like the Investigator, I have taken into account the FCA's Principles for Businesses, in particular Principles 2, 3 and 6 which provide:

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

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

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

I've also considered the relevant law including:

- *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) ('BBA');
- *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) which I've already referred to as BBSAL above; and
- The High Court decision in *Adams v Options SIPP* [2020] EWHC 1229 (Ch) and the Court of Appeal decision in the same case *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474.
- The Court of Appeal decision in *Options UK Personal Pensions LLP v Financial Ombudsman Service Ltd* [2024] EWCA Civ 541.

And I have considered the various publications the FCA (and its predecessor, the FSA) issued which reminded SIPP operators of their obligations and which set out how they might achieve the outcomes envisaged by the Principles, namely:

- The 2009 and 2012 Thematic Review reports.
- The October 2013 Finalised SIPP Operator Guidance.
- The July 2014 *"Dear CEO"* letter.

I acknowledge that the 2009 and 2012 reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 Finalised Guidance is). However, the reports and *"Dear CEO"* letter 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 produce the outcomes envisaged by the Principles. In that respect, the publications which set out the Regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice.

I'm mindful that the publications listed above were published after Mr P's SIPP was set up and the first two investments were made. But, like the Ombudsman in the *BBSAL* case, I don't think the fact that the publications post-date the events that took place in relation to Mr P's complaint, mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although the publications were published after the events subject to this complaint, the Principles that underpin these existed throughout, as did the obligation to act in accordance with the Principles.

It's also clear from the text of the 2009 and 2012 Thematic Review Reports (and the "Dear CEO" letter in 2014) that the Regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the Regulators' comments suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it's clear the standards themselves hadn't changed.

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

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

As I understand it, AJ Bell is an execution only SIPP administrator, and the SIPP Mr P opened was only available through financial advisers that had an agency with AJ Bell. It was not regulated to provide advice.

I accept that AJ Bell didn't provide any advice here, and so it didn't have an obligation to consider the suitability of the investments for Mr P. Nevertheless, I think AJ Bell was required (in its role as an execution only SIPP provider) to consider whether it was appropriate to accept business from Firm M and to consider whether the investments proposed for him were appropriate investments to make within its SIPP. And overall, I think AJ Bell's duty as a SIPP operator was to treat Mr P fairly and to act in his best interests.

What did AJ Bell's obligations mean in practice?

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

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

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

It appears that AJ Bell understood it was required to carry out some checks on the investment proposal before accepting it into the SIPP. It has explained the process that was followed. But I think that AJ Bell also ought to have understood that its obligations meant that it had a responsibility to also carry out appropriate checks on introducers to ensure the quality of the business it was introducing.

I also think that it's fair and reasonable to expect AJ Bell to have looked carefully at the investment it was allowing Mr P's pension fund to be invested in. To be clear, for AJ Bell to accept investments in Stirling Mortimer without carrying out a level of due diligence that was consistent with its regulatory obligations, wouldn't in my view be fair and reasonable or sufficient. And if AJ Bell didn't look at an investment in detail, and if such a detailed look would have revealed that the investment might not be secure, might be fraudulent, or that the investment couldn't be independently valued, or that it was impaired, it wouldn't in my view be fair or reasonable to say AJ Bell had exercised due skill, care and diligence – or treated its customer fairly – by accepting such an investment.

Due Diligence checks on Firm M

As I've said above, AJ Bell only dealt with advisers who were FCA regulated and registered with it. It said Firm M was authorised by the FCA (then known as the FSA) and it was regulated to provide pension and investment advice. Firm M was first registered with AJ Bell in 2003 and AJ Bell said it sent Firm M its SPP Adviser Handshake in April 2007, which it had to agree to in order to place business with it.

AJ Bell explained that Firm M set up 27 SIPPs with it between April 2007 and 2009 and 20 of Firm M's clients were invested in Stirling Mortimer funds, either directly or via their TPA, in some cases alongside other investments. AJ Bell said around eight clients invested in Stirling Mortimer funds before Mr P invested in SM4. And although AJ Bell hasn't provided these details, I think it's reasonable to assume other clients would've made further investments in Stirling Mortimer funds by the time Mr P made his investment in SM7 in October 2008 and in SM9 via his TPA. Although a relatively high proportion of Firm M's customers invested in the Stirling Mortimer funds, it didn't believe that the volume of business overall was significant, nor was it anywhere near the level where it could reasonably have given rise to any concerns about their business model.

It doesn't appear that AJ Bell carried out checks beyond ensuring that Firm M was regulated and asking it to agree to the Adviser Handshake. However, even if AJ Bell had carried out additional checks, such as asking for information about Firm M's business model or checking whether there were any obvious conflicts of interest or whether Firm M had a clear disciplinary history, I'm not persuaded it would have made a difference to things here. I think it still would've been reasonable to accept the introduction from Firm M.

Firm M was regulated to provide pensions and investment advice – so I think AJ Bell was entitled to take comfort from that.

By the time Mr P's SIPP application was sent to AJ Bell, it seems that around eight clients had made investments in Stirling Mortimer. But I don't think the volume or nature of this pattern of business was such that it should have given AJ Bell cause for concern. That's particularly the case given that the investments in Stirling Mortimer were not the only investments being placed for clients of Firm M. So, on receipt of Mr P's SIPP application, I don't think AJ Bell should've reasonably had any concerns about the potential for consumer detriment associated with introductions from Firm M.

Mr P says that the Stirling Mortimer investments could only be offered to Qualified Investors. And he has referred to the Adjudicator's findings about this in his complaint about Firm M. While I have taken into account Mr P's comments about this, the Adjudicator's findings in respect of Mr P's earlier complaint about Firm M aren't necessarily relevant to my findings about AJ Bell's role and responsibilities.

The restriction Mr P refers to is taken from the SM4 supplementary memorandum. It says:

*"Offer for Subscription*

*CONTAINING SPECIFIC TERMS AND CONDITIONS OF THE SHARES*

*Shares are not to be offered directly by the Company to the public, meaning any person not regulated under any of Guernsey's financial services regulatory laws, within the Bailiwick of Guernsey.*

*The communication accompanying this notice is only being and may only be distributed and directed at (i) persons outside the United Kingdom, subject to the exclusions relating to Guernsey Resident Investors contained in the Guernsey Registered Funds Regime; or (ii) persons in the United Kingdom who are (a) a "Qualified investor" within the meaning of Section 86(7) of the United Kingdom Financial Services and Markets Act 2000 ("FSMA") and (b) within the categories of persons referred to in Article 19 (Investment professionals) of the United Kingdom Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (the "Financial Promotion Order") (all such persons together being referred to as "relevant persons"). The securities being offered by the communication accompanying this notice are only available to, and any invitation, offer or agreement to subscribe, purchase or otherwise acquire such securities will be engaged in only with, relevant persons. Any person who is not a relevant person should not act or rely on the communication accompanying this notice or any of its contents. The communication accompanying this notice is not a prospectus for the purposes of Section 85(1) of FSMA. Accordingly, the accompanying communication has not been approved as a prospectus by the United Kingdom Financial Services Authority ("FSA") under Section 87A of FSMA and has not been filed with the FSA pursuant to the United Kingdom Prospectus Rules nor has it been approved for the purposes of section 21(2)(b) of the FSMA."*

While this does say that the promotion of the shares offered were restricted to certain categories of person, AJ Bell did not promote or offer the shares to Mr P. And SIPP providers were not generally required to check the individual circumstances of the individual investor. Given AJ Bell understood that Firm M had recommended the investments to Mr P, I don't think it ought reasonably to have checked whether Mr P was eligible for the initial promotion of the investments. I think it was entitled to rely on Firm M having acted in line with its regulatory responsibilities in the particular circumstances of this case.

I appreciate that Mr P found out that Firm M had been receiving undisclosed commission from Stirling Mortimer for placing investments with it. But I don't think AJ Bell could've reasonably known about this on receipt of his SIPP application form. The SIPP application form showed that Firm M would be paid for the work it carried out for Mr P by way of initial fees charged on contributions and ongoing adviser fees annually based on the value of his pension fund. So, I don't think AJ Bell could've reasonably been expected to ask any additional questions of Firm M about how it was remunerated for the services provided to its clients. And even if such a question had been asked, I think it's unlikely the arrangement Firm M had with Stirling Mortimer would've been disclosed to AJ Bell.

Lastly, I haven't been able to find any adverse information about Firm M or the individuals involved with it at the time Mr P made his application and investments. So, I don't think there

was any information in the public realm, at the time Mr P made his SIPP application and investments that ought reasonably to have given AJ Bell cause for concern about accepting the introduction of Mr P's business from Firm M.

Overall, I haven't seen sufficient evidence to persuade me that AJ Bell ought to have refused to accept Firm M's introduction of Mr P's SIPP business. And I don't think there were any aspects of the introduction of Mr P's business that ought to have been of concern to AJ Bell, such that it ought reasonably to have asked further questions about Mr P.

I've considered whether AJ Bell ought to have refused the instructions it received from Firm M in respect of Mr P's investment in SM4 and SM7, which came after the SIPP had been set up. But I don't think it ought to have done so for essentially the same reasons I've given above. The investments were made several months apart, and did not account for the entirety of Mr P's pension funds held in the SIPP. So, I don't think AJ Bell ought to have been concerned about this pattern in this instance.

Mr P says that AJ Bell ought to have refused the instructions to place the investments based on his circumstances, in particular his age, risk profile and investment experience. He says at age 57, he was relatively close to retirement so AJ Bell ought to have questioned whether the investments were appropriate for him, not just appropriate for its SIPPs. Mr P also says that AJ Bell ought to have questioned the proportions of the investments being made for him, as the investments in the Stirling Mortimer funds well exceeded the Regulator's expectations as per the FSA's UCIS Project Findings published in July 2010.

I appreciate Mr P's strength of feeling about this, but undertaking an analysis or assessment of the nature Mr P describes would essentially require AJ Bell to consider the suitability of the investments for Mr P. And as I've said above, AJ Bell was not required to assess the suitability of the investment for Mr P, including the proportions in which the investments were made. Mr P had appointed a financial adviser in Firm M, and it was Firm M's responsibility to ensure the suitability of the investments it recommended for him. I appreciate Mr P feels let down by Firm M in this regard, but that doesn't mean that AJ Bell should've also been expected to carry out its own checks into the suitability of the SIPP or investments for Mr P. I don't think AJ Bell's duty to treat Mr P fairly and pay regard to his interests extended to having a responsibility to ensure the suitability of the investments for him personally.

Mr P's investment in SM9 was made via his TPA. I haven't seen evidence of when this took place but Mr P says the investment was made in June 2010. I also don't know whether Mr P placed the investment himself or whether Firm M arranged it for him. But even if it was instructed by Firm M, I still don't think AJ Bell should've had any concerns about continuing to deal with Firm M. I accept that by this time it seems that other new customers introduced by Firm M were also investing some of their pension funds in Stirling Mortimer. But I still don't think the pattern and volume of business should've given AJ Bell cause for concern about the risk of consumer detriment given that customers also made other investments, not just in Stirling Mortimer.

As I've said above, AJ Bell also needed to carry out appropriate due diligence checks on the investments in Stirling Mortimer before allowing Mr P's applications to invest in it to proceed. So, I've thought about the due diligence checks that AJ Bell ought to have carried out on the investments before it should've accepted them. And whether the information it ought to have gathered should have led it, if acting in line with the Principles and guidance, to decline to accept the investments into the SIPP.

Due Diligence checks on the investments

As the Regulator has made plain, SIPP operators have a responsibility for the quality of the SIPP business that they administer. So, SIPP operators should undertake appropriate independent enquiries about the nature or quality of an investment proposed before determining whether to accept or decline it into its SIPP, which would mean making checks that go beyond simply reviewing the investment literature.

I've considered what would constitute reasonable due diligence checks before accepting the investment in Stirling Mortimer into the SIPP. Although I recognise that Mr P made separate investments into SM4, SM7 and SM9 (via his TPA), the structure and features of the investments were the same. So, I've considered the checks AJ Bell ought to have completed across the Stirling Mortimer investments as a whole.

AJ Bell was asked to provide evidence of the due diligence checks it carried out at the time of Mr P's applications to invest in Stirling Mortimer. It said it undertook what it considered to be reasonable due diligence which was in line with good industry practice for a SIPP operator at that time in order to establish:

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

AJ Bell said its normal custom and practice at the time in relation to the approval of unregulated collective investment schemes ('UCIS'), such as the Stirling Mortimer funds, was to review the related product literature and related application form, and to have an information request completed by the manager of the investment. On review of the information AJ Bell received, it said it was satisfied that the investments would be considered an acceptable SIPP investment under HMRC's rules at the time. This was because the investment was listed on the CISX, an HMRC recognised stock exchange, and was regulated by the Guernsey Financial Services Commission. AJ Bell said investments listed on HMRC recognised stock exchanges have always been considered acceptable investments for SIPPs to make.

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

The FCA has made it clear that the due diligence required on SIPP investments will vary depending on the nature of the intended investments. Even though the funds were not likely to be classified as UCIS, I think they could still reasonably be described as unusual/non-mainstream offshore investments. And it's evident that AJ Bell treated the investments as such, asking Firm M to complete its 'Collective Investment Schemes – Declaration for non-UK regulated and/or illiquid investments' form.

The Sterling Mortimer funds were all listed on CISX, a recognised stock exchange and Mr P held shares in a protected cell company for each investment. These shares (some

preference and some ordinary shares) were listed on CISX. I think AJ Bell could take some comfort from the fact that the investments met the listing requirements of CISX. In addition to being listed on a recognised exchange, the investments were intended to be for a fixed term with a set redemption date. Overall, considering the information available, I think AJ Bell could be satisfied that the assets were genuine and not a scam, that they were safe and secure, and that they could be independently valued and sold. As such, I'm not persuaded that AJ Bell had any grounds to refuse to accept the Stirling Mortimer investments into its SIPPs when Mr P's applications to invest in them were made.

Mr P says that AJ Bell shouldn't have allowed him to invest his pension funds in any of the Stirling Mortimer funds as they were high-risk, illiquid and were not appropriate to be held in a pension. He has referred to the findings of the judge in *BBSAL*, who said that SIPP operators had discretion as to whether they should accept a particular investment, even if it was, on the face of it, permitted by HMRC to be held in a SIPP.

As I've said above, I've taken the *BBSAL* case into account, but the fact that the investment was speculative and carried a high degree of risk does not, in itself, mean that AJ Bell (if acting in line with the Principles and guidance) should not have permitted the investment to be held in the SIPP, particularly as the investment brochures, which Mr P confirmed he'd read and understood, were transparent about the risks involved. Each document set out the risk factors in full, including that it was conceivable investors may not receive any return on their investment or that it could be lost entirely. So, I haven't seen enough to persuade me that if AJ Bell had carried out reasonable checks into the investment, that it ought to have concluded that it shouldn't accept the relevant investments in this case.

I appreciate that Mr P was unable to redeem his investments on the original redemption dates and he says that the investments were always illiquid as no secondary market ever developed for the shares. But I'm satisfied that the investment brochures made it clear that it did not expect a liquid market to develop for the shares. And it's evident that the shares could be traded on the CISX. Ultimately I don't think AJ Bell should've reasonably refused to permit the investments in this case on the basis that it might fail in the future; that is an inherent risk of all investments.

I appreciate that Mr P may not have fully understood the implications of the redemption dates not being guaranteed and that they could be extended. But ultimately I think this relates to the risk profile of the investment and that is not something AJ Bell is responsible for.

Summary

Overall, I'm satisfied that AJ Bell carried out some due diligence checks into Firm M and the Stirling Mortimer investments it made for Mr P. And I think AJ Bell could take comfort from the fact that a regulated adviser was involved and that the investments were listed on a recognised stock exchange.

I think AJ Bell needed to carry out further checks in accordance with the Regulator's rules, Principles and good industry practice before accepting the introduction from Firm M and the investment applications. But even if AJ Bell had carried out further independent checks, I haven't found anything that would've been discoverable to AJ Bell at the time that ought to have led it to refuse the investments to be made within its SIPP.

So, based on all the evidence I've seen, I'm not upholding Mr P's complaint. I appreciate this will be very disappointing for him to hear.

## My final decision

For the reasons set out above, I'm not upholding Mr P's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 3 October 2024.

Hannah Wise
**Ombudsman**