Neutral Citation Number: [2018] EWHC 2878 (Admin)

Case No: CO/1093/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/10/2018

Before :

MR JUSTICE JACOBS

- -

Between :

Berkeley Burke SIPP Administration Ltd	**Claimant**
- and -	
Financial Ombudsman Service Limited	**Defendant**
- and –	
Mr Wayne Charlton	**First Interested Party**
- and –	
Financial Conduct Authority	**Second Interested Party**

- -
- -

Jonathan Kirk QC and Thomas Samuels (instructed by **Spearing Waite LLP**) for the **Claimant**
James Strachan QC and Stephen Kosmin (instructed by **Financial Ombudsman Service**) for the **Defendant**
Simon Howarth (instructed by **Shakespeare Martineau**) for the **First Interested Party**
Andrew Henshaw QC (instructed by **Financial Conduct Authority)** for the **Second Interested Party**

Hearing dates: 10, 11, 12 October 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE JACOBS

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MR JUSTICE JACOBS :

A: Introduction

1. This case involves a challenge by the Claimant ("BBSAL") to the final decision of one of the Defendant's ombudsmen, Mr. Colin Brown ("the Ombudsman"). The Ombudsman issued a Provisional Decision ("the Provisional Decision") on 10 November 2016, in which he provisionally concluded that BBSAL had not acted fairly and reasonably in its dealings with Mr. Wayne Charlton ("Mr. Charlton"), who is the First Interested Party in these proceedings. On 2 February 2017, the Ombudsman issued his Final Decision ("the Final Decision") in which he decided not to depart from his provisional findings, and ordered BBSAL to pay compensation to Mr. Charlton.

2. BBSAL is a self-invested personal pension ("SIPP") provider and administrator. The basic concept of a SIPP is that an individual can choose the investments which are to form the assets in his or her pension pot. There are certain assets, such as listed shares in quoted companies, which can be put into a SIPP and which benefit from the tax advantages which apply to SIPPs, and are therefore (to use the word deployed in the course of the case) "SIPPable". Other assets, such as residential property, do not qualify for those advantages, and there is therefore no benefit to holding such assets in a SIPP.

3. Mr. Charlton was a gardener. In 2011, he was introduced to BBSAL by a company called Big Pebble Ltd. Mr. Charlton wanted to make an investment in a "green oil" scheme in Cambodia, and to hold that investment in a SIPP. The investment was offered by a company called Sustainable AgroEnergy plc ("SA"). Mr. Charlton applied to transfer his existing personal pension to BBSAL and to use the money for investment in SA's scheme. A large number of other individuals invested in the scheme: some 616 investors invested around £ 12,250,000 in SIPPs operated by BBSAL. However, it transpired that the scheme was a scam. SA lacked basic title to the land in question in Cambodia and the scheme was fraudulent. SA was subsequently placed into receivership following a Serious Fraud Office investigation, and three of its directors were sent to prison for fraud.

4. The Defendant ("FOS") deals with certain complaints under a statutory scheme created by the Financial Services and Markets Act 2000. On 20 September 2012, Mr. Charlton complained to FOS about the conduct of BBSAL ("the Complaint"). He sought reimbursement from BBSAL for the sums he had lost as a result of placing his funds in SA. In due course, the Ombudsman issued the Final Decision. This incorporated his earlier Provisional Decision. In upholding Mr. Charlton's Complaint, the Ombudsman considered that he was acting in accordance with his statutory jurisdiction under section 228(2) of the Financial Services and Markets Act 2000 ("FSMA 2000"), namely to "determine [the Complaint] by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case". BBSAL now challenge the lawfulness of his Final Decision.

5. Permission for the present claim was granted by order of Yip J on two grounds described hereafter. Permission was also given to join the Financial Conduct Authority ("FCA"), the regulator of financial services in the UK, as an interested party. At the hearing of the application, FOS and Mr. Charlton submitted that the

Ombudsman's decision was lawful, and that BBSAL's application for judicial review should be dismissed. The FCA made submissions as to the true interpretation of the laws and rules which comprised the context for the FOS decision under challenge.

B: The Financial Services legislative regime

6. The FCA is the statutory regulator of SIPP operators. Its predecessor was the Financial Services Authority ("FSA"), which was the regulator at the time that Mr. Charlton made his investment. However, for the purposes of this case it is unnecessary to draw a distinction between the FSA and the FCA, and (unless the context otherwise requires) I will simply refer to the FCA as encompassing both bodies.

7. The FCA has a statutory function under section 2 (4) of FSMA 2000 to make rules and issue guidance, and with it supporting materials. These rules and guidance are contained within the FCA Handbook ("the Handbook"), which uses acronyms or abbreviations such as "PRIN", "DISP", and "COBS" to denote different sections of the Handbook. The rules are denoted by the suffix 'R' and guidance by the suffix 'G'. Rules were more important than guidance, in the sense that FSMA provides that a contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of its contravention. There is no equivalent provision in respect of guidance. Unless the context otherwise requires, references in this judgment to legislation, rules and guidance refer to those provisions in force at the time that Mr. Charlton made his investment.

8. At the time when Mr. Charlton made his SIPP investment in 2011, the FCA's general rule-making power was contained in Part X of FSMA. Section 138 empowered the FCA to make rules as appeared to it to be necessary or expedient for the purpose of meeting its regulatory objectives. These regulatory objectives included, under FSMA section 2 (2), market confidence, financial stability, the protection of consumers and the reduction of financial crime. Rules could be made by the FCA without Parliamentary oversight. However, FSMA section 155 provided that if the FCA proposed to make any rules, it had to publish a draft of the proposed rules in a way appearing to it to be best calculated to bring them to the attention of the public. The draft had to be accompanied by a number of things: a cost benefit analysis; an explanation of the purpose of the proposed rules; an explanation of the FCA's reasons for believing that making the proposed rules was compatible with its general duties under FSMA section 2; and, importantly, notice that representations about the proposals could be made to the FCA within a specified time. Under section 155 (4), the FCA was required, before making the proposed rules, to "have regard to any representations made to it" in accordance with the notice that had been given. Thus, there was, as the heading to section 155 indicates, a statutory requirement for "consultation" on proposed rules. FSMA section 157 provided, similarly, for consultation in relation to any proposed "guidance".

9. The Handbook contains high-level rules called 'Principles for Businesses' ("Principles"). It was common ground that these had been consulted upon. The purpose of the Principles, as set out in PRIN 1.1.2G, is that they are a "general statement of the fundamental obligations of firms under the [FCA's] regulatory system". Amongst the Principles which are set out at PRIN 2.1.1R are:

> 2. A firm must conduct its business with due skill, care and diligence.
> 6. A firm must pay due regard to the interests of its customers and treat them fairly.

The relationship of the Principles to the specific rules and guidance promulgated by the FCA in the Handbook was considered in detail by Ouseley J. in *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin). This is an important decision (to which I shall refer as "*BBA*"), both generally and in relation to the issues in the case.

10. The FCA Handbook also contains guidance and specific rules governing the conduct of a firm, including, in particular, the rules and guidance contained in the Conduct of Business Sourcebook ("COBS"). The rules and guidance in COBS 9 concern the suitability of a firm's recommendation for a client. Thus, COBS 9.2.1 provides that a firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client. The rules and guidance in COBS 10 concern the appropriateness of an investment for a client. Thus, COBS 10.2.1 provides that when providing a service to which COBS 10 applies, a firm "must ask the client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the firm to assess whether the service or product envisaged is appropriate for the client". It was common ground that the duties set out in COBS 9 and 10 did not apply to BBSAL.

11. COBS 11 concerns "Best execution". Its provisions are central to one of BBSAL's arguments and are set out in more detail in Section G4 below.

12. The Ombudsman Service was established pursuant to Part XVI of FSMA 2000 to provide an independent and informal complaint resolution procedure for the financial services industry without the need for consumers of regulated financial services to resort to the courts.

13. Sections 226 and 228(2) of FSMA deal with an ombudsman's obligation to deal with complaints that fall within the compulsory jurisdiction. A complaint falling within that jurisdiction "is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case."

14. Under section 225(4) and paragraphs 13 and 14 of Schedule 17 to and Part X of FSMA 2000, rules relating to the ambit of FOS's statutory jurisdiction are made by the FCA, and those rules governing the procedures for handling the complaints by firms and at the FOS are made jointly by the FCA and FOS pursuant to these provisions of Schedule 17. These rules are set out in the FCA Handbook under the section entitled "Dispute Resolution: Complaints" ("DISP").

15. DISP 3.6.1R reiterates the statutory duty under section 228(2) of FSMA 2000 and DISP 3.6.4R provides:

> "In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:
> (1) relevant:

(a) law and regulations;
(b) regulators' rules, guidance and standards;
(c) codes of practice; and

(2) (where appropriate) what he considers to have been good industry practice at the relevant time."

C: The investment and the Complaint

The investment

16. The background to Mr. Charlton's investment was that SA offered investments based on jatropha trees grown in Cambodia. The investments involved the investors leasing plots of land, along with the trees planted on them, and receiving a return either as annual income payments or additional land plots.

17. On 8 September 2011, Mr. Charlton met up with Mr. Stones of Big Pebble Ltd., which acted as an introducer of business to BBSAL. Mr. Charlton signed a standard form document for an investment with an Investment Name "Capital Builder" and Investment Type "Green Oil". The document provided:

> "I, WAYNE [Charlton] being the prospective member/ member of the above Scheme write to instruct Berkeley Burke SIPP Administration Limited acting on behalf of Berkeley Burke Trustee Company Limited to Purchase for a consideration of £ 24,195 on my behalf for the above Scheme.
>
> I confirm that I have considered the information prospectus provided by the product provider and I am fully aware that this is investment is High Risk and/or Speculative, may be illiquid and/or difficult to value or sell and confirm that I wish to proceed.
>
> I acknowledge that I have been recommended to seek professional advice from a suitably qualified and authorised adviser however has chosen not to seek advice for this transaction.
>
> I am fully aware that Berkeley Burke SIPP Administration Limited act on an Execution Only Basis as directed by me as scheme member and that Berkeley Burke SIPP Administration Limited has not provided any advice whatsoever in respect of this investment or the SIPP.

18. On the same day, Mr. Charlton completed BBSAL's SIPP Application form. This identified that his SIPP funds would be invested, in the amount of £ 24,000, in the "Capital Builder" investment, and it identified his Financial Adviser as Edward Stones of Big Pebble. It was signed in three places on the final page. Mr. Charlton thereby stated:

> "I require my SIPP to purchase and sell investments and/or accept transfers in of other pension policies into the SIPP, within the 30-day cooling off notice period.
>
> I confirm that I understand that by signing this section I have waived my rights to the 30 day cooling off notice
>
> …
>
> I understand that I should seek advice regarding the setting up of a self invested personal pension plan and that I do not require and do not seek advice in this respect from Berkeley Burke".

19. Mr. Charlton also completed BBSAL's Asset Purchase Form, identifying the asset to be purchased as "Capital Builder" and the amount of £ 24,000. This included the following relevant passages:

> "… you accept that the investment may be illiquid and that Berkeley Burke SIPP Administration take no responsibility for the suitability of the investment to your personal circumstances and we strongly suggest that you take investment advice before proceeding."
>
> You can ask us to proceed immediately by waiving the 'waiting period', however, you will be liable for any costs incurred in connection with the purchase, should you decide not to go ahead.
>
> Do you wish to waiver the waiting period of seven days?

In relation to the question concerning waiver, Mr. Charlton's answer was "yes".

20. On 26 September 2011, Mr. Charlton received a letter from BBSAL welcoming him to the "Berkeley Burke SIPP". The letter stated.

> **WELCOME TO BERKELEY BURKE SIPP**
>
> We received your application documentation to open a Berkeley Burke SIPP on 16th September 2011, from your non-regulated agent Edward Stones at Big Pebble. I can confirm that the documentation will now go through our compliance checking procedure. This procedure is currently taking in the region of 10 working days from date of receipt of the pack. You will receive a New Member Pack to confirm that this has been set up.
>
> …
>
> We have a process in place to assess whether investments are capable of being held within a SIPP in line with HMRC guidance. For the avoidance of doubt, acceptance of an investment by us in a SIPP does

not mean we endorse the investment, nor its suitability to meet your own financial objectives or investment risk profile. The responsibility for assessing the 'suitability' of any investment within your SIPP rests with you and your professional advisers. If you have doubts about the investment options proposed, you should seek advice from a suitably authorised and qualified adviser. Berkeley Burke SIPP Administration Limited are not authorised to provide financial advice.

We are not currently aware of the investments to be made by your SIPP. However, you need to be aware that for your particular investment proposition the following issues should be considered by you before entering into any contract:

- The asset may be illiquid.
- There may be future requirements to make contributions to the SIPP to fund purchases of ongoing fees or costs associated with the investment.
- HMRC/FSA rules may change in future and that could alter the acceptability of the investment.
- If the member cannot complete on the contract, the investment may be lost.
- The investment may not be covered by any UK Financial Services compensation scheme (i.e. FSCS and FOS).
- If the investment is an unregulated investment, it will not be covered by the FSA.
- You would be strongly advised to seek financial advice of the investment and any related issues before proceeding.
- You must be comfortable that any shortfalls would need to be made up either by the transfers of pension plans or by cash contributions from you and that you have the ability to facilitate and finance such matters should they arise.

You should note that Berkeley Burke SIPP Administration Limited cannot be held responsible for any losses or liabilities that may arise from your investment decisions.

Bearing all of the above in mind, I would be grateful if you could please sign and return the attached copy of this letter to me, confirming your understanding of the issues raised. The administration team will not be able to process your investment until they receive back your signed confirmation letter.

21. On 10 October 2011, Mr. Charlton signed the letter which provided at its foot:

I have read a copy of the issues set out above and indemnify Berkeley Burke SIPP Administration Limited against any losses or liabilities that may arise.

22. On 28 October 2011, Mr. Charlton signed a "Capital Builder Programme Application Form and Lease Agreement". The other signatories to this document were: BBSAL as SIPP Trustee; SA; and Citadel Trustees CC Ltd defined in the Agreement as "the Trustee". The shape of the investment was that Mr. Charlton purchased 4 "Capital Builder" plots of land, including all the trees planted on the land, for a total purchase price of £ 24,195. The agreement specified how the land was to be held and how Mr. Charlton's interest in the land was to be evidenced.

> **Land Title**
>
> Sustainable AgroEnergy warrants that it has acquired good title to a large estate of agricultural land ("the land") of which the plot forms part. Sustainable AgroEnergy has arranged for the Land to be vested in the name of the Trustee by way of a registered lease for an initial duration of approximately 45 years … At Sustainable AgroEnergy's direction, the Trustee has created plots out of the Land, each measuring one hectare or more. Each plot has been demarcated on the ground and on a plan held by the Trustee. The Trustee has been holding the Plot in trust for the benefit of Sustainable AgroEnergy until this Agreement is executed. Thereafter following Sustainable AgroEnergy's receipt of full payment of the Purchase Price referred to in Section 2 of this Agreement the Trustee will hold the Plot in trust for the benefit of you the Purchaser(s) listed in Section 1 of this Agreement, until the Termination Date. Your beneficial ownership will be evidenced by a Certificate of Leasehold issued by the Trustee. This document states the location of your Plot(s). Additionally, the trees on your Plot(s) have been logged in the field using a global positioning satellite system and recorded in the Trustee's records".

23. BBSAL had conducted little or no investigation into the SA investment. It had commissioned and received two documents. The first was a short two-page report from a company called Enhance Support Solutions Limited dated 8 September 2010. This was focused on whether the investment would attract tax relief when placed into the SIPP; i.e. whether it was "SIPPable". The document concluded:

> "This document has been completed as part of a due diligence process on a proposed investment within a member-directed pension arrangement. The process undertaken by Enhance Support Solutions Limited seeks to identify whether the investment is likely to be acceptable based on HMRC rules as set by the Finance Act 2004 and subsequent amendments. The commentary provided is for information purposes only. This process does not comment on the suitability of the investment for meeting the scheme member's investment objectives and should not be constituted as advice".

24. The second was a 3-page document, also from Enhance Support Solutions Limited, and dated July 2011. This repeated the paragraph quoted immediately above. It also gave a broad description of the investment and the parties involved. It included a description of the Client Money flow and stated that:

> "A valuation will not routinely be provided, instead the value is more likely to be determined by the income generated. An annual report will be provided to confirm the underlying crop strategy plus Citadel will report the financials".

25. BBSAL accepted that these were the only documents in relation to the scheme which it considered at the time. It did not carry out an investigation into whether, for example, the plots had actually been planted with jatropha trees, or whether SA had good title to the land. BBSAL's case before the Ombudsman was, in essence, that it was not required to do so. BBSAL was acting as an administrator. It was not providing advice on the investment, as the various documents signed by Mr. Charlton made clear. In due course, the substance of this case was rejected by the Ombudsman.

26. As I have said, Mr. Charlton was the victim of a scam. In early 2012, SA was put into receivership. On 27 April 2012, the receiver of SA sent investors a letter which stated:

> The (SA) Companies have no title to the land in Cambodia. Yet they have purported to effect the sale of leases to third party investors on the basis that they did. Moreover, the land at present is entirely unsuitable for palm oil production and requires very substantial investment before any significant returns can be made from agriculture. Of particular concern is that the land is unsuitable for the growing of jatropha. All that the Companies own in Cambodia are some plant and equipment of little, if any, realisable value.

Mr. Charlton's complaint

27. On 20 September 2012, Mr. Charlton referred his Complaint to the Ombudsman Service. The complaint form summarised his complaint as follows:

> "Complainant is unhappy with the business as they invested his pension money into a company that went into administration. He has lost a large amount of his pension, and feels that the business should recover this for him."

28. The resolution of Mr. Charlton's Complaint has a protracted history, with a number of Ombudsmen involved. But it is not necessary to describe this in detail. The consideration of Mr. Charlton's Complaint was ultimately transferred to Mr. Colin Brown. Mr. Brown issued his Provisional Decision on 10 November 2016, in which he indicated that he was minded to uphold the complaint but providing a further opportunity for representations. After representations, he upheld the Complaint in his Final Decision dated 2 February 2017. The Ombudsman decided that the Claimant did not act fairly and reasonably in its dealings with Mr. Charlton.

D: The Ombudsman's decision

29. The Ombudsman's principal fact-findings and reasoning were contained in the Provisional Decision, which was subsequently incorporated in his Final Decision. The Provisional Decision ran to 31 pages, with headings and sub-headings rather than paragraph numbers. Bracketed numbers in this judgment refer to the page numbers of that decision. At page (4) he identified the critical question:

> The core question that has been considered is whether BBSAL acted fairly and reasonably by accepting Mr C's SA investment into his SIPP. That has involved looking at what BBSAL's obligations were.

30. He then set out the background to Mr. Charlton's investment and the parties' submissions, and continued (11) – (13):

> **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.
>
> I'd like to assure both parties and their representatives that I've looked at all of their submissions with care. In this decision I concentrate on the key arguments and evidence that are material to my determination of the complaint.
>
> When considering what's fair and reasonable in the circumstances, I need to take into account relevant law and regulations, regulators' rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the time. This goes wider than the rules and guidance that come under the remit of the FCA. I'm required under the Financial Services and Markets Act 2000 (FSMA) to make a decision that's fair and reasonable in all the circumstances of the case.

31. Pages (13) – (18) contain the Ombudsman's discussion of "relevant considerations".

> ***relevant considerations***
>
> …
> In my view, the FCA's Principles for Businesses are of particular relevance to my decision on what's fair and reasonable in this case.
>
> The Principles for Businesses, which are set out in the FCA's handbook, *"are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G).

32. Having quoted from the decision of Ouseley J. in *BBA*, the Ombudsman continued:

> I note that on 23 April 2009 the FSA sent BBSAL a letter which said:

> *"…the firm is responsible for taking the appropriate and ongoing measures to ensure that it is compliant with the FSA's principles and rules and that its clients are treated fairly."*

I'm therefore satisfied that, contrary to what BBSAL says, it should have been aware that it needed to comply with the Principles for Businesses, that it was an ongoing obligation and that it was for the firm to determine how to meet the obligation. Mr C's SIPP was arranged two and a half years after the FSA's letter reminded BBSAL of this obligation.

The FSA and its successor the FCA also issued reports in 2009 and 2012, guidance in October 2013 and the 'Dear CEO' letter in 2014, all regarding the responsibilities of SIPP operators. In my view, these are all relevant considerations to this complaint.

Some of these documents were issued after the events in this complaint, but the regulations and principles that underpin them already existed. So I'm satisfied that in referring to the reports, guidance and letter, I wouldn't be deciding this complaint with the benefit of hindsight. BBSAL's responsibility to comply with the Principles for Businesses existed from the outset of its relationship with Mr C. I've decided the reports, letter and guidance, which gave the regulator's views on the kinds of steps the Principles might require a SIPP operator to take in practice, are all relevant considerations in this case.

I accept that the 2009 and 2012 reports aren't formal 'guidance' (though the 2013 guidance is). The documents are important because they provide a reminder that the Principles for Businesses should be followed and they illustrate the kinds of things the regulator expected a SIPP operator might do to produce the outcomes envisaged by the Principles.

33. The Ombudsman then set out extracts from the FSA and FCA documents referred to above, and concluded the "relevant considerations" of his Provisional Decision as follows:

> So, when deciding what's fair and reasonable in the circumstances of this case, the factors I need to take into account include the requirements placed on BBSAL by the Principles for Businesses, as these are relevant rules. It follows that I must consider whether BBSAL did enough, fairly and reasonably, to meet the regulatory obligations placed on it by the Principles.
>
> The Principles which are of particular relevance to this complaint are numbers 2 and 6:

> ***Principle 2. Skill, care and diligence*** *- A firm must conduct its business with due skill, care and diligence.*
>
> ***Principle 6. Customers' interests*** *– A firm must pay due regard to the interests of its customers and treat them fairly.*

BBSAL says that Principle 2 relates only to internal procedures and the way in which a business runs itself, and has nothing at all to do with consumer protection. I don't agree. In my view this seeks to make a distinction that is artificially narrow. To my mind, it would be fair and reasonable to expect BBSAL to comply with both Principles 2 and 6. So if, for example, consumers are treated unfairly as a result of a failure to conduct its business with due skill, care and diligence, then it hasn't complied with the either Principle 2 or 6.

Having said that, I should stress again that I'm required to make a decision based on what's fair and reasonable in all the circumstances of the case. This is wider than the rules and guidance that come under the remit of the FCA.

34. At pages (17) – (18), he said:

> ***did BBSAL act fairly and reasonably towards Mr C***
>
> I've answered this question by considering what BBSAL's obligations meant in practice, what the firm did, and what it should have done. The Principles and appropriate due diligence are relevant considerations here.
>
> ***what did BBSAL's obligations mean in practice?***
>
> It's my view that Principles 2 and 6 together mean that BBSAL was obliged to carry out due diligence on the SA investment – due diligence that went further than simply checking that the investment was 'SIPP-able' under HMRC rules. I say that after taking into account the regulator's reports, guidance and 'Dear CEO' letter, among other matters, in considering whether BBSAL acted fairly and reasonably in this case.
>
> BBSAL is of the view that it wasn't required to carry out "*commercial*" due diligence. It hasn't explained what it considers commercial due diligence to be in this context. In any event, in this case, the focus should be on what BBSAL should have done fairly and reasonably to meet its responsibilities to Mr C, whether that's correctly characterised as commercial due diligence or not.
>
> It's my view that it's fair and reasonable to expect BBSAL to have looked carefully at the investment it was allowing Mr C's pension fund to be invested in. For BBSAL to accept everything 'SIPP-able' that

> came its way and ask its customer to accept warnings absolving it of the consequences wouldn't, in my view, be fair and reasonable or sufficient.
>
> For example, if BBSAL 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 might not exist, then it wouldn't in my view be fair and reasonable to say BBSAL had exercised due skill, care and diligence – or treated its customer fairly – by accepting the investment.

35. He then considered at (18) – (23) the due diligence which BBSAL had actually carried out, and then set out his views as to what BBSAL should have done, and what BBSAL ought reasonably to have concluded if it had carried out sufficient due diligence. In the context of what BBSAL should have done, he said:

> Taking into account all the available evidence and the relevant considerations I've described, and what's fair and reasonable in the circumstances of this case – in relation to the SA investment – my view is that BBSAL should, at least, have:
>
> – Identified SA as a high-risk, speculative and non-standard investment, so it should have carried out sufficient due diligence.
>
> – Considered whether SA was appropriate for a pension scheme.
>
> – Ensured that the investment was genuine and not a scam, or linked to fraudulent activity.
>
> – Independently verified that SA's assets were real and secure, and the investment operated as claimed.
>
> – Ensured that the investment could be independently valued, both at point of purchase and subsequently.
>
> – Ensured Mr C's SIPP wouldn't become a vehicle for a high-risk and speculative investment that wasn't a secure asset, and could be a scam.

36. His conclusion at the end of this section of his Provisional Decision (22) -(23) was:

> After considering these points, I don't regard it as fair and reasonable to conclude that BBSAL acted with due skill, care and diligence, or treated Mr C fairly by accepting the investment in SA. BBSAL didn't meet its regulatory obligations, and it allowed Mr C's funds to be put at significant risk as a result.

> I'm not making a finding that BBSAL should have assessed the *suitability* of the SA investment for Mr C. I accept BBSAL had no obligation to give advice to Mr C, or to ensure otherwise the suitability of an investment for him. My finding isn't that BBSAL should have concluded that Mr C wasn't a candidate for high-risk investment. It's that BBSAL should have concluded the investment wasn't *acceptable* for his pension scheme and thereby failed to treat Mr C fairly or act with due skill, care and diligence when accepting the investment.

37. At pages (23) – (25) he considered the question of whether BBSAL acted fairly and reasonably in proceeding with Mr. Charlton's instructions. In that context he considered arguments advanced by BBSAL as to the effect of COBS 11. His conclusion was that:

> I'm satisfied that if BBSAL had acted fairly and reasonably in its dealings with Mr C by carrying out adequate due diligence, it wouldn't have accepted SA as a permitted investment. I therefore don't accept BBSAL's submission that it had no choice but to make the investment, or that the rules allowed it to simply give risk warnings and go ahead.

38. He then addressed a number of matters under the heading "other issues", including the question of good industry practice at (26):

> ***industry good practice***
>
> When determining what's fair and reasonable in this complaint, one of the things I'm required by our rules (under DISP 3.6.4(2)) to take into account is what I consider to have been *good* industry practice at the time. Not simply what was *common* industry practice – they may not amount to the same thing.
>
> As discussed above, the regulator's reports, guidance and letter go a long way to clarify what should be regarded as good practice and what should not. In my view, it was good practice to check before accepting an investment into a pension scheme that it was what it purported to be. And in this case it seems BBSAL had a very limited understanding of the investment Mr C made. So BBSAL didn't carry out what I consider to have been good industry practice.
>
> In any event, the statement BBSAL provided from a trade association honorary secretary says enquiries by an operator might be made into "*matters affecting title, HMRC compliancy, compliance, money laundering and overt criminal activity*". And in my view BBSAL didn't go that far with its due diligence into the SA investment Mr C made – in particular, BBSAL appears not to have made adequate enquiries into matters affecting title.

39. He then expressed his provisional conclusions as follows:

provisional conclusions

In summary, my provisional conclusion is that, for the reasons set out above, BBSAL didn't act fairly and reasonably in its dealings with Mr C. BBSAL didn't act in accordance with its responsibilities to Mr C as set out in the Principles for Businesses and didn't carry out sufficient due diligence on the SA investment. If it had done so, BBSAL ought reasonably to have identified that it wasn't an acceptable investment for Mr C's pension and so it shouldn't have accepted an application to open a SIPP to facilitate the investment. So BBSAL didn't act fairly and reasonably in proceeding with Mr C's instructions.

40. In his Final Decision, the Ombudsman addressed various arguments advanced following his Provisional Decision, but his decision was not to depart from his provisional findings. He concluded by setting out the basis upon which BBSAL should compensate Mr. Charlton.

E: The grounds of challenge

41. Permission to apply for judicial review was granted by Yip J. The permission application contended that there were two grounds (subsequently referred to as Ground 1 and Ground 2) on which it was alleged that the Ombudsman had erred in law:

    a. Finding that BBSAL was not required to execute Mr. Charlton's specific instructions in accordance with rule 11.2.19 of COBS which implemented the obligation in Article 21 of MiFID; and
    b. Failing to follow previous decisions of the Pensions Ombudsman Service or to give cogent reasons for his declining to do so.

42. The permission application identified two questions of law arising from the Ombudsman's decision, namely:

    a. In circumstances where, on an execution only basis, a client instructs a SIPP provider (who is prohibited from giving investment advice) to include a named unregulated investment in his SIPP, is that SIPP provider, apart from ensuring that the proposed investment complies with HMRC rules regarding inclusion in a SIPP, under any duty to undertake extensive legal, regulatory and factual inquiries and/or investigations into that investment in order to ascertain whether it is viable and should or should not be accepted into the SIPP; and, where the SIPP provider ascertains that it should not be accepted, refuse to include it within the client's SIPP, notwithstanding his instructions to the contrary?
    b. To what extent was Mr. Brown bound by the principle of consistency as regards previous decisions of the Pensions Ombudsman in cases in which the facts were the same or not materially dissimilar to the facts of the case before him?

43. The arguments advanced by BBSAL in relation to the first ground were ultimately somewhat expanded, in particular with a focus on the lack of consultation in relation to the duty which the Ombudsman had found to exist. However, there was no objection to the expansion of the arguments and it is therefore appropriate that I should deal with all points advanced on their merits.

F: The parties' submissions

The Claimant's submissions: Ground 1

44. In summary, BBSAL contended that the Ombudsman found that a SIPP administrator had a specific duty to investigate whether a foreign high-risk investment was suitable for a SIPP. Although he accepted that an administrator had no duty to advise on the merits of an investment, the Ombudsman found that there was a duty to investigate to determine whether the investment was "acceptable for inclusion in a SIPP". This begged the question, what is the purpose of such an investigation? The purpose can only be to determine whether a product is unlikely to yield a return and therefore a bad investment for a SIPP. It was therefore to dress up a duty to advise as due diligence.

45. The scope of the duty that the Ombudsman found was extensive. He had suggested that a SIPP administrator ought to have investigated and verified the foreign title in the underlying land asset. It should have travelled to the foreign jurisdiction to verify that the land was being used for its stated purpose. It should have obtained legal opinions to ensure the scheme complied with foreign law and regulations. It should have ascertained the method by which the business enterprise might be valued and realised. It should have investigated the general viability of that type of investment in crops. The administrator ought to have scrutinised the company accounts to determine whether the certified auditor (PwC) had included disadvantageous caveats. In short, the duty of a SIPP administrator was effectively to become an overseas fraud investigator.

46. The Ombudsman derived that duty from the FSA Principles rather than rules. The Ombudsman made a material error of law by creating such a duty. In the course of his submissions, Mr. Kirk refined his argument to four basic propositions. These began with the correct proposition that it was not suggested that the Claimant had breached any express rule or guidance that had been consulted upon, save for Principles 2 and 6. Against that background, the Claimant made four submissions.

47. *(1) The Consultation Argument.* BBSAL submitted that the Principles were important, but they remain a part of secondary legislation. Secondary legislation cannot be used to undermine a primary statutory requirement for there to be consultation on rules or guidance.

48. The effect of an Ombudsman creating novel duties from general Principles was to undermine the statutory protection against rule-making without consultation. The relevant part of FSMA (Part X at the material time) conferred substantial powers on the financial regulators to make both general and specific rules affecting the provision of financial services without direct Parliamentary oversight. The rationale for this rule-making independence is the complexity of financial services and the potential

need for urgent change. However, the safeguards include the statutory requirement for consultation with those potentially affected. If the UK regulator would not be permitted to make such specific rules without consultation, it is inappropriate for an Ombudsman to do so at first instance. This is particularly so, where both FOS and the FCA are treating this decision as a test case.

49. The Ombudsman's approach therefore bypassed important statutory safeguards relating to rule-making, namely

    a. the rule making powers can only be exercised by the governing bodies of the FCA and Prudential Regulation Authority;
    b. the powers must be exercised in accordance with the statutory objectives; and
    c. there is a strict statutory requirement for consultation with practitioners and consumers.

50. In short, the Principles cannot become a rule-making power. The moment they become a rule-making power to create new obligations, the statutory obligation to consult about rules and guidance has been undermined.

51. *(2) The Augmentation Argument*. BBSAL submitted that where there is an existing regulatory framework in which a business operates, the Principles should be used to augment, clarify or enlarge existing duties, rather than to create *new unexpected* duties (BBSAL's emphasis) that have not been the subject of consultation.

52. Thus, BBSAL accepted that the Principles could be used to augment the FSA Rules. However, they submitted that in a sector that had been subject to specific duties, they should not be used to create new and surprising or unexpected duties. Whilst it was permissible to augment a rule by amplifying an existing duty, it was not permissible to create a new rule, by using the Principles, which does not amplify an existing duty. To do so would mean that businesses that operated under an existing set of duties would suddenly without consultation have a new duty.

53. Here, there were express, specific FSA rules that required certain categories of regulated person to assess the suitability and appropriateness of an investment. Those duties did not apply to a SIPP administrator without permission to advise retail clients on the merits of an investment. Having expressly declared that certain types of business were included in the duty to assess whether a product is likely to achieve a return, it was wrong to then retrospectively imply a rule that other administrators also had that duty. It was common ground that BBSAL did not have the duty of a financial advisor or portfolio manager to assess the suitability or appropriateness of specific investments, and that the applicable rules in that regard (in particular COBS 9 and 10) did not apply to BBSAL, an administrator with permission only to establish and operate pension schemes.

54. A reasonable construction to place on COBS 9 and 10, taken in conjunction with COBS 11 (described below) was that since there was no duty to advise the client on suitability or assess appropriateness, and since there was a duty to execute a transaction instructed by the client, there was (contrary to the Ombudsman's conclusion) no duty to assess whether or not a particular product was acceptable for a SIPP.

55. BBSAL also submitted that the potential effect of any individual Ombudsman being permitted to create duties from the Principles is inconsistency in decision-making. The result of that is unfairness to respondents. The Ombudsman's duty to decide on the basis of what is "fair and reasonable" cannot mean that an individual Ombudsman can reach any decision he or she thinks is appropriate on a complaint. If that were permitted, an identical complaint would achieve a different result from the Financial Ombudsman Service than from the Pensions Ombudsman Service. The consequence would be forum-shopping by complainants undermining the system of detailed rules imposed on financial services operators.

56. BBSAL recognised that certain passages in the decision of Ouseley J. in *BBA* created difficulties for this line of argument, and Mr. Kirk said that he faced the difficult task of distinguishing it. Nevertheless, he submitted that the case was distinguishable and that, properly read, the principal passages on which FOS and the interested parties relied were obiter. The Ombudsman misunderstood that case, which involved the regulator setting out high level rules in relation to PPI compensation complaints handling that had been the subject of extensive statutory consultation. It was not authority for the proposition that an Ombudsman is entitled to determine a case by deriving specific rules from general principles; particularly when to do so contravenes another expressly stated rule.

57. *(3) The Conflict Argument*. BBSAL submitted that in this case, there was a conflicting rule (namely COBS 11.2.19R) that meant that the extensive duty of inquiry was imposed in conflict with a rule that required execution on instruction. A duty to engage in foreign investigation was contrary to the express obligation, set out in the FSA rules, for a SIPP administrator to execute an instruction. The purpose of such an administrative duty to execute is that it must take precedence over consideration of an investment's merit. The duty is not to execute only those transactions that were believed to be good investments. It is to execute the transaction when instructed.

58. At the relevant time, the rule at COBS 11.2.19R (1) provided that:

> "Whenever there is a specific instruction from the client, the firm must execute the order following the specific instruction."

Pursuant to COBS 11.2.19R (2), in doing so a firm satisfied its obligation to "take all reasonable steps to obtain the best possible result for a client". To have undertaken due diligence as contended for by the Ombudsman would have required BBSAL to disregard Mr Charlton's specific instruction on the ground that the investment was not a good one. Such assessment inevitably goes beyond whether the investment could lawfully be held in a SIPP wrapper under HMRC rules or the criminal law, and where a SIPP operator might not be required to execute a transaction. The Ombudsman's decision required a value judgment to be made by BBSAL as to the legitimacy and value of the investment. Further detail as to BBSAL's arguments in this regard is set out in Section G4 below.

59. At the time when Mr. Kirk submitted his skeleton argument, and made his opening submissions, it had been and appeared to be common ground that the FSA rule in COBS 11.2.19R was applicable to BBSAL's execution of this transaction. However at the start of the second day of the hearing, Mr. Henshaw for the FCA indicated that he

wished to take a point that 11.2.19R was not applicable. After discussion between the parties, it was agreed by them that the Court should proceed on the basis that COBS 11.2.19R was applicable. However, if the Court concluded that there was a material conflict between the application of COBS 11.2.19R and the Principles then the case should be listed for resolution of the argument advanced by the FCA that COBS 11.2.19R did not in fact apply. The reason for this approach was that BBSAL could not fairly be expected to respond immediately to the new argument as to the applicability of COBS 11.2.19R. However, the issue as to its applicability would only become significant if I were to conclude that the Ombudsman had erred in law in deciding that there was no material conflict between COBS 11.2.19R and the Principles.

60. *(4) The Error of Law Argument.* BBSAL's overarching submission was that the Ombudsman's discretion to (a) consider a wide range of materials and (b) to depart from the common law, did not mean that he did not have to consider the law and get it right.

61. In summary, the reason that the Ombudsman erred in the present case was that he had used the Principles to find that there was a duty of enquiry or investigation. He had derived that duty from the Principles, but he was wrong to do so. This meant that BBSAL were found to have duties of extensive enquiry, whereas its duty was actually administrative in nature.

The Claimants' submissions: Ground 2

62. In relation to Ground 2, BBSAL submitted that the Ombudsman's Decision created an inconsistency as to approach between FOS and the Pensions Ombudsman, which had previously repeatedly rejected similar complaints by consumers. BBSAL relied upon three decisions in February 2014, March 2015 and March 2016. The first was a decision of an investigator within the Pensions Ombudsman Service ("POS"), and the latter two were decisions of a Pensions Ombudsman within POS.

63. BBSAL submitted that consistency was a fundamental principle of public law', relying upon Lord Bingham in *R (O'Brien) v Independent Assessor* [2007] 2 AC 312, at paragraph [30]:

> "It is generally desirable that decision-makers, whether administrative or judicial, should act in a broadly consistent manner. If they do, reasonable hopes will not be disappointed."

64. BBSAL submitted that the authorities in relation to FOS recognised the crucial importance of consistency in a decision-making process which operates according to what is "fair and reasonable" under section 228(2) of FSMA. In *R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642, Stanley Burnton L.J. said at paragraph [49]

> "the common law requires consistency: that like cases are treated alike. Arbitrariness on the part of the ombudsman, including an unreasoned

> and unjustified failure to treat like cases alike, would be a ground for judicial review."

65. BBSAL accepted that FOS and POS operated according to different statutory standards, and that it was correct that neither was bound by decisions of the other. However, that cannot affect whether or not a particular duty of care was in fact owed by a SIPP operator to an investor. Here, for example, either BBSAL owed a specific duty to investigate the legitimacy of investments pursuant to Principle 2 or it did not. To conclude otherwise would encourage forum-shopping by consumers and businesses. The consequence would, again, be to undermine the detailed regulatory scheme which applies to SIPP operators in the pensions industry. They would be unable to assess the risk of non-compliance and to structure their day-to-day activities accordingly.

66. BBSAL's oral submissions on Ground 2 were made by Mr. Samuels. He submitted that there was a material error of law for the Ombudsman to ignore the overarching principle of consistency. He emphasised that if the Ombudsman wished to make an inconsistent decision, he could only do so if there were cogent reasons. Here, the Ombudsman had provided no such reasons. He had simply said:

> I'm aware of the Pensions Ombudsman cases that BBSAL has referred to. But I'm not bound to follow the Pensions Ombudsman's conclusions, which are decided by reference to a different statutory scheme. I'm required to form my own view, in accordance with our own statutory framework, on what I consider the fair and reasonable outcome of the complaint should be. That's what I've done in determining this complaint.

67. Mr. Samuels accepted that the Pensions Ombudsman decides matters according to law, whereas the FOS can decide cases on a "slightly" wider basis. But this was a case which could have been decided either by the POS or the FOS, and indeed the POS and FOS had entered into a memorandum under which they agreed to co-operate with each other and conduct regular exchanges of best practices in relation to (amongst other things) how the ombudsmen independently approach the resolution of similar complaints. Consistency was therefore important between the two organisations, and the reasons given by the Ombudsman for not following the previous decisions of the POS were not sufficient and constituted a material error of law.

The submissions of FOS

68. In relation to Ground 1, FOS emphasised that the decision as to what was fair and reasonable in all the circumstances was for the Ombudsman, not for the court. On a judicial review application, the Court had to approach the decision on the basis of the facts found by the FOS. There was no challenge in the present case to the decision on the basis that a finding of fact was made on the basis of irrelevant considerations. Nor was there any challenge to the Final Decision on the basis of irrationality.

69. In upholding Mr. Charlton's Complaint, the Ombudsman was acting in accordance with his statutory jurisdiction under section 228(2) of FSMA, namely to *"*determine [the Complaint] by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case". The Ombudsman's Final Decision simply reflected the application of the Claimant's obligations to "conduct its business with due skill, care and diligence" in accordance with Principle 2 of the FCA's Principles for Businesses, and to act in Mr Charlton's interests and treat him fairly in accordance with Principle 6 of those Principles. The Final Decision is properly reasoned and is consistent with the application of the Ombudsman's statutory jurisdiction. BBSAL's disagreement with the Ombudsman's assessment of what was fair and reasonable is not a proper basis for challenging that decision.

70. *(1) The Consultation Argument.* FOS submitted that the Consultation Argument failed at the outset. The duty of consultation was a duty on the FCA to carry out consultation before making rules or guidance. But the Ombudsman's task in the present case was to decide what was fair and reasonable in the light of the rules that existed. The Ombudsman applied the Principles, which were rules, and which had been consulted upon. His conclusion was simply that there had been a failure to comply with Principles 2 and 6. There was therefore no error of law.

71. In summary on the Consultation Argument, the FOS submitted that:

    a. The Ombudsman did not use the Principles to create a new rule in breach of a duty of consultation. He was simply making a determination, based on the existing rules, pursuant to section 228 of FSMA.

    b. Nowhere did the Ombudsman articulate that he was creating a new rule. He was applying established rules to the facts of the case.

    c. It was of no assistance to recast the Ombudsman's findings in terms of a duty of enquiry or investigation. The concept of "due diligence" in Principle 2 inevitably involved enquiry or investigation. Enquiry and investigation fell within the natural meaning of "due diligence".

    d. Applying the Principles to the facts of the case does not create a new rule. It is simply the application of an existing rule to a given set of circumstances. BBSAL's real complaint is the width of the existing rules. But those are the rules which exist and which were consulted upon.

    e. It is entirely acceptable for the Ombudsman to apply the Principles to the facts in a way which is not spelt out in more specific rules. It was not only permissible to do this, but the Ombudsman was bound to do it.

72. *(2) The Augmentation argument.* On the augmentation argument, FOS submitted:

    a. This added nothing to the Consultation Argument, and indeed was formulated by reference to duties "that had not been the subject of Consultation". Accordingly, FOS's arguments against that argument

were equally applicable. In particular, no new duty was being created. The Ombudsman was simply applying an existing rule to the facts.

b. Secondly, the argument failed because it was in direct conflict to the decision in *BBA*. The Principles were ever-present rules. There was no requirement that the Principles could only augment an existing rule.

c. Thirdly, as was clear from *BBA*, the Ombudsman under section 228 was entitled to take a view on what was fair and reasonable, taking into account the Rules. So there was no basis for the contention that the existing Rules could not be "augmented".

d. Fourthly, the premise of the argument was that the Ombudsman had found a new unexpected duty. But this was inconsistent with the Ombudsman's finding as to what was good practice at the time.

73. *(3) The Conflict Argument.* The Conflict Argument failed because there was no conflict between the Principles and the relevant rule in COBS 11, as the Ombudsman had correctly recognised. COBS 11.2.19R did not create a duty to execute a transaction, regardless of Principles 2 and 6. The relevant provisions in COBS were concerned with the manner in which a transaction was to be executed, but did not create a duty on the part of a SIPP provider to execute all transactions for which the client gave instructions. A SIPP operator had a discretion, and would not be in breach of COBS 11 if, having ascertained that a particular investment was not acceptable for a SIPP, it declined to execute a transaction.

74. *(4) Error of Law:* Overall, FOS submitted that there was no error of law which could be identified in the decision of the Ombudsman. He had identified and applied the correct principles of law. The relevant question was whether there had been a failure to comply, on the facts of the present case, with Principles 2 and 6. The court could and should not interfere with the decision of the Ombudsman as to how those Principles applied on the particular facts of the present case. That decision was a matter for the Ombudsman.

75. *Ground 2.* In relation to Ground 2, FOS submitted that:

a. The principle of consistency in administrative law has to be properly understood. It was a principle applicable to decision-makers to encourage good administrative practice; to treat like cases alike. But it was fundamental to the principle that the decision-maker was acting under the same substantive jurisdiction. The principle could not apply where, as here, the decision-makers were acting under different jurisdictions. No authority had been produced which sought to extend the "consistency" principle across different jurisdictions.

b. The FOS and the Pensions Ombudsman were acting under different statutory jurisdictions. The FOS was required to make a decision under section 228 of FSMA 2000. The Pensions Ombudsman makes a decision under section 146 of the Pensions Scheme Act, where the question was whether a person had "sustained injustice in consequence

of maladministration in connection with any act or omission of a person responsible for the management of the scheme". There may be overlaps in that a particular case could go to the FOS, the POS or indeed the courts, each of which would have to decide cases on the basis of the principles which it was required to apply.

c. Even if the principle had any application, it only applied to treating like cases alike. The cases before the Pensions Ombudsman were not cases which were sufficiently similar to the present case.

d. Finally and in any event, even if there were room for the consistency principle, the Ombudsman was not bound to follow the decisions of the Pensions Ombudsman. He had to comply with his statutory duty under section 228. He was entitled to depart from those decisions if, applying the relevant test in section 228, he considered that the complaint was justified by reference to what, in his opinion, was fair and reasonable in all the circumstances of the case. In the present case, the Ombudsman had given very thorough consideration to all the arguments and had determined, in a fully reasoned decision, that the complaint should be upheld. Reliance was placed upon paragraphs [87] – [88] in the speech of Lord Carswell in *O'Brien.*

The submissions of the Interested parties

76. The FCA's written submissions principally sought to address the true interpretation of the relevant laws and rules. In particular, the FCA addressed detailed submissions as to the applicability of COBS 11 by reference to the preceding European Directives. In that regard, the FCA submitted that the relevant provisions of the Directives, and COBS 11, were simply concerned with the manner or method of execution of an order once accepted. They had nothing to do with the question of whether or not the order should be accepted in the first place. COBS 11.2 had no bearing on the breaches of the Principles that the Ombudsman found to have occurred. Again, Section G4 below contains further detail as to the submissions of both the FCA and FOS in relation to COBS 11 and the Conflict argument.

77. Brief submissions were also made by Mr. Howarth on behalf of Mr. Charlton. He largely adopted the arguments advanced by FOS and the FCA. In relation to Ground 2, Mr. Howarth submitted that it was fatal to the challenge that BBSAL now accepted that there were different statutory jurisdictions for the POS and the FOS, and different tests which each was required to apply. Indeed, if the FOS had followed the decision of the POS, this would have created fertile ground for a public law challenge on the basis that he gave too much weight to the law and did not sufficiently exercise his function of deciding what the fair and reasonable result would be. Once the jurisdiction of the FOS was engaged, he had to do his job according to the rubric given by Parliament to act.

G: Analysis and conclusions: Ground One

G1: The approach to the decision of the FOS

78. The present case is a challenge to the lawfulness of the Ombudsman's decision. It is not a challenge to his conclusions of fact.

79. As set out above, Section 228(2) of FSMA 2000 required the Ombudsman to determine the complaint "by reference to what is, in the opinion of the Ombudsman, fair and reasonable in all the circumstances of the case". DISP 3.6.4R identifies the matters which the Ombudsman should take into account in that regard.

80. The test under section 228(2) of FSMA 2000 is therefore a subjective one for the ombudsman. It is now well-established that "the words 'in the opinion of the ombudsman' themselves make it clear that he may be subjective in arriving at his opinion of what is fair and reasonable in all the circumstances of the case": see *R (IFG Financial Services Ltd) v Financial Ombudsman Service* [2005] EWHC 1153 (Admin), at §13 per Stanley Burnton J. There is therefore a wide latitude within which the ombudsman can operate so long as he is fair and reasonable in his approach to the case and the conclusions he reaches are not perverse: *R (Williams) v Financial Ombudsman Service* [2008] EWHC 2142 per Irwin J; and *R (on the application of Green) v Financial Ombudsman Service Ltd* [2012] EWHC 1253 (Admin) at paragraph [38] per Collins J. In *Williams,* Irwin J. reviewed the authorities and said at paragraph [26]:

> The ombudsman is dealing with complaints, not causes of action. His jurisdiction is inquisitorial not adversarial. There is a wide latitude within which the ombudsman can operate. He can depart from the common law if justified, but must explain the extent to which the reasons for any such departure. Next, he can import his knowledge of good industry practice at the time, that being stipulated in the rules and emphasised by the judgment of Stanley Burnton LJ in the *Heather Moor* case. Next, he must be fair and reasonable in his approach to the case and his conclusions. Next, he cannot be perverse or merely subjective, and will be susceptible to judicial review if he is, both as to the manner in which the decision is reached and as to the outcome.

81. In the present case, there is no challenge to the Ombudsman's decision on the basis of the irrationality or perversity of his decision. The errors of law relied upon by BBSAL, and summarised above, are alleged to be errors in the Ombudsman's legal analysis of the rules contained in the FSA Handbook, and which led to him recognising a duty which did not exist. If there were such an error of law, then it was not disputed that the Ombudsman's decision could be judicially reviewed.

82. However, I agree with the submission of FOS that there is an important distinction between (i) construction of the rules (which is a matter for the Court), and (ii) the application of those rules to the facts of the case, which is a matter for the decision-maker. This distinction can be seen in the decision of Ouseley J. in *R v Financial Ombudsman Service ex p Norwich and Peterborough Building Society* [2002] EWHC 2379, to which both BBSAL and FOS referred. In that case, the Court was concerned with the decision of the Building Society Ombudsman under a statutory scheme which provided for determination of complaints to be "made by reference to what is, in the adjudicator's opinion, fair in all the circumstances of the case". Ouseley J. at paragraphs [72] – [73] drew a distinction between issues as to the construction of the Banking Code, which were matters for the Court, and issues as to the application of the Code to the circumstances of the case. He said that the Ombudsman was to be afforded "considerable leeway in the application of the Code to the circumstances

which he finds". Ouseley J went on to say at paragraphs [77] – [78] (consistent with later authority) that:

> [77] … The very concept of "unfairness" is very wide, and permits reasonable people to disagree. But its very width serves as a caution against over-active judicial intervention in the approach adopted by the Ombudsman, in the criteria which he develops or in the application of those criteria or of the concept of unfairness to the circumstances of the case.
>
> [78] It is only if the Ombudsman has committed such errors of reasoning as to deprive his decision of logic that it can be said to be legally irrational. The Court should be very wary of reaching such a conclusion. Its own views as to what would be fair are not to be substituted for the Ombudsman's views when what is at issue is a question of the substantive merits of a decision as to unfairness".

83. The case-law also establishes that any Ombudsman's decision letter should be read as a whole and in a common sense, and certainly not in a legalistic way: see *R (Garrison Investment Analysis) v Financial Ombudsman Service* [2006] EWHC 2466 (Admin) at paragraph [5].

84. Against this background, I turn to the three errors of law on which BBSAL relied.

G2: The Consultation argument

85. On this issue, I accept the submissions of FOS as summarised above. The most important points in my judgment are as follows.

86. First, I do not accept that the Ombudsman, in his decision, was creating a new rule at all. His approach was simply to identify the existing rules, specifically the Principles, which had been consulted upon, and then to decide how those rules applied in the context of the particular facts before him. This is apparent from the decision as a whole.

87. Thus, having introduced the facts and the parties' arguments, the Ombudsman said that he had considered all the available evidence and arguments to decide what was fair and reasonable in the circumstances of this complaint (11). (Bracketed numbers again refer to the pages of his Provisional Decision, extracts of which are quoted in Section D above). He then said that the FCA's Principles were "of particular relevance to my decision on what's fair and reasonable" (13). He then referred (13) to the decision of Ouseley J in *BBA*, at paragraph [77] and [162], including the statements that the "Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with". He then set out Principles 2 and 6 in full, and said that to his mind "it would be fair and reasonable to expect BBSAL to comply with both Principles 2 and 6. So if, for example, consumers are treated unfairly as a result of a failure to conduct its business with due skill, care and diligence, then it hasn't complied with … Principle 2 or 6" (17). He then went on to stress that he was "required to make a decision based on

what's fair and reasonable in all the circumstances of the case. This is wider than the rules and guidance that come under the remit of the FCA" (17).

88. The Ombudsman then gave his answer to the question: "did BBSAL act fairly and reasonably towards Mr. C". He said that he was doing so "by considering what BBSAL's obligations meant in practice, what the firm did, and what it should have done. The Principles and appropriate due diligence are relevant considerations here". He then addressed the following topics: "what did BBSAL's obligations mean in practice"(17); the due diligence carried out by BBSAL (18); "what should BBSAL have done" (18); and "If BBSAL had completed sufficient due diligence, what ought it reasonably to have concluded" (20). At the end of that section, he concluded that:

> After considering these points, I don't regard it as fair and reasonable to conclude that BBSAL acted with due skill, care and diligence, or treated Mr C fairly by accepting the investment in SA. BBSAL didn't meet its regulatory obligations, and it allowed Mr C's funds to be put at significant risk as a result.
>
> I'm not making a finding that BBSAL should have assessed the *suitability* of the SA investment for Mr C. I accept BBSAL had no obligation to give advice to Mr C, or to ensure otherwise the suitability of an investment for him. My finding isn't that BBSAL should have concluded that Mr C wasn't a candidate for high-risk investment. It's that BBSAL should have concluded the investment wasn't *acceptable* for his pension scheme and thereby failed to treat Mr C fairly or act with due skill, care and diligence when accepting the investment.

89. He then went on to consider, additionally, whether BBSAL had acted fairly and reasonably in proceeding with Mr. Charlton's instructions and concluded that:

> I'm satisfied that if BBSAL had acted fairly and reasonably in its dealings with Mr C by carrying out adequate due diligence, it wouldn't have accepted SA as a permitted investment. I therefore don't accept BBSAL's submission that it had no choice but to make the investment, or that the rules allowed it to simply give risk warnings and go ahead.

90. I do not consider that there is anything in the Ombudsman's analysis that makes it appropriate to characterise his decision as the creation of a new rule or guidance which should have been consulted upon. It was simply, as FOS correctly submitted, the application of an existing rule, namely Principles 2 and 6, to a given set of circumstances. The application of the Principles in a particular context may lead to the conclusion that a firm erred by taking or omitting to take particular action. But that does not constitute the derivation of specific rules from general principles, but is merely the operation of the Principles.

91. At one point in his submissions, Mr. Kirk correctly said that Principle 2 was a very wide general principle, and that what it amounts to may be "very subjective", with

different people holding different views about what a SIPP operator ought to do. He submitted that the Principle had to be applied "reasonably and proportionately". He also said, again correctly, that Principle 6 was very wide. These submissions to my mind fortify the conclusion that the Ombudsman in the present case was not creating a new rule, but was applying the wide Principles 2 and 6 to the facts before him. The difficulty for BBSAL is that the Principles are indeed wide. But as Mr. Strachan submitted, this was the virtue of the rules, not their vice.

92. Accordingly, to adapt the words of Ouseley J. in *Norwich and Peterborough Building Society*, this is a case where the Ombudsman's decision does no more than apply the Principles "to the circumstances which he finds". In the absence of a challenge on the basis that the Ombudsman's decision in that respect was irrational, there is in my judgment no error of law.

93. Secondly, I consider that there is very good reason not to seek to characterise the Ombudsman's decision as the creation of a new rule. There is nothing in the Ombudsman's Decision which indicates that he thought that he was articulating a new rule, as distinct from applying the established rules to the circumstances of the case. It seems to me that BBSAL's argument is an artificial way of seeking to negate the width of the discretion which the Ombudsman is given under Section 228 of FSMA. Under that section, it is for the Ombudsman to decide what is fair and reasonable in all the circumstances of the case. Here, he paid regard (as DISP 3.6.4R requires him to do) to the relevant regulators' rules, namely Principles 2 and 6. The decision as to how those Principles apply "in all the circumstances of the case" must be a matter for him.

94. Thirdly, it also seems to me that there is another artificiality in BBSAL's approach, namely the characterisation by BBSAL of the supposed new "rule" as a duty to investigate. The concept of "due diligence" in Principle 2 inevitably brings to mind the concept of enquiry or investigation. They are not such distinct concepts that an Ombudsman's conclusion – that the exercise of due diligence involved enquiry or investigation – involves the creation of a new rule.

95. Fourthly, I agree with FOS's submission that it is difficult to see how the consultation argument can be a valid ground for reviewing the decision of the Ombudsman. The Ombudsman had to take the rules, including the Principles, as they were. As is clear from his decision summarised above, he considered those rules in arriving at his decision as to what was fair and reasonable. There can be no valid criticism of this approach. Indeed, it is provided for in DISP 3.6.4R.

96. Finally, I agree with FOS that it is entirely acceptable for the Ombudsman to apply the Principles to the facts in a way which was not spelt out in specific rules. This is clear from the *BBA* decision. It is also the effect of DISP 3.6.4R, which requires the Ombudsman to "take into account" relevant regulators' rules. As the Ombudsman correctly stated (17):

> "I should stress again that I'm required to make a decision based on what's fair and reasonable in all the circumstances of the case. This is wider than the rules and guidance that come under the remit of the FCA".

These considerations provide further reasons why it is not appropriate to characterise the Ombudsman's decision as the creation of a new rule, as opposed to the application of the existing rules to the facts of the case. Once it is recognised, as *BBA* shows, that the Principles have room in which to operate irrespective of whether there is a specific rule, then it follows that the Ombudsman's decision is simply the application of existing rules, namely the Principles. There is no intermediate stage where a new rule has been created.

97. Accordingly, I do not consider that there was an error of law as suggested by the consultation argument.

G3: The Augmentation argument

98. I agree with FOS that the reasons why the Consultation argument fails, as set out above, also apply to the Augmentation argument. This argument depends upon the proposition that the Ombudsman's decision created a "new, unexpected" duty. However, as already explained, I consider that the Ombudsman's decision simply applies the existing duties, as set out in Principles 2 and 6, to the facts before him. There are, however, two additional reasons why the augmentation argument must fail.

99. First, the premise of the argument is that the Ombudsman's decision created a "new, unexpected" duty. However, I consider that this argument is inconsistent with the conclusions of the Ombudsman as to what "*he considers to have been good industry practice at the relevant time";* this being one of the matters to which the Ombudsman was entitled to have regard under DISP 3.6.4R. It is clear from the Provisional Decision that the Ombudsman received submissions as to what good industry practice was. As already stated, his conclusion (26) was:

> ***industry good practice***
> When determining what's fair and reasonable in this complaint, one of the things I'm required by our rules (under DISP 3.6.4(2)) to take into account is what I consider to have been *good* industry practice at the time. Not simply what was *common* industry practice – they may not amount to the same thing.
>
> As discussed above, the regulator's reports, guidance and letter go a long way to clarify what should be regarded as good practice and what should not. In my view, it was good practice to check before accepting an investment into a pension scheme that it was what it purported to be. And in this case it seems BBSAL had a very limited understanding of the investment Mr C made. So BBSAL didn't carry out what I consider to have been good industry practice.

100. This conclusion is not the subject of any judicial review challenge for which permission has been granted, and accordingly this case must be determined on the basis of that conclusion. The relevant conclusion is either a factual conclusion as to what constituted good industry practice at the time, or perhaps more strictly the Ombudsman's conclusion as to what he considered to be such practice. On any view, it was not (as Mr. Kirk sought to submit in reply) a conclusion of law. The Ombudsman's conclusion as to good industry practice at the time is, in my view, fatal

to the contention that the effect of the Ombudsman's decision was to create "new, unexpected duties".

101. Secondly, the augmentation argument also involves the proposition that, within an existing regulatory framework, the Principles should only be used to "augment, clarify or enlarge existing duties, rather than to create new unexpected duties that have not been the subject of consultation". The premise of the argument, therefore, was that there were limitations in the extent to which the Principles could augment the existing rules, with a distinction to be drawn between the augmentation of "existing duties" and the creation of "new unexpected" duties. I do not consider that this argument is consistent with the decision of Ouseley J. in *BBA*, and in substance it seeks to advance the case that was rejected in that case.

102. The *BBA* case involved a claim for judicial review against the Financial Services Authority and the FOS arising out of complaints handling for PPI policies. The FSA had published a Policy Statement, including amendments to its Handbook rules, and guidance about how PPI sales complaints should be handled by banks, and the basis on which they should be decided. The claimant ("the BBA"), which was the leading association which represented banks, argued that the Policy Statement was unlawful on various grounds. One of those grounds was that the FSA were using the Principles in order to augment or contradict specific regulatory rules, and this was not permissible. The BBA submitted that where specific rules had been promulgated by the FSA "to occupy the field", and where the purpose of the specific rules was to implement specific Principles, the FSA could not additionally resort to those Principles. If that contention were correct, then the FOS was also acting unlawfully in publishing and maintaining guidance which stated that the Principles would be taken into account in deciding whether compensation was fair and reasonable. As the argument developed, it was focused primarily on the question of whether specific rules could be <u>augmented</u> by the general Principles, rather than on the question of whether the specific could be <u>contradicted</u> by the general: see paragraphs [96] and [158].

103. Ouseley J. rejected the BBA's argument, and said:

> [161] I turn to the substance, dealing first with the general approach. In my judgment, and fundamentally, the BBA analysis rather puts the issue the wrong way round when it contends that the Principles cannot be used to contradict or augment the specific rules. The relationship between them has to be determined by understanding the true role of the Principles. The Principles are the overarching framework for regulation, for good reason. The FSA has clearly not promulgated, and has chosen not to promulgate, a detailed all-embracing comprehensive code of regulations to be interpreted as covering all possible circumstances. The industry had not wanted such a code either. Such a code could be circumvented unfairly, or contain provisions which were not apt for the many and varied sales circumstances which could arise. The overarching framework would always be in place to be the fundamental provision which would always govern the actions of firms, as well as to cover all those circumstances not provided for or adequately provided for by specific rules.

> [162] The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirements they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules.
>
> [163] That role for the Principles has been clear from the language describing their role in the Handbook; see PRIN 1.1.7G to 1.1.9G, and paragraphs 29-31 above. That was also clear from what the FSA said in the 1998 Consultation Paper and the Supplementary Memorandum on which [counsel for the BBA] relied in submission on the first ground.
>
> [164] If the question, as posed by [counsel for the BBA's] submission, makes the intent of the FSA in promulgating the rules relevant to the question of their construction in this respect, it is plain that no such exhaustion of the Principles was intended in the making of specific rules. The FSA was very clear before and in the Policy Statement about that: the Principles remain the overarching source of obligations.
>
> [165] It was not suggested that the relationship intended by the FSA between Principles and specific rules was ultra vires the Act, or an abuse of power. It is perfectly possible for specific and general rules to have the relationship for which it contends. The relationship for which it contends is explained in the Handbook. I find it very difficult to see what error of law there can be in a rule-making regulator explaining that intention and giving effect to it, unless the language it has used precludes it.
>
> [166] It follows that there is no reason in principle why the specific obligations in the rules should not be subject to the wider role of the Principles. The specific obligations are not to be seen as exhausting the requirement to comply with high level Principles. The unhelpful concept of the specific rules "occupying the field" is inapt to express the true position. The Principles "occupy the field"; they stand over the specific rules. It is the general performing its role as the overarching requirement which cannot be displaced by compliance with specific rules if the overarching requirement is breached. Since the correct starting point is that the Principles govern the sales activities of the firms at all times, the real question is whether there is any reason to interpret a specific rule as excluding the general so that a breach of the Principles goes unredressed, even though a specific rule has been complied with.

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

those set out in Principles 2 and 6. To my mind, the decision in *BBA*, and in particular the passages set out above, are inconsistent with BBSAL's proposition that it is necessary or appropriate to search for an answer to the rather elusive question of whether there has been an augmentation of an existing duty or the creation of a new unexpected duty.

105. Furthermore, it is clear from the judgment that (consistent with the status of the Principles) the concept of augmentation is very broad indeed. Thus, at paragraphs [167] – [179], Ouseley J. considered a number of examples where the BBA had argued that the FSA had used the Principles to create conflict with the specific rules or illegitimately to augment them. In each case, he held that there was no contradiction and only a legitimate augmentation. In each case where there was a legitimate augmentation, there was plainly a widening of what the rules had previously expressly required. Thus, at paragraph [173], Ouseley J. addressed the fact that a PPI sale would now be treated as substantially flawed where a complainant had orally not been given information concerning the amount of a refund of premium in the event of early termination. Ouseley J. accepted that this went "further than the specific rules do". He said that it did not contradict them, but augmented them and this was lawful. Another example was addressed at paragraphs [175] – [177], where the judge held that the existing rules in relation to oral sales had been augmented. He said that it was:

> "a very good example of why the FSA approach to the role of Principles is correct and illustrates the need for an overarching framework from which the specific rules are drawn without exhausting the ability of the Principles to cover gaps in the regulatory framework to deal with new techniques".

106. Similarly, in paragraph [178], the judge referred to a number of situations addressed in the evidence of an FSA witness, and not covered by specific rules. He held that:

> "in so far as the Principles add to the specific rules so as to deal with those situations, it shows that they should do so. They do not contradict rules, but add to them to cover areas which are not covered specifically".

107. The passages in the judgment of Ouseley J. discussed above were essentially directed at the question of whether the FSA could use the Principles to augment the rules. The answer to that question was that it could and there is no suggestion that the concept of augmentation was to be limited in the manner for which BBSAL contended. However, it is also important that the present case concerns the decision of an Ombudsman, rather than the FSA. In that connection, it is clear from the judgment of Ouseley J. that the Ombudsman can permissibly take an even broader approach than the regulator. Thus, in an earlier part of his judgment (addressing a different ground of challenge), Ouseley J. said:

> [77] Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable

> and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules.

108. Ouseley J. went on to say (at [184])

> [184] The width of the Ombudsman's duty to decide what is fair and reasonable, and the width of the materials he is entitled to call to mind for that purpose, prevents any argument being applied to him that he cannot decide to award compensation where there has been no breach of a specific rule, and the Principles are all that is relied on. Even if I were to accept the BBA argument that the FSA could not use the Principles to contradict or augment the specific provision where they were exhaustive of the application of the Principles, that would not prevent the FOS deciding that it was fair and reasonable to treat the firm as having breached an exhausted or contradicting Principle, and require the payment of compensation. If for example there were limitations on the FSA created by the restatement of Principle 7 in ICOB 2.2.3R and 3.2.1G, or amplifications, they would not inevitably constrain how the FOS must decide complaints. That would involve no necessary error of interpretation by the FOS. That would simply be the consequence of a decision as to what was fair and reasonable. It would involve the FOS deciding that one of the conflicting provisions was the dominant provision, or that there were aspects of the Principles which were not adequately or fully represented in the specific rules. But I see no reason why he should not so decide, or why that should involve misinterpreting the provisions. It involves giving them meaning and weight according to his special function.

109. I consider that these passages, too, are fatal to BBSAL's attempts to put limits on the extent to which the Ombudsman was entitled to use the Principles in order to augment existing rules or duties. The Ombudsman has the widest discretion to decide what was fair and reasonable, and to apply the Principles in the context of the particular facts before him.

110. BBSAL sought to distinguish *BBA* on the grounds that the FSA's Policy Statement in question had been the subject of consultation by the FSA and was to be used only to impose duties on banks going forward. Here, however, there had been no consultation by the FSA on its regulatory approach, upon which the Ombudsman had relied. I consider, however, that this factual distinction has no impact upon the decision in *BBA* as to the significance of the Principles, their relationship to the other rules within the FSA Handbook, and the width of the Ombudsman's discretion.

111. BBSAL also submitted that it was important to look carefully at the *ratio decidendi* of *BBA*. Mr. Kirk submitted that the ratio was that the Principles could augment a rule by amplifying on existing duty. This could be seen by careful consideration of the

examples discussed by Ouseley J. at paragraphs [167] – [179] of his judgment. But none of those examples were cases where a new rule, which does not amplify an existing duty, had been created by using the Principles. Properly understood, the *BBA* case had not been wrongly decided. However, he submitted that if it was authority for the proposition that the Principles could be used to create new and unexpected duties, then it was wrongly decided.

112. In my judgment, however, the ratio of the case was that the Principles were overarching, and that they could therefore be used, both by the FSA and the Ombudsman, to augment the rules. There is no suggestion that the augmentation was limited to amplification of an existing duty. Indeed, this proposed limitation is in my view inconsistent with the overarching nature of the Principles. It would also give rise to subtle questions as to what was meant by 'amplification' in any particular case; questions which in my view are not consistent with the language of the Principles, or their effect as decided upon by Ouseley J. I also consider that there is no basis on which I can or should say that *BBA* was wrongly decided in these respects or indeed at all.

113. I therefore reject the Augmentation argument. On this aspect, there was no error of law by the Ombudsman

G4: The Conflict argument

The arguments of the parties

114. BBSAL's case was that the Ombudsman imposed a duty of inquiry in conflict with COBS 11.2.19R (1). That rule provides:

> **Following specific instructions from a client**
>
> (1) Whenever there is a specific instruction from the client, the firm must execute the order following the specific instruction.
>
> [Note: article 21(1) of MiFID]
>
> (2) A firm satisfies its obligation under this section to take all reasonable steps to obtain the best possible result for a client to the extent that it executes an order, or a specific aspect of an order, following specific instructions from the client relating to the order or the specific aspect of the order.
>
> [Note: article 44(2) of the MiFID Implementing Directive]

115. BBSAL's case was that Mr. Charlton had given a specific instruction to acquire the Capital Builder asset. They referred specifically to the Asset Purchase Form signed by Mr. Charlton on 8 September 2011, including the following question:

> You can ask us to proceed immediately by waiving the 'waiting period', however, you will be liable for any costs incurred in connection with the purchase, should you decide not to go ahead. Do you wish to waiver the waiting period of seven days?

Mr. Charlton answered "yes" to that question.

116. BBSAL contended that the effect of COBS 11.2.1R (1) was that they had to execute the order which they had been given. There was no room for the exercise of any discretionary decision-making on the part of BBSAL. They placed particular reliance on the final sentence of Article 21.1 of MiFID (the acronym for the Markets in Financial Instruments Directive 2004/39/EC of the European Parliament and of the Council) to which COBS 11.2.19R (1) cross-referred. This provided:

> "Article 21
>
> **Obligation to execute orders on terms most favourable to the client**
>
> 1. Member States shall require that investment firms take all reasonable steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order. Nevertheless, whenever there is a specific instruction from the client the investment firm shall execute the order following the specific instruction." (Emphasis supplied)

117. FOS and the FCA contended that this approach was fundamentally flawed. They contended that COBS 11.2.19R (1) was subject to the Principles, which were the ever present sub-strata or overarching framework which stood over COBS 11.2.19R at all times.

118. Furthermore, COBS 11.2.19R (1), when seen in context, was simply concerned with the manner in which an order should be executed. This too was the effect of Article 21 of MiFID, as well as Article 44 of Commission Directive 2006/73/EC which implemented MiFID. Thus, to give an illustration used in the course of argument, if a client gave an instruction to a firm for the purchase of 100 shares in company A, the firm would have to comply, when executing that order, with the best execution provisions. This might involve, for example, deciding to purchase the shares on an exchange in New York rather than London, if that were more beneficial to the client. However, if the client's specific instructions were to purchase the shares in London, then the firm would be entitled to rely upon that specific instruction as to venue as fulfilment of its best execution obligation in that respect. COBS 11.2.19R went no further than this.

The Ombudsman's decision on this issue

119. The Ombudsman addressed this issue in his Decision. Having set out COBS 11.2.19R (1), as well as COBS 11.2.6, he said:

> I'm not persuaded by BBSAL's arguments here. These COBS rules relate to the execution of an instruction to make an investment, but they would only be relevant where the investment in question was one that BBSAL accepted as a permitted investment. BBSAL would only have got to the point of executing the specific instruction, of having to have regard to the characteristics of the things associated with the instruction, or of having to give risk warnings, if it accepted the investment. If it hadn't accepted the investment, none of this would have arisen.
>
> I'm satisfied that if BBSAL had acted fairly and reasonably in its dealings with Mr C by carrying out adequate due diligence, it wouldn't have accepted SA as a permitted investment. I therefore don't accept BBSAL's submission that it had no choice but to make the investment, or that the rules allowed it to simply give risk warnings and go ahead.
>
> BBSAL has asked whether or not the ombudsman accepts Mr C would have understood the risk warnings. I've considered BBSAL's point but I'm satisfied I don't need to reach a conclusion on what Mr C understood. That matter would only be important if I'd concluded that BBSAL acted fairly and reasonably in accepting the SA investment as an appropriate SIPP investment. But it's my view that BBSAL shouldn't have accepted the investment, so Mr C should never have had to deal with the risk warnings about it.

Analysis and conclusions

120. I consider that the submissions of FOS and the FCA on this issue were correct, and that there is no error of law in the Ombudsman's reasoning. I start by considering COBS 11.2.19(R) in context, bearing in mind the approach to construction of the Handbook set out in GEN 2.2.1R and GEN 2.2.2G. These provide:

> 2.2.1R Every provision in the Handbook must be interpreted in the light of its purpose.
>
> 2.2.2G The purpose of any provision in the Handbook is to be gathered first and foremost from the text of the provision in question and its context among other relevant provisions.

121. COBS 11.2.19R appears in section 11.2 of the Handbook. This is headed: "Best execution". The first provision is COBS 11.2.1R. This provides:

> "**Obligation to execute orders on terms most favourable to the client**
>
> COBS 11.2.1R

> A firm must take all reasonable steps to obtain, when executing orders, the best possible result for its clients taking into account the execution factors.
>
> [Note: article 21(1) of MiFID and article 25(2) first sentence of the UCITS implementing Directive]"

The execution factors referred to are defined as "price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of an order."

122. The heading to COBS 11.2.1R shows that it is concerned with the manner in which orders are to be executed: i.e. on terms most favourable to the client. This is consistent with the heading to COBS 11.2 as a whole, namely: "Best execution". The text of COBS 11.2.1R is to the same effect. The expression "when executing orders" indicates that it is looking at the moment when the firm comes to execute the order, and the way in which the firm must then conduct itself. It is concerned with the "mechanics" of execution; a conclusion reached, albeit in a different context, in *Bailey & Anr v Barclays Bank* [2014] EWHC 2882 (QB), paras [34] – [35]. It is not addressing an anterior question, namely whether a particular order should be executed at all. I agree with the FCA's submission that COBS 11.2 is a section of the Handbook concerned with the method of execution of client orders, and is designed to achieve a high quality of execution. It presupposes that there is an order being executed, and refers to the factors that must be taken into account when deciding <u>how</u> best to execute the order. It has nothing to do with the question of whether or not the order should be accepted in the first place.

123. This conclusion is confirmed by other parts of COBS 11.2. Thus COBS 11.2.6R identifies various criteria, which a firm must take into account "for determining the relative importance of the execution factors". These include, for example, the characteristics of the client. The opening words of this rule are: "When executing a client order". COBS 11.2.7R addresses the role of the price "[w]here a firm executes an order on behalf of a retail client". COBS 11.2.9R, together with COBS 11.2.10G-11.2.13G, address the issue of delivering best execution where there are competing venues. All of these provisions are concerned with the manner in which the order is to be carried out, if it is to be executed.

124. Similarly, COBS 11.2.20G provides:

> When a firm executes an order following specific instructions from the client, it should be treated as having satisfied its best execution obligations only in respect of the part or aspect of the order to which the client instructions relate. The fact that the client has given specific instructions which cover one part or aspect of the order should not be treated as releasing the firm from its best execution obligations in respect of any other parts or aspects of the client order that are not covered by such instructions.

Again, therefore, the provision is concerned with the manner in which the instruction is to be carried out.

125. Given that all of these provisions are concerned with the manner of execution, it is appropriate to construe COBS 11.2.19R as concerned with the same subject-matter. That provision, when read as a whole, is simply an exception from the general requirement on the firm, in COBS 11.2.1R, to carry out the client's order so as to obtain the best possible result. When executing an order, if the firm decides that it is appropriate to do that, it should follow any 'specific instruction'. When it follows that instruction, there can be no complaint, in that respect, about best execution.

126. This approach is in my view consistent with Article 21 of MiFID, which is quoted above. MiFID has a lengthy list of recitals which provide context to Article 21. Recital (2) identifies the need for the degree of harmonisation "needed to offer investors a high level of protection". Recital (5) refers to the need to "ensure a high quality of execution of investor transactions". Recital (33) identifies the necessity "to impose an effective 'best execution' obligation to ensure that investment firms execute client order on terms that are most favourable to the client". It is in that context that Article 21 is to be construed.

127. The heading to Article 21 ("Obligation to execute orders on terms most favourable to the client") shows clearly that the Article is concerned with the manner of execution. This is also clear from the first sentence of Article 21, which requires investment firms to take all reasonable steps to obtain the best possible result for their clients "when executing orders". The first sentence then identifies various factors to be taken into account when carrying out the execution, including price, costs, speed, likelihood of execution and settlement and "other considerations relevant to the execution of the order". Again, these factors are referable to the manner of execution.

128. The second sentence of Article 21 must be seen in the context of the first. It is a qualification to that first sentence. It addresses the case where there has been a "specific instruction from the client". That naturally refers to an instruction relating to one or more of the matters identified in the first sentence. Thus, where a client gives a specific instruction as to how (i.e. the manner in which) an order is to be executed – for example an instruction as to the venue, or the identity of a counterparty with whom the transaction is to be concluded – then the firm should follow that instruction. However, there is nothing in the final sentence, when seen in the context of Article 21 as a whole, and the other provisions of MiFID, which creates (as BBSAL contended) a self-standing obligation on a firm to execute a transaction come what may. A contrary conclusion would also be difficult to reconcile with the stated purpose of MiFID, namely to offer investors a high degree of protection.

129. This approach is also consistent with the Implementing Directive (Commission Directive 2006/73/EC). Recital (67) provides:

> For the purposes of ensuring that an investment firm obtains the best possible result for the client when executing a retail client order in the absence of specific client instructions, the firm should take into consideration all factors that will allow it to deliver the best possible

> result in terms of the total consideration, representing the price of the financial instrument and the costs related to execution. Speed, likelihood of execution and settlement, the size and nature of the order, market impact and any other implicit transaction costs may be given precedence over the immediate price and cost consideration only insofar as they are instrumental in delivering the best possible result in terms of the total consideration to the retail client.

Again, the focus here is on what is to be achieved "when executing a retail client order", and upon the manner of execution. This is also clear from Recital (68):

> (68) When an investment firm executes an order following specific instructions from the client, it should be treated as having satisfied its best execution obligations only in respect of the part or aspect of the order to which the client instructions relate. The fact that the client has given specific instructions which cover one part or aspect of the order should not be treated as releasing the investment firm from its best execution obligations in respect of any other parts or aspects of the client order that are not covered by such instructions. An investment firm should not induce a client to instruct it to execute an order in a particular way, by expressly indicating or implicitly suggesting the content of the instruction to the client, when the firm ought reasonably to know that an instruction to that effect is likely to prevent it from obtaining the best possible result for that client. However, this should not prevent a firm inviting a client to choose between two or more specified trading venues, provided that those venues are consistent with the execution policy of the firm.

130. Similarly, and importantly, Article 44 of this Directive, headed "Best execution criteria", provides:

> "1. Member States shall ensure that, when executing client orders, investment firms take into account the following criteria for determining the relative importance of the factors referred to in Article 21(1) of Directive 2004/39/EC
>
> (a) the characteristics of the client including the categorisation of the client as retail or professional;
>
> (b) the characteristics of the client order;
>
> (c) the characteristics of financial instruments that are the subject of that order;
>
> (d) the characteristics of the execution venues to which that order can be directed.

> For the purposes of this Article and Article 46, 'execution venue' means a regulated market, an MTF, a systematic internaliser, or a market maker or other liquidity provider or an entity that performs a similar function in a third country to the functions performed by any of the foregoing.
>
> 2. An investment firm satisfies its obligation under Article 21(1) of Directive 2004/39/EC to take all reasonable steps to obtain the best possible result for a client to the extent that it executes an order or a specific aspect of an order following specific instructions from the client relating to the order or the specific aspect of the order.
>
> 3. Where an investment firm executes an order on behalf of a retail client, the best possible result shall be determined in terms of the total consideration, representing the price of the financial instrument and the costs related to execution, which shall include all expenses incurred by the client which are directly related to the execution of the order, including execution venue fees, clearing and settlement fees and any other fees paid to third parties involved in the execution of the order.
>
> For the purposes of delivering best execution where there is more than one competing venue to execute an order for a financial instrument, in order to assess and compare the results for the client that would be achieved by executing the order on each of the execution venues listed in the firm's order execution policy that is capable of executing that order, the firm's own commissions and costs for executing the order on each of the eligible execution venues shall be taken into account in that assessment."

131. I agree with the submission of the FCA that the list of factors in Article 44(1), the words in Article 44(2) "to the extent that" the firm executes an order, and the explanation in Article 44(3) of what is meant by the "best possible result", all serve to confirm that these provisions relate simply to manner of execution of an order once accepted. There is nothing in Article 44, or any other part, of this Directive which mandates a firm to execute an order which has been given by a client, or which suggests that there is an obligation to execute.

132. In these circumstances, there is no difficulty in concluding, as the Ombudsman concluded, that the Principles were applicable to the question of whether BBSAL should accept the investment in the first place, and that COBS 11.2.19R applied to the execution of the transaction once that decision was made. There is, therefore, no conflict between the application of the Principles, and COBS 11.2.19R, to the issue

which the Ombudsman had to consider. There was, therefore, no error of law in the Ombudsman's reasoning.

133. There are additional reasons for reaching this conclusion.

134. First, the Principles are indeed the ever-present sub-strata or overarching framework which stood over COBS 11.2.19R. It is appropriate, if possible, to construe COBS 11.2.19R harmoniously and consistent with the Principles. The Ombudsman's decision does so. BBSAL's submission creates a conflict where none exists. Indeed, at paragraph [162] of *BBA*, Ouseley J. said that "the Principles always have to be complied with. The specific rules do not supplant them and cannot be used to contradict them". In so far as BBSAL contended that COBS 11.2.19R mandated execution of Mr Charlton's instruction, notwithstanding that the scheme into which the investment was to be placed was fraudulent and lacked underlying assets, it seems to me that they were repeating the submission, rejected in *BBA*, that a specific rule must necessarily fill the space and leave no room for the application of the Principles.

135. Secondly, any suggestion that a SIPP provider must, as a result of COBS 11.2.19R, execute a transaction, regardless of the duties contained in the Principles, produces surprising results and in my view cannot be right. A number of examples were given during the course of argument as to circumstances in which, having received an instruction, the SIPP provider would or might think it inappropriate to proceed, or at the very least query the transaction with his client. These included situations where: (1) the proposed investment was not then "SIPPable"; i.e. was not eligible for the tax benefits of putting an investment into a SIPP; (2) the SIPP provider knew that although it was then SIPPable, there had been a legislative change which meant that it would no longer be SIPPable in a few months time; (3) the SIPP provider had received information which cast doubt on the integrity of those who were promoting the proposed investment, or as to whether underlying assets actually existed; (4) the SIPP provider had learnt of problems, such as a possible insolvency, which affected the proposed investment. In all of these situations, I consider that there is scope for the operation of the Principles, and that COBS 11.2.19R does not mandate the SIPP provider to proceed to execute the transaction. This is consistent with the underlying purpose of the COBS rules, which have their origin in MiFID, namely consumer protection.

136. Thirdly, it seemed to me that, ultimately, BBSAL did not dispute that the Principles were potentially applicable in some situations; so that in certain circumstances a SIPP provider could and should properly decline to accept an investment. In his oral opening submission, when asked whether there was a duty to execute even if the investment was not SIPPable, Mr. Kirk sensibly submitted that the obligation to execute was not "immutable". He accepted that there were some circumstances – where execution would further a fraud, or breach the criminal law such as the Proceeds of Crime Act 2002, or where existing express duties were incompatible with execution – where the SIPP provider could decline to execute. But he submitted that in the circumstances of the present case the obligation to execute should not have been contradicted by the obligations in the Principles such as due diligence. This submission was somewhat refined in reply, where Mr. Kirk accepted that the duty under COBS 11.2.19R was not immutable in the sense that no civil duties are immutable: they are all subject to criminal law and specific legal duties. But this did not mean that there was a discretion as to whether or not to execute. He therefore

submitted that COBS 11.2.19R was subject to Principle 2 and 6, but that the Ombudsman's construction of the Principles conflicted with the rule. In short, the error of law was to construe the Principles so as to find the duty of enquiry.

137. In my view, however, once it is accepted (correctly) that COBS 11.2.19R was not immutable and did not override the Principles, the question of the application of the Principles to the particular circumstances of the case was a matter for the Ombudsman: see the *Norwich and Peterborough Building Society* case and my conclusions in relation to the "Consultation Argument" above. If, as I conclude, the Principles have room to operate in a situation where COBS 11.2.19R is potentially applicable, then it was for the Ombudsman to decide how the Principles apply in a particular context. Absent a challenge on the basis of irrationality, which was not the case articulated, there is no error of law.

H: Analysis and Conclusions: Ground Two

138. The Ombudsman's reasons for declining to follow the decisions of the POS were contained in his Final Decision, which was given following further representations by BBSAL on the consistency question. The Ombudsman said:

> I'm aware of the Pensions Ombudsman cases that BBSAL has referred to. But I'm not bound to follow the Pensions Ombudsman's conclusions, which are decided by reference to a different statutory scheme. I'm required to form my own view, in accordance with our own statutory framework, on what I consider the fair and reasonable outcome of the complaint should be. That's what I've done in determining this complaint.

139. There were therefore essentially two reasons why the Ombudsman declined to follow the conclusions of the POS. First, there was a different statutory scheme. Secondly, it was for the FOS Ombudsman to decide, applying the statutory scheme, what the fair and reasonable outcome of the complaint should be. I do not consider that either approach betrays any error of law.

140. First, the statutory schemes under which the POS and the FOS operate are different, and the criteria for a decision under section 228, including the matters to be taken into account under DISP 3.6.4R, are different from and indeed have no parallel in the POS scheme. In my view, this is fatal to any challenge based upon the public law principle concerning consistency. No authority was cited where there has been judicial review of a decision-maker, acting under one statutory jurisdiction, on the basis of inconsistency with the decision of a decision-maker acting under a very different statutory jurisdiction.

141. Secondly, the decision in *O'Brien* involved inconsistency in the decisions of two independent assessors who were assessing compensation payable for miscarriages of justice under section 133 of the Criminal Justice Act 1988. The two applicants in that case had been awarded significantly less compensation than another individual who had been wrongly convicted of the same murder. Even though the compensation regime was the same for the applicants and the other individual, their appeal was nevertheless dismissed. Lord Bingham said:

> [30] It is generally desirable that decision-makers, whether administrative or judicial, should act in a broadly consistent manner. If they do, reasonable hopes will not be disappointed. But the assessor's task in this case was to assess fair compensation for each of the appellants. He was not entitled to award more or less than, in his considered judgment, they deserved. He was not bound, and in my opinion was not entitled, to follow a previous decision which he considered erroneous and which would yield what he judged to be an excessive award. While he did not, in his initial assessments, refer to Sir David's [i.e. the first assessor's] 10% deduction, he made plain that he regarded the deductions he did make as the permissible minimum. In his addendum his disagreement with Sir David was express. Since the appropriate deduction is a highly judgmental matter and the assessor's deductions are not in themselves impugned, I would reject the appeal on this ground also.

142. Lord Carswell said:

> [88] I agree that the inconsistency in the level of deduction between Robinson's case and those of the appellants does not vitiate the assessor's conclusions. Consistency in the award of damages is a very desirable feature, just as it is in sentencing criminals-the recognition of which has produced such valuable works as *Kemp & Kemp, The Quantum of Damages.* That is because it is a facet of justice, to both payer and recipient, that like cases should attract like amounts. But it is only one facet, and the imperative of consistency may have to yield to the larger imperative of justice in the particular case, achieving a result which is proper and fair to the interests of both payer and recipient.

143. This authority provides support for the Ombudsman's approach in this case, namely to consider the relevant facts in the case before him, and come to a conclusion applying the FOS statutory scheme as to what, in his opinion, was "fair and reasonable in all the circumstances of the case". He considered that it was and he expressed his reasons in a lengthy and cogent decision. In reaching his conclusion, he took into account (as he was entitled to do under DISP 3.6.4R) what he considered "to have been good industry practice at the relevant time". There is no challenge to any aspect of his decision on the basis that it was not reasoned, or on the basis of irrationality. It was also common ground that he was not bound to follow the decisions of the POS. Against this background, there can in my view be no sustainable challenge on the basis of a lack of consistency with the decisions of the POS.

144. In view of these conclusions, it is not necessary for me to express a concluded view as to the extent to which the three decisions of the POS were cases sufficiently similar to Mr. Charlton's case. It is not clear to me that the facts of any of the cases were quite as stark as Mr. Charlton's case, where the underlying assets did not exist. It is fair to say, however, that the approach taken by the Ombudsman in the present case as to

what was required of a SIPP operator, and his view as to what was good industry practice at the material time, appears to be different to the approach of the POS, certainly as expressed in the most detailed of the three decisions to which I was referred (namely the complaint against Carey Pensions Ltd. by Mr. Richardson). Ultimately, the Ombudsman did not seek to distinguish the POS cases on the basis of dissimilarity on the facts. He considered that he needed to make up his own mind on the basis of the facts of the case that were before him, and the statutory framework in which he was operating. For the reasons given above, this approach was correct and did not involve any error of law.

145. For these reasons, the claim for judicial review is dismissed.