DRN-3070435

The complaint

Mr A complains that the advice given by Central Markets Investment Management Limited (CMIM) in relation to a Small Self Administered Scheme (SSAS) and the investment of his pension into a Cape Verde hotel development of The Resort Group (TRG) was unsuitable for him.

What happened

In 2013, Mr A says he was cold-called and offered a review of his existing pension provisions. It seems this would have been Your Choice Pensions Limited (YCP), which was an unregulated firm.

Mr A was 41 and only had one pension policy with Royal London worth of £33,689.15. He had no other savings or investments and no previous investment experience. He had an outstanding mortgage of £90,000.

He was given information about an oversea property investment with TRG to be made through a SSAS. Mr A says he was persuaded by YCP this would provide better returns than his existing pension which he was told had not been performing well.

The SSAS was set up with Mr A as the trustee and Cantwell Grove (CW) as the administrator.

Mr A signed CMIM's terms of business in October 2013 which confirmed that CMIM would provide him, in his capacity as trustee of the SSAS, with a letter of advice in relation to the TRG investment for the purposes of section 36 of the Pensions Act 1995 (PA'95).

For reference, section 36 of PA'95 requires trustees of an occupational pension scheme such as a SSAS to obtain and consider written advice *'on the question whether the investment is satisfactory having regard to the requirements of regulations under subsection (1), so far as relating to the suitability of investments…'*. s.36 also warns that the advice required under this section may constitute the carrying on of a regulated activity under the Financial Services and Markets Act 2000 ('FSMA)'.

The terms of business clarified that:

- CMIM was a regulated firm, but that the service it would provide was not regulated, as it related to an unregulated investment.
- It was providing the service to trustees of a SSAS.
- No advice was being given on investments regulated under s.22 of FSMA and other than the Cape Verde investment.
- No '*individual suitability advice…which takes into account your personal financial circumstances'* was being given.

Mr A also completed an indicative investment form (undated) which showed his intention was to invest 59.75% into TRG and 37.3% through CMIM.

Mr A's pension transfer value of £33,689.15 was paid into the SSAS bank account in January 2014. Bank statements show that in February 2014 £20,650 was invested into the TRG investment and £10,939.15 was paid to CMIM's DFM arrangement.

In 2015, Mr A instructed CG to invest £11,521.84 into a DFM portfolio with Organic, managed by Gallium Fund Solutions. Organic has since gone into liquidation.

In 2019 Mr A complained to CMIM about the advice he received. He said the SSAS and the TRG investment, which is now illiquid- had been unsuitable. The SSAS was only established to allow the TRG investment.

CMIM rejected the complaint. They said their advice was appropriate and compliant with PA'95. They said they made it very clear in their advice letter that the TRG investment was not suitable for a cautious investor and provided risk warnings as well as pointing out the need for diversification of investments. The decision to invest was down to the trustee.

Mr A referred his complaint to this service and one of our investigators upheld his complaint. CMIM disagreed and responded in detail on this complaint as well as by way of letters covering several complaints simultaneously. I've considered all their submissions even though I won't repeat them in detail here.

What I've decided – and why

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

<u>CMIM's advice process</u>

CMIM confirmed that they had an introducer agreement with YCP. They say they were first approached by YCP in mid-2013 and knew customers were in the process of establishing SSAS's to invest in TRG. CMIM say their only financial benefit was the opportunity to promote their DFM service for the residual funds.

CMIM's written advice took the form of a "Dear trustee" letter, which was general in nature and not addressed to a named recipient. These letters were provided to customers through CG and YCP.

CG then provided customers with an investment instruction form which they had to sign and in which they confirmed the following:

Prior to issuing this letter I have obtained and considered the advice letter Central Markets Investment Management Limited has produced in relation to the Cape Verde investment opportunity. I believe Central Markets Investment Management Limited to be an appropriately qualified advisor for the purposes of section 36 of the Pensions Act 1995, in relation to the question of whether that investment opportunity is satisfactory in terms of:
(a) its suitability as an investment in the SSAS; and
(b) *the need for diversification, in so far as is appropriate to the circumstances of the SSAS.*

Mr A does not have a copy of the 'Dear Trustee' letter or the investment instruction form and neither were they provided to us by CG. However, CMIM did provide a template of the 'Dear Trustee' letter which they acknowledge was passed to YCP and CG to provide to customers intending to invest in TRG. And I've seen the investment instruction form on other cases like this. Given that Mr A as the trustee of a SSAS was required by section 36 of PA'95 to obtain and consider advice in relation to his investments in the SSAS and this seems to have been the general paperwork used in these cases at the relevant time, I think it's more likely than not that Mr A received the same forms and letters.

The 'Dear Trustee' letter explained that YCP had asked CMIM to consider a number of specific investments and provide advice to customers as the trustees as to whether these investments were appropriate for their SSAS. It said the advice wasn't deemed to be regulated under the Financial Services and Markets Act 2000 as the SSAS was not regulated by the FCA. It said:

'We have researched the commercial property investment, The Resort Group, the hotel operator (Melia Hotels International), and the wider aspects of ownership and security; and our conclusion is that it is an appropriate investment albeit when considered in the light of sensible diversification of a portfolio of an investor's overall wealth and that an effective "exit" strategy is planned in order to coincide with the needs of the investor. The Resort Group have cooperated with our research.'

'The investment is not suitable for a cautious investor who needs the protection of the UK investor compensation and regulatory environment, as both a SSAS and the overseas investment have no such regulatory protection. There are a range of risks that we have seen have been clearly documented to the investor and should be considered carefully: The value of any investment can fall as well as rise. Land or commercial property should not necessarily be considered as a liquid investment; it may therefore not be suitable should you need access to the capital at short notice or the timeframe desired by the trustee….

Commercial property investments tend to incur ongoing costs and charges, which may not always be covered by any possible rental returns. The value of rental returns is dependent on occupancy demand, which cannot be guaranteed. Investments held overseas may have additional risks such as currency fluctuations, which may impact on any returns when converted back into sterling; political risk to ownership and title; and commercial risk to the delivery and management of a property/resort. You may wish to take independent legal advice to ensure you understand all these issues…

Our view is that the investment is appropriate but only as part of a diversified holding according to an investor's attitude to risk and capacity for withstanding loss. You should ensure that you only invest what you can afford to lose…We believe as core principles that where an investor is looking to retire within ten years then no more than 50% of their investment should be invested directly within commercial property, and the remainder should be held in liquid investments. Our advice to investors is to consider the need for diversification carefully…We have not reviewed other overseas commercial property investment opportunities and accordingly are not providing you with advice as to the merits of the proposed investment as against other such investment opportunities. If you still have any doubts we recommend that you seek independent financial advice…'

I'm satisfied that CMIM did carry out the regulated activity of 'advising on investments'. This is defined in the FSMA 2000 (Regulated Activities) Order 2001 (amongst other things) as advice on '*buying, selling, subscribing for or underwriting* ***a particular investment*** *which is a security or a relevant investment'*. **(my emphasis)**

CMIM said they didn't provide Mr A with a personal recommendation. And I tend to agree. Their terms of business clearly stated they wouldn't be giving *individual suitability advice…which takes into account your personal financial circumstances'* and I think Mr A would have been aware that he never met anyone from CMIM or that they hadn't explored his personal and financial circumstances.

Without a personal recommendation, the suitability obligations set out in COBS 9 wouldn't apply here. However, CMIM still had regulatory obligations when giving their advice. Amongst the FCA's Principles, CMIM was required to:

- conduct its business with due skill, care and diligence (Principle 2);
- take reasonable care to organise and control its affairs responsibly and effectively,
- with adequate risk management systems (Principle 3);
- pay due regard to the interests of its customers and treat them fairly (Principle 6);
- take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment (Principle 9).

I've also considered other COBS rules that aren't in chapter 9 as well as the restrictions to promotion of UCIS at 238 FSMA. CMIM has accepted the TRG investment appears to meet the legal definition of a collective investment scheme, albeit an unregulated one, following *Asset Land v FCA [2016] UKSC 17*). Although they admitted they didn't realise this at the time of the advice.

<u>Did CMIM promote the TRG investment to Mr A, ancillary to their advice?</u>

The glossary definition of promotion is the FCA handbook is *'an invitation or inducement to engage in investment activity that is communicated in the course of business'*. The words 'invitation' or 'inducement' are not defined in the glossary or under the corresponding s.21 of FSMA. Applying the guidance at PERG 8.4.5G I'm not satisfied CMIM's 'Dear Trustee' letter had the characteristics of an *invitation*, mainly because it seems YCP had already invited Mr A to consider TRG as an investment. But at PERG 8.4.7G the FCA went on to say this about inducements, with my emphasis:

*'An inducement may be described as a link in a chain where the chain is **intended** to lead ultimately to an agreement to engage in investment activity. But this does not mean that all the links in the chain will be an inducement or that every inducement will be one to engage in investment activity. Only those that are a significant step in persuading or inciting or seeking to persuade or incite a recipient to engage in investment activity will be inducements under s.21.'*

The FCA clarified this further at PERG 8.4.4G, again with my emphasis:

*'The FCA considers that it is appropriate to apply **an objective test** to decide whether a communication is an invitation or an inducement. In the FCA's view, the essential elements of an invitation or an inducement under section 21 are that it must both have the purpose or intent of leading a person to engage in investment activity and be promotional in nature. So it must seek, on its face, to persuade or incite the recipient to engage in investment activity. The objective test may be summarised as follows.*

Would a reasonable observer, taking account of all the circumstances at the time the communication was made:
(1) consider that the communicator intended the communication to persuade or incite the recipient to engage in investment activity or that that was its purpose; and
(2) regard the communication as seeking to persuade or incite the recipient to engage in investment activity.'

I don't dispute that YCP likely first promoted the TRG investment to Mr A and I agree it's likely YCP had persuaded him to invest before he received CMIM's advice. However, this doesn't prevent CMIM's actions being an inducement too. Their 'Dear Trustee letter' was clearly *intended* to lead trustees to invest in TRG. A reasonable conclusion to draw was that only trustees who were cautious and/or needed short-term access to the money shouldn't invest. And I think CMIM ought to have reasonably known this was an unlikely conclusion to draw for most of the recipients of their letter. I say this with view of the following:

- the advice was being given on a pension, which is typically held for the long-term
- no indication was given to the trustee to understand whether they met this 'cautious' definition. The letter also said that the more cautious the investor, the lesser amount of the holding should be in commercial property. So even if someone thought of themselves as fairly cautious, in my view the letter suggested an investment in TRG could still be appropriate as part of their portfolio.
- CMIM suggested it was possible to mitigate the risks of TRG by diversifying with liquid assets and suggested their own DFM service.

CMIM say the letter encouraged trustees to take independent regulated advice. However, whilst I appreciate they did tell trustees to seek independent advice 'if in doubt about your choice', I think it would have been reasonable for most trustees to infer from the letter that if they weren't particularly cautious or needed their money in the short-term no further advice was needed. I also disagree with CMIM's apparent suggestion that setting out the risks of the TRG investments means the letter couldn't have been an inducement to invest.

CMIM argue YCP and CG had vested interests in trustees investing in TRG and they were the ones promoting it. However, CMIM also stood to gain from trustees choosing TRG as an investment as they could offer them to diversify their portfolios with CMIM's DFM service. I think CMIM would have been aware that if the investment in TRG was discouraged, it was unlikely trustees would use their DFM service.

Overall, I think the 'Dear Trustee' letter inferred that whilst there were risks in TRG, if properly diversified the investment was appropriate for most. In my view the letter's *intent* was to induce investment and I'm satisfied a reasonable observer would regard the letter in this way. On the evidence provided I'm satisfied CMIM promoted the TRG investment to Mr A.

The fact that advice could also be a promotion was further confirmed on 1 January 2014 when the FCA revised the list of exemptions allowing promotion of UCIS (by then included in a wider category of 'non-mainstream pooled investments') at COBS 4.12.4R.

The new exemption for 'solicited advice' only allowed a promotion where the communication met all of the following requirements:

'(a) the communication only amounts to a financial promotion because it is a personal recommendation on a non-mainstream pooled investment;
(b) the personal recommendation is made following a specific request by that client for advice on the merits of investing in the non-mainstream pooled investment; and
(c) the client has not previously received a financial promotion or any other communication from the firm (or from a person connected to the firm) which is intended to influence the client in relation to that non-mainstream pooled investment. [See Note 3.]

Note 3 read as follows: *'A person is connected with a firm if it acts as an introducer or appointed representative for that firm or if it is any other person, regardless of authorisation status, who has a relevant business relationship with the firm.'*

The introducer agreement YCP had entered into with CMIM would always have made this exclusion unavailable (in effect because the introducer, rather than the trustee, was soliciting the advice). And CMIM also didn't give a personal recommendation. But what I consider relevant here is that the wording of the exclusion itself confirms that advice can also amount to a promotion – even where a third party had previously promoted the investment. That is what happened here: CMIM promoted and advised on the investment through their 'Dear Trustee letter'.

CMIM say trustees wouldn't have taken much notice of their advice letter and only would have signed where they were told to by third parties. Their letter wouldn't have influenced their decision to invest.

However, whether Mr A read the letter or not is in my view immaterial to whether CMIM's advice letter was also a promotion. Whether something counts as an inducement depends on the intent of the communication and how it would be regarded by a reasonable observer. I think it ought to have been clear to CMIM that the SSAS administrators would expect trustees to sign a confirmation that they had obtained and considered proper advice as required in section 36 of PA'95.

Their advice was a significant step in the investment process and they should have reasonably expected their advice to be considered by trustees. Their involvement as a regulated party and provider of advice legitimised the arrangement. And CMIM should have realised their advice was also an inducement which means they were promoting the investment as well as advising on it.

Did Mr A qualify for a relevant exemption from the restrictions on UCIS promotion?

Mr A unlikely qualified under the criteria set out in the in the FSMA (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, because he didn't appear to be a high net worth or sophisticated investor. This was not established at the time by CMIM (as required under the regulations).

This leaves the range of exemptions set out at COBS 4.12.4R, none of which apply to Mr A in my view. The remaining COBS exemptions were slightly altered on 1 January 2014. I don't know when the 'Dear trustee' letter was delivered to Mr A, however I can't see that any of the remaining exemptions in COBS either before 1 January 2014 or after apply to Mr A.

The only conclusion I can therefore draw from this is that CMIM unlawfully promoted the TRG investment to Mr A as part of their advice, in contravention of s238 of FSMA.

Moreover CMIM ought reasonably to have been aware that other parties who promoted the investment to Mr A previously were likely also in contravention of FSMA – because they were themselves unregulated and/or because it appears unlikely they could rely on a valid exemption.

What should CMIM have done instead?

CMIM had chosen to advise on TRG, so it ought to have established whether or not it was a UCIS – as if it was, then they (and others) were promoting it in breach of FSMA.

They attended meetings with the other parties involved where a whole sales and marketing strategy was apparently discussed to attract new clients to invest in TRG. Yet CMIM now say it should have been obvious to CG that those clients were wholly inappropriate candidates for SSASs. They also say CMIM's name was being used to give the arrangements an 'air of credibility'. These arguments demonstrate why CMIM shouldn't have got involved in inducing Mr A's investment into TRG at all. They knew that none of the other parties in the transaction were regulated by the FCA and they could not, as a result, expect them to have the same regulatory obligations towards clients like CMIM did.

I have significant concerns about the arrangement CMIM entered into that effectively meant it could only track who the end recipients of their 'dear Trustee' letter in respect of TRG were if YCP remembered to pass on a trustee's signed copy of its terms of business, or it later heard from them because they'd signed up for their DFM service.

That calls into question whether CMIM was adhering to Principle 3 (take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems). They didn't have enough oversight of who would receive their advice and left it to unregulated parties-who they should have known had an interest in trustees investing in TRG- to control and influence the advice process. The trustees here were often inexperienced investors with very modest pension funds and who the TRG investment was unsuitable for.

I also can't see how it was possible for CMIM to give trustees proper advice which enabled them to make investment decisions for their SSAS (as set out in CMIM's terms of business) if it wasn't personalised to their specific SSAS and considering its circumstances and objectives.

As set out at the beginning of this decision the FCA's Principles required CMIM amongst other things to treat Mr A fairly and pay due regard to his interests. And they had to take care when formulating their advice to him.

In observance of these principles and rules, in my view there were only really two options CMIM had in this situation:

1) Decline to get involved in the introducer-adviser relationship with YCP, and therefore not come into contact with retail clients like Mr A at all; or

2) Agree to accept introductions from YCP, but proceed on a basis which was fundamentally different in a number of ways in order to ensure that it was complying with the principles and rules. This would have included:

- Taking reasonable care to make a recommendation to Mr A, which was tailored to his specific circumstances and thus was more likely to pay due regard to his best interests and treat him fairly.

- Being mindful that if the recommendation was not to invest, this would not amount to promotion and so the restriction wouldn't be breached.

- Issuing that recommendation to Mr A directly, rather than supplying it to YCP (where there was potentially some doubt whether it would reach Mr A, if the advice didn't give a favourable impression of investing).

I considered what consequences these alternative actions would have had. If CMIM declined to get involved or warned that it would need to advise Mr A, and other investors of a similar background to him, *not* to invest in TRG, it's possible that YCP would have sought a relationship with a different adviser hoping to get a more favourable outcome.

However the wording of PA'95 meant that the 'proper advice' Mr A was required to take couldn't be given by just any adviser. And evidently the SSAS administrator or the other parties involved, presumably in not wanting to jeopardise the successful operation of the SSASs being established, were keen to ensure that this legislation was observed.
Section 36 states:

‘For the purposes of this section “proper advice” means—
(a) if the giving of the advice constitutes the carrying on, in the United Kingdom, of a regulated activity (within the meaning of the Financial Services and Markets Act 2000), advice given by a person who may give it without contravening the prohibition imposed by section 19 of that Act (prohibition on carrying on regulated activities unless authorised or exempt);
(b) in any other case, the advice of a person who is reasonably believed by the trustees to be qualified by his ability in and practical experience of financial matters and to have the appropriate knowledge and experience of the management of the investments of trust schemes’

Whether or not the other parties realised that any advice on TRG was a regulated activity, it wasn’t surprising that typically the relevant knowledge and experience to give that advice was more likely to be found amongst regulated firms.

In this context I think it’s also reasonable to expect *any* regulated adviser to be as mindful of the FCA’s principles and rules as CMIM should have been. So I would have expected any regulated adviser to consider the position on promotion and the consequences for that of giving any advice in favour of investing that couldn’t be supported by a valid exemption. I’ve also taken into account that CMIM had the option to refuse to get involved in advising Mr A at all, but it chose to give advice. So, I think it’s fair and reasonable that CMIM is held to the standard of the proper personal recommendation that it *should have given* to him to satisfy the regulator’s expectations.

<u>What would have happened if CMIM gave suitable advice?</u>

As a regulated firm with permission to advise on investments, I’m satisfied CMIM should have been aware of the regulator’s views on UCIS and other non-mainstream investments. It ought to have known that any investment in UCIS taking up a significant portion of a SSAS was plainly unsuitable the majority of retail investors, including Mr A. There was nothing about TRG in particular – being an off-plan, offshore property development subject to a variety of currency, counterparty, construction and occupancy risks – to counter that presumption of unsuitability.

It should have been apparent that Mr A couldn’t afford to take the speculative risk investing over half of his pension provisions in TRG. And Mr A is unlikely to have had the experience to fully understand the risks to his pension.

It’s evident that the whole reason for the SSAS being introduced to Mr A by other parties was in order to invest in TRG. So I need to consider how Mr A would likely have acted, if CMIM had advised against the TRG investment.

<u>Would Mr A have invested in TRG anyway?</u>

There’s no evidence CMIM provided Mr A with the advice to open a SSAS and transfer his pension. It’s likely he received this advice from YCP before CMIM got involved. There’s limited paperwork in this case. And some of the documents are undated. So I don’t know when exactly Mr A would have received CMIM’s ‘Dear trustee letter’. It would have been at some point between October 2013, when he signed CMIM’s terms of business, and February 2014 when his pension funds were transferred to TRG and the DFM.

I think it’s likely YCP would have focussed on the positives of the TRG investment and Mr A would have been persuaded to invest in TRG by YCP and possibly CG. However, I don’t think Mr A was at a point where he couldn't have changed his mind about the investment in TRG.

If CMIM had clearly told him that the TRG investment was unsuitable for him explaining that this was a specialist high-risk investment which meant there was a real risk of losing large parts of his pension and the regulator deemed this sort of investment unsuitable for inexperienced investors like him, I think it's likely he would have listened.

Of course I don't know for certain what Mr A would have done. And I appreciate it can be difficult sometimes to backtrack from a planned action. However, I've considered that Mr A was cold called by YCP and doesn't appear to have had a longstanding relationship with them. On balance, I think if Mr A had received a clear recommendation from an independent regulated financial adviser like CMIM not to proceed as it wasn't in his best interest to do so, he would have decided against the investment into TRG.

It's possible that he only received CMIM's advice after his pension had already been transferred to the SSAS. So I'm not sure whether this could have been prevented. However, I think the investment into TRG more likely than not would not have happened if CMIM had given proper advice. On the balance of probabilities I also think that Mr A would not have ended up investing in a DFM through CMIM. This was only suggested to diversify the TRG investment. Given Mr A's low fund value and lack of investment experience I don't think a DFM portfolio would have likely been right for him.

If he had been informed that the TRG proposition was unsuitable for him and not in his best interest, I think he would have reconsidered the whole investment proposition and sought further advice.

<u>Involvement of other parties</u>

CMIM feels it's unfair that they should compensate Mr A for all his losses when they weren't involved in the pension switch advice and initial promotion of TRG. They also say the CG were heavily involved in the transaction and should be held responsible for any losses. I'm aware that other parties were involved here. And I appreciate they might have contributed to the situation Mr A now finds himself in. However, I can only consider the complaint brought to this service which is the one against CMIM. As explained in this decision I think CMIM didn't act in line with their regulatory obligations and if they had done so, Mr A likely would not have invested in TRG.

It looks like Mr A changed his investment to a different TRG resort in 2016. CMIM say they weren't involved in this and weren't involved at all after the DFM changed to Organic. And I think this is likely to be correct.

However, in my view Mr A likely wouldn't have been invested in TRG and in any DFM arrangement at all if CMIM had given advice like they should have. I haven't seen evidence that any regulated adviser was involved in making these changes to the DFM and TRG investment. CMIM allowed Mr A to be left under the influence of unregulated parties which had promoted a high-risk, unregulated investment to him in the first place and likely suggested the changes to his investments here.

I'm satisfied CMIM could have prevented Mr A's losses if they had advised him properly. So in the circumstances I think it's fair and reasonable that they compensate him for his losses in full.

I’m also satisfied the losses or indeed gains (if any) flowing from the DFM investments Mr A made subsequent to CMIM’s advice form part of his overall loss. I think on balance Mr A would have no reason to end up in these DFM arrangements at all, but for CMIM’s failings.

So, including the present-day value of the DFM component is part of putting Mr A back into the position he would have been in, had CMIM not acted as it did. That includes the subsequent changes of DFM provider which also would not likely have needed to happen if CMIM had advised Mr A differently.

If CMIM feel that other parties’ actions have contributed to these losses, they are free to pursue this directly with them once the paid the full redress to Mr A.

Putting things right

My aim is that Mr A should be put as closely as possible into the position he would probably now be in if he had been properly advised.

I take the view that it’s possible he would have already transferred his personal pension into the SSAS before he received CMIM’s advice. However, in any event I think he would have likely invested his funds differently. I don’t know exactly how he would have invested, but I am satisfied what I have set out below is fair and reasonable, given Mr A's circumstances and likely attitude to risk.

What must CMIM do?

To compensate Mr A fairly, CMIM must:

- Compare the performance of Mr A's investment with that of the benchmark shown below. If the actual value is greater than the fair value, no compensation is payable.

  If the fair value is greater than the actual value there is a loss and compensation is payable.

- CMIM should add interest as set out below

- CMIM should pay into Mr A's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If CMIM is unable to pay the total amount into Mr A's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn’t a payment of tax to HMRC, so Mr A won’t be able to reclaim any of the reduction after compensation is paid.

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

- Here, it’s reasonable to assume that Mr A is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. But as he would be yet to take his tax-free cash sum in respect of the majority of the fair value, the adjustment should only apply to 75% of the compensation, giving a composite reduction of 15% overall.

- Pay to Mr A £300 for the distress caused by experiencing losses to his pension.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
SSAS and DFM portfolio (if not included in SSAS anymore)	Some liquid/some illiquid	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

This means the actual amount payable from the investment at the end date.
It may be difficult to find the *actual value* of the portfolio. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case. CMIM should take ownership of any illiquid assets by paying a commercial value acceptable to the pension provider. The amount CMIM pays should be included in the actual value before compensation is calculated.

If CMIM is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the *actual value*. CMIM may require that Mr A provides an undertaking to pay CMIM any amount he may receive from the illiquid assets in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. CMIM will need to meet any costs in drawing up the undertaking.

CMIM has suggested to this service that it may be able to use independent valuers for the TRG investment, or agree a value with the SSAS administrators (which is more than nil value), even if it's not actually buying the investment from the SSAS. As there appears to be no market for the investment I don't consider it's fair to use a value that is the opinion of someone who is not actually prepared to (or unable to) buy the investment from the SSAS. I also cannot anticipate whether TRG will be permitting changes of ownership because clearly legal processes would be involved. But to the extent that this is possible, if CMIM believes that the investment has value then it can benefit by buying the investment out of the SSAS.
The aim of this undertaking is to avoid double-recovery of Mr A's losses. It is not my role to set the terms of the assignment and undertaking, but rather to explain its aim in achieving overall fairness for both parties.

As stated above the actual value should include the present-day value of the DFM component.

Fair Value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the fair value when using the fixed rate bonds as the benchmark, CMIM should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sum paid into the investment should be added to the fair value calculation from the point in time when it was actually paid in.

The SSAS only exists because of illiquid assets. In order for the SSAS to be closed and further fees that are charged to be prevented, those assets need to be removed. I've set out above how this might be achieved by CMIM taking over the illiquid assets, or this is something that Mr A can discuss with the provider directly. But I don't know how long that will take.

Third parties are involved and we don't have the power to tell them what to do. If CMIM is unable to purchase the illiquid assets, to provide certainty to all parties I think it's fair that it pays Mr A an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the SSAS to be closed.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr A was 41 and so still a long time away from retirement, so I think he would have been willing and able to take at least a small amount of investment risk
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr A's circumstances and likely risk attitude.

Details of the calculation must be provided to Mr A in a clear, simple format.

My final decision

I uphold this complaint and require Central Markets Investment Management Limited to compensate Mr A as set out above

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 9 August 2022.

Nina Walter
Ombudsman