DRN-3187120

The complaint

Mr C has complained that he was unsuitably advised by Central Markets Investment Management Ltd (CMIM), as a trustee of his Small Self-Administered Scheme (SSAS), to make investments within the scheme including a discretionary managed portfolio and a Cape Verde hotel development of The Resort Group (TRG). Mr C is represented by a claims management company (CMC) in this complaint.

What happened

In mid 2013 Mr C was a transport worker approaching age 55, with no dependants earning about £28,000pa. He owned his home with an outstanding mortgage, but had £30,000 of other debts and had little in the way of savings and investments other than a LV= personal pension and an occupational scheme with about 10 years' service – which isn't involved in this complaint.

His CMC says that he was cold-called before meetings took place at his home to discuss transferring his pension into a SSAS which would invest in TRG's Llana Beach resort as well as a discretionary portfolio. Mr C recalls being told these investments would do much better than his existing LV= plan, but not specifically what investments were involved.

As part of the arrangements to transfer Mr C's pension, on 23 October 2013 a new employer was incorporated; named after the road in which he lives. Mr C would have signed an employment contract with that company, and on the same day he also signed terms of business agreeing that CMIM would provide a letter of advice in relation to TRG for the purposes of s.36 of the Pensions Act 1995 ("PA'95").

(For reference, s.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)'.)

CMIM's terms of business clarified the following:

- 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.

On 18 December 2013 a SSAS was established by trust deed for Mr C's new employer with him as sole trustee, and Cantwell Grove Ltd (CGL) as SSAS administrator. The SSAS had an annual fee of £500+VAT. It was registered with HMRC. On 21 January 2014 CGL then requested a transfer of Mr C's LV= policy using forms Mr C had signed.

We know that around this time an unregulated introducer firm was working with CMIM (Your

Choice Pensions or 'YCP'). It sent letters to prospective candidates for the TRG investment and CMIM's Discretionary Fund Management (DFM) service, whilst its sister firm Consumer Money Matters contacted the existing pension providers for information. We don't have Mr C's copy of YCP's letter but LV= has confirmed it heard from Consumer Money Matters in November 2013. We know from other complaints that YCP's letter is likely to have said:

> *'Please find enclosed written advice on your proposed investment into commercial property in Cape Verde. This advice has been provided by Central Markets Investment Management Limited under your instruction for your consideration.'*

CMIM has sent us a copy of what the enclosed written advice – a so-called 'dear Trustee' letter - would have said. The letter does not refer to the trustee by name and mentions that the business has been introduced by YCP. It repeats that CMIM is providing the trustee with advice that it understands to be unregulated, because a SSAS is not regulated (and furthermore, the TRG investment involves direct ownership in property). It goes on:

> *'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 ourresearch.'*

In the letter CMIM explained the reference to diversification meant that its advice would be to consider other investments alongside the property investment that were low risk and unconnected with it. And the reference to an exit strategy was that the trustee needed to plan ahead if they wanted to draw benefits from the SSAS – in particular purchasing an annuity. It went on to say (with my **emphasis**):

> *'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. 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…*
>
> *Ultimately, you, as trustee, will take your own decision* ***in the light of your personal circumstances, which we have not assessed.****'*

On 20 November 2014 Mr C sent a templated letter giving investment instructions to CGL. He wanted £10,000 to be invested in TRG and another £10,000 to CMIM's DFM service. It said that advice has been obtained and considered from CMIM on the proposed investments; and that the trustee member believes CMIM to be appropriately qualified to assess the suitabiltiy of that investment for the SSAS under s.36 of the Pensions Act 1995.

LV= transferred £28,842 to CGL on 2 December 2014. CGL wrote back to Mr C on 13 January 2015 to confirm receipt of his investment instruction and that £10,000 had been invested with TRG (through an agreement for sale of membership in a UK company limited by guarantee), and about £9,355 into CMIM's DFM arrangement. The TRG resort was subsequently switched with Mr C's agreement from Llana to Dunas Beach in August 2015.

Mr C had also completed a CGL drawdown application on 1 July 2014 to withdraw £7,175 of tax-free cash on 8 December 2014, but no income. However a further payment of £1,500 (which may or may not be an income withdrawal – *CGL should be asked to clarify this*) was made from the SSAS on 10 December 2014.

The original agreement for sale of fractional ownership shows a 'special discount' was offered on the purchase, paid back to investors by monthly instalments at 7%pa for a maximum period of the first two years – after which rental income was expected to be payable when the resort opened. Those remaining features were transferred to the new agreement with Dunas Beach. The UK limited company had entered into separate contracts with developers to build the property, and to pay a third party to manage it.

By March 2015 Mr C seems to have been advised by Organic Investment Management to switch the £9,087 he by then had in CMIM's DFM to Organic. A medium risk preference over a 5-10 year horizon was expressed at that time. In June 2016 TRG began paying a regular quarterly income of about £30-40 into Mr C's SSAS, with a further one-off payment of £758 in January 2017. The last quarterly payment I can see being made was in March 2019.

The Organic portfolio was also sold in August 2017 to fund what appear to be further gross withdrawals of £2,000 in May 2017 and £3,068 in August 2018. A further investment of £3,000 was made into a Zurich investment portfolio in October 2018 on the advice of Astute Financial Management, whom CGL had referred Mr C to. This was 50% invested in shares.

Mr C's CMC complained in July 2019 that CMIM's advice had been unsuitable in respect of both the TRG investment and discretionary portfolio. CMIM didn't respond directly to the complaint so the CMC referred it to our service. CMIM has made a number of submissions on this and similar complaints and I summarise these below:

- Much of its data was lost or corrupted following its IT migration to a new system following the decentralisation from its FX trading company in 2017.
- CMIM was first approached by Your Choice Pensions (YCP) in mid-2013 and knew customers were in the process of establishing CGL SSAS's to invest in TRG. It entered into an introducing agent agreement with YCP. Its only financial benefit arose out of the opportunity to promote its DFM service for the residual funds. It attended numerous meetings with the marketers of the SSAS, including YCP.
- At no point did CMIM recommend or influence cautious investors to invest in TRG. It concluded that TRG was 'risky', only appropriate when considered as part of a diverse portfolio of investments where an effective 'exit' strategy was planned. It promoted its DFM services as an 'alternative' and/or as diversification – as it was a 'low risk' portfolio of Exchange Traded Funds (ETFs) of major, liquid, equity indices and bonds.
- CMIM had no interaction with Mr C or physical handling of any investment, except when it received instructions to allocate funds to its DFM service. A full suitability check relating to the specific trustee was only carried out at that point. To the best of its knowledge all communications were routed through CGL.
- The dates trustees received their 'dear Trustee' letter were very close to the date

stated on the Trust Deed to establish the SSAS. This suggests that no reliance was placed on this letter as the trustees had already decided to invest in TRG, and they also had their own statutory duties as a trustee to invest prudently.

- CGL had told them it would accept the investment (after presumably carrying out its own due diligence into TRG), and required them to sign a letter stating they had relied on CMIM's advice - without CMIM's knowledge. It deliberately misrepresented CMIM as the provider of investment advice that was regulated as a personal recommendation and subject to COBS 9 (suitability) in the FCA handbook.
- If CMIM had been asked to provide such advice it would have declined, as *'it did not have an adviser suitably qualified to provide individual advice in relation to a SSAS'.* Its terms of business materially differed from those used in FCA-regulated advice.
- It accepts that TRG appears to meet the legal definition of a collective investment scheme, albeit an *unregulated* one, following *Asset Land v FCA [2016] UKSC 17*), although it didn't realise this at the time.
- YCP refers to CGL as its 'partner SSAS Administrator'. '…[G]*iven their declaration as experts in the field of SSAS pensions, Cantwell Grove's lack of consideration of* [inexperienced investors] *as a suitable candidate for a SSAS Pension was both reckless and negligent.'*
- After approximately 9 months Mr C's DFM arrangement moved to Organic Investment Management, so CMIM has no responsibility for how he was invested after that point.

We put some of CMIM's comments to CGL. It said the following:

- It disputes that it acted as a 'funnel' for communications between CMIM and Mr C. It believes CMIM's involvement was co-ordinated from the outset by YCP.
- *'Prior to consenting to investments, as the scheme administrator, we would fully expect that the trustee would consider advice. The investment advice wouldn't necessarily need to be obtained from a regulated firm, however, it should be from a person or firm that has the relevant knowledge and experience.'*

The investigator also spoke to Mr C directly and corroborated the recollections provided by his CMC (which I've added to above). His comments reflected the fact that he was financially unsophisticated and got drawn in by the promise of better returns. He found the salesman who visited his home convincing, and had the impression that switching a pension was much like switching an energy supplier. When asked how he would have reacted if CMIM had advised the TRG investment was not in his best interests, Mr C said that this would have put him off investing - or at least have led to him seeking a second opinion on it.

In summary, our investigator took the view that CMIM should have advised Mr C not to invest in TRG: firstly because it was unsuitable for him as an unsophisticated investor, but secondly because to do otherwise would constitute promotion of an unregulated collective investment scheme (UCIS) contrary to the restriction on such promotions.

CMIM didn't agree with the investigator. Some of the points it made reiterated its previous admissions. The following is a summary of its new points:

- The only client relationship was between CGL, its intermediaries and the trustees, who received the 'dear Trustee' letters hand-delivered to them in their homes. Naming CMIM gave the pension advice they were giving 'the intended air of credibility'.
- The terms of business between CMIM and the trustees was to ensure that they understood the purpose of the 'dear Trustee' letter. It plainly was not contracting to provide advice that was regulated by the FCA, and denied all liability in such respects. So it was not necessary for CMIM to make itself aware of the personal and financial circumstances of the trustees or their attitude to risk, except for the DFM investment.

- It is a fundamental premise in law that an act of providing negligent advice or information is not, in itself, sufficient to determine the cause(s) of financial loss incurred by the recipient of that advice. The courts must consider whether such breaches of duty of care were the causes of the trustee's loss.
- As in its view Mr C did not rely upon the 'dear Trustee' letter, it *'might just as well have not existed'*. That was a view taken by another investigator and so this service was not being consistent in its approach.
- The 'dear Trustee' letter was general in nature, not addressed to a named recipient and, most significantly, not specific as to the actual resort to be invested in or the amount of money involved. It contained ample warnings against investing. *'It was equally unreasonable to make a connection that anyone investing in TRG would not necessarily regard themselves as someone unneeding of easy access to liquid funds'.*
- Before CMIM became involved, the trustees had already taken a series of positive actions to establishing an employer and SSAS under trust deed, and executing all the necessary agreements for the SSAS to operate. It cannot be argued that they were induced to take any of these actions by CMIM.
- The people that promoted TRG to Mr C were the original introducers, and that also extended to CGL given the correspondence it prepared for Mr C to authorise the investment. It did not extend to CMIM, as its 'dear Trustee' letter did not amount to a 'significant step' in him making the investment given the warnings it contained. It also encouraged Mr C to seek independent advice from an IFA.
- Considering all of the above it was wholly unfair and unjust to attribute Mr C's loss 100% to CMIM. CGL described themselves as specialists in the field of SSAS pensions, and should be held responsible for Mr C's losses. They were complicit in every step necessary for Mr C to make the investment, and granted their consent to it, which it was in their interest to do as they received remuneration from the SSAS.

CMIM also made some observations on redress, which I'll address when I reach that point in my decision.

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>Did CMIM make a personal recommendation for Mr C to invest in TRG?</u>

I'm satisfied on the balance of probabilities that the arrangements that CMIM had put into place with YCP led to Mr C receiving a 'dear trustee' letter at the time – even though he's not been able to locate his copy now. He went on to become a client of CMIM in respect of its DFM service and I don't think that was a coincidence. I consider CMIM ought to have been aware as a result of this that Mr C had received the 'dear trustee' letter.

Receipt of that letter meant, in my view, 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 appears to be suggesting that the advice in this case was not specific enough because it didn't refer to the particular hotel, or the amount to be invested. But TRG had the characteristics of a UCIS – Mr C would be participating in a (named) pooled property scheme where the hotel resort (including shared facilities) would be operated as a whole. CMIM accepts this was a UCIS. It wasn't necessary for CMIM to refer to the number of the apartment that TRG denoted Mr C's investment by to meet that definition.

As CMIM itself said, it attended 'numerous' preliminary meetings with YCP or CGL and 'reviewed detailed documentation regarding the investment to ensure it was suitable for SSAS investment and as to risk.' That indicates the preparation it made for the advice it gave. However, advice given in 2014 that wasn't a personal recommendation wasn't caught by chapter 9 of COBS – the regulator's rules governing 'suitability'.

I agree CMIM didn't set out to make a personal recommendation. It said in the terms of business that it wasn't giving *'individual suitability advice…which takes into account your personal financial circumstances'*. And the end of its 'dear Trustee' letter reminds Mr C that it hadn't assessed those circumstances. The FCA definition of a personal recommendation, with my emphasis, is:

> *'a recommendation that is advice on investments, or advice on a home finance transaction and is presented as suitable for **the person** to whom it is made, **or** is based on a consideration of the circumstances of **that person**.*
> *A recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public.'*

The part of the definition before the word 'or' does indicate it's possible to make a personal recommendation *without* considering that person's specific circumstances - *if* it is presented in such a way that the recipient reasonably believes the firm is endorsing the investment as being suitable for them in particular. But if I approach this from Mr C's position I have to take into account that CMIM told him it wasn't making a personal recommendation; he knew he hadn't met anyone from CMIM; and no 'fact finding' had been done by it.

On balance, I think Mr C ought to have realised that the 'dear Trustee' letter was a prompt for him to consider if he met the circumstances of the person being described in that letter as an appropriate investor into TRG. It left him to some of the work: was he cautious or more tolerant of risk? Did he require access to the funds during the expected duration of the investment? If Mr C felt he met those criteria I can see why CMIM's advice would have carried more weight to him than one issued to the public at large: after all, he had personally contracted with CMIM for it to provide this advice. But that doesn't of itself mean it was truly a personal recommendation, and I'm not persuaded that it was.

If there's no personal recommendation, COBS 9 doesn't apply. But that also isn't the end of this complaint. CMIM has still given advice in the 'dear Trustee' letter, which isn't negated by it separately encouraging him to seek further independent advice. If it thought Mr C was better off doing that then in my view it shouldn't have advised him at all. And it's open to me to consider whether its advice is consistent with the regulator's wider principles (set out at PRIN in the rulebook), and other COBS rules that aren't in chapter 9.

I'll return to these later in my decision. But first, it's important to note that as TRG was a UCIS, the restrictions to promotion at s.238 FSMA would also apply.

<u>Did CMIM promote the TRG investment to Mr C, ancillary to its 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. Under the guidance at PERG 8.4.5G I'm not satisfied CMIM's 'dear Trustee' letter had the characteristics of an *invitation*, essentially because it seems other third parties had already invited Mr C 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."

I appreciate CMIM is arguing that Mr C had already decided to invest in TRG, so the 'dear Trustee' letter would not have been pivotal in his thinking. However I don't think this is relevant to what CMIM's *intent* was, as highlighted above. 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.'

It's clear that the 'dear Trustee' letter was *intended* to lead trustees to making an investment. A reasonable conclusion to be drawn was that only trustees who were cautious and/or needed short-term access to the money *shouldn't* invest. And I think CMIM would have known this was an unlikely conclusion for most of the recipients to draw, in the context of:

- the advice being given on a pension, which is typically held for the long-term;
- the risks CMIM highlighted in the letter were being mitigated by the strategy it was proposing to diversify their investment with a DFM arrangement held alongside it;
- no indication being given to the trustee to understand whether they met this 'cautious' definition.

In relation to the final point, CMIM says that was why it encouraged Mr C to take his own regulated advice. In my view that doesn't explain why it set out its letter in a way that allowed him to infer that he could go ahead without that advice if he wasn't cautious or needing short-term access to funds. I also don't think it's a coincidence that the 'dear Trustee' letter was written in this way. CMIM stood to gain business from being able to provide DFM services, if a trustee went ahead with the TRG part of the investment.

It would have been apparent to CMIM that other third parties had quite a lot of influence over what the trustees did, as this is the basis of much of its arguments now. So, it was unlikely to receive the DFM business if it discouraged the investment in TRG. I think that, given this clear intention, CMIM's 'dear Trustee' letter was a 'significant step' in persuading Mr C to make the investment. Notwithstanding CMIM's observations about how much attention Mr C paid to it at the time, he then signed an instruction declaring that he had regard for it in making his investment decision. If CMIM didn't realise this is what would follow then it should have done, given it said it was giving its advice for the purposes of PA'95.

Whether or not (in CMIM's view) Mr C was simply signing where a third party told him shouldn't have diminished that this was a highly significant step. It made CMIM's advice an inducement that meant it was promoting the investment. CMIM seems to have taken the view that both YCP and CGL *were* inducing Mr C to invest because of vested interests, yet it was not. That simply doesn't stand up to scrutiny.

My view that this was a promotion is underlined by the fact that on 1 January 2014 FCA revised the list of exemptions at COBS 4.12.4R to clarify that '*a personal recommendation on a non-mainstream pooled investment'* could, as a promotion, qualify for an exemption in certain limited circumstances. This underlines that advising on (and not just personally recommending) an investment could always have amounted to a promotion: the very nature of promotion means that it does not have to be targeted to a specific individual.

That is what happened here: CMIM promoted and advised on the investment (even though YCP may also have promoted it originally, and even though didn't make a personal recommendation).

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

Mr C is unlikely to have qualified under the criteria set out 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) and has not been suggested since. This leaves the range of exemptions set out at COBS 4.12.1R, most of which weren't available because Mr C doesn't appear to have been high net worth or sophisticated and didn't have any of the other professions or roles specified.

The remaining COBS exemptions were slightly altered on 1 January 2014. We don't know when the 'dear trustee' letter was delivered to Mr C, but I'm persuaded it was likely before the transfer of his existing personal pension was completed. If he got the 'dear trustee' letter before 1 January 2014, the only other relevant COBS exemption was a Category 2 person, being both someone:

- *for whom the firm has taken reasonable steps to ensure that investment in the collective investment scheme is suitable; and*
- *who is an 'established' or 'newly accepted' client of the firm or of a person in the same group as the firm*

Mr C was not an established client of CMIM, and explanatory notes confirm that a newly accepted client required a written agreement relating to designated investment business (i.e. activities which were regulated by the FCA). Mr C's agreement with CMIM specifically *excluded* such regulated activities, so he could not have met the definition of a newly accepted client.

If it was after 1 January 2014, 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.]

Here the explanatory notes confirm that business relationships with a firm including introducers or appointed representatives are 'connected' to it. So it's clear that YCP's introducer agreement with CMIM would always have made this exclusion unavailable too.

The only reasonable conclusion I can therefore draw from this is that CMIM unlawfully promoted the TRG investment to Mr C, in contravention of s.238 of FSMA. Moreover it ought reasonably to have been aware that other parties who promoted the investment to Mr C previously were likely also in contravention of FSMA – because they were themselves unregulated and/or couldn't rely on a valid exemption either.

CMIM's position that Mr C paid no attention to or was misled by the 'dear Trustee' letter

CMIM believes CGL's reference to the 'dear Trustee' letter was intentionally misleading, as it encouraged Mr C to confirm that he believed CMIM to be an 'appropriately qualified adviser' for the purposes of PA'95 – meaning that in effect Mr C thought he'd received 'suitability advice'. I don't find this misleading to the extent that it would materially alter CMIM's culpability, as this pre-supposes that Mr C would have understood the difference between 'advice' and 'suitability advice'.

Mr C was a lay-trustee, which CMIM knew, and unsophisticated in financial matters. Our investigator's conversation with Mr C confirmed this. So I think the most he would have reasonably understood was that he was getting an appropriately qualified opinion on whether he should include TRG in his SSAS (or in layman's terms and as implied by s.36 of PA'95, its suitability for his SSAS). I can't see that Mr C misunderstood CMIM's role if it now considers it wasn't appropriately qualified to give that advice. And at a fundamental level, I don't think his inclination (or otherwise) to read the 'dear Trustee' letter materially alters the outcome because, as I've set out above:

- Whether something counts as an inducement depends in part on how it would be received by a *reasonable person*; not necessarily someone (Mr C) that CMIM considers wasn't inclined to read the letter.
- Whether it was also a significant step in securing the investment is largely answered by the fact CGL required Mr C to take this advice, irrespective of the level of attention he paid to it.
- So, it's plainly wrong to say that this letter *'might just as well have not existed',* as the investment in my view was promoted unlawfully - and that fundamentally affects the outcome of the complaint.

CMIM says its name was used to give the arrangements an 'air of credibility'. But in my view it should have gone into this with its eyes open. It 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 it now says it should have been obvious to CGL that those clients were wholly inappropriate candidates for SSASs. These arguments actually serve to demonstrate very well why CMIM shouldn't have got involved in inducing Mr C's investment into TRG at all. It knew that none of the other parties in the transaction were regulated by the FCA and it could not, as a result, expect them to share its duty of care to clients.

<u>What should CMIM have done instead?</u>

In addition to the FCA Principles, CMIM was bound by COBS 2.1.1R (the client's best interests rule) and COBS 4.2.1R (ensuring a communication or a financial promotion is fair, clear and not misleading). These COBS rules were not part of chapter 9 (suitability) and still applied if CMIM was 'advising on investments'.

In any event, it's just as difficult to see how advice that was stated in the terms of business to enable a trustee to make investment decisions for his SSAS under s.36 of PA'95 could *not* be personalised to that trustee. PA'95 itself makes references to suitability and diversification, and says other regulations may specify further criteria. Owing to its small size, most of the regulations in the Occupational Pension Schemes (Investment) Regulations 2005 don't cover Mr C's SSAS. But regulation 7 does and this states that:

> *'…the trustees of the scheme in exercising their powers of investment, and any fund manager to whom any discretion has been delegated under section 34 of the 1995 Act in exercising the discretion, must have regard to the need for diversification of investments, in so far as appropriate to the circumstances of the scheme.'*

This precise wording was reflected in the investment instructions CGL required Mr C to sign. And I can't fairly say it was possible for Mr C to obtain advice on whether TRG was suitable, and provided adequate diversification for the circumstances of *his* SSAS, without a recommendation being made specifically in respect of the requirements and objectives of *that* SSAS. Furthermore, 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 have significant concerns about an arrangement CMIM entered into that effectively meant it could only track who the end recipients of its 'dear Trustee' letter in respect of TRG were if YCP passed on a trustee's signed copy of its terms of business, or it later found they'd signed up for its DFM service. That calls into question whether CMIM was adhering to Principle 3. I also think Principle 9 is particularly apt here, as it refers to the care CMIM should take in formulating advice (whether that's a personal recommendation or not).

In observance of these principles and rules, I think there were only really two routes CMIM could reasonably take:

1. Decline to get involved in the introducer-adviser relationship with YCP, and therefore come into contact with clients like Mr C at all; <u>*or*</u>
2. Agree to accept introductions from YCP, but proceed on a basis which was fundamentally different in a number of respects in order to ensure that it was complying with the principles and rules:
   - Take reasonable care to make a personal recommendation to Mr C, which was tailored to his specific circumstances and thus was more likely to pay due regard to his best interests and treat him fairly.
   - Note that if the recommendation was *not to* invest, this would not amount to promotion and so the restriction wouldn't be breached.
   - Ensure it issued that recommendation to Mr C directly, rather than supplying it via third parties (where there was potentially some doubt whether it would reach Mr C, if the advice didn't give a favourable impression of investing).

I've carefully considered what the possible consequences of CMIM taking either of these two routes might have been. Clearly no third party could *make* CMIM give advice that was positively in favour of investing in TRG. So if CMIM declined to get involved or wanted to ensure it made direct personal recommendations, I accept it's possible that those parties would have looked to tie up with a different adviser hoping to get a more favourable outcome. However the wording of PA'95 meant that the 'proper advice' Mr C was required to take couldn't be given by just any adviser. s.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. And I would also expect *any* regulated adviser to be as mindful of the FCA's principles and rules as CMIM should have been. So they too should have considered the position on promotion; whether a personal recommendation would be expected by the regulator; and the consequences of them giving advice in favour of investing that couldn't be supported by a valid exemption.

CMIM had the option to refuse to get involved in advising Mr C at all, and it chose not to take that route. So I think it's fair and reasonable that CMIM is held to the standard of a proper personal recommendation that it *should have given* to Mr C to satisfy the regulator's expectations and those of PA'95.

What would have happened if CMIM gave suitable advice?

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. So it ought to have known that investment in UCIS (particularly for an unsophisticated retail investor) shouldn't take up more than a small part of the investor's overall assets – if their attitude to risk even allows them to make such an investment at all.

Mr C's CMC has told us that he was, at most, a medium risk investor. That seems to be reflected in the choices of portfolio when he later moved to Organic and Zurich – and although Mr C had very little other savings or investments he had another occupational pension that gave him further capacity to take risk with this one. But that doesn't mean a holding of over 50% of the pension in TRG was suitable for such a risk appetite.

TRG was an off-plan, offshore property development subject to a variety of currency, counterparty, construction and occupancy risks and was typically unsuited to an inexperienced investor like Mr C who wasn't wanting to take high risks. I've also taken into account here that Mr C had passed age 55 and was putting his pension into drawdown, meaning he would potentially need to access further sums as income – which he later did. An illiquid investment forming the majority of the pension was a potential barrier to doing so.

It's evident that the whole reason for the SSAS being promoted to Mr C was in order to invest in TRG. And looking at the timeframes involved in this case, and from my experience of other cases, I think it's likely at the time Mr C received CMIM's 'dear Trustee' letter, LV= would have been yet to transfer the funds. So I need to consider how he would have acted, if CMIM had made a proper personal recommendation that didn't involve TRG.

Mr C has indicated to our investigator that this would have given him second thoughts about investing. As he would have been reliant on CMIM's advice as an unsophisticated investor that's a credible argument. He suggested he might then have sought a second opinion, but as I said above, I think it's reasonable to conclude that other regulated firms should *also* have advised against TRG. And there is a reason consumers are referred to regulated firms such as Mr C already was being in this case – to obtain qualified advice.

CGL told this service the advice wouldn't necessarily need to come from a regulated adviser, but I'm mindful that an unauthorised firm recommending a collective investment scheme would be committing an actionable offence under FSMA. That would in my view make such a firm difficult to find, and their advice would in any event carry less credibility. It would also have played further into the checks Mr C's existing provider would have been carrying out to mitigate against pension liberation/scams – these might have involved asking him if he was being advised by a regulated adviser, for example.

Mr C didn't have particularly close ties to making the investments recommended: he'd simply been cold-called. As CMIM itself realises, it was brought on board to 'legitimise' Mr C's investment in TRG. But its advice should have far from legitimised the investment. It should have made very clear that it was unsuitable for him. Once it had given that advice I can't safely say it could easily have been 'undone' by any attempts to refer Mr C to other advisers. And they needed advice in favour of the TRG investment to comply with PA'95, so I think it most likely that Mr C would have cancelled his request to transfer from LV= to the SSAS because the advice he was getting didn't support the investments being proposed.

<u>Should I only apportion part of Mr C's losses to CMIM?</u>

CMIM says that CGL was *'reckless and negligent'* given its professed level of experience. I understand the argument that it should have been apparent to CGL that the 'dear Trustee' letter couldn't satisfy the requirements (which it identified itself) of PA'95. I didn't know whether Mr C intends to complain about CGL's actions as administrator, but occupational schemes aren't within the Financial Ombudsman Service's jurisdiction. In any case there is a higher bar against financial advisers, and this is reflected in the way they are regulated and rules they must follow. So it's also understandable that Mr C has chosen to bring this complaint to us.

CMIM also says that Mr C's own responsibilities as a trustee should be taken into account, but a trustee is just as entitled to appropriate advice as any consumer of financial services. CMIM was providing FCA-regulated advice to Mr C as the sole lay-trustee and, equally, had an opportunity to check for itself what the requirements of PA'95 were. If it couldn't do that, it shouldn't have given the advice. I can't see a basis here on which it would be fair or reasonable for me allow CMIM to avoid the consequences of its own failings, even in part.

I agree that *if I were* satisfied that Mr C would have chosen to transfer and invest in TRG 'come what may', it wouldn't be fair for me apportion any responsibility for compensating him to CMIM. It's not that principle that is in dispute. Rather it is whether I can, in fact, fairly say that on the balance of probabilities Mr C would still have gone ahead with transferring his pension in order to invest in TRG, had CMIM treated him fairly. And here, I'm persuaded on the balance of probabilities that Mr C would have heeded the proper advice he was told he would get, and was entitled to expect, from CMIM.

Putting things right

My aim in awarding fair compensation is to put Mr C in the position he would have been in, had he not gone ahead with the transfer from LV= to the SSAS.

Central Markets Investment Management Limited must therefore contact LV= to obtain a *notional value* for Mr C's former policy as at the date of my final decision, assuming that it continued to be invested in the same funds it was at the point it was transferred out. As a condition of accepting this decision, Mr C will need to give CMIM his authority to obtain this information. CMIM should check that no further income payments have been taken from the SSAS than those I've outlined above. The gross amounts of these payments will all need to be allowed for accordingly in the notional value requested.

The *actual value* of Mr C's CGL SSAS (including the current proceeds of the DFM arrangements used) as at the date of my final decision should be deducted from the *notional value* to arrive at Mr C's *initial loss amount*. (Any currently outstanding administration charges yet to be applied to the CGL SSAS should be removed from the *actual value* first.)

The *actual value* is difficult to determine where an investment is illiquid (meaning it cannot be readily sold on the open market). That seems to be the case with the TRG holding in the CGL SSAS. Therefore as part of calculating compensation in respect of the TRG value:

- CMIM should agree an amount with CGL SSAS as a commercial value for this investment, then pay the sum agreed to CGL SSAS plus any costs, and take ownership of it. The actual value used in the calculations should include anything CMIM has paid to CGL SSAS. The fractional ownership company, as a member of which Mr C holds the TRG investment, should be consulted to achieve this.
- Alternatively, if CMIM is unable to buy the investment from CGL SSAS it should give

them a nil value as part of determining the actual value. In that event it's also fair that Mr C should not be disadvantaged while he is unable to close down the CGL SSAS and move to a potentially cheaper arrangement. I recently asked the investigator to remind CMIM on this case that to provide certainty to all parties I think it's fair that CMIM adds five years' worth of future SSAS administration fees at the current tariff to the *initial loss amount*, to give a reasonable period of time for the SSAS to be closed.

CMIM has suggested to this service that it may be able to use independent valuers for the TRG investment, or agree a value with CGL (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 buying the investment from the SSAS.

I also cannot anticipate whether TRG and/or the fractional membership company will be permitting changes of ownership because clearly legal processes would be involved. But to the extent that this is possible, CMIM will have benefited from any value it thinks remains in the investment by buying it out of the SSAS. But if CMIM is unable to take ownership of the investment, it may ask Mr C instead to provide an undertaking in return, to account to it for the net amount of any payment he may receive from the investment in future.

The aim of this undertaking is to avoid double-recovery of Mr C's losses. If CMIM wishes to do this the undertaking should be drawn up after compensation is paid – and CMIM will need to meet any associated costs. 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. If CMIM asks Mr C to provide this undertaking, payment of the compensation awarded may be made dependent upon provision of that undertaking.

Payment of compensation

If there is an overall loss, CMIM should pay into the CGL SSAS, to increase its value by the initial loss amount. The payment should allow for the effect of charges and any available tax relief. CMIM shouldn't pay into the CGL SSAS if this will conflict with any tax protections or allowances.

If CMIM is unable to pay the compensation into the CGL SSAS, it should pay it direct to Mr C. But had it been possible to pay into the CGL SSAS, it would have provided a taxable income. Therefore the initial loss amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr C's actual or expected marginal rate of tax at his selected retirement age. Here, it's reasonable to assume that Mr C is likely to be a basic rate taxpayer at the selected retirement age, and he's already withdrawn his tax-free cash sum, so the reduction would equal 20%.

CMIM must also pay Mr C £300 for distress and inconvenience in view of the disruption caused to his retirement planning. Details of the calculation should be provided to Mr C in a clear, simple format.

If LV= cannot provide a notional value

In this eventuality, CMIM will need to use a benchmark to provide a *fair value* for this policy and switch that for the notional value in its calculations. As I said above, Mr C seems to have been willing to take some risk to get a higher return. So I consider that the FTSE UK Private Investors Income Index on a Total Return basis would be the appropriate benchmark to use.

This index is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It doesn't mean that Mr C would specifically have made investments that exactly mirrored the return on this benchmark. For that reason CMIM should not be deducting investment costs or other charges from the benchmark. The view I'm taking here is that the *sort of* funds Mr C would have remained invested in with LV= (***if*** a notional value is unavailable) would typically have performed broadly in line with this benchmark; notwithstanding the charges (which would have been lower than the SSAS in any event). It is a proxy that is being used for the purposes of compensation.

I'm also satisfied the losses or gains in the DFM portfolio form part of Mr C's overall loss. I note the points CMIM has made about the steps it took to ensure that its own DFM portfolio was appropriate, which it cannot vouch for in the subsequent reinvestment. But I've reached the conclusion that Mr C would have had no reason to be transferring his pension from LV= at all, but for CMIM's failings – and I don't think it likely LV= would have permitted DFM in the type of plan Mr C held.

So including the present-day DFM value in the calculation is part of putting Mr C back into the position he would have been in, had CMIM not acted as it did. And that includes the subsequent changes of DFM provider which it seems were encouraged by the very same third parties which CMIM had agreed to get involved with (in a way which did not act in the best interests of Mr C and its other clients).

In all of the circumstances above I think it's fair and reasonable for me to hold CMIM responsible for 100% of Mr C's loss. It's a matter for CMIM whether it wishes to attempt to recover any of the compensation I'm requiring it to pay from other parties. It may take an assignment of Mr C's rights to pursue those parties as a further part of the above-mentioned undertaking, if it wishes to do so.

My final decision

I uphold Mr C's complaint and require Central Markets Investment Management Limited to pay him compensation as set out in the 'Putting things right' section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 14 July 2022.

Gideon Moore
Ombudsman