The complaint

Miss B has complained that she was unsuitably advised by Central Markets Investment Management Ltd (CMIM), as a trustee of her 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). Miss B is represented by a claims management company (CMC) in this complaint.

What happened

In mid 2013 Miss B was aged 54, working in the public sector on a salary of about £25,000pa. She had two dependent children. She didn't own her own home or any other savings or investments – her CMC says she was *'at most a low risk investor'.* She was cold-called before meetings took place at her home to discuss transferring her Royal London pension elsewhere, being told that the destination investments would perform much better than her existing plan.

As part of the arrangements to transfer Miss B's pension, on 7 November 2013 a new employer was incorporated; named after the road in which she lives. On 13 November 2013 she 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.

We also know that Miss B signed an (undated) 'indicative investment form' stating that she wanted to invest 50% of her SSAS in Cape Verde and 50% in CMIM's DFM arrangement. On 28 November 2013 a SSAS was established by trust deed for Miss B's new employer with her as sole trustee, and Cantwell Grove Ltd (CGL) as SSAS administrator. It had an annual fee of £500+VAT and was registered with HMRC.

We know that around this time an introducer firm working with CMIM (Your Choice Pensions or 'YCP') sent letters to prospective candidates for the TRG investment and CMIM's Discretionary Fund Management (DFM) service. That firm shared directors with Consumer Money Matters Limited, who also wrote to Royal London for information about Miss B's pension in October 2013. It was invested in the Managed fund.

We don't have Miss B's copy of the letter YCP likely sent her, or therefore know precisely when it was sent, but we know other clients' letters 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.'*

Both CMIM and Miss B have sent us a copy of what the enclosed written advice – a so-called 'dear Trustee' letter. The letter does not refer to Miss B 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 our research.'*

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: it proposed an investment in its Global Growth Portfolio. 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.

CMIM went on to summarise its research and view on the suitability of the Cape Verde investment, some of which I've quoted below (with my **emphasis**). The first three paragraphs below were extracted without much alteration from TRG's own 'key features' document about the risks of the investment:

> *'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.****'*

Mrs B signed to confirm not only receipt of a copy of this letter but that she agreed with its contents, much later on 26 September 2014. This is likely connected with the fact that on 1 October 2014 she had to agree to a duplicate SSAS being set up because of a 'dating issue' with the trust deed and rules of her original SSAS. (She also re-signed CMIM's terms of business as well as separate terms for its DFM service on 1 August 2014.)

On 6 December 2013 CGL then requested a transfer of Miss B's Royal London policy using the forms Consumer Money Matters had obtained and which Miss B had signed. Royal London transferred £23,684 to CGL on 7 January 2014.

CGL has a copy of a signed investment instruction from Miss B dated 7 February 2014, in which she refers to advice she has obtained and considered from CMIM on the proposed investments; and that she believes CMIM to be appropriately qualified to assess the suitability of that investment for the SSAS under s.36 of PA'95.

By 20 February 2014 a total of £11,200 had been invested in the Dunas Beach Hotel resort of TRG (through an agreement for sale of membership in a UK company limited by guarantee). The UK limited company had entered into separate contracts with developers to build the property, and to pay a third party to manage it. She had also invested £10,384 into CMIM's DFM arrangement.

Just prior to this, CMIM completed a sheet entitled *'assessment of appropriateness for Cantwell Grove Limited...SSAS's'*. Broadly, a CMIM employee declared that Miss B had sufficient knowledge and understanding to make these investments *because* she had taken written advice (from it). They said that the proposed DFM arrangement was appropriate for her investment objectives and attitude to risk (involving an instruction to *'take into account existing holdings'*) because it was diversified.

TRG immediately began paying a regular monthly income of about £65 into Miss B's SSAS. I understand that this would later have reduced and potentially stopped due to the unprofitability of the hotel venture.

By March 2015 Miss B seems to have been advised by Organic Investment Management to switch the £15,067 she by then had in CMIM's DFM to Organic. A medium-high risk growth objective was specified for this with a timeframe of more than ten years. The TRG investment and SSAS bank account were also transferred in specie to the duplicate CGL SSAS at around the same time.

By April 2019 Miss B still had £11,996 with Organic and £11,200 in TRG, with a minimal amount in the SSAS bank account. Organic subsequently got into financial difficulty and Miss B has said an IFA is now looking after the DFM part of her portfolio.

Miss B's CMC complained in December 2019 that CMIM's advice had been unsuitable. 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 an introducer firm, 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 Miss B 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 Miss B's DFM arrangement moved to Organic Investment Management, so CMIM has no responsibility for how she 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 Miss B. 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 Miss B directly. She could recall being visited by salespeople several times and that this led to the property and DFM investments being made, as she felt under pressure to agree to what they said. However she wasn't offered any other incentives to make the investments. She felt she could trust the people she spoke to as they said they were regulated. She added that she had been contacted by the same people later on (or those connected to them) and encouraged to switch those funds which were liquid again.

In summary, our investigator took the view that CMIM should have advised Miss B not to invest in TRG: firstly because it was unsuitable for her 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 ofcredibility'.

- 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 Miss B 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 Miss B were the original introducers, and that also extended to CGL given the correspondence it prepared for Miss B to authorise the investment. It did not extend to CMIM, as its 'dear Trustee' letter did not amount to a 'significant step' in her making the investment given the warnings it contained. It also encouraged Miss B to seek independent advice from an IFA.
- Considering all of the above it was wholly unfair and unjust to attribute Miss B's loss 100% to CMIM. CGL described themselves as specialists in the field of SSAS pensions, and should be held responsible for Miss B's losses. They were complicit in every step necessary for Miss B 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 Miss B to invest in TRG?</u>

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 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 – Miss B 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 Miss B's investment by to meet that definition.

I don't think there is a plausible argument here that CMIM wasn't, at least, carrying out the regulated activity of advising on investments. As CMIM 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.' 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 Miss B 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.'*

So, the part of the definition before the word 'or' indicates 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 Miss B's position I have to take into account that CMIM told her it wasn't making a personal recommendation; she knew she hadn't met anyone from CMIM; and no 'fact finding' had been done by it.

On balance, I think Miss B ought to have realised that the 'dear Trustee' letter was a prompt for her to consider if she met the circumstances of the person being described in that letter as an appropriate investor into TRG. It left her to some of the work: was she cautious or more tolerant of risk? Did she require access to the funds during the expected duration of the investment? If Miss B felt she met those criteria I can see why CMIM's advice would have carried more weight to her than one issued to the public at large: after all, she 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 her to seek further independent advice. If it thought she was better off doing that then in my view it shouldn't have advised her 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 Miss B, 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 Miss B 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 Miss B had already decided to invest in TRG, so the 'dear Trustee' letter would not have been pivotal in her 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 Miss B to take her own regulated advice. In my view that doesn't explain why it set out its letter in a way that allowed her to infer that she could go ahead without that advice if she 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 its advice tended to discourage the investment in TRG. I think that, given this clear intention, CMIM's 'dear Trustee' letter was a 'significant step' in persuading Miss B to make the investment. Notwithstanding CMIM's observations about how much attention Miss B paid to it at the time, she then signed an investment instruction declaring that she had regard for it in making her 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) Miss B was simply signing where a third party told her shouldn't in my view 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 (who were likely involved in this case given the wider circumstances) and CGL *were* inducing Miss B 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 specified (and limited) circumstances. This underlines that advising on (and not just personally recommending) an investment can also amount 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 Miss B qualify for a relevant exemption from the restrictions on UCIS promotion?

Miss B is unlikely to have qualified under the criteria set out in the FSMA (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, because she 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 Miss B doesn't appear to have been a high net worth or sophisticated investor 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 Miss B, except that I think it's most likely she received it before she issued her investment instructions to CGL on 7 February 2014 – and simply signed to confirm receipt of it later on, potentially as part of a record keeping exercise when her SSAS was being duplicated. And in any case, I'm not persuaded the precise date of receipt of this letter makes a difference to whether she qualified for a relevant exemption.

If it was 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*

Miss B 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). Miss B's agreement with CMIM specifically *excluded* such regulated activities, so she 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.]*

Note 3 essentially said that anyone with a business relationship with the firm including an introducer or appointed representative, is 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 Miss B, in contravention of s.238 of FSMA. Moreover it ought reasonably to have been aware that other parties who promoted the investment to Miss B 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 Miss B 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 Miss B to confirm that she believed CMIM to be an ‘appropriately qualified adviser’ for the purposes of PA’95 – meaning that in effect Miss B thought she’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 Miss B would have understood the difference between ‘advice’ and ‘suitability advice’.

Miss B was a lay-trustee, which CMIM knew, and unsophisticated in financial matters. So I think the most she would have reasonably understood was that she was getting an appropriately qualified opinion on whether she should include TRG in her SSAS (or in layman’s terms and as implied by s.36 of PA’95, its suitability for her SSAS). I can’t see that Miss B 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 her 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 (Miss B) 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 Miss B to take this advice, irrespective of the level of attention she 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 Miss B’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.

What should CMIM have done instead?

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 her 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 Miss B’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 Miss B to sign. And I can't fairly say it was possible for Miss B to obtain advice on whether TRG was suitable, and provided adequate diversification for the circumstances of *her* SSAS, without a recommendation being made specifically in respect of the requirements and objectives of *that* SSAS.

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 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 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 Miss B 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 Miss B, which was tailored to her specific circumstances and thus was more likely to pay due regard to her best interests and treat her 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 Miss B directly, rather than supplying it via third parties (where there was potentially some doubt whether it would reach Miss B, 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' Miss B 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 Miss B 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 Miss B 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.

I've taken into account the CMC's assertion that Miss B was of a low risk nature, but also the fact that her existing pension was in the Managed fund (broadly a mixture of shares and bonds that would sit more commonly in the medium risk bracket). And, even if encouraged by the same third parties who solicited her TRG and CMIM investments, she was also willing to select medium-high risk for her Organic portfolio.

As the evidence of her attitude to risk is not entirely consistent I also note that she had little investment experience and a modest amount of pension provision, giving her low capacity to absorb losses. 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 the presumption that it would be unsuitable for someone with an attitude to risk that was, in all likelihood, only up to the medium level and no higher.

It's evident that the whole reason for the SSAS being promoted to Miss B 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 Miss B received CMIM's 'dear Trustee' letter, Royal London was still in the process of transferring the funds or those funds could have been returned if she changed her mind. I'm certainly satisfied on the balance of probabilities that Miss B hadn't yet issued her investment instructions to invest in TRG and the DFM portfolio at the point she received the letter - as that was the whole point of the letter. So I need to consider how she would have acted, if CMIM had made a proper personal recommendation that didn't involve TRG.

To secure the TRG investment the third parties involved needed advice in favour of it to comply with PA'95 and as I said above I think it's reasonable to conclude that other regulated firms should *also* have advised against TRG. 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. They might also have expected an unauthorised firm to play further into the checks Royal London should have been carrying out to mitigate against pension liberation/scams – such as asking her if she was being advised by a regulated adviser.

From what I can see in this case, Miss B didn't have particularly close ties to making the investment. She had simply been cold-called and agreed to invest under pressure from a salesperson in her home. As CMIM itself realises, it was brought on board to 'legitimise' Miss B'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 Miss B.

So, once CMIM had properly advised Miss B – as s.36 of PA'95 anticipated – I can't safely say it could easily have been 'undone' by any attempts to refer Miss B to other advisers. I'm satisfied the more likely outcome is that any further attempts to secure Miss B's TRG investment would have failed in the light of CMIM's advice. As a result, she would have been in a position to unwind the instruction to transfer her Royal London plan or at the very least, avoid investing in TRG and the unnecessarily complex DFM arrangement.

<u>Should I only apportion part of Miss B'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 Miss B 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 Miss B has chosen to bring this complaint to us.

CMIM also says that Miss B'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 Miss B 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 Miss B would have chosen to transfer and invest in TRG 'come what may', it wouldn't be fair for me apportion any responsibility for compensating her 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 Miss B would still have gone ahead with transferring her pension and investing in TRG and the DFM arrangement (both of which CMIM recommended as a 'package'), had CMIM treated her fairly.

I'm persuaded on the balance of probabilities that Miss B would not have made these investments. I think the effect of CMIM placing a barrier in her way would have been more likely to deter her ultimate investment than not. I think it's likely she would have heeded the proper advice she was told she would get, and was entitled to expect, from CMIM.

Putting things right

I agree with the investigator that the aim in awarding fair compensation should be to put Miss B in the position she would have been in, had she not gone ahead with the transfer from Royal London to the SSAS – or alternatively and if this is not possible, to give her the performance of an investment similar to that she previously had with Royal London (which was in a Managed fund).

Central Markets Investment Management Limited must therefore contact Royal London to obtain a *notional value* for Miss B'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, Miss B will need to give CMIM her authority to obtain this information.

The *actual value* of Miss B'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 Miss B'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.)

If any part of the CGL SSAS has been transferred elsewhere under new advice, the value of those proceeds as at the date of my final decision will also need to be included in the *actual value* – as I don't consider Miss B would have needed to seek new advice to recover from the demise of Organic had she not followed CMIM's advice in the first place. CMIM should also check that no tax-free cash or income payments have been taken from the SSAS or any successor plan: if they have, the gross amounts of these payments will need to be allowed for accordingly from the *notional value* also to give a like-for-like comparison.

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 the investment. The actual value used in the calculations should include anything CMIM has paid to CGL SSAS. The fractional ownership company through membership of which Miss B 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 Miss B should not be disadvantaged while she is unable to close down the CGL SSAS and move to a potentially cheaper arrangement. Third parties are involved and we don't have the power to tell them what to do. So to provide certainty to all parties I think it's fair that CMIM <u>adds</u> five years' worth of future SSAS administration fees at the current tariff to the *initial loss amount*, to allow a reasonable period of time for the CGL 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 the value it thinks is in the investment by buying it out of the SSAS. But if CMIM is unable to take ownership of the investment, it may ask Miss B instead to provide an undertaking in return, to account to it for the net amount of any payment she may receive from the investment in future.

The aim of this undertaking is to avoid double-recovery of Miss B'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 Miss B 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 or any successor 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 SSAS if this will conflict with any tax protections or allowances.

If CMIM is unable to pay the compensation into the CGL or successor SSAS, it should pay it direct to Miss B. But had it been possible to pay into the 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 Miss B's actual or expected marginal rate of tax at her selected retirement age. Here, it's reasonable to assume that Miss B is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. But if she is yet to take her tax-free cash sum, the adjustment would only apply to 75% of the compensation, giving a composite reduction of 15% overall.

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

If Royal London cannot provide a notional value

As I've said above, I think a notional value based on Royal London's Managed fund would be most representative of the type of investment Miss B would have gone on to make after getting proper advice from CMIM. Either because she would have had time to cancel or reverse the transfer from Royal London, or because it would be an adequate proxy for more appropriate investments she could have made within the SSAS at her risk level, instead of TRG and the DFM arrangement.

However if Royal London can't provide a notional value, CMIM will need to use a benchmark to provide a *fair value* for one or both of the policies, and switch that for the notional value in its calculations. I consider that the FTSE UK Private Investors Income Index on a Total Return basis would most closely align with Miss B's likely attitude to risk and/or how the Royal London plan would have continued to perform.

The FTSE UK Private Investors Income total return index is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return. It doesn't mean that Miss B 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 Miss B would have invested in (***if*** a notional value isn't available) would typically have performed broadly in line with this benchmark, notwithstanding the charges. 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 Miss B'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 Miss B would have had no reason to be using a DFM arrangement at all if it hadn't been presented to her as a 'combined package' with TRG – and I don't think it likely Royal London would have permitted DFM in the type of plan Miss B held.

So, including the present-day DFM value in the calculation is part of putting Miss B back into the position she would have been in, had CMIM not acted as it did. And that includes the subsequent changes of DFM provider as these were either encouraged by the very same third parties which CMIM had agreed to get involved with, or were necessitated by the demise of a subsequent provider.

In all of the circumstances above I think it's fair and reasonable for me to hold CMIM responsible for 100% of Miss B'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 Miss B'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 Miss B's complaint and require Central Markets Investment Management Limited to pay her compensation as set out in the 'Putting things right' section above. If Miss B accepts this decision and compensation is not paid within 28 days of CMIM being notified of her acceptance, interest must be added to my award at the rate of 8% per year simple from the date of the final decision to the date of payment.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B to accept or reject my decision before 27 July 2022.

Gideon Moore
Ombudsman