DRN-3299329

The complaint

Mr Y complains that he was given unsuitable investment advice by Helm Godfrey Partners Ltd ("Helm Godfrey"). He's said the investment it recommended for part of his SIPP (Self Invested Personal Pension) presented a higher degree of risk than he had agreed to take. He has also said he was incorrectly assessed as a "Professional Client."

What happened

I issued my Provisional Decision on this complaint on 10 September 2021. The background and circumstances to the complaint, and the reasons why I was provisionally minded to uphold it were set out in that decision. I've copied the background and my provisional findings here.

"Background

Mr Y has said he was introduced to Helm Godfrey's adviser in 2010 by a friend. He said he was looking to discuss the investments held within his SIPP as he had in excess of £800,000 held on deposit in it.

A Meeting Note dated 24 March 2010 recorded that Mr Y's SIPP's total value was approximately £1.4 million. Helm Godfrey's adviser completed a Risk Profiler Questionnaire which Mr Y signed on 27 March 2010. It included the following questions and Mr Y's responses.

Q - Which statement best describes your objectives for this investment?

A - I want to achieve higher long-term returns and am prepared to tolerate reasonable levels of volatility.

Q - At the beginning of the year you have £100,000 invested. The chart and options below show the performance of five different hypothetical investments. Each bar gives a range of possible values at the end of the same year. Which investment are you most happy with?

A - Portfolio B £124,000 to £90,000 (out of a range of A to E). A was £114,000 to £96,000 and E was £144,000 to £72,000.

Q - What level of fall in the value of this portfolio over a one-year period would concern you, bearing in mind that equity investment requires a long term view?

A - 10% to just under 15%. There were five categories ranging from 0% to 5% to "None of the above concern me."

The questions and answers were input into a well-known provider's online risk profiler which produced an "Assess attitude to risk report". This report generated a score which was described as giving:

"…an indication of the level of risk your client is prepared to take with this investment on a

range from 1 (low risk) to 10 (high risk)."

The score was 7. A handwritten asterisk was marked against the following wording:
"This questionnaire was completed with a particular product in mind."

Mr Y signed a Helm Godfrey Client Agreement on 12 May 2010 (there is also another date on it - 12 August 2010). This included:

"It is a requirement of the Financial Services Authority that all clients being advised on designated investment business are categorised into one of three categories. Unless otherwise agreed in writing, you have been categorised as a "Retail Client" giving you the highest level of protection. However you have the right to request a different categorisation if you wish."

A Confidential Client Information Fact-Find for Mr and Mrs Y was completed and signed by Mr Y on 12 May 2010.This recorded:

- Mr Y was a business owner/property developer
- Mr and Mrs Y's estimated income was around £1 million per year
- They had approximately £450,000 in an ISA
- Mr Y's attitude to risk was *"Balanced Adventurous".* It described this as *"Likely to suit an experienced long-term investor seeking returns that significantly outpace inflation."* A handwritten note said *"Likes to self invest to a large extent. Distrust of institution and lack of imagination."*
- Under client's knowledge and experience the *"experienced"* box was ticked. Another box handwritten into the fact-find was also ticked as *"professional"*
- Mr Y's company had had a good year with £2 million in profits. It said other property investments were doing well in an investment company
- Notes added to the fact find said Mr Y had a portfolio of properties. Helm Godfrey has said Mr Y's portfolio of properties was worth approximately £6 million.

The application for the investment was signed and dated by Mr Y on 20 May 2010.

A *"New Business Submission Sheet"* referring to the £100,000 investment was signed by the adviser on 20 May 2010 and the administrator on 21 May 2010.

A letter from the SIPP provider to Helm Godfrey dated 25 May 2010 said:

"Further to your letter dated 20th May and a conversation I have had today with your colleague [name of adviser], *please find enclosed the application form for* [Mr Y's] *investment in the Rejuvenation Mauritius Cell (Cell1). Also find enclosed various money laundering documents …..and a cheque in the sum of £100,000."*

Mr Y was sent a suitability letter by Helm Godfrey dated 26 May 2010. This said, amongst other things, that Mr Y:

- Was in his mid-50s
- Was the managing director of a business
- Wanted to retire in 5 years' time
- Was contemplating selling his company at retirement for a figure in the region of £10 million
- Had a SIPP worth about £1.35 million

The suitability letter included the following:

“Attitude to Risk

At our meeting on 27 March 2010 you completed a risk profile questionnaire. The questionnaire has been processed and the results show you have a risk level of 5 on a scale of 1 to 7 where 1 is the lowest risk and 7 is the highest risk. Your risk level would indicate a balanced to adventurous attitude to risk.

This is consistent with the portfolio you have put together and the rather adventurous investments you have undertaken in the past.

Recommendation

From the funds within your SIPP trustee bank account I have recommended an investment of £100,000 in the Rejuvenation Mauritius Cell. I would confirm that in order to make these investments you will need to be classified as a Professional Client.

During our meeting I provided you with written confirmation of the definition of a Professional Client however I would ask you to please read the definition below and kindly sign the attached letter confirming your understanding of being categorised as a professional client.”

It went on to say:

“The definition of a Professional Client is as follows:

A professional client is a client that "Is capable of making his/her own Investment decisions and understand the risks involved".

Appropriateness: Where we assess whether a product or service is appropriate for you, we can assume that you have the necessary level of experience and knowledge to understand the risks involved in relation to any Investment, service, product or transaction. We therefore may not issue you with the same level of documentation as that provided to a Retail Client.

Eligibility to Complain: As a Professional Client you would not be an "Eligible complainant" and may lose the right of access to the Financial Ombudsman Service. Any complaint you make will be dealt with under our Internal complaints procedures.

Financial Promotions: We may take your status into consideration in determining what Information should be Included In a financial promotion to you in order to satisfy our requirement to make the communication fair, clear and not misleading.”

And later in the letter it said:

“The investment is consistent with your current attitude to risk.

Rejuvenation Mauritius is as a cell of Rejuvenation PCC Limited, an open-ended protected cell investment company which is registered in Guernsey and authorised by the Guernsey Financial Services Commission.

There are no Cancellation Rights associated when investing in the Rejuvenation Mauritius Cell.

I [Helm Godfrey’s adviser] *am a director of Rejuvenation PCC Limited.*

I would refer you to the following risk factors when investing:

• The value of your investment may go down as well as up and a shareholder may not get back the full amount invested.

• There is likely to be an illiquid market in the shares and in such circumstances shareholders may find it difficult to realise their investment.

• You should note that shares will not be redeemable until after the property is sold and will not be transferable other than in very limited circumstances.

• It is appropriate to consider investing over the medium to long term.

• There can be no assurance that Rejuvenation Mauritius will achieve its investment objective. Past operating history is no guarantee to its likely future performance.

• There is no guarantee that the investment will produce a greater return than your [name of *provider]* SIPP bank account."

Mr Y signed an undated declaration which said:

"I confirm that I wish to be treated as a professional client in respect of my investment in the Rejuvenation Mauritius Cell.

I confirm that I have been made aware in writing of the investor and compensation rights I may lose in respect of making an investment in the Rejuvenation Mauritius Cell. I confirm that I am aware of the consequences of losing such protections."

£100,000 was invested into Rejuvenation PCC Limited re Mauritius Cell on 31 July 2010. This bought 80,645 units priced at £1.24 each.

Mr Y subsequently complained to Helm Godfrey by letter dated 15 December 2016. The value of the investment had fallen significantly and he complained that, in brief, the investment wasn't suitable for his circumstances.

Helm Godfrey didn't uphold Mr Y's complaint and it was subsequently referred to us. Helm Godfrey didn't think the complaint had been referred to us within the relevant time limits. I issued a decision on our jurisdiction to consider the complaint on 1 March 2021. My decision was that we were able to consider it. In this decision, I am now considering the merits of Mr *Y's complaint.*

my provisional findings

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

Mr Y complained to Helm Godfrey by letter dated 15 December 2016. In it he said:
"The reason for my complaint is that the investment was not suitable for my circumstances because

• I was identified as a balanced investor, not very high risk investor
• At no time could I be categorised as a professional investor (a high net worth client but certainly not sophisticated)

• *The investment was not commensurate to my attitude to risk"*

And when Mr Y referred his complaint to us he said in his letter dated 21 March 2017 that he wanted to complain about an investment he made into his pension after taking advice from Helm Godfrey's adviser. He said, amongst other things, that it was *"…a matter of record that I was not a high risk investor"* and although he acknowledged he had a *"very high capacity for loss"* he said his *"tolerance to risk has always been no more than "balanced to adventurous" at the most, however, this falls well short of a very high risk investment being an appropriate recommendation."*

So, I think Mr Y's complaint is essentially that the investment Helm Godfrey recommended presented a higher degree of risk than he had agreed that he wanted to take. And that he was incorrectly classified as a professional investor/client.

The investment has been referred to as an Unregulated Collective Investment Scheme (UCIS). It's not entirely clear to me whether this was or wasn't a UCIS. The suitability letter described it:

"Rejuvenation Mauritius is as a cell of Rejuvenation PCC Limited, an open-ended protected cell investment company which is registered in Guernsey and authorised by the Guernsey Financial Services Commission."

Whether it was or wasn't strictly a UCIS, it was similar in that it had restrictions on the type of consumer it could be promoted to. In my view the question of whether it was a UCIS, or not, isn't material to deciding the fair and reasonable outcome of the complaint. In my view Mr Y *was* the type of investor that this investment could be promoted to, in that he was a high net worth client.

Mr Y signed an undated declaration saying that he wished to be treated as a professional client in respect of the investment in the Rejuvenation Mauritius Cell.

The regulator's Conduct of Business Rules (COBS) provided:

Elective professional clients
COBS 3.5.3 R

A firm may treat a client as an elective professional client if it complies with (1) and (3) and, where applicable, (2):

(1) the firm undertakes an adequate assessment of the expertise, experience and knowledge of the client that gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved (the "qualitative test");

(2) in relation to MiFID or equivalent third country business in the course of that assessment, at least two of the following criteria are satisfied:

(a) the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;
(b) the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds EUR 500,000;

(c) the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged; (the "quantitative test"); and

(3) the following procedure is followed:

(a) the client must state in writing to the firm that it wishes to be treated as a professional client either generally or in respect of a particular service or transaction or type of transaction or product;

(b) the firm must give the client a clear written warning of the protections and investor compensation rights the client may lose; and

(c) the client must state in writing, in a separate document from the contract, that it is aware of the consequences of losing such protections."

Mr Y says he wasn't a professional client. He said although he had experience of having built up a portfolio of UK residential properties, he had limited knowledge of investments outside of his property portfolio and he relied on a firm's advice. In 2014 Mr Y was asked to answer some questions about his file and investment following an FCA section 166 order to Helm Godfrey. Mr Y identified himself as a balanced risk investor. Mr Y said Mr M of Helm Godfrey asked him *"do you buy and sell properties and have you invested as a professional businessman and entrepreneur your own business?".* Upon confirming that he had indeed done so, Mr Y says he was told by Mr M that as a result of this response, he was a professional investor and needed to sign accordingly. Mr Y said, during discussions with the adviser, he questioned the issue as he didn't appreciate what the term meant. However, Mr Y says that as Mr M had come highly recommended to him by a trusted friend, he in turn trusted that this was the correct thing to do. Mr Y says he now realises this trust was misplaced.

The adjudicator said he thought what was key in relation to COBS 3.5.3 R (1) was that the assessment was *"in light of the nature of the transactions or services envisaged"*. The investigator didn't think that Helm Godfrey had demonstrated that it had carried out an adequate assessment of Mr Y's expertise, experience and knowledge of overseas unregulated property developments.

Helm Godfrey had explained in its suitability letter dated 26 May 2010 that in order to make the investment Mr Y needed to be classed as a Professional Client. In that letter it said it had previously provided Mr Y with written confirmation of the definition of a Professional Client, and it asked him to sign a letter to confirm his understanding of being categorised in this way. Mr Y signed that declaration.

So Helm Godfrey took steps to alert Mr Y to what a Professional Client was and followed the procedure in COBS 3.5.3 (3). But in order for Helm Godfrey to treat Mr Y as an Elective Professional Client it was also required to meet the requirements of COBS 3.5.3 (1). It was required to make an adequate assessment of Mr Y's expertise, experience and knowledge, in light of the transaction, to give it reasonable assurance that Mr Y was capable of making his own investment decision and the risks involved.

Helm Godfrey did obtain information that was relevant to such an assessment as recorded in the Fact-Find. Mr Y had investments in residential property, his pension and an ISA. The Fact-Find also recorded his investment knowledge and experience as "experienced" and "professional".

However it doesn't record how it came to this conclusion or in what types of investments Mr Y had knowledge and experience of (in addition to his current provision). The investments recorded in the fact find appear to be mainstream investments. I don't think this was sufficient to give it a reasonable assurance that Mr Y had knowledge and experience of the

type of niche investment presented by Rejuvenation PCC Limited and its associated risks.

So, like the adjudicator, I don't think Helm Godfrey demonstrated that it had undertaken an adequate assessment of Mr Y's expertise, experience and knowledge of the type of investment he was actually making - an overseas property investment. So I don't think it had a reasonable assurance he was capable of making his own investment decision and understood the risks involved in the particular transaction.

However even if I am wrong about that, I've also seen no evidence that Mr Y satisfied two out of the three conditions set out in 3.5.3 (2) a, b and c – "the qualitative test". I've seen no evidence on file that this was established.

So I don't think Mr Y was a Professional Client as provided for in the COBS Rules. I think Mr Y was a retail client as he was originally categorised in the terms of business.

Having said that, although I don't think Helm Godfrey correctly classified Mr Y as a Professional Client, I don't think this failure alone caused the losses that Mr Y has claimed. As I have said above, in my view he *was* the type of investor that this investment could be promoted to, in that he was a high net worth client. I think what's material to deciding the fair and reasonable outcome of Mr Y's complaint about the suitability of the investment advice given, is whether Helm Godfrey met its obligations in providing suitable advice.

Helm Godfrey was providing regulated advice on investments and was therefore bound by the Regulator's Conduct of Business rules; in particular COBS 9 as it applied to a retail client.

These included:

COBS 9.2.1(1) which said that *"A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client."*
And the relevant part of COBS 9.2.2 which provided:

(1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:

(a) meets his investment objectives;

(b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and

(c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

(2) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.

Helm Godfrey was also bound by the Regulator's overarching Principles for Business which included: Principle 2, that a firm must conduct its business with due skill care and diligence; and Principle 9, that it must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.

Did Helm Godfrey meet its obligations?

Helm Godfrey completed a fact-find, and I think it did obtain the information that was necessary for it to understand Mr Y's general financial position. It also obtained information about Mr Y's preferences regarding risk taking and his risk profile.

However, it was also required to have a reasonable basis for believing that its recommendation met Mr Y's investment objectives; that he was able financially to bear the related investment risks and he had the necessary experience and knowledge in order to understand the risks involved in the transaction.

It's not in dispute that Mr Y was able to bear the risks the investment presented; in my view he had the financial capacity to absorb the loss of the whole investment – i.e if the investment failed, he had other financial provision he could rely on.

However, although an investor may have the capacity to accept risk, they are still able to decide on the preferred level of risk that they actually want to take with any particular investment. I note the following:

- the risk profiler which produced an "Assess attitude to risk report". This suggested Mr Y had a risk rating of 7 on a scale of 1 to 10.

- Mr Y's answers in the questionnaire as I set out above didn't suggest he wanted an investment that presented high risks. Mr Y had said he was prepared to tolerate reasonable levels of volatility; had indicated he would be happy with the example portfolio B and losses/gains between £124,000 and £90,000 from a £100,000 investment, and would be concerned if the portfolio lost 10 to 15% over a year.

- It recorded *"This questionnaire was completed with a particular product in mind."*

- Section 8 of the Confidential Client Information Fact-Find that recorded Mr Y's attitude to risk was *"Balanced Adventurous".*

- Although the suitability letter said Mr Y had been assessed as having a risk rating of 5 out of 7 (which doesn't reflect the source document that had a scale of 1-10 as I have said above), it was in any event described as "*Your risk level would indicate a balanced to adventurous attitude to risk."*

- The suitability letter confirmed "*The investment is consistent with your current attitude to risk."*

Mr Y has said he has always thought himself as a balanced risk investor and this is reflected in his investments made before and after his dealings with Helm Godfrey. However, I note that the 2009 annual report for Mr Y's SIPP recorded that although the "Investment Objective" was "Balanced", the "Risk Profile" was "Higher".

I think it's clear that Mr Y had the capacity to accept significant levels of risk with a proportion of his money. But in my view I consider its most likely that both parties understood Mr Y had agreed to a balanced to adventurous degree of risk for this particular investment in itself. This is because, as I have set out above, Mr Y's attitude to risk was recorded in the fact-find and suitability letter as balanced/adventurous; this was consistent with the risk profile questionnaire rating of 7 out of 10; the answers in that questionnaire weren't consistent with someone wanting to accept significant or speculative risks; the suitability letter showing the

adviser's understanding said the investment was consistent with Mr Y's attitude to risk; the absence of evidence suggesting that Mr Y wanted an investment presenting higher risk, but within an overall balanced to adventurous portfolio, or evidence that the investment had been presented to Mr Y in this context.

An overview of the project underlying the Mauritius Rejuvenation investment was given in the suitability letter. It said the first phase of the development had changed, as the original scheme had been to develop the project as a medical centre with a number of villas and apartments surrounding it, which would be let to those receiving treatment at the medical centre. However, it had been decided that the medical centre should become a commercial centre and that the villas and apartments would be built for sale.

It said the first phase would now encompass the construction of the commercial centre and twenty-two residential units, comprising a number of three to five-bedroom villas and one to three-bedroom apartments. Cell 1, on its completion, would own the commercial centre, comprising of shops, restaurants and offices that would lie at the heart both of the first phase and of the extended development.

It said the development was a Real Estate Scheme regulated and approved by the Mauritian Board of Investment. And then it went on to describe some of the risks the investment presented as I have set out in the background section above.

The risks of the investment were also set out in the Information Memorandum dated March 2010. These included the risks associated with borrowings that could be used to invest in the property; that it was subject to the usual business risks associated with investing in commercial property; there were illiquidity risks as it wasn't listed or quoted on an exchange and there was no established market; there was no investors compensation scheme; the costs of developing and constructing the properties had currency exchange rate risks, and a Loan Note paying a 6.25% rate that had been issued as an alternative to bank financing was unsecured. It also said:

"The content of this promotion has not been approved by an authorised person within the meaning of the Financial Services and Markets Act 2000. Reliance on this promotion for the purpose of engaging in any investment activity may expose an individual to a significant risk of losing all of the property or other assets invested.

Any person who is in any doubt about the investment to which this Information Memorandum ("Memorandum") relates should consult an authorised person specialising in advising on investments of the kind to which this memorandum requires."

The performance of the investment depended on the success of this single commercial property focussed overseas project. The investment was exposed to a number of risks as I have described above, including the "significant risk" of losing all the assets invested. The investment also didn't have all the protections and restrictions associated with mainstream regulated funds.

Taking all this into account, I think the investment itself presented significant risks, and presented a greater degree of risk than the balanced to adventurous risk that Mr Y had agreed to take for this particular investment.

Mr Y has said:

"To be clear, I have never received a brochure / key features document or similar document for the investment and I have also never received a formal signed reason why letter on Helm Godfrey letterhead."

He has subsequently said that he didn't receive a copy of the 'reason why' letter at the time of the transaction. And although he said he doesn't remember receiving a brochure, he recalls seeing a document containing some architectural drawings.

Mr Y did sign a subscription form for the Rejuvenation Mauritius Cell (Cell1) on 20 May 2010. And in the declaration it said he agreed he had "*Read and understood the Information Memorandum."*

The 'reason why' letter was dated 26 May 2010 so this was after the adviser's meetings with Mr Y and after the application forms had been signed. The copy provided to Mr Y when he requested his data from the firm in 2011 was on un-headed paper and was unsigned; as was the copy on the firm's file provided to us.

So I think there is some doubt as to whether Mr Y received a copy of the 'reason why' letter at the time he made the decision to invest. However, although Mr Y also says he didn't receive a brochure, he does recall seeing a document containing some architectural drawings. I don't think it's likely that Mr Y would have agreed to invest such a significant amount of his capital - £100,000 – without some information about what he was investing into. I think it's more likely than not that he would have wanted some information and understanding of where he was putting his money. Mr Y has said he didn't have sight of the "reason why" letter which provided some information about the investment. Given I'm not aware of any other obvious source of information I think it's more likely than not that he did see the Information Memorandum. And this is consistent with Mr Y signing the subscription form dated 20 May 2010 which said he had read and understood it.

The risks of the investment were outlined in the Information Memorandum. This was 57 pages long. On page 8 it said that reliance on the promotion could expose the individual to a significant risk of losing all of the investment. It also went onto say the investment in property could carry a higher risk than investments in quoted shares and may be difficult to realise.

So I recognise it could be argued that Mr Y should have been alerted that he was taking a higher degree of risk than the balanced to adventurous risk initially agreed from the information in the Memorandum.

However, Helm Godfrey was obliged to provide advice that was suitable and met Mr Y's investment objectives. This included his preference for risk, and that the investment needed to be aligned to the degree of risk that he wanted to take. In my view the onus was on Helm Godfrey to ensure the investment was appropriate to the degree of risk that had been agreed, rather than rely on Mr Y to realise this might not be the case, on his own reading of the Memorandum. The Information Memorandum was 57 pages long, and the fact that the investment presented significant risks to capital was within the main body of the document. The Memorandum didn't give a risk rating for the investment, and I don't think Mr Y ought reasonably to have been alerted that the investment presented risks above what he understood he had agreed to because he was given the Memorandum. I've seen no persuasive evidence that Mr Y was told the investment was outside of his risk category for him to consider those risks and agree to them. In my view Mr Y would likely have relied on Helm Godfrey to ensure the investment was aligned to the degree of risk I'm satisfied had been agreed, and I think he was entitled to rely on it.

Given all the risks that the investment presented as I set out in detail earlier above, my view is that the degree of risk presented by the investment *in itself*, was greater than the balanced to adventurous risk that Mr Y had agreed to take for this particular investment. So, I don't think Helm Godfrey took reasonable steps to ensure that its recommendation met Mr Y's investment objectives; it wasn't aligned with his preferences regarding risk taking. I don't

think Helm Godfrey had a reasonable basis for believing its recommendation for Mr Y to invest in Rejuvenation Mauritius Cell was aligned to the degree of risk that Mr Y wanted to take. Ultimately therefore, I don't think Helm Godfrey's recommendation was suitable and it didn't meet its obligations under COBS 9.

I also think the firm failed to meet its obligation under the regulator's Principles 2 and 9. For the reasons I set out above, I don't think Helm Godfrey made an adequate assessment of Mr Y's expertise, experience and knowledge to give it reasonable assurance that Mr Y was capable of making his own investment decision and the risks involved. And it went onto recommend an investment that presented a higher degree of risk than Mr Y had agreed to take. So I don't think Helm Godfrey conducted its business with the required skill care and diligence; and it didn't take reasonable care to ensure the suitability of its advice. I think if it had done it wouldn't have recommended that Mr Y invest in the Rejuvenation Mauritius Cell."

Given all the above, I said that my provisional decision was that I upheld Mr Y's complaint, and I thought Mr Y's losses flowed from Helm Godfrey's failures in regard to the Regulator's Principles for Business and Conduct of Business Rules as I had described. I went on to set out how I thought Helm Godfrey should calculate and pay Mr Y fair compensation.

I asked both parties to let me have any further evidence or arguments that they wanted me to consider before I made my final decision.

Helm Godfrey (through its representative) didn't agree with my provisional findings. It said, in summary:

On jurisdiction

- Mr Y submitted a complaint letter dated 15 December 2016. He asserted the reason for his complaint was that; the investment wasn't suitable for his circumstances because he was identified as a balanced investor not a very high risk one so the investment wasn't commensurate with his attitude to risk; and, at no time could he be categorised as a professional investor. Therefore the letter of complaint referred to the shortcomings in Helm Godfrey's advice about Rejuvenation. This had been identified by Mr Y's new IFA in May 2011; that Mr Y had been wrongly assessed as a professional investor; and the IFA had doubts about the suitability of Rejuvenation.

- Helm Godfrey wrote to Mr Y in August 2014 confirming it had appointed a firm to prepare a report addressed to the FCA concerning UCIS advice given by Helm Godfrey. It said the report would address 1) the eligibility of investors to invest in UCIS 2) the suitability of the advice '*in the case of a sample of clients.'* The review didn't concern Rejuvenation or Mr Y specifically. And the letter gave no indication to Mr Y that his Rejuvenation investment or the UCIS the firm had been asked to review had been mis-sold. The second provisional decision on jurisdiction contained an apparent error of fact. It had said the firm appointed by Helm Godfrey to carry out the review hadn't reviewed the suitability of the investment. However it had reviewed Mr Y's case and concluded that (subject to anything the FCA had to say – as with all cases it reviewed), Mr Y had elected to be categorised as a professional investor, had accepted the risk of the Rejuvenation investment, and so Helm Godfrey wasn't required to offer him redress.

- Putting the error above aside, it said it didn't accept it could be reasonably said that Mr Y's failure to comply with the six-year time limit was a result of exceptional circumstances. He'd had over five years from the date when he knew, or should have known, that he had cause for complaint (in 2011), and over three years from when he

received the 2013 statement in which to make a complaint. Even if Mr Y had delayed making a complaint whist the review was ongoing, he'd already had over three years between learning that he had cause for complaint and being contacted by Helm Godfrey about the review. So the failure to comply with the six-year time limit was clearly not the result of exceptional circumstances.

- If the review had made Mr Y aware of his cause for complaint for the first time, it could conceivably see how the delay in conducting the review could be said to have caused a delay in the making of the complaint. But this wasn't the position here. Mr Y had years to make a complaint from learning the basis of it.

- No finding had been made that Mr Y had any intention of pursuing a complaint in July 2014 – before he was contacted about the review. It thought there was no doubt that the mailing about the review prompted a complaint which would not otherwise have been made, rather than delaying a complaint been made.

- It was not the case that the complaint was delayed by the failure to notify Mr Y of the outcome of the review; this wasn't Mr Y's position, and was indeed contrary to his position. Mr Y had said, supported by his new IFA, that he had made a complaint in September 2014. Mr Y couldn't have been caused to delay making his complaint by the review as a matter of fact as he believed that he had already made a complaint. His letter of complaint concerned the outcome of the review and that wasn't a complaint that was within our jurisdiction.

On the merits of the complaint

'Cap' on loss

In my jurisdiction decision I had accepted that Mr Y had been aware that his new IFA had concerns about the suitability of the fund in May 2011 and that he ought reasonably to have become aware that had cause for complaint at that time. It said it was therefore unclear why I considered that Helm Godfrey was liable for losses after May 2011. It understood that the ombudsman's practice was to 'cap' losses at the date a new adviser reviewed an investment complained about. It provided examples of other ombudsman's decisions made on that basis.

Misappropriations

The provisional decision didn't refer to the misappropriations from the Rejuvenation fund or the extent to which the fraud impacted on Mr Y's losses. It said it was unclear on what basis Helm Godfrey could be said to be liable for losses resulting from that fraud; losses which it clearly didn't cause and were wholly outside of its control.

Causation

The provisional decision didn't address the issue of causation of the loss. It said it seemed inconceivable that Mr Y wouldn't have proceeded with the investment if he had been told it was adventurous. He was a very wealthy individual, the suitability letter referred to other adventurous investments he had made in the past, and Mr Y had approached Helm Godfrey's adviser with certain non-mainstream investment proposals introduced to him by a third party. It thought Rejuvenation clearly appealed to Mr Y – it represented only 7% of the SIPP's value and 1% of his broader investments. It was accepted he could afford to take the risk and he was warned of the risks in the information provided to him. It thought Mr Y would have proceeded with the investment if he'd been told it involved an adventurous risk.

Mr Y said he had no further comments to make.

I sent a further provisional decision to both parties dated 10 December 2021. In summary, I said that I'd considered the points about the merits of the complaint raised by Helm Godfrey's representative following my provisional decision. And in response I said:

'Cap' on loss

I didn't agree that there should be a 'cap', as such. However, I'd considered whether Mr Y could have sold the investment in May 2011 when the new IFA alerted him that it had concerns about suitability, and therefore limited his losses going forward. The suitability letter said:

- *There is likely to be an illiquid market in the shares and in such circumstances shareholders may find it difficult to realise their investment.*

- *You should note that shares will not be redeemable until after the property is sold and will not be transferable other than in very limited circumstances.*

The Information Memorandum said:

There is no established market for interests held by the Company. The investment is not quoted or listed on any recognised stock exchange making the assets relatively illiquid. In accordance with the terms in the Information Memorandum investments in the Company may not be cancelled and interests in the Company are not freely transferable or marketable. Investment is not suitable as a medium or short term investment.

I said we had asked the SIPP provider whether it was possible to sell the investment and it had said:

"This was an illiquid investment from the outset in as much as shares were not traded on any recognised exchange and, as far as we know, there was no active secondary market. That said, we are aware of no reason why the investment couldn't have been sold privately subject to finding a willing buyer."

So I thought the investment was effectively illiquid from the start. And it seemed to me unlikely that a private buyer would want to invest in Rejuvenation knowing of the ongoing issues with it. My understanding was that the development company was put through an insolvency procedure in May/June 2011. And there was an ongoing threat of litigation from the person accused of taking money from the investment – one of the main people involved in the project.

I said the investment wasn't listed on a recognised market, and there was no active secondary market. So deciding what price might have been attractive to persuade a private investor to buy the investment, despite its problems, wouldn't be straightforward. I said in any event, my current view was that it was unlikely that Mr Y would have been able to sell the investment to a private buyer at that time. Therefore I didn't think there should be a 'cap' (as referred to by Helm Godfrey), on Mr Y's losses.

Misappropriations

In Helm Godfrey's adviser's e-mail to investors dated 2 August 2014, when referring to the misappropriated funds, he mentioned a figure of £615,000 and said: "*In August 2009 I confronted* [Mr A] *over loans taken by him from the Development Company as a result of those conversations he confirmed that he had rectified any anomalies and he confirmed that*

there were no outstanding loans from the company and that he had repaid any that he had taken.

At the end of the year it was apparent that what we had been told not correct. Not only had the loans not been repaired but they were significantly larger than first disclosed. A figure of £615,000 was determined to be the correct figure. This figure appears in the audited accounts of March 2009 which are signed by [Mr A]."

I said the adviser appeared to have been aware of the misappropriation issue in August 2009. And that what he'd been told by the person behind it was incorrect prior to advising Mr Y to invest in Rejuvenation. I thought the adviser had recommended that Mr Y invest in the fund despite knowing that issue hadn't been resolved. So I thought it was a known risk. I didn't think there was a break in the chain of causation, and I thought the losses flowed from the unsuitable advice.

Causation

The adviser had carried out a risk profiling exercise and concluded that Mr Y came out as a score of 7 on a scale of 1-10. I thought Mr Y's answers to the risk questionnaire were consistent with that score. The "Assess attitude to risk report" said "This questionnaire was completed with a particular product in mind." The suitability letter said that Mr Y had a balanced to adventurous attitude to investment risk. Again I thought this was consistent with the answers Mr Y had provided in the questionnaire.

I said for the reasons I'd set out in detail in my provisional decision, I thought Mr Y had specifically agreed to take a balanced to adventurous degree of risk for this particular investment. And that Mr Y likely relied on Helm Godfrey to ensure the investment was aligned to the degree of risk it had said the investment presented, and that he had agreed to take.

I thought the contemporaneous evidence, in particular Mr Y's answers to the risk questionnaire, was consistent with Mr Y not wanting to invest in a speculative manner for this investment. So on balance, I said I didn't think Mr Y would have proceeded with the Rejuvenation investment if he'd been clearly alerted to the degree of risk that it presented, and he'd been told it wasn't suitable for the degree of risk he'd said he was willing to take.

I said I therefore still intended to uphold Mr Y's complaint, and order Helm Godfrey Partners Ltd to calculate and pay compensation to Mr Y as I had set out in my earlier provisional decision dated 10 September 2021. I invited both parties to provide any further evidence or arguments that they wanted to make.

Mr Y said he had nothing further to add.

Helm Godfrey (through its representative) responded to say, in summary, that Mr M, Helm Godfrey's adviser responsible for the advice that was complained about, left Helm Godfrey in December 2010. However a current staff member who worked with Mr M at the time said that the issues about the fraud and the discovery of the unauthorised loans arose in the latter part of 2010. She recalled there had been a falling out between Mr M and the person responsible for the fraud (Mr A) and this was shortly before Mr M had left Helm Godfrey. Therefore Helm Godfrey thought there was a mistake in Mr M's e-mail to investors dated 2 August 2014 – that Mr M had confronted the other party in August 2010 rather than in August 2009.

The investigator sent an e-mail to Helm Godfrey on my behalf on 7 January 2022, including a copy of an Affidavit from court proceedings in Mauritius. I said, as recorded under point 7

in the Affidavit, it appeared the disputed loans were arranged in 2008 and 2009, and there was a letter dated 14 October 2009 where the alleged fraudster (Mr A) had admitted this (albeit we didn't have a copy). But I said point 7.4 referred to a shareholder meeting held on 15 February 2010 where the £615,000 was discussed. Given Mr M's position (Helm Godfrey's adviser) and his involvement with the fund, I thought it was highly unlikely this was all happening without his knowledge. The dates in the Affidavit were consistent with the dates referred to in Mr M's e-mail of 2 August 2014 being more likely than not the correct dates. So I said I was satisfied that it was likely that Mr M was aware of the loans issue prior to advising Mr Y to invest in Rejuvenation.

I asked Helm Godfrey to provide any further evidence or arguments that it wanted to make about this issue to us by 14 January 2022. Helm Godfrey's representative said it had nothing further to add.

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.

As I've said above, I've considered what's fair and reasonable which is relevant in deciding the merits of the complaint. However in response to my provisional decision dated 10 September 2021, Helm Godfrey, through its representative, said it still didn't agree that I had jurisdiction to consider the complaint. As I am required to do, I have kept the matter of jurisdiction under constant review, and have considered the further points that were raised. Having done so, I'm satisfied that I have jurisdiction to consider the case.

Jurisdiction

Helm Godfrey said the second provisional decision on jurisdiction contained an apparent error of fact. I'd said the firm appointed by Helm Godfrey to carry out the review hadn't reviewed the suitability of the investment – the error of fact. It said it had reviewed Mr Y's case and concluded that (subject to anything the FCA had to say – as with all cases it reviewed), Mr Y had elected to be categorised as a professional investor, had accepted the risk of the Rejuvenation investment, and so Helm Godfrey wasn't required to offer him redress.

However I note the review invite letter dated 7 August 2014 had given some information about the reasons for the section 166 review and then said:

"The Skilled Person's Report concerns advice given by Helm Godfrey Partners Ltd to participate in Unregulated Collective Investment Schemes("UCIS"). The Skilled Person's Report involves a review of 1) the eligibility of relevant investors to invest in UCIS and 2) the suitability of the advice on UCIS in the case of a sample of clients of Helm Godfrey Partners Ltd.

In June 2010 you effected an investment in the Rejuvenation Mauritius Fund, which is classified as a UCIS and your case is amongst the sample which [the firm appointed to carry out the review] *is reviewing.*

[The firm appointed to carry out the review] *have assessed that you were eligible for UCIS promotion and the purpose of this letter is, therefore, to request information to assess the suitability of the advice for you to invest in UCIS."*

It's my understanding that the firm hadn't reviewed the suitability of the investment - which was part two of the review as outlined above in its 7 August 2014 letter. Whilst this letter said

it had assessed that Mr Y was eligible for UCIS, it didn't say this meant he had accepted the risks of Rejuvenation. And the letter specifically said the review was in two parts – the second being to review the suitability of the advice for a sample of clients – Mr Y being in that sample.

As I said in my previous decision, the 7 August 2014 letter said that if Mr Y wanted the firm to review the suitability of the advice he'd received he needed to complete the reply form. The 'purpose' of the letter was to invite Mr Y to have the suitability of the advice reviewed. Mr Y completed and returned the reply form. In the circumstances, I think it was reasonable for him to understand that the reviewing firm was going to review the suitability of the investment – that's what the letter said it would do.

It's not entirely clear to me whether Helm Godfrey are saying that suitability (as in part 2 above) was reviewed. Or if it's referring to the 'review' leading to the conclusion that Mr Y was 'assessed' as being eligible for UCIS promotion. My understanding was that it wasn't in dispute that suitability (as in 2) hadn't been reviewed. However, even if suitability (as in 2) was reviewed, Mr Y wasn't sent an outcome of that review despite – as I explained in my previous decision - chasing Helm Godfrey for the outcome through his IFA. And as I said in my decision, the IFA wasn't told until November 2016 that Mr Y's case *"…had not been reviewed as he had been deemed as a professional investor by* [the reviewing firm], *not subject to possible redress."*

Whilst the 7 August 2014 letter may not have specifically said that it would inform Mr Y of the outcome of the review, as Mr Y was invited to have the advice reviewed and he accepted that invitation, I think he'd have a reasonable expectation of being told of the outcome. But, regardless of Mr Y's expectations, his new IFA had made multiple attempts to contact Helm Godfrey for the review outcome. So Helm Godfrey should have been aware that Mr Y was waiting for the review outcome. And when Mr Y was alerted to the firm's position he complained.

Helm Godfrey has said my decision isn't consistent with Mr Y's own stated position – that he made a complaint in September 2014 (when returning the reply form for the review). So the review didn't cause a delay in the making of a complaint.

I agree that Mr Y's position is that he made a complaint in September 2014. Either he did make a complaint at that time (albeit there is no record of it). Or he didn't. If he did make a complaint at that time, I don't think that is inconsistent with finding that the failure to alert Mr Y to the outcome of the review on suitability (or tell him it hadn't reviewed suitability) caused him to delay making the December 2016 complaint. Mr Y is unlikely to be familiar with the DIPS Rules and the associated implications of making a complaint at that time. Mr Y says he made a complaint in September 2014. But I don't think that would have stopped him making a further complaint following the "outcome" of the review. He clearly made a complaint in December 2016 once he knew the firm's position. For the reason I set out in my decision, I'm satisfied that Mr Y was chasing the outcome of the review during that period. And on discovering that suitability hadn't been reviewed he made a complaint.

I therefore think it's more likely than not that if Mr Y had been alerted to the firm's position on the review earlier he would also have complained earlier – this is consistent with his actions on discovering the firm's position. So I'm satisfied the firm's failure to alert Mr Y to the outcome of the review delayed the making of his complaint. Given the firm clearly led Mr Y to believe it was reviewing suitability, I don't think he would have reasonably thought that he had to make a separate complaint about it at the same time – it was already being reviewed by a third party.

On the one hand, as I set out in my earlier jurisdiction decision, I think Mr Y ought reasonably to have become aware that he had cause for complaint in May 2011. So I accept the three-year window had already passed by the time that Mr Y received the review invitation letter dated 7 August 2014.

However, Mr Y also had six years from the event complained about. The 7 August 2014 letter was well within that six-year period. This letter alerted Mr Y that the third party reviewing the matter had assessed that he was eligible for UCIS promotion. But the letter also said suitability would be reviewed if Mr Y returned the reply form – which he did. So there was still the possibility the firm would make good Mr Y's losses following the third party's review of suitability. Therefore I don't think it was unreasonable for Mr Y to wait to complain about both issues until he'd found out the result of that review.

For the reasons I've given above and in my earlier decisions, I'm satisfied that Mr Y delayed making his December 2016 complaint because of Helm Godfrey's failure to alert him to the outcome of its review of suitability (or tell him it hadn't reviewed suitability). Whether or not the August 2014 letter prompted the complaint – it clearly brought the matter to Mr Y's mind in September 2014 whether he'd previously been thinking about it or not; he returned the reply form, effectively accepting the offer of a review. Mr Y still had around 18 months remaining before the six-year limit expired. For the reasons I've given, I think Mr Y understood, reasonably, that he had no need to complain during this period as the issue of suitability was – apparently - already being reviewed by a third-party reviewer. Mr Y's IFA was chasing the outcome on his behalf – so Helm Godfrey ought to have been aware that Mr Y was waiting for an outcome even if the 7 August 2014 letter didn't say he would receive one.

I think if Mr Y had been told the firm's position on the matter during that period, he would more likely than not have complained on being alerted to it - as he did in December 2016. I think the firm's actions directly caused Mr Y to delay making his complaint.

As I said in my decision on jurisdiction dated 1 March 2021, the DISP rules provide for the ombudsman to decide if the failure to comply with the relevant time limits was, in his view, as a result of exceptional circumstances. In my view, for the reasons I have outlined, I think Mr Y's failure to comply with the time limits *was* a result of exceptional circumstances.

Mr Y's letter of complaint to the firm dated 15 December 2016 did refer to the firm's 'review'. And then he went onto say, amongst other things:

"It is only recently they [his IFA] *have been informed that my file was not reviewed and no response would be forthcoming."*

And then:

"As a result of this I have no other choice but to register a formal complaint regarding the sale of the Rejuvenation Mauritius Fund in June 2010.

The reason for my complaint is that the investment was not suitable for my circumstances because…. "

Mr Y went onto outline the reasons for his complaint.

I'm satisfied that Mr Y was complaining about the original advice to invest in Rejuvenation that he'd been given in 2010, rather than merely the outcome of the review. The advice to invest was a regulated activity, and a complaint about it is something that I can consider.

Merits

Helm Godfrey's representative raised a number of points about the merits of the complaint in response to my provisional decision dated 10 September 2021. I responded to those points in my second provisional decision dated 10 December 2021, and e-mail dated 7 January 2022 as set out above. In summary, for the reasons given in those documents:

- I don't think there should be a 'cap' on the losses as from May 2011. I think it was unlikely that Mr Y would have been able to sell the investment and limit the losses from it.

- I think it's more likely than not that Helm Godfrey's adviser was aware of the misappropriation issue prior to advising Mr Y to invest in Rejuvenation. So I think it was a known risk, and there wasn't a break in the chain of causation. I consider Mr Y's losses flow from Helm Godfrey's failures in regard to the Regulator's Principles for Business and Conduct of Business Rules as I have described.

- I don't think Mr Y would have proceeded with the Rejuvenation investment if he'd been clearly alerted to the degree of risk that it presented, and he'd been told it wasn't suitable for the degree of risk he'd said he was willing to take. I think Helm Godfrey's failings did cause the losses that Mr Y has claimed.

Taking all the above into account, I'm upholding Mr Y's complaint.

Putting things right

I order that Helm Godfrey Partners Ltd calculates and pays compensation to Mr Y on the following basis:

fair compensation

In assessing what would be fair compensation, my aim is to put Mr Y as close as possible to the position he would probably now be in if he had been given suitable advice. It's not possible to say precisely what Mr Y would have done, but I'm satisfied that what I have set out below is fair and reasonable given Mr Y's circumstances and objectives when he invested.

what should Helm Godfrey Partners Ltd do?

To compensate Mr Y fairly, Helm Godfrey Partners Ltd should compare the performance of Mr Y's investment with that of the benchmark shown below. If the fair value is greater than the actual value, there is a loss and compensation is payable. If the actual value is greater than the fair value, no compensation is payable.

Helm Godfrey Partners Ltd should also pay any interest as set out below.

If there is a loss, Helm Godfrey Partners Ltd should pay into Mr Y's pension plan to increase its value by the amount of the compensation and any interest. The payment should allow for the effect of charges and any available tax relief. Helm Godfrey Partners Ltd shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.

If Helm Godfrey Partners Ltd is unable to pay the compensation into Mr Y's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to

notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr Y's actual or expected marginal rate of tax at his selected retirement age.

I think Mr Y is likely to be a higher rate taxpayer at the selected retirement age, so the reduction should equal the higher rate of tax (40%). However, if Mr Y would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Rejuvenation Mauritius Cell.	still exists	The FTSE UK Private Investors Balanced total return index	Date of investment	Date of decision	8% simple a year from date of decision to date of settlement if settlement isn't made within 28 days of Helm Godfrey Partners Ltd being notified of Mr Y's acceptance of this decision

In addition, Helm Godfrey Partners Ltd should:

- Pay Mr Y £300 for the distress I'm satisfied the matter has caused him. Although Mr Y was a wealthy individual the £100,000 invested was still a significant amount. I think the loss of a large part of that investment was likely to cause a degree of distress to Mr Y.

- Provide details of the calculation to Mr Y in a clear, simple format.

- Income tax may be payable on any interest paid. If Helm Godfrey Partners Ltd considers that it is required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr Y how much it has taken off. It should also give Mr Y a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Actual value

This means the actual value of the investment at the end date.

If, at the end date, the investment is illiquid (meaning it cannot be readily sold on the open market) it may be difficult to find its actual value. So the value should be assumed to be nil to arrive at fair compensation. Helm Godfrey Partners Ltd should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider / administrator. This amount should be deducted from the compensation and the balance paid as above.

If Helm Godfrey Partners Ltd is unable to purchase the investment its value should be

assumed to be nil for the purpose of calculation.

Helm Godfrey Partners Ltd may wish to require that Mr Y provides an undertaking to pay it any amount he may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing or receipt from the pension plan. Helm Godfrey Partners Ltd will need to meet any costs in drawing up the undertaking.

Fair value

This is what the investment would have been worth at the end date had it grown in line with the benchmark.

Any additional sum paid into the investment should be added to the fair value calculation from the point in time when it was actually paid in. Any withdrawal, income or other distribution out of it should be deducted from the fair value at the point it was actually paid so it ceases to accrue any return in the calculation from that point on.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr Y wanted capital growth and was willing to accept a higher than average amount of investment risk.

- The FTSE UK Private Investors Balanced total return index is made up of a range of indices with different asset classes, mainly UK and international equities and also some government and corporate bonds. It's a fair measure for someone who was prepared to take a higher than average risk to get a higher return.

My final decision

My final decision is that I uphold Mr Y's complaint.

Fair compensation should be calculated as I have set out above. My decision is that Helm Godfrey Partners Ltd should pay Mr Y the amount produced by that calculation – up to a maximum of £150,000 plus interest.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £150,000, plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £150,000, I may recommend that the business pays the balance.

Recommendation: If the amount produced by the calculation of fair compensation is more than £150,000, I recommend that Helm Godfrey Partners Ltd pays Mr Y the balance.

This recommendation isn't part of my determination or award. Helm Godfrey Partners Ltd doesn't have to do what I recommended. It's unlikely that Mr Y could accept a final decision and go to court to ask for the balance. Mr Y might want to get independent legal advice before deciding whether to accept a final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr Y to accept or reject my decision before 22 April 2022.
David Ashley
Ombudsman