DRN-3337516

## The complaint

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

## What happened

In late 2013 Mr W was an industry worker aged 47, earning about £20,000pa and owned his own home worth £80,000 net of mortgages. He had no other significant assets. He says he was offered a pension review by an agent of a company called Your Choice Pensions Ltd (YCP). The agent said he could obtain better returns by transferring his Aviva pension to a SSAS. My understanding is that the investments under discussion would have included a fractional investment in TRG.

As part of the arrangements to transfer Mr W's pension, on 17 December 2013 a new employer was incorporated; named after the road in which he lives. Mr W would later have signed an employment contract with that company, and on 6 January 2014 Mr W 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.

Notwithstanding that this advice hadn't yet been provided, Mr W also signed an indicative investment form, stating that his intention was to invest 75% of his pension in TRG and 25% in CMIM's discretionary fund management (DFM) service. My understanding is that YCP or its sister company (Consumer Money Matters) would then have requested a transfer pack and discharge form from Aviva, with Mr W's authority.

On 20 January 2014 a SSAS was established by trust deed for Mr W's new employer with him as sole trustee, and Cantwell Grove Ltd (CGL) as SSAS administrator. The fee to set up the scheme was £750+VAT, followed by £500+VAT annually. It was registered with HMRC on 29 January.

On 19 February 2014 CGL then requested a transfer of Mr W's Aviva pension policy using forms Mr W had signed on 30 January and most likely provided by YCP or its sister company. On 24 February 2014, a letter was sent to Mr W displaying CGL's logo and phone number. It 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.'*

I'm aware of other near-identical letters sent at that time which appeared to come from YCP but 'borrowing' CGL's logo. However those letters provided a different contact number – that of YCP. Mr W's letter appears to have come from CGL. CMIM has sent us a copy of what the enclosed written advice – a so-called 'dear Trustee' letter - would have said. The letter does not refer to Mr W 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. And the reference to an exit strategy was that the trustee needed to plan ahead if they wanted to draw benefits from the SSAS – in particular purchasing an annuity. It went on to say (with my **emphasis**):

> *'The investment is not suitable for a cautious investor who needs the protection of the UK investor compensation and regulatory environment, as both a SSAS and the overseas investment have no such regulatory protection. There are a range of risks that we have seen have been clearly documented to the investor and should be considered carefully: The value of any investment can fall as well as rise. Land or commercial property should not necessarily be considered as a liquid investment; it may therefore not be suitable should you need access to the capital at short notice or the timeframe desired by the trustee….*
>
> *Commercial property investments tend to incur ongoing costs and charges, which may not always be covered by any possible rental returns. The value of rental returns is dependent on occupancy demand, which cannot be guaranteed.*
>
> *Investments held overseas may have additional risks such as currency fluctuations, which may impact on any returns when converted back into sterling; political risk to ownership and title; and commercial risk to the delivery and management of a property/resort.*
> *You may wish to take independent legal advice to ensure you understand all these issues…*
>
> *Our view is that the investment is appropriate but only as part of a diversified holding according to an investor's attitude to risk and capacity for withstanding loss.*
>
> *You should ensure that you only invest what you can afford to lose…We believe as core principles that where an investor is looking to retire within ten years then no more than 50% of their investment. Our advice to investors is to consider the need for diversification carefully…We have not reviewed other overseas commercial property investment opportunities and accordingly are not providing you with advice as to the merits of the proposed investment as against other such investment opportunities. If you still have any doubts we recommend that you seek independent financial advice…*
>
> *Ultimately, you, as trustee, will take your own decision* ***in the light of your personal circumstances, which we have not assessed.****'*

It seems Aviva took some time to make Mr W's transfer because it was not until 21 July 2014 that CGL received £25,776 from Aviva. It notes that on 23 July Mr W returned a signed letter giving investment instructions as trustee of his SSAS. The letter read as follows:

> *'The purpose of this letter is to confirm that, in accordance with the power of investment under the SSAS trust deed and rules and after due consideration of the investment advice I have received (referred to below), I wish to proceed to invest my SSAS fund as follows*
> *£9,333.33 of the value of my SSAS fund in the Cape Verde investment opportunity offered by The Resort Group and*
> *£10,000.00 of the value of my SSAS fund in* [CMIM]*'s discretionary fund management services'*

The advice Mr W had considered was explained as follows:

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

CGL wrote back to Mr W on 11 August 2014 to confirm receipt of his investment instruction and that the above amounts had been invested accordingly (the investment in DFM had taken place on 30 July and TRG on 7 August). However it wasn't actually until 27 February 2015 that Mr W signed an agreement for sale of membership in a UK company limited by guarantee, which constituted his investment in the Dunas Beach Resort of TRG – a different hotel to that first envisaged.

My understanding from other cases this service has seen is that discounts were offered on the purchase, paid back to investors by monthly instalments at 7%pa for a maximum period of the first two years – after which rental income was expected to be payable when the resort opened. The UK limited company had entered into separate contracts with developers to build the property, and to pay a third party to manage it.

At around this time Mr W seems to have been otherwise advised to switch the £10,159 he by then had in CMIM's DFM to Organic Investment Management – and add another £4,000 from the SSAS bank account. The application for this DFM was for a 'medium low' level of risk and for a 10+ year investment term. Organic subsequently failed and Mr W's remaining money is now managed by Philip J Milton & Company in a separate SIPP.

TRG began paying a regular monthly income of about £54 into his SSAS. That regular income stopped in February 2016, although resumed at the rate of around £60-70 per quarter from November 2016. By 2018 the income had broadly halved on average.

Mr W complained in around September 2019 that CMIM's advice had been unsuitable. CMIM responded that it did not have an opinion on the suitability of a SSAS for any individual, but it considered the advice it gave him as trustee was complaint with s.36 of PA'95. It said its advice was generalised but heavily focused on the risks, warning trustees that TRG wasn't suitable for cautious investors.

Mr W referred the complaint to this service. He told us that he had been cold-called and a lady from YCP visited his home to encourage him to transfer to the SSAS. When all the paperwork was ready she returned to collect his signature. After the event he felt that things had been somewhat rushed.

CMIM has made a number of submissions, both on this case and during the course of a very similar complaint for another individual, which I decided some time ago. I summarise all of its points below:

- It understands Mr W's complaint to be about both the TRG and DFM investments within his SSAS.
- Much of CMIM's 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 YCP in mid-2013 and knew customers were in the process of establishing CGL SSAS's to invest in TRG. It entered into an introducing agent agreement with YCP. Its only financial benefit arose out of the opportunity to promote its DFM service for the residual funds. It attended numerous meetings with the marketers of the SSAS, including YCP.
- At no point did CMIM recommend or influence cautious investors to invest in TRG. It concluded that TRG was 'risky', only appropriate when considered as part of a diverse portfolio of investments where an effective 'exit' strategy was planned. It promoted its DFM services as an 'alternative' and/or as diversification – as it was a 'low risk' portfolio of Exchange Traded Funds (ETFs) of major, liquid, equity indices and bonds.
- CMIM had no interaction with Mr W or physical handling of any investment, except when it received instructions to allocate funds to its DFM service. A full suitability check relating to the specific trustee was only carried out at that point. To the best of its knowledge all communications were routed through CGL.
- The dates trustees received their 'dear Trustee' letter were very close to the date stated on the Trust Deed to establish the SSAS. This suggests that no reliance was placed on this letter as the trustees had already decided to invest in TRG, and they also had their own statutory duties as a trustee to invest prudently.
- CGL had told them it would accept the investment (after presumably carrying out its own due diligence into TRG), and required them to sign a letter stating they had relied on CMIM's advice - without CMIM's knowledge. It deliberately misrepresented CMIM as the provider of investment advice that was regulated as a personal recommendation and subject to COBS 9 (suitability) in the FCA handbook.
- If CMIM had been asked to provide such advice it would have declined, as *'it did not have an adviser suitably qualified to provide individual advice in relation to a SSAS'.* Its terms of business materially differed from those used in FCA-regulated advice.
- It accepts that TRG appears to meet the legal definition of a collective investment scheme, albeit an *unregulated* one, following *Asset Land v FCA [2016] UKSC 17*), although it didn't realise this at the time.
- YCP refers to CGL as its 'partner SSAS Administrator'. '…[G]*iven their declaration as experts in the field of SSAS pensions, Cantwell Grove's lack of consideration of* [inexperienced investors] *as a suitable candidate for a SSAS Pension was both reckless and negligent.'*
- After approximately 9 months Mr W's DFM arrangement moved to Organic Investment Management, so CMIM has no responsibility for how he was invested after that point.

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

- It disputes that it acted as a 'funnel' for communications between CMIM and Mr W. 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's view of 26 October 2021***

The investigator considered that Mr W's complaint should be upheld for the following reasons:

- CMIM didn't make a personal recommendation, however it did carry out the regulated activity of 'advising on investments'. The 'dear Trustee' letter included a recommendation on the suitability of TRG for the trustees to whom it was directed.
- Although Mr W didn't have direct contact with CMIM, he signed terms of business for it to provide advice - and then referred to that advice in his trustee instruction to invest, as CMIM knew he would do in order to comply with s.36 of PA'95.
- The 'dear Trustee' letter was written in such a way that it would only deter very cautious trustees or those needing short-term access to funds from investing in TRG. So it had the effect of *inducing* other trustees to make the investment. It was in CMIM's interests that to happen and likely its intention to do so. This meant the letter also met the definition of a financial promotion.
- The promotion of UCIS, such as TRG, is restricted under s.238 of FSMA unless an exemption applies. No valid exemption appeared to be available to CMIM in this case, meaning the promotion was unlawful.
- In any event it was difficult to see how CMIM's advice achieved the purpose of s.36 of PA'95, because that envisaged a suitability assessment specific to Mr W's SSAS and therefore a personal recommendation would have been needed. It would also have been consistent with the FCA's principles and rules for CMIM to make such a personal recommendation.
- Mr W had little investment experience and the SSAS was his main pension provision. So CMIM ought to have recognised that an investment in UCIS taking up 75% of the SSAS was wholly inappropriate for him. It could have advised him *not* to invest in TRG without breaching the prohibition on financial promotion.
- As Aviva didn't make Mr W's transfer until several months after he'd received the 'dear Trustee' letter, Mr W would have been able to stop it. And being mindful of the correct advice he should have received, that's what he would most likely have done.

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

- The only client relationship was between CGL, its intermediaries and the trustees, who received the 'dear Trustee' letters hand-delivered to them in their homes. Naming CMIM gave the pension advice they were giving 'the intended air of credibility'.
- The terms of business between CMIM and the trustees was to ensure that they understood the purpose of the 'dear Trustee' letter. It plainly was not contracting to provide advice that was regulated by the FCA, and denied all liability in such respects. So it was not necessary for CMIM to make itself aware of the personal and financial circumstances of the trustees or their attitude to risk, except for the DFM investment.
- It is a fundamental premise in law that an act of providing negligent advice or information is not, in itself, sufficient to determine the cause(s) of financial loss incurred by the recipient of that advice. The courts must consider whether such breaches of duty of care were the causes of the trustee's loss.
- As in its view Mr W did not rely upon the 'dear Trustee' letter, it *'might just as well have not existed'*. That was a view taken by another investigator and so this service was not being consistent in its approach.

- The 'dear Trustee' letter was general in nature, not addressed to a named recipient and, most significantly, not specific as to the actual resort to be invested in or the amount of money involved. It contained ample warnings against investing. *'It was equally unreasonable to make a connection that anyone investing in TRG would not necessarily regard themselves as someone unneeding of easy access to liquid funds'.*
- Before CMIM became involved, the trustees had already taken a series of positive actions to establishing an employer and SSAS under trust deed, and executing all the necessary agreements for the SSAS to operate. It cannot be argued that they were induced to take any of these actions by CMIM.
- The people that promoted TRG to Mr W were the original introducers, and that also extended to CGL given the correspondence it prepared for Mr W to authorise the investment. It did not extend to CMIM, as its 'dear Trustee' letter did not amount to a 'significant step' in him making the investment given the warnings it contained. It also encouraged Mr W to seek independent advice from an IFA.
- Considering all of the above it was wholly unfair and unjust to attribute Mr W's loss 100% to CMIM. CGL described themselves as specialists in the field of SSAS pensions, and should be held responsible for Mr W's losses. They were complicit in every step necessary for Mr W to make the investment, and granted their consent to it, which it was in their interest to do as they received remuneration from the SSAS.

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

**What I've decided – and why**

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

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

I should start by saying 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 – Mr W would be participating in a (named) pooled property scheme where the hotel resort (including shared facilities) would be operated as a whole. CMIM accepts this was a UCIS. It wasn't necessary for CMIM to refer to the number of the apartment that TRG denoted Mr W'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. For one thing, there would have been no need (as it has said) to attend 'numerous' meetings or for it to have '*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 evidently didn't believe advice being given for s.36 of PA'95 was regulated. It said in the terms of business that it wasn't giving *'individual suitability advice…which takes into account your personal financial circumstances'*. And the end of its 'dear Trustee' letter reminds Mr W that it hadn't assessed those circumstances. But my consideration of this point doesn't end there, as what the firm intended doesn't solely determine what rules apply. Firms can even be mistaken as to whether what they are doing is regulated or not, as seems to be the case in respect of the TRG investment here. And COBS 2.1.2R sets out that:

> *'A firm must not, in any communication relating to designated investment business seek to:*
> *(1) exclude or restrict; or*
> *(2) rely on any exclusion or restriction of;*
> *any duty or liability it may have to a client under the regulatory system.'*

The FCA definition of a personal recommendation, with my emphasis, is:

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

The words 'the/that person' indicates a personal recommendation is targeted at one person specifically. Nevertheless the part of the definition before the word 'or' above indicates that it's possible to make a personal recommendation *without* having gone through a process of considering that person's specific circumstances - if the recommendation is presented in such a way that the recipient still reasonably believes the firm is endorsing the investment as being suitable for them in particular. That stands to reason, as one of the objectives of regulation is consumer protection – and the *perception* of the firm's advice to a client is equally important as the actual mechanics of how the advice is given.

I consider I should therefore approach this from the point of view of what a reasonable person in Mr W's position would have perceived from CMIM's advice. That involves weighing up everything, including that CMIM told Mr W it wasn't making a personal recommendation; Mr W knew he hadn't met anyone from CMIM; and no 'fact finding' had been done by it. I accept CMIM's point that this fact-finding would only have happened if Mr W went on to make use of its DFM service. My understanding is that Mr W did invest with CMIM, and although it's not clear when (or if) any further assessment of his circumstances took place, I'm persuaded that it would have been after the 'dear Trustee' letter.

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

But I must emphasize here that the absence of a personal recommendation makes no difference to whether the regulated activity of 'advising on investments' was being carried out – or what 'advice' (in the non-personalised sense) was contained in the 'dear Trustee' letter. And encouraging Mr W in the 'dear Trustee' letter to seek further independent advice doesn't change the advice that was already contained in this letter. Otherwise that rather begs the question of why the advice was even being provided at all.

If there's no personal recommendation, COBS 9 doesn't apply. But that also isn't end of this complaint. It remains open to me to consider whether CMIM's actions were consistent with the regulator's wider principles (set out at PRIN in the rulebook), and other COBS rules that aren't in chapter 9. I'll return to these later in my decision. But first, it's important to note that as TRG was a UCIS, the restrictions to promotion at s.238 FSMA would also apply.

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

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

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

I appreciate CMIM is arguing that Mr W had already decided to invest in TRG – he had completed an indicative investment form – so the 'dear Trustee' letter would not have been pivotal in his thinking. However I don't think this is relevant to what CMIM's *intent* was, as highlighted above. The FCA clarified this further at PERG 8.4.4G, again with my emphasis:

> *'The FCA considers that it is appropriate to apply an **objective** test to decide whether a communication is an invitation or an inducement. In the FCA's view, the essential elements of an invitation or an inducement under section 21 are that it must both have the purpose or intent of leading a person to engage in investment activity and be promotional in nature. So it must seek, on its face, to persuade or incite the recipient to engage in investment activity. The objective test may be summarised as follows. Would a reasonable observer, taking account of all the circumstances at the time the communication was made:*
> *(1) consider that the communicator intended the communication to persuade or incite the recipient to engage in investment activity or that that was its purpose; and*
> *(2) regard the communication as seeking to persuade or incite the recipient to engage in investment activity.'*

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

- the advice being given on a pension, which is typically held for the long-term;
- the risks CMIM highlighted in the letter were being mitigated by the strategy it was proposing to diversify their investment with a DFM arrangement held alongside it;
- no assistance provided (such as by way of showing tolerance for loss in example scenarios) for them to understand whether they met this 'cautious' definition – and to counteract the tendency they may otherwise have to 'follow the herd'.

In relation to the final point, CMIM says that was why it encouraged Mr W to take his own independent advice; as such advice would have analysed his own risk appetite. But I think this misses the point. If that was what CMIM considered Mr W should do, it shouldn't have been commenting in a way that allowed him to infer that he didn't actually *need* that advice.

I 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 also think that given this clear intention, CMIM's 'dear Trustee' letter was a 'significant step' in persuading Mr W to make the investment. Notwithstanding CMIM's observations about how much attention Mr W paid to it at the time, he then signed an investment instruction declaring that he had regard for CMIM's advice. There was, of course, a reason for that: Mr W was required under PA'95 to consider advice before making the investment.

Whether or not Mr W was simply signing where a third party told him shouldn't in my view have diminished the importance that this step should have held to CMIM – or that it ought to have realised its advice was an inducement that meant it was promoting the investment. CMIM seems to have taken the view that both YCP and CGL were inducing Mr W to invest because of vested interests, yet it did 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 – more than a month before Mr W received the 'dear Trustee' letter – FCA revised the list of exemptions at COBS 4.12.4R. The new exemption for 'solicited advice' only allowed a promotion where the communication met all of the following requirements:

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

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

Setting aside that a personal recommendation wasn't made anyway, it's also clear that YCP's introducer agreement with CMIM would always have made this exclusion unavailable – because the introducer, rather than the trustee, was soliciting the advice. The wording of the exclusion itself confirms that advice can also amount to a promotion – even where a third party had previously promoted the investment. That is what happened here: CMIM promoted and advised on the investment (although didn't make a personal recommendation).

<u>Did Mr W qualify for a relevant exemption from the restrictions on UCIS promotion?</u>

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

This leaves the range of exemptions set out at COBS 4.12.1R. Not only was the 'solicited advice' one (mentioned above) unavailable, I also can't see that any of the others were – not least because Mr W 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 January 2014 'clamping down' on UCIS promotion had been well-publicised by the regulator. They meant that the former exemption of *'A person…for whom the firm has taken reasonable steps to ensure that investment in the collective investment scheme is suitable'* was no longer available either.

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

<u>CMIM's position that Mr W paid no attention to or was misled by the 'dear Trustee' letter</u>

I appreciate CMIM finds this frustrating but at a fundamental level, I don't think it can alter the overall conclusion I'm going to reach on this complaint. As I've set out above: whether something counts as an inducement, and is therefore a financial promotion which in this case was unlawful, depends in part on how it would be received by a *reasonable person*; not necessarily someone (Mr W) that CMIM considers wasn't inclined to read the letter.

It also depends on the inducement being a significant step in Mr W making the investment, which again I think it was by virtue of CGL (as the SSAS administrator) requiring this letter to be issued before Mr W invested. And that, again, applies whatever the level of attention Mr W paid to the content of the letter. So it's plainly wrong to say that this letter *'might just as well have not existed',* as it fundamentally affects the outcome of the complaint.

CMIM believes CGL's reference to the 'dear Trustee' letter was intentionally misleading, but I neither find it misleading to the extent CMIM suggests, or in a way which materially alters CMIM's own responsibility in these arrangements. For instance CMIM says that although CGL didn't refer to 'suitability advice', it encouraged Mr W to confirm that he believed CMIM to be an 'appropriately qualified adviser' for the purposes of PA'95 – meaning that in effect Mr W did think he'd received 'suitability advice'.

All of this pre-supposes that Mr W would have understood the difference between 'advice' and 'suitability advice'. He was a lay-trustee, which CMIM knew, and unsophisticated in financial matters. So I think he the most he would have reasonably understood was that he was getting an appropriately qualified opinion on including TRG in his SSAS. That is a correct reflection of the regulations he as trustee was subject to. I can't see that Mr W was misled if CMIM now considers it wasn't appropriately qualified to give that advice.

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 says it attended meetings with the other parties involved where a whole sales and marketing strategy was discussed to attract new clients to invest in TRG. Yes it now says it should have been obvious (to CGL, but strangely not CMIM) that those clients were wholly inappropriate candidates for SSASs. I think these arguments actually serve to demonstrate very well why CMIM shouldn't have got involved in inducing Mr W's investment into TRG at all. It was always apparent that none of the other parties in the transaction were regulated by the FCA and CMIM could not, as a result, expect them to have the same duty of care to clients as a regulated firm.

But the most important for me to reiterate here is that I consider this was a financial promotion which was unlawful, and therefore it should not have happened in any event – irrespective of Mr W's level of attention to the 'dear Trustee' letter.

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

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

But in any event at the time Mr W received his 'dear Trustee' letter, COBS 4.12.5G also said that where a firm communicated any promotion of investments such as UCIS in the context of advice, *'it should have regard to and comply with its obligations under COBS 9'*. So this implies a personal recommendation. This is also clear from the wording of the one exemption allowed where a client genuinely solicits independent advice: the regulator expects a personal recommendation to be made, or the exemption isn't available. Given how restricted the promotion of UCIS had become, the regulator seems to have taken the view that any advice had to be more than simply generic and non-personalised.

It's also difficult to see how advice that was stated in the terms of business to enable a trustee to make investment decisions for his SSAS under s.36 of PA'95 could not be personalised to that trustee. PA'95 itself makes references to suitability and diversification, and says other regulations may specify further criteria. Owing to its small size, most of the regulations in the Occupational Pension Schemes (Investment) Regulations 2005 don't cover Mr W'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.'*

It doesn't seem to be a coincidence that this precise wording was reflected in the investment instructions CGL required Mr W to sign. And I can't fairly say it was possible for Mr W to obtain advice on whether TRG was suitable, and provided adequate diversification for the circumstances of *his* SSAS, without a recommendation being made specifically in respect of the requirements and objectives of *that* SSAS.

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 couldn't track who the end recipients of its 'dear Trustee' letter were. (That is, unless 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 take:

- Decline to get involved in the introducer-adviser relationship with YCP, and therefore come into contact with clients like Mr W at all; <u>*or*</u>
- 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:
  - Taking reasonable care to make a personal recommendation to Mr W, which was tailored to his specific circumstances and thus was more likely to pay due regard to his best interests and treat him fairly.
  - Being mindful that if the recommendation was *not to* invest, this would not amount to promotion and so the restriction wouldn't be breached.
  - Ensure it issued that recommendation to Mr W directly, rather than supplying it via third parties (where there was potentially some doubt whether it would reach Mr W, if the advice didn't give a favourable impression of investing).

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

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

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

As a regulated firm with permission to advise on investments, I'm satisfied CMIM should have been aware of the regulator's views on UCIS and other non-mainstream investments. So it ought to have known that any investment in UCIS taking up the vast majority of a SSAS – which was that consumer's sole pension provision – was plainly unsuitable for a retail investor. Especially one of medium low risk such, as was determined for Mr W's later Organic portfolio (noting that CMIM has provided no evidence of its own assessment).

There was nothing about TRG in particular – being an off-plan, offshore property development subject to a variety of currency, counterparty, construction and occupancy risks – to counter that presumption. It's evident that the whole reason for the SSAS being promoted to Mr W was in order to invest in TRG. And at the time Mr W received CMIM's 'dear Trustee' letter, it seems to have been at an early stage of Aviva carrying out its checks before sending his funds to the SSAS. So I need to consider how he would have acted, if CMIM had made a proper personal recommendation that didn't involve TRG. That might for example have included a recommendation for DFM on his whole portfolio.

Demonstrably Mr W wouldn't have obtained advice that was in favour of investing in TRG, so I find it unlikely that the other parties involved would have been interested in him proceeding to transfer to the SSAS on that basis. It was evidently important to them that the advice he took for the purposes of PA'95 supported the investment decision he made. As I've said above, I think it's reasonable to conclude that any other regulated firm they might have approached instead should have given the same advice as CMIM. Even though there's a possibility they could have tried to locate an more unscrupulous unregulated firm, that begs the question why they didn't go straight to one of those firms in the first place.

Firstly, I think such a firm would have been more difficult to find – I note even CMIM says *'it did not have an adviser suitably qualified to provide individual advice in relation to a SSAS'*, which was plainly what was required here. Secondly, I expect they believed Mr W was likely to take advice from a regulated firm more seriously. And thirdly, they would know pension providers like Aviva had introduced checks after 2013 required by the Pensions Regulator to reduce the possibility of 'pension liberation'. Even if liberation wasn't happening in Mr W's case, he might still be asked if he was being advised by a regulated adviser, for example.

From what I can see in this case, Mr W didn't have particularly close ties to making the investment – such as a connection with friends or family. He had simply been cold-called. He told our investigator himself that he felt rushed into making the investment. As CMIM itself realises, it was brought on board to 'legitimise' Mr W'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 Mr W. And once that opinion had been given I can't safely say it could easily have been 'undone' by the opinion of an unregulated adviser hastily brought in afterwards.

I'm satisfied the more likely outcome is that any further attempts to secure Mr W's TRG investment would have failed in the light of CMIM's advice. As a result, he would never have had a reason to confirm his agreement at a later stage for his Aviva funds to be transferred, and he would have remained in the Aviva plan.

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

I didn't know whether Mr W intends to complain about CGL's actions as administrator, but the Financial Ombudsman Service does not cover the activities of occupational pension scheme administrators. In any case there is a higher bar against financial advisers, and this is reflected in the way they are regulated and rules they must follow. So it's also understandable that Mr W has chosen to bring this complaint to us.

CMIM says that CGL was *'reckless and negligent'* given its professed level of experience. I understand the argument that it could have been apparent to CGL that the 'dear Trustee' letter couldn't satisfy the requirements (which it identified itself) of PA'95. Nevertheless CGL didn't act as a professional trustee. CMIM was the one providing FCA-regulated advice to Mr W 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.

CMIM also says that Mr W'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. I can't see a basis here on which it would be fair or reasonable for me allow CMIM to avoid the consequences of its own failings, even in part.

I agree that *if I were* satisfied that Mr W would have chosen to invest in TRG 'come what may', it wouldn't be fair for me apportion any responsibility for compensating Mr W to CMIM. It's not that principle that is in dispute. Rather it is whether I can, in fact, fairly say that on the balance of probabilities Mr W would still have gone ahead with transferring his pension in order to invest in TRG, had CMIM treated him fairly. I don't need to be 100% sure of this in order to make a finding that CMIM is responsible for Mr W's losses. But I am persuaded of it on the balance of probabilities.

If an investigator has taken a different view on causation on another complaint, then CMIM ought to bear in mind that either party can refer the initial view to an ombudsman. I may not have agreed with the initial view on the other complaint it has mentioned.

I think the effect of CMIM placing a barrier in Mr W's way would have been more likely to deter his ultimate investment than not. I'm satisfied it's likely he would have heeded the proper advice he was told he would get, and was entitled to expect, from CMIM.

Mr W received the 'dear Trustee' letter and signed the investment instruction *before* his funds were even transferred across by Aviva. So I don't agree CMIM's involvement came too late for it to have caused Mr W’s losses. The conclusion I’ve reached is that no funds would have arrived in the SSAS from Aviva because Mr W would likely have aborted that transfer.

**Putting things right**

My aim in awarding fair compensation is to put Mr W in the position he would have been in, had Mr W not gone ahead with the transfer from Aviva to the SSAS at all.

Central Markets Investment Management Limited must therefore contact Aviva to obtain a *notional value* for Mr W’s policy as at the date of my final decision, assuming that it continued to be invested in the same funds after it was transferred-out in July 2014. As a condition of accepting this decision Mr W will need to give CMIM his authority to obtain this information. CMIM should check that no tax-free cash or income payments have been taken – if they have, the gross amounts of these payments will need to be allowed for accordingly.

This *notional value* should be compared with the *actual value* of Mr W’s CGL SSAS (including any associated SIPP if that now contains the proceeds of the CMIM DFM funds) as at the date of my final decision. Any currently outstanding administration charges yet to be applied to the CGL SSAS should also be deducted from the *actual value* first.

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

- 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.
- Alternatively, if CMIM is unable to buy those investments from CGL SSAS it should give them a nil value as part of determining the actual value. It’s also fair that Mr W should not be disadvantaged while he is unable to close down the CGL SSAS and move to a potentially cheaper and more strongly regulated 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 also covers five years’ worth of future administration fees at the current tariff for the CGL SSAS as part of the compensation, to allow a reasonable period of time for the CGL SSAS to be closed.

In response to the investigator’s view CMIM has suggested that it may be able to use an independent valuer for the investment, or agree a value with CGL (which is more than nil value), even if it is not actually buying the investment from the SSAS. The value required here is not the opinion of someone who is not actually prepared to (or unable to) buy the investment from the SSAS, as it will be dictated by whether there is any market for the investment at all. And that will be affected by what I understand are acknowledged difficulties in establishing proper ownership and receiving income from the investment. I also cannot anticipate whether TRG will be permitting that ownership to change hands because clearly legal processes would be involved.

To the extent that it is possible to transfer ownership, if CMIM believes that the investment has value then it can benefit by buying the investment out of the SSAS. But if CMIM is not taking ownership of the investment, and as I’m not aware that the investment would be attractive on the open market in its current position, it may ask Mr W to provide an undertaking in return, to account to it for the net amount of any payment he may receive from the investment in future.

The aim of this undertaking is to avoid double-recovery. If CMIM wishes to do this it should be done after compensation is paid – and CMIM will need to meet any costs in drawing up the undertaking. It is not my role to set the terms of the assignment and undertaking, but rather to explain its aim in achieving overall fairness for both parties. If CMIM asks Mr W to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

*Payment of compensation*

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

If CMIM is unable to pay the compensation into the CGL SSAS, it should pay that amount direct to Mr W. But had it been possible to pay into the CGL SSAS, 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 W's actual or expected marginal rate of tax at his selected retirement age. Here, it's reasonable to assume that Mr W is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%.

CMIM must also pay Mr W £300 for distress and inconvenience in view of the disruption caused to his retirement planning.

Details of the calculation should be provided to Mr W in a clear, simple format.

*If Aviva cannot provide a notional value*

In this eventuality, CMIM will need to use a benchmark to provide a *fair value* for Mr W's investment instead, and use it in the same way in its calculations. CMIM responded to the investigator's view by suggesting that it would use the FTSE UK Private Investors Income Total Return Index in Mr W's and all other similar cases. But in my view in order to arrive at fair and reasonable compensation an appropriate benchmark will depend on what we think is likely to have been a consumer's contemporaneous attitude to risk.

Mr W was 47 at the time of advice and not particularly close to retirement. We know that he had a medium low level of risk when he applied for the Organic DFM portfolio, but in my view this assessment was likely reached out of awareness that greater risks were being taken elsewhere in the SSAS. Taking all of this into account, and only if Aviva **cannot** provide a notional value – which remains the preferred method of redressing this complaint – I consider that the FTSE UK Private Investors Income Total Return Index would be the appropriate benchmark to use in this case.

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. Although it is called an income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr W's circumstances and likely risk attitude.

It doesn't mean that Mr W would specifically have made investments that exactly mirrored the return on this index. For that reason CMIM should not be deducting investment costs or other charges from the benchmark. That misses the point, as the view I'm taking here is that the *sort of* funds Mr W would have remained invested in with Aviva would typically have performed broadly in line with this benchmark; notwithstanding the level of charges which of itself would be lower than those incurred in the SSAS. It is a proxy that is being used for the purposes of compensation.

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

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

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

**My final decision**

I uphold Mr W's complaint and award compensation as set out in the 'Putting things right' section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 25 March 2022.

Gideon Moore
**Ombudsman**