DRN-3400238

The complaint

Miss R's complaint is about shares she brought through Templeton Securities Limited (at the time an appointed representative of Alexander David Securities Limited). Miss R says the shares weren't suitable for her and Templeton Securities didn't act in her best interests.

What happened

I issued my provisional decision on this complaint on 22 February 2022. I set out the background and my provisional findings. I've repeated what I said here.

'*Miss R says she was advised to transfer her existing personal pension to a self invested personal pension (SIPP). The adviser also advised her to invest in shares in two companies – Emmit plc and Eligere Investments plc.*

Miss R completed Templeton Securities' Private Client Portfolio Agreement and Application Booklet on 9 May 2014. Under the heading, 'What to expect as a client of Templeton Securities', it said:

'We understand that individual client investment needs vary with differing goals and as an independent stockbroker, Templeton Securities aim is to provide the best private client investment service with clarity and vision whilst tailoring our advice to suit individual client needs.

To understand your investment requirements and to create your personal portfolio, we will need to know the details of your financial background and your plans for the future which will enable us to advise a tailored solution to suit your aims and objectives. It is therefore imperative that you fully complete this Application as failure to do so may mean that we are unable to affect a suitable portfolio or offer an appropriate service.'

And, under the heading, 'Important information regarding your application', it said that Templeton Securities was required under the Financial Services and Markets Act 2000 (FSMA) to provide suitable investment advice and services, based on the information Miss R provided about her circumstances.

Miss R had to fill out her personal details. In the section headed 'Important Financial information' the form said:

'In order for us to properly assess your ability to bear investment risks in relation to the services we provide, we need to understand the composition of your assets and liabilities, and income and expenditure. We are required to take this into account when assessing the suitability of our investment management service we provide.'

Miss R didn't own her own property, she had no savings or other assets and her total net worth (she had no long or short term liabilities) was £23,000 which was the value of her pension plan. Her total monthly income was £1,196 pm and her total expenditure £850 pm, giving her a surplus of £346 pm. Under investment risk and objectives she indicated she was a novice investor in equities, fixed interest and alternative assets but intermediate for funds.

Both Medium and Medium/High were ticked for her preferred level of portfolio risk. She indicated her time horizon was more than seven years and 'Advisory Broking' as her previous level of investment experience. Details given earlier in the form recorded that she was 50 years old, single, and looking to retire in 2024.

Under 'Acceptance Form' it said, amongst other things:

'I/We wish Templeton Securities Limited ("Templeton") to advise on a portfolio of investments for me in accordance with the Terms and Conditions, a copy of which we have received and which I agree to.'

I've referred below to what some of those term and conditions said.

Miss R's account with Templeton Securities was opened and £23,840 was transferred into it. Templeton Securities sent Miss R a welcome letter on 20 May 2014. It included the following:

'We note your interest in high risk products. Investments in smaller companies, in particular 'Penny Shares' and investments that are not readily realisable e.g. small unquoted companies, involve a high risk that all or part of your investment may be lost. You may also have difficulty in selling these shares at a reasonable price and in some circumstances you may not be able to sell at any price. There can be a big difference between the buying and the selling price and if they have to be sold immediately, you may get back much less than you paid for them.'

On 22 May 2014 Miss R sent an email to Templeton Securities. After giving her name and reference details the email said:

'I wish to invest £11,765.00 in Eligere investments pic (ELI) gxg listed securities with a 55 pence limit for T3 settlement.
I wish to invest £11,765.00 in Emmit pic (EMT) aim listed securities with a £1.75 limit for T1 settlement.
Please advise me via email when this has been transacted.'

The investments were made on 22 May 2014.

Templeton Securities wrote to Miss R on 11 September 2014. The letter, headed 'Appropriateness of your Investment – Emmit', said:

'We are writing to draw your attention to the investment of your pension in the above type of stocks and believe that you need to consider whether or not you feel it's appropriate to invest in such high-risk investments.
We fully understand that you have purchased these 'Execution Only but wish to advise that in the provision of this execution, Templeton Securities is not required to assess the suitability of the service provided or offered and that therefore, as a client, you do not benefit from the corresponding protection of the relevant FCA [Financial Conduct Authority] Conduct of Business Rules.'*

The FCA issued a statement about the promotion of shares in Emmit on 31 October 2014. It said it had been made aware that individuals were being encouraged to transfer money from their work pension schemes into SIPPs and use that money to buy shares in Emmit. It said some investors were being offered "cash back" on their investments in Emmit of up to 30% of the transfer value, paid by a third party, as an incentive to do this. Some investors appeared to have invested 100% of their pension assets into Emmit shares and could suffer significant financial loss if they'd done that without fully understanding what they were doing.

Trading of shares in Emmit was suspended in October 2014 and the shares were delisted in May 2015. The exchange on which the Eligere shares had been listed, GXG, closed in August 2015 which meant that those shares couldn't be traded. Both investments are now valued at zero.

Miss R lodged a complaint with Templeton Securities through her representative, a claims management company, in August 2018. The complaint alleged that Miss R was given unsuitable advice to transfer her pension and invest in unsuitable assets, as she was a low risk investor with very little investment experience. The representative argued that Templeton Securities had failed in its regulatory obligations.

Templeton Securities didn't uphold the complaint. It said it hadn't provided Miss R with any financial advice and had acted on her email instruction to invest. It had opened and operated a trading account in line with its terms and conditions. Execution only investing wasn't precluded, as was the case with the Emmit and Eligere shares – the terms and conditions of Miss R's account say advice won't be given where the client isn't expecting it.

The complaint was brought to this service. Our investigator upheld it. In summary he said Miss R's complaint wasn't isolated and what had happened to her appeared to have happened to a number of investors at about the same time. Given her lack of investment experience, it seems unlikely that she'd suddenly decide to invest her life savings in two obscure shares. Moreover, the language of the email was technical in nature, and suggests knowledge of securities that Miss R didn't have. And we'd seen other emailed instructions with very similar wording sent on the same day. Templeton Securities should've concluded there was likely some connection between supposedly disparate customers with little investment experience all spontaneously deciding to invest in the same, non mainstream, shares with emails sent on the same day with identical wording.

Templeton Securities wasn't obliged to carry out all instructions and had some discretion. It was also subject to the regulator's Treating Customers Fairly Principles. Principle 1 states that a firm should conduct its business with integrity. Principle 6 says a firm should pay due regard to the interests of its customers and treat them fairly. Templeton Securities should've concluded that a third party, most likely an unregulated firm, was responsible for Miss R's investment instructions and carried out further investigations. Had it done so, and concluded that Miss R and others were acting on instructions from an unregulated individual acting in breach of the general prohibition in section 19 of FSMA, it would've been obvious that the investments were likely to be unsuitable. Templeton Securities should've exercised its discretion not to act on Miss R's instruction. The investigator didn't think Miss R would've found a way to invest anyway, particularly as she'd denied getting any incentive payment.

Templeton Securities didn't accept the investigator's view. As agreement couldn't be reached the complaint was referred to me to decide.

What I've provisionally 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.
We can consider a complaint under our compulsory jurisdiction if it relates to an act or omission by a firm in the carrying on of one or more listed activities, including regulated activities (see Dispute Resolution (DISP) 2.3.1R).

Regulated activities are specified in Part II of the Regulated Activities Order (RAO) and include advising on investments (article 53 RAO). And arranging deals in investments (article 25 RAO). So I can consider the complaint either about advice – or the omission to provide

advice. Or about arranging the purchase of the shares if it was an execution only sale.

I'm required, under DISP 3.6.4R, in considering what's fair and reasonable in all the circumstances of the case, to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time. Where the evidence is incomplete, inconclusive, or contradictory, I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of all the available evidence and the wider circumstances.

The documentation and literature that was provided at the time the Private Client Portfolio account was opened with Templeton Securities clearly described it as providing an advisory service. But the terms and conditions said that Templeton Securities was able to accept execution only instructions in some circumstances. I've considered whether Templeton Securities acted correctly by accepting Miss R's email of 22 May 2014 as an execution only instruction to purchase shares in Emmit plc and Eligere Investments plc. I've referred below to what I see as the central provisions of the terms and conditions of Miss R's agreement with Templeton Securities.

Clause 3 said:

'3. The services we will provide

3.1 If you are designated as an execution-only client or if you have not supplied us with sufficient information (either orally or in writing) about your investment objectives, financial circumstances and the degree of risk you are prepared to accept ***or when, even though you have previously supplied us with information, we may reasonably believe that you are not expecting us to advise you about the merits of a particular transaction in a "non-complex" financial instrument, then we will not make any personal or product investment recommendations*** *[my emphasis]. Nothing in our literature or in these Terms & Conditions should be treated as a solicitation or recommendation to buy, sell or maintain any product. We will action all instructions on an 'execution-only' basis. This means that we are only able to act on the instructions that you provide. We cannot give you advice about what instructions you should give us. You are responsible for the investment decisions that you make when you engage our services as an execution-only customer. We do not accept responsibility on a continuing basis for advising you on the composition of your portfolio.'*

Miss R hadn't been designated as an execution only client. And she'd supplied information about her investment objectives, financial circumstances and the degree of risk she was prepared to accept. But, as I've highlighted above, clause 3.1 provided for the situation where, even though information had been given, it might be reasonable for Templeton Securities to believe that Miss R wasn't expecting it to advise about the merits of a particular transaction in non complex financial instrument. In that scenario Templeton Securities wouldn't make any recommendations. 'Non complex' wasn't defined. But I think, taking into account what COBS 10.4.1R said (as I've set out below), investments in Emmit and Eligere shares were non complex financial instruments.

Clause 3.1 was echoed in clause 6, headed, 'Appropriateness'.
'6.1 In providing services other than investment advice management, we may be subject to an obligation under Applicable Regulations to assess the appropriateness of the contemplated product or service for you by determining whether you have the necessary experience and knowledge in order to understand the risks involved in relation to the specific type of product or service offered or demanded. In such circumstances, where on the basis of information received we consider that the contemplated product or service is not appropriate for you, we will provide you with a warning to that effect.'

'Applicable Regulation' was defined as meaning 'FCA rules or any other rules of a relevant regulatory authority or any other rules of a relevant Market and all other applicable laws, rules and regulations as in force from time to time'.

I think that's a reference to COBS 10. I've considered that and in particular COBS 10.4 which is headed 'Assessing appropriateness: when it need not be done'. COBS 10.4.1R (1) said (at the time):

'A firm is not required to ask its client to provide information or assess appropriateness if:
(a) the service only consists of execution and/or the reception and transmission of client orders, with or without ancillary services, it relates to particular financial instruments and is provided at the initiative of the client;
(b) the client has been clearly informed (whether the warning is given in a standardised format or not) that in the provision of this service the firm is not required to assess the suitability of the instrument or service provided or offered and that therefore he does not benefit from the protection of the rules on assessing suitability; and
(c) the firm complies with its obligations in relation to conflicts of interest.'

The particular financial instruments, referred to in subsection (a), are set out in COBS 10.4.1R (2) and include shares admitted to trading on a regulated market (for example, AIM).

*I think (a) is satisfied. I haven't seen anything to suggest there was any conflict of interest as mentioned in (c). But I don't think (b) was met. Templeton Securities has pointed to its terms and conditions (see, for example, clause 6.4 mentioned below). But, while a warning in standardised form was permitted, I think (b) requires a warning to be given at the time of the particular service. It says, 'in the provision of **this** [my emphasis] service'. That means a specific warning (albeit that in might be in a standardised format) has to be given at the time. And that's consistent with Templeton Securities' own terms and conditions – see clause 6.4 which says:*

*'Please note, however, that we will not advise you about the merits of a particular transaction if we reasonably believe that, when you give the order for that transaction, you are not expecting such advice and are dealing on an execution-only basis. Where the transaction relates to noncomplex financial instruments such as shares, bonds and UCITS, we will inform you **at the time** [my emphasis] that we will execute your order on that basis and we will not be required to ensure that the transaction is suitable or appropriate for you. Please note therefore, that you will not benefit from the protection of the relevant FCA Rules requiring us to assess the suitability or appropriateness of the transaction for you.'*

I haven't seen that Templeton Securities gave Miss R the requisite warning at the time.

That said, I don't think much turns on that. I don't think a failure to give a warning at the time (as required by COBS 10.4.1R and Templeton's own terms and conditions) means that Templeton Securities couldn't accept an execution only instruction from Miss R. I think the more important question is whether, as clause 6.4 (and clause 3.1) required, Templeton Securities reasonably believed that Miss R wasn't expecting advice and was dealing on an execution only basis.

I note here what our investigator said about the email of 22 May 2014 and its wording. I agree the wording was, in some respects, technical. I don't think anyone without some financial services experience, including in securities transactions, would be familiar with or understood how a request to purchase shares with a '55 pence limit for T3 settlement' or a '£1.75 limit for T1 settlement' would operate. Nor do I think a novice equities investor such as Miss R would've necessarily understood what an AIM or GXG listed security was and

how that differed from a stock that was listed on, for example, the London Stock Exchange. I note Miss R had indicated she had some advisory broking investment experience. But no further details were given and I'm not sure how credible that was.

But, in any event, I don't think the wording of the email on its own meant that Templeton Securities should've queried Miss R's instruction. If anything, it might reinforce Templeton Securities' belief that Miss R wasn't expecting advice. It might appear she'd taken advice from another party. On the face of it, it appeared to be a valid instruction. It was clear and specific. It looked like Miss R had made a settled decision to invest in Emmit and Eligere. I don't think there's anything in her email which suggests she was expecting Templeton Securities to give her any advice about the transactions. I think the indication is that she'd made a decision to invest and she expected Templeton Securities to simply comply with her instruction and go ahead and make the purchases.

And clause 4.9, about 'Specific client instruction', said:

'4.9.1 Where you give us a specific instruction as to the execution of an order, we will execute the order in accordance with those specific instructions. Where your instructions relate to only part of the order, we will continue to apply our order execution policy to those aspects of the order not covered by your specific instructions.

4.9.2 You should be aware that providing specific instructions to us in relation to the execution of a particular order may prevent us from taking the steps set out in our order execution policy to obtain the best possible result in respect of the elements covered by those instructions. We reserve the right to refuse specific instructions from you regarding the execution of your order, where in our opinion such instructions are not practicable or may be contrary to your best interests.'

I don't overlook what the investigator said about the other similar emails and which I've referred to below. But, just looking at Miss R's email for the time being and in more or less isolation, I don't think Templeton Securities acted incorrectly in treating it as an execution only instruction.

That meant, and in accordance with clause 3.1 (see the penultimate sentence I've quoted from that provision above), Templeton Securities didn't accept responsibility for the investment decision which Miss R had made when she'd engaged Templeton Securities as an execution only customer.

But I don't think that's the end of the matter. I've gone on to consider if Templeton Securities should've accepted Miss R's instruction. As I've gone on to explain, I think there were wider factors which should've led Templeton Securities to question or look more closely at her instruction and whether it should comply with it.

I'd reiterate (as set out above) that I'm required to decide what's fair and reasonable in all the circumstances of a case. Templeton Securities received a significant number of requests to open this type of advisory account with it, all within a relatively short period. And, very shortly after the accounts were opened, emailed instructions with almost identical wording were sent to Templeton Securities instructing investment in the one or two particular and niche shares.

By the time Templeton Securities received Miss R's instruction (22 May 2014), it had received some six or so emails only the previous day from different investors. They were all instructions to invest in these shares, with near identical wording, and sent to the same person at Templeton Securities (who I understand held the CF30 function with Alexander David Securities Limited at that time). This was all very shortly after the accounts had been

opened. Miss R's emailed instruction was one of at least three very similar, if not identical, instructions received on 22 May 2014.

To date we've received over 20 complaints against Templeton Securities, representing Alexander David Securities Limited, about very similar transactions that all happened at around the same time. From what I've seen, in all cases emails with the same or very similar investment instructions were sent to the same person at Templeton Securities. And these are only the cases where investors have complained and the matter has been referred to us. I think it's very probable that there are other instances of which I'm not aware and where no complaint has been made and referred to us.

Templeton Securities' primary duty was to implement its client's instructions. But that duty wasn't unqualified.

First, Templeton Securities had a broad contractual discretion whether to accept any order or instruction from Miss R. Clause 3.7 said:

'We may, at our discretion, decline to accept any order or instruction from you or instigate certain conditions prior to proceeding with your order.'

Secondly, Templeton Securities, as a regulated firm and in accordance with its own terms and conditions, had an obligation to comply with the FCA's rules. Clause 2.2 said:

'These Terms and Conditions and all transactions are subject to Applicable Regulations. The term 'Applicable Regulations' means:

a. the rules of the Financial Conduct Authority ("FCA") including the Handbook issued by the FCA ("FCA Rules") or any other rules of a relevant regulatory authority;
b. the rules of a relevant stock or investment exchange; and
c. all other applicable laws, rules and regulations as in force from time to time.

This means that:

> *(i) if there is any conflict between these Terms and Conditions and any Applicable Regulations, the latter will prevail;*
> *(ii) nothing in these Terms and Conditions shall exclude or restrict any obligation which we have to you under any Applicable Regulations;*
> *(iii) we may take or omit to take any action we consider necessary to ensure compliance with any Applicable Regulations; and*
> *(iv) such actions that we take or omit to take for the purposes of compliance with any Applicable Regulations shall not render us or any of our directors, officers, employees or agents liable to you.'*

The duty to comply with the FCA's rules was recognised in the terms and conditions as an overriding duty that prevailed over anything to the contrary in those terms. And that Templeton Securities could take, or omit to take, any action it considered necessary (such as not complying with a client's instruction) to ensure compliance with its regulatory obligations.

The FCA is responsible for consumer protection which it seeks to achieve through the application of its Rules, including its Principles for Business (PRIN). Templeton Securities was providing regulated financial services and was bound by these Principles and Rules (for example COBS) and as set out in the terms and conditions.

In deciding what is fair and reasonable, I've thought about the Principles. I've borne in mind

what the courts have said (see, for example, Ouseley J's comments in British Bankers Association v The Financial Services & Anor [2011] EWHC 999 (Admin)) about how the Principles operate in deciding whether Templeton Securities complied with them, taking into account what I've said above about the wider circumstances and in the context of the instruction Miss R gave on 22 May 2014. I think Principles 2, 3 and 6 are particularly relevant here. They say:

'Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.

Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems. Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly.'

Here Templeton Securities had received at least six emails the previous day and Miss R's email was one of at least three instructions given the next day; all the emails were sent to the same person; there was a pattern of remarkably similarly worded execution only instructions from different clients with SIPP accounts. All wanted Templeton Securities to process purchases in the same niche shares, traded on non mainstream markets.

I think in these circumstances a stockbroker ought reasonably to have been alerted to the possibility that something unusual might be going on. In my view, the circumstances ought to have been a trigger for Templeton Securities to intervene in the normal processing of the transactions and take a closer look behind them. If it had done so, it would have identified that the instructions were coming from ordinary retail customers who:

- *had all recently opened advisory accounts and yet within a short period of time from opening were all sending execution only instructions to make their first investment;*
- *were investing the majority of the money in their SIPP in these same niche shares presenting significant risks which weren't the type of investments that would normally be expected to form the significant part of anyone's pension provision;*
- *had sent almost identically worded instructions to invest in the same niche share(s), suggesting these retail consumers may be being systematically advised by someone to buy these shares and on how to go about it.*

And that was in the context that:

- *Only an FCA authorised firm was lawfully able to give investment advice. And a regulated firm giving investment advice would usually arrange the transactions themselves so as to charge dealing commission. It raised the possibility of serious malpractice if an unauthorised person was giving investment advice in breach of section 19 of FSMA.*
- *The number of grouped instructions to purchase niche shares, specifying particular days for settlement at particular prices, was highly unusual for seemingly unconnected retail customers. Including settlement details in their instructions was not only unusual but served no obvious purpose from a pension investor's point of view.*
- *The possibility that the advice to buy the shares was coming from an unauthorized person was increased by the riskiness of concentrating pension funds in the shares of one or two small, obscure companies: a FCA authorised firm would have regulatory obligations not to give unsuitable investment advice, and would be unlikely*

to find such shares a suitable pension investment for many (if any) of their clients, let alone a string of clients, and all at around the same time.

In my view, the circumstances surrounding the receipt of Miss R's instruction ought reasonably to have caused Templeton Securities to take a closer look at the transaction.

Had it done so and looked at the information it already had available through the account opening documentation, it would've seen that Miss R's only asset was her pension plan with a value of £23,000. She had a relatively modest income, only a small amount of disposable income, no savings, other investments or assets and she didn't own her own property. She'd indicated a medium or medium high attitude to risk. She didn't have any capacity for loss and she apparently wanted to invest all of her pension fund and her entire net worth in two niche shares which weren't traded on mainstream markets and when she had no experience of investing in equities.

I understand that Templeton Securities has said that the unregulated firm wasn't known to it. And it didn't have any discussions or agreement with it or any arrangement of any kind for the introduction of business or otherwise. According to what Miss R said on her complaint form, she'd been in contact with Templeton Securities first who'd then introduced her to another adviser. And it was that adviser who recommended the transfer and subsequent investments in Emmit and Eligere. In other cases we've seen I don't think it's been suggested that the introduction to an adviser (who was unregulated) came from Templeton Securities itself. But I don't think anything turns on this. I haven't looked at the complaint on the basis that Templeton Securities had any link with whoever advised Miss R to transfer and invest in Emmit and Eligere. I've considered the complaint from the perspective of what Templeton Securities should've done when it received Miss R's instruction to invest in Emmit and Eligere.

I think, if Templeton Securities had looked into things further, it would've discovered, relatively easily, that in Miss R's (and others') case, an unregulated firm, was the common denominator and that the many and similarly worded instructions had come from that firm. Had Templeton Securities queried the instruction with Miss R and explained its concerns, I can't see that she'd have had any reason not to tell Templeton Securities who'd suggested the investment.

Giving investment advice and arranging deals in investments are regulated activities. Section 19 of FSMA) – the general prohibition – says that no person may carry on a regulated activity in the UK, or purport to do so unless they are an authorised person. But I don't see that Miss R (or other ordinary retail clients) would've been aware of the general prohibition or that the business she was dealing with wasn't an authorised firm and the significance of that. I don't doubt that Miss R (and others) would simply have trusted the unregulated firm and assumed that its adviser was acting lawfully and in her best interests.

If Miss R had said that another business was involved and, if Templeton Securities had checked out that business' status, it would've found out that it was unregulated. Knowing that an unregulated firm was involved ought, I think, to have rung alarm bells with Templeton Securities – it seemed an unauthorised person was advising Miss R (and others) to invest in niche, high risk shares.

I think Templeton Securities would've been able to identify from a fairly cursory look at the information it held about Miss R's circumstances, that the investment advice she'd received – to invest a very substantial sum, representing her entire pension fund and only asset, in two niche high risk shares – was wholly unsuitable for her. And that she wasn't, for her own particular reasons, instructing an unsuitable order, given that so many other, relatively new (and advisory) and inexperienced clients were giving virtually identical

instructions in similar circumstances. I think Templeton Securities ought to have realised that it was likely that a third party was behind all the highly similar and somewhat unusual instructions. At that point I think Templeton Securities should've exercised its discretion to decline to accept the instruction.

Against that background, I don't think Templeton Securities met its obligations under Principles 2, 3 and 6. If it had conducted its business with skill care and diligence and taken reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems, it should've identified the high number of execution only requests from relatively new advisory clients. And that there were striking and unusual similarities in those requests. I think that should've led Templeton Securities to take a closer look at the instructions.

If it had done so, Templeton Securities would've discovered that Miss R (and others) were being advised by an unregulated adviser who was assisting them in making high risk and unsuitable investments. Given the clear risk of consumer detriment, Templeton Securities, and acting in Miss R's best interests, should've exercised its discretion and declined to accept her instruction.

Templeton Securities did write to Miss R about her investment in Emmit shares and the fact that it was high risk in September 2014. Templeton Securities has said, that at the time of the share purchases, there was no indication that a third party was involved. And that only came to light when the FCA issued its warning. But that wasn't until October 2014 so something else must have prompted Templeton Securities to write. It's told us that it wrote to customers following a review carried out by its compliance officer because of the number of transactions in Emmit and the rumours that were circulating around the market about people investing in it.

If Templeton Securities did write to some customers and for the reasons given, I think that supports what I've said – that Templeton Securities should've realised from the volume of similar, if not identical, business that it was receiving that something unusual and untoward might be going on and which required further investigation.

Principle 3 requires a firm to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems. I think Templeton Securities should've had systems and controls in place which, in the circumstances I've set out above, would've meant a pattern was spotted at a very early stage.

Templeton Securities should've exercised its discretion under clause 3.7 to decline to carry out Miss R's instruction to purchase the Emmit and Eligere shares. It should've realised that there was a real risk of consumer detriment. It was in a position to prevent the purchase of the shares. Instead it facilitated Miss R's investments. I think Templeton Securities failed in its regulatory obligations by acting on Miss R's instruction.

I've gone on to consider what Miss R would've done if Templeton Securities had declined to carry out her instruction.

I think a refusal and an explanation from Templeton Securities as to why it wasn't prepared to carry out Miss R's instruction would've carried weight. And given her pause for thought about whether investing in Emmit and Eligere Investments was really a good idea.

Depending on how Templeton Securities might have put things to Miss R and what may have been said about the dangers of accepting advice from an unauthorised person and the high risk nature of the investments, Miss R may have decided immediately that she didn't want anything further to do with the unregulated firm. I recognise she may have been dealing

with the unregulated adviser for some time and presumably trusted them. But I think an indication from Templeton Securities, a regulated firm, that what she was being told to do by someone who wasn't authorised to give financial advice anyway, is likely to have caused Miss R to think again about the wisdom of investing as had been suggested. I think, in that scenario, Miss R would've asked Templeton Securities for advice as to how to invest instead and in line with her attitude to risk and circumstances.

If Miss R had still wanted to proceed as planned then, as she'd already transferred funds to Templeton Securities and if it had declined to purchase the shares, she'd have needed to have found another broker, asked the SIPP provider to get the money back from Templeton Securities and then transfer it into the new account. I think that would've caused practical difficulties for Miss R and is likely to have been enough to have made her think again.

I'm aware that in some cases investors received a payment in return for investing. Miss R has said that she didn't get any payment. We've asked her for copies of her bank statements to verify what she says. I'm issuing this provisional decision subject to sight of that further evidence and we'll let Alexander David know what we find out before any final decision is issued. But, as things stand, it doesn't seem that Miss R was motivated by the promise of an incentive payment.

As I've said, Templeton Securities wrote to Miss R about her investment in Emmit in September 2014. As that letter was sent before the Emmit shares were suspended (in October 2014), there may be some argument that Miss R could've done something to mitigate her position by trying to sell the shares. Templeton Securities has said that the share price was then 132.50p. A sale at that price would still have represented a loss for Miss R but she'd have avoided the total loss of her investment which she now faces.

But selling would've crystallised a loss. And I don't know if Miss R would've been able to sell and, if so, at what price. A sudden and large volume of sell instructions might not have been possible for the market to accommodate and is likely to have impacted adversely on the share price – I bear in mind that Templeton Securities appears to have written to other investors at about the same time.

More importantly, I don't think the letter was sufficient to prompt investors to act. It was relatively brief. It did draw to Miss R's attention the high risk nature of the investment. And that Templeton Securities hadn't assessed suitability. But the letter didn't indicate there were any particular problems with the investment. I don't think the wording was sufficiently strong or specific such as ought to have prompted Miss R to act. Further the letter only referred to Emmit – Eligere wasn't mentioned. I don't think the letter meant that Miss R should've acted to mitigate her losses. Or that her losses should be limited to what they'd have been if she'd sold her Emmit shares on receipt of that letter.

I've also mentioned above the welcome letter sent to Miss R on 20 May 2014. It referred, in particular, to 'Penny Shares' and investments in small unquoted companies. Both Emmit and Eligere were public limited companies and their shares were traded on recognised (albeit non mainstream) markets. I don't think Miss R would've realised the warnings given in that letter might apply to the investments she went on to make in Emmit and Eligere.

Lastly, and for completeness, I've also considered the application of sections 27 and 28 of FSMA. And, in doing so, I've borne in mind the findings in the Court of Appeal case of Adams v Options UK Personal Pensions LLP (formerly Carey Pensions UK LLP) [2021] EWCA Civ 474.

In summary, section 27 may apply where an authorised person (here Templeton Securities) makes an agreement with another person (Miss R) in the course of carrying out a regulated

activity, which was a consequence of something said or done by a third party (here the unregulated firm) acting in breach of the general prohibition (section 19 of FSMA). Section 27 provides that an agreement to which it applies is unenforceable against the other party and sets out what the other party can recover. Section 28 provides the court with the discretion to allow an agreement to which section 27 applies to be in any event enforced, if it considers it is just and equitable to do so.

Given the facts of Miss R's complaint and the surrounding circumstances as I've set out above, I think it's most likely the unregulated firm was in breach of the general prohibition by arranging deals in and advising on investments – articles 25 and 53 of the RAO. And I think the advice and the unregulated firm's actions in providing Miss R with her draft purchase instruction clearly played a crucial part in her buying the shares. As I've explained, I think it's unlikely that so many ordinary retail clients would suddenly all unilaterally decide to invest in these little known niche shares at around the same time. I think a court would find that section 27 applies, and Miss R can (subject to section 28), recover the monies she invested through her agreement with Templeton Securities when it accepted her instructions to purchase the shares and the investment losses she sustained.

I've gone on to consider section 28. I think the overriding question is set out in section 28 (3) – that is whether it would be 'just and equitable in the circumstances of the case' to allow enforcement of the agreement or retention of the price paid. The significance of sections 28 (4) and (6) is to require the court to 'have regard' to whether the firm knew the third party was breaching the general prohibition. But, as the Court of Appeal emphasised, '…meeting the requirements of section 28 (6) will not necessarily mean that relief should be granted.'

So, whilst it has to be taken into account, that factor isn't necessarily determinative. And the question of whether the firm should reasonably have known the general prohibition was being breached is something that it 'may be proper to take into account', but again it isn't a determinative test, just a potentially relevant circumstance in some cases.

I think, in deciding section 28 (3) and what was 'just and equitable' in Miss R's case, the court would, as it did in Adams v Options, look at all the circumstances in the round. For the reasons I've set out, I think Templeton Securities ignored several red flags that should've reasonably alerted it that there was a strong possibility that its clients were being put in harm's way and that they'd been given the same unsuitable advice by the same unregulated source. As I've said, I don't think Templeton Securities acted reasonably in ignoring those signals of potential wrongdoing. And I think, whilst the court would take into account Templeton Securities may not have had actual knowledge of the breach, looking at the circumstances in the round, had it acted reasonably – rather than ignore those clear warnings – it would've discovered the breach on making reasonable enquiries around it.

Taking all this into account, I don't think a court would find it was just and equitable to allow Templeton Securities relief under section 28. And so I think Miss R could recover her money under section 27.

In reaching my conclusions I've borne in mind that Templeton Securities wasn't the only business involved. I accept that the unregulated firm played a central role – it was behind the transfer to the SIPP, the setting up of Miss R's account with Templeton Securities and her instruction to invest in Emmit and Eligere. I have no power to investigate a complaint against an unregulated firm. But Templeton Securities was a regulated firm and bound by the regulator's Rules and Principles. I think, for the reasons I've explained, that Templeton Securities failed to meet its regulatory obligations to Miss R.

Templeton Securities should've realised there was a clear possibility of detriment to Miss R and acted to prevent that. In my view, Miss R's losses flow from Templeton Securities'

failings and so it's fair and reasonable that Templeton Securities should redress Miss R for those losses. If Templeton Securities considers that some other party is responsible, in whole or in part for Miss R's losses, I don't think Miss R, if her losses are met in full by Templeton Securities, would decline to assign any rights she might have against any other party to Templeton Securities/Alexander David Securities Limited.

We've been told that the FCA conducted an investigation into Templeton Securities with regard to both Eligere and Emmit, including a full review of all telephone calls and emails but then dropped the investigation, deciding that there was no case to answer and no wrongdoing found on Templeton Securities' part. But in the absence of full details of that investigation (which we've requested but which haven't been forthcoming) I'm not sure that the FCA was investigating the same matter, or that the outcome was as suggested. I'm considering if Templeton Securities met its obligations to Miss R in its dealing with her. For the reasons I've set out, I don't think it did.'

In summary, my provisional decision was that it was fair and reasonable to uphold the complaint. I went on to set out what I considered was fair compensation. I asked both parties to provide any further evidence or arguments they wanted me to consider before I made my final decision.

We've received a reply on behalf of Alexander David. It said my provisional decision had missed fundamental issues and had failed to take fully into account the following:

- Previous Financial Ombudsman Service rulings.
- That the FCA had conducted a thorough investigation into TS Capital in regard to Eligere and Emmit, including a full review of all telephone calls and emails. The FCA dropped its investigation as it decided there was no case to answer. No wrongdoing was found.
- It sympathised with Miss R and her loss and her involvement in what, with hindsight, was clearly an investment scam undertaken by unregulated entities. TS Capital accepted and undertook the instruction for the transaction on an execution only basis. It hadn't agreed to provide advisory services as per clause 3.2 of its terms and conditions.
- The trade instructions came from a regulated pension provider – the SIPP provider – who was technically the account holder. The account was a trust account opened by a regulated SIPP provider. Miss R was the beneficiary with powers to undertake transactions. At the time of her instruction, it wasn't unreasonable for TS Capital to accept the instruction and to conclude that it was an ordinary transaction(s) for investments listed on recognised exchanges.
- The terminology in the instruction wasn't necessarily technical for someone who had previously made any direct stock market investment, as Miss R had done. The nature of the instruction wasn't in itself, or in a series, necessarily unusual, given the account was opened with it by a regulated firm and clients could and did obtain and undertake investment research through a variety of mediums. Such as web and internet forums and tip services. At the point of the transaction it was unaware of any issues with the investments.
- It became aware of general market concerns in September 2014. It would have been appropriate and reasonable to alert investors of suitability concerns which is exactly what the letter sent in September 2014 did. It thought this was the date any fair and reasonable award should be calculated to as Miss R had a duty to mitigate any loss. She could've sold the shares before they were suspended, and not suffered the total loss that she did.
- It queried why the incentive payment hadn't been deducted. It wasn't aware of the payment which it said was clearly a pension liberation attempt. Miss R's version of

events surrounding the payment wasn't consistent with the known facts about this issue as highlighted by the FCA's alert in October 2014. The key trigger for the 'scam' was a promise of a cashback. This was the motivation for Miss R to transfer and subsequently send specific instructions to buy the shares in question. Her version of events was a disingenuous recollection of events and/or had been drafted by her representative. The ability to liberate some of her pension savings prior to the date she was allowed to access her pension was the most likely reason for the investments.

- It didn't accept that relief shouldn't be provided under section 28 (3). It said the introduction(s) all came directly from a regulated pension provider and it was technically the account holder and Miss R a beneficiary. It didn't believe that it was unreasonable to undertake and accept the specific execution only instructions from Miss R or the other clients at that time. Or for TS Capital to be unaware that an unregulated entity was contravening the general prohibition at the point the instruction was received and the investment was made.

In my provisional decision I said that, as I far as I was aware, Miss R hadn't received any incentive payment. And that we'd asked her for copies of her bank statements to verify that. I said we'd let Alexander David know what we found out before any final decision was issued.

Since then Miss R has produced a bank statement which shows a payment of £1,630.91 made on 6 June 2014. When we asked about that, Miss R's representative said, given the time that had elapsed, Miss R didn't recall the payment and what, if anything, had been said about it. We explained to Miss R's representative that the timing, value and source of the payment was consistent with what we'd seen in other cases and that we considered it was an incentive payment and that it should be taken into account in the redress. We also told Alexander David about the payment and that it would be allowed for in the redress.

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.

Having done so, I'm not minded to depart from my provisional decision to uphold Miss R's complaint. The findings I made in my provisional decision and set out above form part of this decision. Although, as I've explained below, I've adjusted the redress to take into account the payment of £1,630.91.

The response on behalf of Alexander David to my provisional decision referred to TS Capital. The firm was trading as Templeton Securities at the time of the event that the complaint is about. I've taken the references to TS Capital as appropriately referring to Templeton Securities at the relevant time.

In respect of the comments made, I'm unsure as to what previous 'rulings' made by this service are referred to. No final decision issued by an ombudsman has been cited. The reference may be to a view issued by one of our adjudicators or investigators. Their role is to try to resolve cases on an informal basis on the facts as they understand them. If the complaint can't be settled and is then referred to an ombudsman, it is considered afresh. I'm not bound by what an adjudicator or investigator may have proposed. I've made my decision here on the basis of what I consider is fair and reasonable in all the circumstances of this complaint.

As I noted in my provisional decision, we've previously and in connection with other complaints, asked Alexander David to provide further details about the investigation carried out by the FCA. It sent a copy of a letter that the FCA had sent to Alexander David dated 12

November 2014. The letter said the FCA had appointed investigators "…*to conduct an investigation into whether offences under section 89 of the Financial Services Act 2012; and or behaviour amounting to market abuse as defined in section 118 of the Financial Services and Markets Act 2000 ("FSMA") may have occurred*." The letter went on to request various records relating to trades in Emmit plc, along with other trading records from certain account holders and account documentation from certain SIPP providers.

We contacted Alexander David to say that it appeared that the FCA was investigating a different matter. And we explained that we were investigating the specific complaint made by the consumer concerned and whether Templeton Securities had met its obligations in its dealings with that consumer. We explained that we'd consider any further evidence or arguments about this issue if it could provide more details. But no further evidence or arguments have been provided. So I'm not satisfied that any investigation undertaken by the FCA is relevant here.

As I explained in my provisional decision, I accept that Templeton Securities undertook the instruction for the transactions on an execution only basis. However I don't think Templeton Securities' wider obligations were diluted because the regulated SIPP provider was technically the account owner. This wasn't unusual and the instruction to invest came directly from Miss R.

I accept that the terminology in the instruction may not necessarily have been technical for someone who had previously made direct stock market investment. And that investors can obtain tips or undertake their own research from a variety of mediums. So a firm might receive a number of orders for a particular investment at around the same time. But the situation here was that a series of emails were all sent to the same specific person, with near identical technical wording, giving very specific instructions to invest in particular niche shares. I think this suggested there was likely to be a single source behind the instructions. And that clients were being systematically advised by a third party to buy these shares and on how to go about it.

I note that it seems to be accepted that Miss R was the victim of some kind of scam, undertaken by unregulated entities. For the reasons I set out in my provisional decision, I think the series of emails should've alerted Templeton Securities to the fact that something unusual might be going on, and ought to have been a trigger for it to intervene in the normal processing of Miss R's instruction and take a closer look behind it. And, having done so, it would've identified the role of the unregulated firm(s).

The letter sent by Templeton Securities to Miss R in September 2014 was headed "*Appropriateness of your Investment – Emmit*". So it wasn't concerned with her Eligere investment. For the reasons I set out in my provisional decision, I don't think the content of the letter was such that Miss R ought to have sold the shares (in Emmit or Eligere) or that she acted unreasonably by not selling them. So I'm not persuaded it would be fair to say that compensation should be calculated on the basis that Miss R should've sold her shares following receipt of the September 2014 letter.

I accept the payment of £1,630.91 may not have been known to Templeton Securities when it processed the instruction. I don't think this was a pension liberation attempt as such, but I accept that sort of cash sum was attractive and would've been a motivating factor for Miss R. I know she's said she doesn't recall anything about it. But, from what I've seen, I'm satisfied it was a payment in return for investing. I also think it's likely Miss R did know at the time that she'd get a payment.

But, irrespective of the motivation behind it, if Templeton Securities had intervened in the processing, and said it wouldn't process her instruction, Miss R would've had to reconsider. I

think it's likely, if Templeton Securities had intervened and explained to Miss R that it wasn't prepared to process her instruction and why, that Miss R would've lost trust in the unregulated firm(s) who were driving the transactions. And, if she'd still wanted to proceed, she'd have needed to overcome practical difficulties. She'd already opened her account with Templeton Securities and money had been transferred into it. She'd have needed to get that money back and transfer it to a new dealing account with another firm in order to buy the shares.

Templeton Securities says that Miss R had previously made direct stock market investment. But I'm not sure that was the case. I note that the account opening documentation showed she was a 'novice' investor in equities. It also said her preferred level of risk was medium/high. I don't think that's consistent with investing her entire and only pension fund (and her only asset) in high risk, niche, shares. I think that represented a higher degree of risk than she'd said she was prepared to accept. There was a significant risk of loss of the entire amount invested, some £23,530. Relative to that and proportionately, the incentive payment of £1,630.91 was modest. Added to that were the practical difficulties I've referred to in buying the shares if Templeton Securities had declined her instruction. Overall and on balance, I think it's unlikely that Miss R would've invested in Emmit and Eligere had it not been for Templeton Securities' failings.

For the reasons I've set out above and in my provisional decision, Templeton Securities ought to have realised that something unusual was going on and made further enquiries about Miss R's investment instructions. And, on doing so, it would've identified that it was likely that an unregulated firm was breaching the general prohibition. And, for the reasons I set out in my provisional decision, I don't think a court would find it was just and equitable to allow Templeton Securities relief under section 28 of the Financial Services and Markets Act 2000. I think a court would find that Miss R could recover her money under section 27. So I'm upholding Miss R's complaint.

Putting things right – fair compensation

In assessing what would be fair compensation, my aim is to put Miss R as close as possible to the position she'd probably now be in if Templeton Securities hadn't agreed to purchase the shares for her account.

In that situation I think Miss R, having already completed the switch of her pension to the SIPP, would've invested differently. It isn't possible to say *precisely* what she'd have done, but I'm satisfied that what I've set out below is fair and reasonable given Miss R's circumstances and objectives when she invested.

what should Alexander David Securities Limited do?

To compensate Miss R fairly Alexander David Securities Limited should:

- Compare the performance of Miss R's investments 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. It should also pay any interest set out below.

If there's a loss, Alexander David Securities Limited should pay into Miss R'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. Alexander David Securities Limited shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.

If Alexander David Securities Limited is unable to pay the compensation into Miss R's pension plan, it should pay that amount direct to her. 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 Miss R's actual or expected marginal rate of tax at her selected retirement age. I think Miss R is likely to be a basic rate taxpayer at her selected retirement age. So the reduction should equal the current basic rate of tax. However, if Miss R would've been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

Investment	Benchmark	From ("start date")	To ("end date")	Additional Interest
The amounts invested in Emmit (£11,765) and Eligere (£11,765) including charges less a deduction of £1,630.91 divided equally so £815.45 from each	FTSE UK Private Investors Total Return Index	Date of purchase of each share	Date of my final decision	8% simple a year from the date of my final decision to the date of settlement if settlement isn't made within 28 days of Alexander David Securities Limited being notified of Miss R's acceptance of my final decision

In addition, Alexander David Securities Limited should:

- Pay Miss R £300 for the distress and inconvenience I'm satisfied the matter has caused her.
- Provide details of the calculation to Miss R in a clear, simple format.
- Income tax may be payable on any interest paid. If Alexander David Securities Limited considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Miss R how much it has taken off. It should also give Miss R a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

actual value

This means the actual amount payable from 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 the *actual value* of the investment. So, the *actual value* should be assumed to be nil to arrive at fair compensation. Alexander David Securities Limited should take ownership of the illiquid investment by paying a commercial value acceptable to the SIPP provider. This amount should be deducted from the compensation and the balance paid as above.

If Alexander David Securities Limited is unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. Alexander David Securities Limited may wish to require that Miss R provides an undertaking to pay it any amount she may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Alexander David Securities Limited 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 produced a return using the benchmark.

why is this remedy suitable?

I don't know exactly how Miss R would've invested. But I think the index I have outlined above is an appropriate benchmark and is a reasonable proxy for the degree of risk that Miss R said she was willing to take.

The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

My final decision

I uphold the complaint. Alexander David Securities Limited must redress Miss R as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss R to accept or reject my decision before 25 April 2022.

Lesley Stead
Ombudsman