DRN-3462890

The complaint

Mr T 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 invest in a Cape Verde hotel development of The Resort Group (TRG). Mr T is represented in this complaint.

What happened

In late 2013 Mr T was a self-employed business owner approaching age 58, earning about £25,000pa. He was married with no dependants. Information on a later application form Mr T completed for a discretionary fund manager said he had a property worth £750,000 and £35,000 of other assets which provided £10,000pa of extra income. He had an existing pension arrangement with LV=.

He believes his existing pension adviser introduced him to an agent of CMIM who recommended he invested in TRG. They came round to his house 3-4 times, showed lots of projections and forecasts with websites that looked legitimate, said that they were investing themselves and the returns were guaranteed. (We know that CMIM had signed an introducer agreement with a firm called Your Choice Pensions (YCP), and other consumers invested through that firm, although Mr T doesn't recall that name.)

As part of the arrangements to transfer Mr T's pension, on 1 November 2013 a new employer was incorporated; named after the road in which he lives. Mr T would later have signed an employment contract with that company, and on 10 December 2013 he 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.

Mr T also signed an indicative investment form, stating that his intention was to invest 70% of his pension in TRG and 30% in CMIM's discretionary fund management (DFM) service. He also completed an application form for the DFM service and US withholding tax forms on 10 December. My understanding is that YCP or its sister company (Consumer Money

Matters) would then have requested a transfer pack and discharge form from LV=, with Mr T's authority.

On 26 January 2014 a SSAS was established by trust deed for Mr T'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.

I understand from other transfers of this nature that CGL would then have requested a transfer of Mr T's LV= pension policy using forms signed by Mr T, and most likely provided by YCP or its sister company. Also based on other similar transfers, at around this time a standard covering letter with CGL's branding would have been sent to Mr T. This said:

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

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

> *'We have researched the commercial property investment, The Resort Group, the hotel operator (Melia Hotels International), and the wider aspects of ownership and security; and our conclusion is that it is an appropriate investment albeit when considered in the light of sensible diversification of a portfolio of an investor's overall wealth and that an effective "exit" strategy is planned in order to coincide with the needs of the investor. The Resort Group have cooperated with ourresearch.'*

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

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

The letter went on to propose CMIM's Global Growth Portfolio (GGP) to provide the suggested diversification into other, lower risk investments. Subsequently, CGL would have asked Mr T to sign a letter confirming his instructions to invest in TRG were based on the above advice. Again, the standard wording in use by CGL at that time read 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.'*

On 30 April 2014 CGL received a transfer of £74,547 from LV=. It wrote back to Mr T on 1 May and 15 July 2014 to confirm receipt of his investment instructions and that £39,050 and £33,365.21 had been invested into TRG's Llana Beach Hotel resort and CMIM's DFM service respectively. So, these differ from the 70/30 split originally intended.

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.

In the event, Mr T was only invested in the CMIM portfolio for a short time. He was advised by a third party in 2015 to switch to Organic Investment Management, as part of which he specified a medium high attitude to risk and a growth objective, over a time frame until 2021. Following Organic's demise, this portfolio is now managed by Philip J Milton & Company. On Mr T's 2019 SSAS statement it was valued at £41,449.

Mr T complained to CMIM in around September 2019 that *'the underlying investment in the Cape Verde Property was a wholly unsuitable asset for such a pension scheme for me. Whilst I recognise that various disclaimers existed, these do not avoid negligence and culpability in relation to the engagement and promotion of wholly unsuitable assets within the Pension Scheme.'* He also complained that the SSAS itself was unsuitable for him.

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 T referred the complaint to this service, adding that he was 'lied to' about the returns from TRG. He told our investigator that he wanted to earn some money 'safely' out of his pension. He added that he was told it would be possible to sell the property at no loss when he wanted to withdraw his money – and although he was encouraged to invest his whole pension in TRG he thought it was sensible not to put 'all his eggs in one basket'. It was described as an opportunity that he had to take now, as he wouldn't get another chance.

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

- It understands Mr T's complaint to be about the TRG investment 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.
- 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.
- 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' and only appropriate when considered as part of a diverse portfolio 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 T 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 appeared to be very close to 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.
- 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.'*
- CMIM isn't responsible for how Mr T's DFM was invested after he moved to Organic.

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 T. 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.'*

<u>The investigator's view of 15 November 2021</u>

The investigator considered that Mr T's complaint should be upheld for these reasons:
- CMIM carried out the regulated activity of 'advising on investments' in respect of a collective investment scheme (TRG). Mr T signed terms of business for it to provide that advice.
- The 'dear Trustee' letter also amounted to a financial promotion, which 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 (unless it advised against investing – which wouldn't amount to a promotion).

- CMIM's advice was inconsistent with the FCA's principles, 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)
- It was also difficult to see how the advice achieved the purpose of s.36 of PA'95, because that envisaged a suitability assessment specific to Mr T's SSAS and therefore a personal recommendation. It would also have been consistent with the FCA's principles and rules for CMIM to make such a personal recommendation.
- In all respects, CMIM should have realised that investing such a high proportion of Mr T's wealth in TRG was unsuitable and contrary to regulatory expectations for UCIS advice – particularly for someone who had little investment experience.
- Mr T wasn't actively looking to switch his pension at the time, so if CMIM had advised against investing in TRG, he wouldn't have gone ahead with the transfer either.

CMIM has responded by way of letters covering several complaints simultaneously. It 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 T 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 T were the original introducers, and that also extended to CGL given the correspondence it prepared for Mr T 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 T to seek independent advice from an IFA.
- Considering all of the above it was wholly unfair and unjust to attribute Mr T's loss 100% to CMIM. CGL described themselves as specialists in the field of SSAS pensions, and should be held responsible for Mr T's losses. They were complicit in every step necessary for Mr T 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.

Did CMIM make a personal recommendation for Mr T to invest in TRG?

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 T 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 T's investment by to meet that definition.

I don't think there is a plausible argument here that CMIM wasn't, at least, carrying out the regulated activity of advising on investments. As CMIM said, it attended 'numerous' preliminary meetings with YCP or CGL and '*reviewed detailed documentation regarding the investment to ensure it was suitable for SSAS investment and as to risk.'* However, advice given in 2014 that wasn't a personal recommendation wasn't caught by chapter 9 of COBS – the regulator's rules governing 'suitability'.

I agree CMIM didn't set out to make a personal recommendation. It evidently didn't believe (mistakenly) that advice being given for s.36 of PA'95 was regulated at all. 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 it reminds Mr T that it hadn't assessed those circumstances. But my consideration of this point doesn't end there, as what the firm intended or believed to be the case doesn't determine what rules apply. Firms can be mistaken. 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.'*

So, the part of the definition before the word 'or' indicates it's possible to make a personal recommendation *without* considering that person's specific circumstances - *if* it is presented in such a way that the recipient reasonably believes the firm is endorsing the investment as being suitable for them in particular. 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 T's position would have perceived from CMIM's advice. That involves weighing up everything, including that CMIM told Mr T it wasn't making a personal recommendation; Mr T 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 T went on to make use of its DFM service. My understanding is that Mr T 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 T 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 T felt he met those criteria I can see why CMIM's advice would have carried more weight to him than one issued to the public at large: after all, he had personally contracted with CMIM for it to provide this advice. But that doesn't of itself mean it was truly a personal recommendation, and I'm not persuaded that it was.

However, 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 CMIM encouraging Mr T to seek further independent advice doesn't negate the advice its letter already contained. Otherwise that begs the question of why its advice was being provided at all.

If there's no personal recommendation, COBS 9 doesn't apply. But that also isn't the 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 T, 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 T 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 T 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. I don't necessarily agree with that, but more importantly I don't think it's 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 – and I count Mr T in that category – to draw. I say this 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 being mitigated by the strategy it was proposing to diversify the TRG investment with a DFM arrangement;
- no clarification being provided for the trustee 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 T to take his own regulated 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 T should do, it shouldn't have been commenting in a way that allowed him to infer that he could go ahead without that advice if he wasn't cautious or needing short-term access to funds. I also don't think it's a coincidence that the 'dear Trustee' letter was written in this way: CMIM stood to gain business from being able to provide DFM services, if a trustee went ahead with the TRG part of the investment.

It would have been apparent to CMIM at the time that third parties had quite a lot of influence over what the trustees did; this is the basis of much of its arguments now. So, it was unlikely to receive the DFM business if its advice tended to discourage the investment in TRG. I think that, given this clear intention, CMIM's 'dear Trustee' letter was a 'significant step' in persuading Mr T to make the investment. Notwithstanding CMIM's observations about how much attention Mr T paid to it, CGL would have expected him to sign an investment instruction declaring that he had regard for CMIM's advice.

There was, of course, a reason for that: he was required under PA'95 to consider advice before making the investment. And whether or not Mr T 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 T to invest because of vested interests, yet it was not. That simply doesn't stand up to scrutiny.

My view that this was a promotion is underlined by the fact that on 1 January 2014 FCA revised the list of exemptions at COBS 4.12.4R. 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.'*

The wording of the exclusion itself therefore suggests that advising on investments could also amount to a promotion – given that a promotion did not have to be targeted to a particular individual – and 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).

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

Mr T 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.

We don't know precisely when the 'dear Trustee' letter was sent to Mr T, and CGL appears not to have kept copies. But it would have been between 10 December 2013 (when Mr T signed CMIM's terms of business) and in all likelihood given how much time elapsed, before 30 April 2014 (when his funds arrived from LV=). On the balance of probability I also find it more likely that he was sent the letter after 1 January 2014, when FCA changes to 'clamp down' on UCIS promotion had tightened the exemption I've quoted above.

YCP's introducer agreement with CMIM would always have made the new exemption unavailable because the introducer, rather than the trustee, was soliciting the advice. But even if I'm wrong on the timing of the 'dear Trustee' letter, I think CMIM should have known that the transaction was likely to complete after the well-publicised 1 January 2014 rule changes. And in any event the former version of the exemption still required Mr T to be *'A person…for whom the firm has taken reasonable steps to ensure that investment in the collective investment scheme is suitable'*. So, for the avoidance of doubt, I don't consider CMIM *could* reasonably have concluded that TRG was suitable in this case – for reasons I'll set out later in this decision.

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

CMIM's position that Mr T paid no attention to or was misled by the 'dear Trustee' letter

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

Mr T 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 whether he should include TRG in his SSAS (or in layman's terms and as implied by s.36 of PA'95, its suitability for his SSAS). I can't see that Mr T was misled if CMIM now considers it wasn't appropriately qualified to give that advice. And at a fundamental level, I don't think Mr T's inclination (or otherwise) to read the 'dear Trustee' letter materially alters the outcome because, as I've set out above:

- Whether something counts as an inducement depends in part on how it would be received by a *reasonable person*; not necessarily someone (Mr T) that CMIM considers wasn't inclined to read the letter.

- Whether it was also a significant step in securing the investment is largely answered by the fact CGL required Mr T to take this advice, irrespective of the level of attention he paid to it.
- So, it's plainly wrong to say that this letter *'might just as well have not existed',* as the investment in my view was promoted unlawfully - and that fundamentally affects the outcome of the complaint.

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

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

In addition to the FCA Principles, CMIM was bound by COBS 2.1.1R (the client's best interests rule) and COBS 4.2.1R (ensuring a communication or a financial promotion is fair, clear and not misleading). These COBS rules were not part of chapter 9 (suitability) and still applied if CMIM was 'advising on investments'. During the process of Mr T being advised the regulator was also publicising its position (set out at COBS 4.12.5G) that promotion in the context of advice had to be more than simply generic and non-personalised.

In any event, it's just as difficult to see it was possible for 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 *not* to 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 secondary Occupational Pension Schemes (Investment) Regulations 2005 don't cover Mr T's SSAS. But regulation 7 does, and this states that:

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

This precise wording was reflected in investment instructions we know CGL required all SSAS members to sign. And I can't fairly say it was possible for Mr T 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 could only track who the end recipients of its 'dear Trustee' letter in respect of TRG were if YCP remembered to pass on a trustee's signed copy of its terms of business, or it later heard from them because they'd signed up for its DFM service (as happened in this case). That calls into question whether CMIM was adhering to Principle 3. I also think Principle 9 is particularly apt here, as it refers to the care CMIM should take in formulating advice (whether that's a personal recommendation or not).

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

1. Decline to get involved in the introducer-adviser relationship with YCP, and therefore come into contact with clients like Mr T at all; <u>or</u>
2. Agree to accept introductions from YCP, but proceed on a basis which was fundamentally different in a number of respects in order to ensure that it was complying with the principles and rules:
   - Take reasonable care to make a personal recommendation to Mr T, which was tailored to his specific circumstances and thus was more likely to pay due regard to his best interests and treat him fairly.
   - Note that if the recommendation was *not to* invest, this would not amount to promotion and so the restrictions on promotion wouldn't be breached.
   - Ensure it issued that recommendation to Mr T directly, rather than supplying it via third parties (where there was potentially some doubt whether it would reach Mr T, 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 in favour of investing in TRG. So if CMIM declined to get involved or indicated it would make direct recommendations against investing, 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 T was required to take couldn't just be given by *any* adviser. s.36 states:

'For the purposes of this section "proper advice" means—
(a) if the giving of the advice constitutes the carrying on, in the United Kingdom, of a regulated activity (within the meaning of the Financial Services and Markets Act 2000), advice given by a person who may give it without contravening the prohibition imposed by section 19 of that Act (prohibition on carrying on regulated activities unless authorised or exempt);
(b) in any other case, the advice of a person who is reasonably believed by the trustees to be qualified by his ability in and practical experience of financial matters and to have the appropriate knowledge and experience of the management of the investments of trust schemes'

Whether or not the other parties realised that any advice on TRG was a regulated activity, it wasn't surprising that typically the relevant knowledge and experience to give that advice was more likely to be found amongst regulated firms. And I would also expect *any* regulated adviser to be as mindful of the FCA's principles and rules as CMIM should have been. So they too should have considered the position on promotion; whether a personal recommendation would be expected; and the consequences giving advice in favour of investing that couldn't be supported by a valid exemption.

I've also taken into account that CMIM had the option to refuse to get involved in advising Mr T at all, but it chose to give advice. So, I think it's fair and reasonable that CMIM is held to the standard of the proper personal recommendation that it *should have given* to Mr T to satisfy the regulator's expectations and those reasonably implied by 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. It ought to have known that any investment in UCIS taking up the majority of a SSAS was plainly unsuitable for an inexperienced investor. Knowing what we do about Mr T's situation at the time, he could ill afford to take the very high degree of risk this entailed given that the SSAS was his sole pension provision.

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 introduced to Mr T by other parties was in order to invest in TRG. I think Mr T would likely have received CMIM's 'dear Trustee' letter before LV= sent his funds to the SSAS: having agreed terms of business in December 2013 CMIM certainly had enough time to ensure its advice was communicated by then. So I need to consider how Mr T would have acted, if CMIM had made a proper personal recommendation that didn't involve TRG.

I'm mindful that could have led to a recommendation for DFM on his whole portfolio. But demonstrably, Mr T would then have obtained advice that wasn't 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. To secure the TRG investment they needed advice in favour of it to comply with PA'95 and as I said above I think it's reasonable to conclude that other regulated firms should *also* have advised against TRG.

CGL told this service the advice wouldn't necessarily need to come from a regulated adviser, but I'm mindful that an unauthorised firm recommending a UCIS would be committing an actionable offence under FSMA. That would in my view make such a firm difficult to find, and their advice would in any event carry less credibility: pension providers like LV= would have introduced checks required by the Pensions Regulator after 2013 to reduce the possibility of 'pension liberation', creating the risk that the ceding scheme would question him about what advice he'd received.

I've taken into account that Mr T didn't instigate the advice here. He believes the referral had come from his existing adviser, but from what I can see in the end he was dealing with other agents, and not that adviser. So I'm not particularly concerned about a strong relationship of trust being built up here. As CMIM itself realises, it was brought on board to 'legitimise' Mr T'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 T.

Once that opinion had been given I can't safely say it could easily have been 'undone' by any attempts to refer Mr T to other advisers. I'm satisfied the more likely outcome is that any further attempts to secure his TRG investment would have failed in the light of CMIM's advice. As a result, Mr T would have had a reason to (and had time to) abort any request in the pipeline for his LV= funds to be transferred, and he would have remained in the LV= plan.

<u>Should I only apportion part of Mr T's losses to CMIM?</u>

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

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

I agree that *if I were* satisfied that Mr T would have chosen to transfer and invest in TRG 'come what may', it wouldn't be fair for me apportion any responsibility for compensating him 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 T would still have gone ahead with transferring his pension in order to invest in TRG, had CMIM treated him fairly.

I'm persuaded on the balance of probabilities that Mr T would not have gone ahead. I think the effect of CMIM placing a barrier in Mr T's way would have been more likely to deter his ultimate investment than not. I think it's likely he would have heeded the proper advice he was told he would get, and was entitled to expect, from CMIM. If an investigator has taken a different view on causation on another complaint, then either party may refer that view to an ombudsman. I may not have agreed with that view.

Putting things right

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

Central Markets Investment Management Limited must therefore contact LV= to obtain a *notional value* for Mr T's policy as at the date of my final decision, assuming that it continued to be invested in the same funds that it was at the point it was transferred out. As a condition of accepting this decision, Mr T 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.

The *actual value* of Mr T's CGL SSAS (including the current proceeds of the CMIM DFM funds) as at the date of my final decision should be deducted from this *notional value* to arrive at Mr T's *initial loss amount*. (Any currently outstanding administration charges yet to be applied to the CGL SSAS should be removed from the *actual value* first.)

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

- CMIM should agree an amount with CGL SSAS as a commercial value for this investment, then pay the sum agreed to CGL SSAS plus any costs, and take ownership of the investment. The actual value used in the calculations should include anything CMIM has paid to CGL SSAS.
- 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 T 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 adds five years' worth of future SSAS administration fees at the current tariff to the *initial loss amount*, to allow a reasonable period of time for the CGL SSAS to be closed.

CMIM has suggested to this service that it may be able to use independent valuers for the TRG investment, or agree a value with CGL (which is more than nil value), even if it's not actually buying the investment from the SSAS. As there appears to be no market for the investment I don't consider it's fair to use a value that is the opinion of someone who is not actually prepared to (or unable to) buy the investment from the SSAS.

I also cannot anticipate whether TRG will be permitting changes of ownership because clearly legal processes would be involved. But to the extent that this is possible, 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, it may ask Mr T instead to provide an undertaking in return, to account to it for the net amount of any payment he may receive from the investment in future.

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

Payment of compensation

If there is an overall loss, CMIM should pay into the CGL SSAS, to increase its value by the 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 tax protections or allowances.

If CMIM is unable to pay the compensation into the CGL SSAS, it should pay that amount direct to Mr T. 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 T's actual or expected marginal rate of tax at his selected retirement age. Here, it's reasonable to assume that Mr T is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. But if he is yet to take his tax-free cash sum, the adjustment would only apply to 75% of the compensation, giving a composite reduction of 15% overall.

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

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

If LV= cannot provide a notional value

In this eventuality, CMIM will need to use a benchmark to provide a *fair value* for Mr T's investment instead, and use it in the same way in its calculations. Whilst Mr T was nearing his sixties at the time of advice and getting near to retirement, he had a significant pension fund. I think his inclination to invest in TRG and also to select a higher risk level for his Organic portfolio – whilst not solely determinative of his attitude to risk, as they were influenced by advice – do suggest a likely willingness to take *some* risk.

Taking all of this into account, and only if LV= **cannot** provide a notional value – which remains the preferred method of redressing this complaint – I consider that the FTSE UK Private Investors Income Index <u>on a Total Return basis</u> 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 T's circumstances and likely risk attitude.

It doesn't mean that Mr T 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. The view I'm taking here is that the *sort of* funds Mr T would have remained invested in with LV= would typically have performed broadly in line with this benchmark; notwithstanding the charges (which would have been lower than the SSAS in any event). It is a proxy that is being used for the purposes of compensation.

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

So including the present-day DFM value in the calculation is part of putting Mr T 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 these were either automatic or were encouraged by the very same third parties which CMIM had agreed to get involved with (in a way which did not act in the best interests of Mr T 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 T'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 T'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 T'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 T to accept or reject my decision before 1 June 2022.

Gideon Moore
Ombudsman