DRN-3473635

The complaint

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

What happened

In late 2013 Mr P was a delivery driver earning about £21,000pa. He was approaching age 51, divorced with two (non-dependent) children. He had an existing pension with Scottish Life resulting from a previous job.

He was cold-called with an offer to improve his pension, and this resulted in him agreeing to an agent visiting his home. We know that at around that time YCP, an unregulated introducer firm, had an agreement with CMIM and sent letters to prospective candidates for the TRG investment which also resulted in those clients investing in CMIM's discretionary fund management (DFM) service. As Mr P was one such person who invested in CMIM's DFM, but also invested in TRG, this seems to be what happened here.

I say this in particular as CMIM has a copy of Mr P's undated 'indicative investment form' noting that he wished to invest 75% of his SSAS into the Cape Verde development and 25% into CMIM's DFM service. It has also supplied us with a copy of its terms of business signed by Mr P on 30 October 2013, which says *'It was usual practice for the Terms of Business to be signed in the presence of the introducing intermediary at* [the client]*'s home'.*

The terms agreed that CMIM would provide an advice letter on TRG for s.36 of the Pensions Act 1995 ("PA'95"). This requires trustees of 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 also 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.

As part of the arrangements to transfer Mr P's pension, on 23 October 2013 a new employer had been incorporated; named after the road in which he lives. A SSAS was then established by trust deed on 1 November 2013 and registered with HMRC for Mr P's new employer - with him as sole trustee, and Cantwell Grove Ltd (CGL) as SSAS administrator. CGL SSASs had a setup fee of £750+VAT and an annual fee of £500+VAT (which has since been reduced to £250+VAT).

From a number of other related complaints, this service is aware that YCP sent a letter to those customers who showed interest, saying: *'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 shared a generic copy of this so-called 'dear Trustee' letter with this service. The letter never referred to the trustees by name and mentioned that their business had been introduced by YCP. It repeats that CMIM is providing the trustee with advice that it understands to be unregulated, because a SSAS is not regulated (and furthermore, the TRG investment involves direct ownership in property). It goes on:

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

In the letter CMIM explained the reference to diversification meant that its advice would be to consider other investments alongside the property investment that were low risk and unconnected with it. It went on later in the letter to promote its MVA Balanced Portfolio – a discretionary managed portfolio – for this purpose. 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.****'*

On 19 May 2014 a £46,065 transfer from Scottish Life to CGL took place. On 22 May CGL required Mr P to send it a templated letter specifying the amount he wanted to invest in TRG and the DFM service. The letter says that advice has been obtained and considered from CMIM on the proposed investments; and that the trustee member believes CMIM to be appropriately qualified to assess the suitability and the need for diversification of those

investments for the SSAS under s.36 of the Pensions Act 1995.

On the following day £20,650 was invested into TRG and later that month, £23,275 into the DFM service. On 30 May CMIM completed an 'assessment of appropriateness' document - but I understand its position to be that this related to the appropriateness of the DFM portfolio, rather than TRG.

Mr P's SSAS would have entered into an agreement for fractional ownership of a UK company limited by guarantee in order to invest in TRG's Dunas Beach Resort. The UK limited company held separate contracts with developers to build the property, and a third party to manage it.

By February 2015 Mr P then seems to have been advised by Organic Investment Management to switch the DFM funds to Organic. (I gather this is likely to be because staff members moved from CMIM to set up Organic.) On his Organic application form a medium-low risk preference balanced between income and growth over a 2-5 year horizon was expressed, as he anticipated drawing income from his pension in 2018.

'Special discounts' were offered on the purchase, usually 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. Income payments began at £120 per month, but by November 2016 this reverted to variable payments of about £75 per quarter. These reduced later in 2018 and dried up in spring 2019 due to low occupancy of the resorts, and have not since recovered.

On 13 December 2017 Mr P withdrew £12,011 of tax free cash from his SSAS, and according to his representative he has transferred the remaining Organic portfolio out into a SIPP. From Mr P's CGL statements £12,281 appears to have been transferred to Gaudi trustees in March 2020.

Mr P complained in February 2019 that the SSAS was wholly unsuitable for him and TRG was a wholly unsuitable asset to hold in his circumstances, given his capacity for loss and need to access the benefits.

In the absence of a response from CMIM, Mr P's CMC referred the complaint to the Financial Ombudsman Service. It highlighted that the apparent inclusion of an Organic portfolio also appeared inappropriate - as Organic's operations were now being investigated by the FCA. (It appears the CMC was unaware that Mr P switched to Organic on separate advice.)

CMIM's submissions

CMIM told this service that it hadn't received the original complaint, but its position in response to this and similar complaints was well-known and can be summarised as follows:

<u>The investment</u>

- CMIM 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.

<u>The parameters of CMIM's advice and promotion of the investment</u>

- CMIM was first approached by YCP in mid-2013 and entered into an introducing agent agreement with it. Its only financial benefit arose out of the opportunity to promote its DFM service. It attended numerous meetings with the SSAS marketers, including YCP.
- CMIM's terms of business materially differed from those used in FCA-regulated advice, to ensure that the trustees understood the purpose of the 'dear Trustee' letter. It plainly

was not contracting to provide advice that was regulated by the FCA.
- It wasn't necessary for CMIM to make itself aware of the trustees' personal and financial circumstances or attitude to risk, except for managing the DFM investment.
- 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'.*
- The 'dear Trustee' letter didn't amount to a 'significant step' in trustees making the investment given the warnings it contained, so it didn't constitute a financial promotion. It also encouraged them to seek independent advice from an IFA.

CMIM's advice

- At no point did CMIM recommend or influence cautious investors to invest in TRG. It concluded that TRG was 'risky', only appropriate when considered as part of a diverse portfolio of investments where an effective 'exit' strategy was planned.
- It promoted its DFM services as an 'alternative' and/or as diversification – as a low risk portfolio of Exchange Traded Funds (ETFs) of major liquid equity indices and bonds.
- 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'.*

The responsibility of others

- CGL presumably carried out its own due diligence into TRG, but still required trustees to sign a letter deliberately misrepresenting CMIM as the provider of a personal recommendation and subject to COBS 9 (suitability) in the FCA handbook. Naming CMIM gave the advice that others were giving 'the intended air of credibility'.
- The people that promoted TRG were the original introducers, and that extended to CGL - given the correspondence it prepared for the trustee to authorise the investment. It was wholly unfair and unjust to attribute 100% of losses to CMIM.
- YCP referred to CGL as its 'partner SSAS Administrator' and CGL said they were specialists in the field of SSAS pensions. So the lack of consideration of whether inexperienced investors were suitable for SSASs was both reckless and negligent.
- CGL was complicit in every step necessary for the trustee 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.
- After approximately 9 months the DFM arrangement moved to Organic Investment Management, so CMIM has no responsibility for how it was invested after that point.

Whether trustees relied on its advice

- 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.
- 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.
- Trustees received their 'dear Trustee' letter very close to the date stated on their Trust Deeds to establish SSASs. No reliance was placed on this letter as the trustees had already decided to invest in TRG. They also had their own statutory duties as trustees to invest prudently. So, the 'dear Trustee' letter *'might just as well have not existed'*.

CGL has separately informed this service that *'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.'

Mr P's submissions

One of our investigators had a direct conversation with Mr P. Mr P said that the agent he first spoke to by phone said it was not good for a pension to be 'sitting doing nothing'. TRG wasn't initially mentioned by name, but a different agent then visited Mr P's home where subsequent documents were signed. This was when 'glossy brochures' for TRG were shown to him.

Mr P said he specifically asked what would happen if the investment went bust, and the agents told him not to worry because if it went bust he would get all his money back. Notwithstanding the indicative investment form (showing a different split), he was always of the understanding that he would be investing about 50% in TRG and 50% in DFM – as actually did happen. His understanding was that the hotel room he invested in would be let out to provide an income, but was now worried how his children would manage with the investment if he died.

The investigator's view and response

Our investigator concluded that CMIM shouldn't have advised Mr P to invest in TRG: firstly because it was unsuitable for him as an unsophisticated investor, but secondly because to do otherwise would constitute promotion of an unregulated collective investment scheme (UCIS) contrary to the restriction on such promotions.

The investigator didn't receive a response to her view, and said that she would be putting the case to an ombudsman for a final decision. Subsequent to this, we received a response from CMIM on 26 May 2022. For the main part, it re-states many of the points I've already summarised above. I note that it sets out in more detail why CMIM considers its 'dear Trustee' letter presented a balanced view that *'gave ample warning against the suitability of TRG as an investment for a SSAS pension'*, because:

> *'a. they were unsuitable to the cautious investor* [who would also require compensatory and regulatory protection: CMIM considers its erroneous reference to TRG being unregulated would still have put the trustee on notice of a problem here]*;*
> *b. that property values are variable* [and subject to currency and political risks]*;*
> *c. that such investments are regarded as 'illiquid' and so not suitable to those who needed access to their pension funds;*
> *d. that the costs and charges associated with property investments were often unmet by the investment's returns; and*
> *e. that their consideration as an investment was only appropriate when part of a balanced portfolio of investments.'*

In CMIM's view, therefore, it did not breach Principle 9 (to ensure the suitability of its advice). Further, CMIM said that:

> *'The question of whether or not the trustee saw, read and digested the Dear Trustee letter stands higher in consideration to the issue of whether the letter itself was compliant with the regulations or, even, whether CMIM inadvertently acted outside of the Rules by not understanding that the TRG investment was a regulated product, being a collective investment scheme.'*

- CMIM denied that it had co-operated in any way with the introducers other than by paying them an introduction fee if the trustee made use of its DFM service.
- It made repeated further points about CGL's greater complicity in inducing, setting up and co-ordinating the investment within the SSAS.

- It reiterated that the onus was on the trustee (not CMIM) under PA'95 to obtain 'proper advice' and questioned whether the trustees had produced a statement of investment principles under s35 of that Act.
- CMIM was not bound to follow the regulator's Principles in any event because it was providing advice for a different purpose (s.36 PA'95).
- Because the client was the trustee, not the beneficiary of the SSAS, and the advice letter was generic in nature, this meant it did not constitute 'designated investment business'. That meant COBS 2.1.1R (to act in the client's best interests) did not apply unless the advice was of a specific, not of a general nature.
- CMIM's advice did not meet all of the limbs of the definition of advice under the Markets in Financial Instruments [EU] Directive (MiFID); in particular it did not present a recommendation as being suitable for the recipient trustee.
- It suggested this service is ignoring evidence from trustees who cannot recall receiving, or reading, the 'dear Trustee' letter.
- It reiterated that section 3 'Liability' in its terms of business said, among other things, '*… [we] are not legally liable to you in any way or for any Loss whatsoever in respect of … the performance or under-performance of the Cape Verde investment; …'.*

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 P to invest in TRG?

Mr P's likely receipt, on the balance of probabilities, of CMIM's 'dear Trustee' letter meant in my view 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).

At one point in its 26 May 2022 submission, CMIM appears to be suggesting that it didn't meet all the requirements under MiFID for this letter to even constitute advice at all. I don't find this plausible and it may be that CMIM was in fact referring to the definition of a personal recommendation here. The FCA refers to its own interpretation of 'generic advice' at PERG 8.26.2 G (for example, advice on the merits of one *type* of investment versus another) – and it's clear that CMIM went further than this in commenting on the suitability (even in general terms) of a *specific* investment in TRG. That is not, in the regulator's view, generic advice of the sort that would not be regulated.

CMIM appears to be suggesting that the advice 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 P 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 P's investment by to meet that definition.

For the avoidance of doubt, a unit in a collective investment scheme is a designated investment, making advice on the same 'designated investment business' under the FCA's handbook glossary. So CMIM's argument that even COBS 2.1.1R (acting in the client's best interests) does not apply here is also wrong.

PERG 8.28.1 & 2 G set out that ***'****advice requires an element of opinion on the part of the adviser. In effect, it is a recommendation as to a course of action… In general terms, simply giving information without making any comment or value judgement on its relevance to decisions which an investor may make is not advice.'*

In this regard it's clear that CMIM's comments on the appropriateness of TRG for the trustee's portfolio, albeit in generic terms, included such value judgements and therefore would constitute advice. As CMIM itself 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.'

I do accept the further point CMIM is making however: advice given in 2014 that wasn't a *personal recommendation* wasn't caught by the detailed 'suitability' rules in chapter 9 of the COBS rulebook. And I agree that CMIM didn't set out to make a personal recommendation to Mr P. It said in the terms of business that it wasn't giving *'individual suitability advice…which takes into account your personal financial circumstances'*. And the end of its 'dear Trustee' letter reminds Mr P that it hadn't assessed those circumstances. Mr P hadn't met anyone from CMIM, nor had any 'fact finding' had been done by it.

On balance, I think Mr P 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 P 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.

If there's no personal recommendation, COBS 9 doesn't apply. But that also isn't the end of this complaint. CMIM has still given advice in the 'dear Trustee' letter, which isn't negated by it separately encouraging him to seek further independent advice. And it's open to me to consider whether its advice is consistent with the regulator's wider principles (set out at PRIN in the rulebook), and other COBS rules that aren't in chapter 9.

I also don't think CMIM can fairly and reasonably exclude all liability for losses on the TRG investment by saying so in its terms of business. This would be a breach of COBS 2.1.2 R:

> *'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.'*

Whether I consider CMIM is responsible for Mr P's losses is a matter for the facts of this case. And CMIM can't claim it isn't bound by PRIN because it said in its terms of business that it would be giving the advice for the purposes of s.36 PA'95 rather than under FCA regulation. CMIM is an FCA regulated firm. It gave regulated advice and is bound by FCA's principles.

I'll return to arguments on COBS and PRIN 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.

Did CMIM promote the TRG investment to Mr P, ancillary to its advice?

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 P to consider TRG as an investment.

However CMIM seems to have taken the view that both YCP and CGL *were* inducing Mr P

to invest because of vested interests, yet it was not. That simply doesn't stand up to scrutiny. 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 P had already decided to invest in TRG, so the 'dear Trustee' letter would not have been pivotal in his thinking. However I don't think this is relevant to what CMIM's *intent* was, as highlighted above. The FCA clarified this further at PERG 8.4.4G, again with my emphasis:

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

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

- the advice being given on a pension, which is typically held for the longer term;
- the risks CMIM highlighted in the letter were being mitigated by the strategy it was proposing to diversify their investment with a DFM arrangement held alongside it;
- no indication being given to the trustee to understand whether they met this 'cautious' definition.

In relation to the final point, CMIM says that was why it encouraged Mr P to take his own regulated advice. In my view that doesn't explain why it set out its letter 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 that other third parties had quite a lot of influence over what the trustees did, as this is the basis of much of its arguments now. So, it was unlikely to receive the DFM business if it discouraged the investment in TRG. And notwithstanding CMIM's observations about how much attention Mr P paid to it at the time, he then signed an instruction declaring that he had regard for CMIM's advice in making his investment decision.

Whether or not (in CMIM's view) Mr P was simply signing where a third party told him shouldn't have diminished that this was a highly significant step. If CMIM didn't realise the context of its advice then it should have done, given it said it was giving its advice for the purposes of PA'95. So given all of this, I think that CMIM's 'dear Trustee' letter was a 'significant step' in Mr P making the investment, and made it an inducement.

My view that this was a promotion is underlined by the fact that on 1 January 2014 FCA

revised the list of exemptions at COBS 4.12.4R to clarify that '*a personal recommendation on a non-mainstream pooled investment'* could, as a promotion, qualify for an exemption in certain limited circumstances. This underlines that advising on (and not just personally recommending) an investment could always have amounted to a promotion: the very nature of promotion means that it does not have to be targeted to a specific individual.

That is what happened here: CMIM promoted and advised on the investment (even though YCP may also have promoted it originally, and even though didn't make a personal recommendation).

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

Mr P 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, most of which weren't available because Mr P doesn't appear to have been high net worth or sophisticated and didn't have any of the other professions or roles specified.

Given when the terms of business were signed, Mr P likely received the 'dear trustee' letter before 1 January 2014. At that point the only other relevant COBS exemption was a Category 2 person, being both someone:

- *for whom the firm has taken reasonable steps to ensure that investment in the collective investment scheme is suitable; and*
- *who is an 'established' or 'newly accepted' client of the firm or of a person in the same group as the firm*

Mr P was not an established client of CMIM, and explanatory notes confirm that a newly accepted client required a written agreement relating to designated investment business (i.e. activities which were regulated by the FCA). Mr P's agreement with CMIM specifically *excluded* such regulated activities, so he could not have met the definition of a newly accepted client. It then became even harder to recommend UCIS after 1 January 2014 due to a clampdown by the regulator.

The only reasonable conclusion I can therefore draw from this is that CMIM unlawfully promoted the TRG investment to Mr P, in contravention of s.238 of FSMA. Moreover it ought reasonably to have been aware that other parties who promoted the investment to Mr P 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 P 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 P to confirm that he believed CMIM to be an 'appropriately qualified adviser' for the purposes of PA'95 – meaning that in effect Mr P 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 P would have understood the difference between 'advice' and 'suitability advice'.

Mr P was a lay-trustee, which CMIM knew, and unsophisticated in financial matters. Our investigator's conversation with Mr P confirmed this. So I think 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 P misunderstood CMIM's role if it now considers it wasn't appropriately qualified to give that advice. And at a fundamental level, I don't think his 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 P) 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 P 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 P's investment into TRG at all. It knew that none of the other parties in the transaction were regulated by the FCA and it could not, as a result, expect them to share its duty of care to clients.

What should CMIM have done instead?

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

In any event, it's just as difficult to see how advice that was stated in the terms of business to enable a trustee to make investment decisions for his SSAS under s.36 of PA'95 could *not* be personalised to that trustee. PA'95 itself makes references to suitability and diversification, but I should note here that the requirement for a formal statement of investment principles (s.35) - to which CMIM has referred - wouldn't apply to a one-member SSAS. However PA'95 says other regulations may specify further criteria.

Again owing to the small size of the SSAS, most of the regulations in the Occupational Pension Schemes (Investment) Regulations 2005 don't cover Mr P's SSAS. But regulation 7 does and this states that:

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

This precise wording was reflected in the investment instructions CGL required Mr P to sign. And I can't fairly say it was possible for Mr P 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. Furthermore, amongst the FCA's Principles CMIM was required to:

- conduct its business with due skill, care and diligence (Principle2);
- 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 passed on a trustee's signed copy of its terms of business, or it later found they'd signed up for its DFM service. That calls into question whether CMIM was adhering to Principle 3. I also think Principle 9 is particularly relevant here, as it refers to the care CMIM should take in formulating advice; even if it is advice that is not a personal recommendation to which the more detailed provisions of COBS 9 apply.

Under these principles and rules, I think there were only really two routes CMIM could take:

1. Decline to get involved in the introducer-adviser relationship with YCP, and therefore come into contact with clients like Mr P at all; *or*
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 P, 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 restriction wouldn't be breached.
   - Ensure it issued that recommendation to Mr P directly, rather than supplying it via third parties (where there was potentially some doubt whether it would reach Mr P, if the advice didn't give a favourable impression of investing).

I've carefully considered what the possible consequences of CMIM taking either of these two routes might have been. Clearly no third party could *make* CMIM give advice that was positively in favour of investing in TRG. So if CMIM declined to get involved or wanted to ensure it made direct personal recommendations, I accept it's possible that those parties would have looked to tie up with a different adviser hoping to get a more favourable outcome. However the wording of PA'95 meant that the 'proper advice' Mr P was required to take couldn't be given by just any adviser. s.36 states:

'For the purposes of this section "proper advice" means—

(a) if the giving of the advice constitutes the carrying on, in the United Kingdom, of a regulated activity (within the meaning of the Financial Services and Markets Act 2000), advice given by a person who may give it without contravening the prohibition imposed by section 19 of that Act (prohibition on carrying on regulated activities unless authorised orexempt);

(b) in any other case, the advice of a person who is reasonably believed by the trustees to be qualified by his ability in and practical experience of financial matters and to have the appropriate knowledge and experience of the management of the investments of trust schemes'

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

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

What would have happened if CMIM gave suitable advice?

As a regulated firm with permission to advise on investments, I'm satisfied CMIM should

have been aware of the regulator's views on UCIS and other non-mainstream investments. So it ought to have known that investment in UCIS (particularly for an unsophisticated retail investor) shouldn't take up more than a small part of the investor's overall assets – if their attitude to risk even allows them to make such an investment at all.

CMIM didn't assess Mr P's attitude to risk but, according to his later application form for Organic he doesn't seem to have been above a low-medium risk profile. That was consistent with the fact he appears to have been looking to draw some benefits from 2018 – when he first turned 55 – as he has now done. He invested about half of the transfer proceeds in TRG. I don't consider that was consistent with what we know of his risk appetite.

TRG was an off-plan, offshore property development subject to a variety of currency, counterparty, construction and occupancy risks and was typically unsuited to an inexperienced investor like Mr P who wasn't wanting to take high risks, even if he did have some time until retirement.

It's evident that the whole reason for the SSAS being promoted to Mr P was in order to invest in TRG. It's not clear when CGL requested the funds from Scottish Life, but they took many months after the SSAS was set up to arrive. So, it's likely Mr P received the dear Trustee letter at a point he was able to cancel (or not begin) that transfer request. I therefore need to consider how he would have acted, if CMIM had made a proper personal recommendation that didn't involve TRG.

Mr P didn't have particularly close ties to making the investments recommended: he'd simply been cold-called. As CMIM itself realises, it was brought on board to 'legitimise' Mr P'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 him. Once it had given that advice I can't safely say it could easily have been 'undone' by any attempts the introducers might have made to refer Mr P to other advisers. And CGL appears to have wanted advice in favour of the TRG investment so that it could say the trustee was complying with PA'95.

CGL told this service the advice wouldn't necessarily need to come from a regulated adviser, but I'm mindful that an unauthorised firm recommending a collective investment scheme would be committing an actionable offence under FSMA. That would in my view make such a firm difficult to find, and their advice would in any event carry less credibility. It would also have played further into the checks that it's likely Scottish Life had started carrying out by 2014 to mitigate against pension liberation/scams – these might have involved asking him if he was being advised by a regulated adviser, for example.

So on balance, I'm persuaded it's most likely that Mr P would have cancelled his request to transfer to the SSAS in its entirely - because the advice he was getting didn't support the investments being proposed by the introducer.

Should I only apportion part of Mr P's losses to CMIM?

CMIM says that CGL was *'reckless and negligent'* given its professed level of experience. I understand the argument that CGL should have known that the 'dear Trustee' letter couldn't satisfy the requirements (which it identified itself) of PA'95. I didn't know whether Mr P intends to complain about CGL's actions, 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 P has chosen to bring this complaint to us.

CMIM also says that Mr P'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 P 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 P 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 to CMIM. It's not that principle that is in dispute. Rather it is whether I can, in fact, fairly say that on the balance of probabilities Mr P would still have gone ahead with transferring his pension in order to invest in TRG, had CMIM treated him fairly. And here, I'm persuaded on the balance of probabilities that Mr P would have heeded the proper advice he was told he would get, and was entitled to expect, from CMIM.

Putting things right

My aim in awarding fair compensation is to put Mr P in the position he would have been in, had he not gone ahead with transferring to the SSAS.

Central Markets Investment Management Limited must therefore contact Scottish Life to obtain a *notional value* as at the date of my final decision, assuming that it continued to be invested in the same funds but was subject to the same gross withdrawals Mr P has direclty received. As a condition of accepting this decision, Mr P will need to give CMIM his authority to obtain this information.

The *actual value* of Mr P's CGL SSAS (including the current proceeds of the DFM arrangements used) as at the date of my final decision should be deducted from the *notional value* to arrive at Mr P'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 seems to be the case with the TRG holding in the CGL SSAS. Therefore as part of calculating compensation in respect of the TRG value:

- CMIM should agree an amount with CGL SSAS as a commercial value for this investment, then pay the sum agreed to CGL SSAS plus any costs, and take ownership of it. The *actual value* used in the calculations should include anything CMIM has paid to CGL SSAS. The fractional ownership company, as a member of which Mr P holds the TRG investment, should be consulted to achieve this.
- Alternatively, if CMIM is unable to buy the investment from CGL SSAS it should value it as nil, as part of determining the *actual value*. In that event it's also fair that Mr P should not be disadvantaged while he is unable to close down the CGL SSAS and move to a potentially cheaper arrangement. 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 give a reasonable period of time for the SSAS to be closed.

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

I also cannot anticipate whether TRG and/or the fractional membership company will be permitting changes of ownership because clearly legal processes would be involved. But to the extent that this is possible, CMIM will have benefited from any value it thinks remains in the investment by buying it out of the SSAS. But if CMIM is unable to take ownership of the investment, it may ask Mr P 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 P'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 P 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 initial loss amount. 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 it direct to Mr P. But had it been possible to pay into the CGL SSAS, it would have provided a taxable income. Therefore the initial loss amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr P's actual or expected marginal rate of tax at his selected retirement age. Here, it's reasonable to assume that Mr P is likely to be a basic rate taxpayer at the selected retirement age, and as he has already taken his tax-free cash this will mean a reduction of 20%.

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

If Scottish Life cannot provide a notional value

In this eventuality, CMIM will need to use a benchmark to provide a *fair value* for this policy and exchange that for the *notional value* specified above. As I said above, Mr P seems to have been willing to take some risk to get a higher return, but this was limited by the timeframe until 2018 when he was likely to draw our some benefits. So I consider that a composite benchmark based on 50% invested at the FTSE UK Private Investors Income Index on a Total Return basis, and 50% at the monthly average rate for one-year fixed rate bonds, would be appropriate here.

The Income 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.

The average rate for fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital. The rate for each month is that published by the Bank of England as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

I consider that Mr P's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. It doesn't mean that Mr P would specifically have made investments that exactly mirrored the return on this composite benchmark. For that reason CMIM should not be deducting investment costs or other charges from the benchmark. The view I'm taking is on how the *sort of* funds Mr P would have remained invested in with Scottish Life (***if*** a notional value is unavailable) would typically have performed; 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.

The gross amount of any withdrawals made from the SSAS will also need to deducted from the *fair value* at the point they were taken, so that they cease to feature in the calculation of growth.

I'm also satisfied the losses or gains in the DFM portfolio form part of Mr P'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 with Organic (which it did not recommend). But I've reached the conclusion that Mr P would have had no reason to be transferring his pension at all, but for CMIM's failings – and I don't think it likely his ceding provider would have permitted DFM as it was not a self-invested pension. So, including the present-day DFM value in the calculation is part of putting Mr P 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.

In all of the circumstances above I think it's fair and reasonable for me to hold CMIM responsible for 100% of Mr P'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 P'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 P's complaint and require Central Markets Investment Management Limited to pay him compensation as set out in the 'Putting things right' section above.

If Mr P accepts this decision and compensation is not paid within 28 days of CMIM being notified of his acceptance, interest must be added to my award at the rate of 8% per year simple from the date of the final decision to the date of payment.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 28 October 2022.

Gideon Moore
Ombudsman