complaint

Mr and Mrs G's complaint concerns their investment of £14,000 in an unregulated collective investment scheme ("UCIS") in 2006. They are contending that, as they did not meet the criteria for promotion of the scheme, Burlington Associates Ltd ("BAL") should not have promoted it to them or supplied them with product literature. Mr and Mrs G consider BAL is responsible for making an unsuitable promotion to them and causing them to invest in a product when they would not have otherwise done so. They ask for appropriate redress for their financial loss.

background

In have issued two provisional decisions, copies of which are attached and form part of this final decision.

In response to my provisional decision of 18 August 2014, Burlington Associates Ltd confirmed that it did not agree with my findings but said that it had nothing new to add to the comments it had previously made. It asked for assistance with calculating the compensation. This service carried out such a calculation and provided the results to Burlington Associates Ltd and Mr and Mrs G. Burlington Associates Ltd did not then provide any further submissions.

Mr and Mrs G responded to confirm their agreement with my provisional decision.

my findings

I have reviewed all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

Neither party has submitted any new points for my consideration. Having reviewed the complaint I confirm that my findings remain unchanged and as set out in my provisional decisions of 7 May 2014 and 18 August 2014. I uphold the complaint.

fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr and Mrs G as close to the position they would probably now be in if they had not been induced to purchase this UCIS.

I take the view that Mr and Mrs G would have invested differently. It is not possible to say precisely what they would have done differently. It seems likely they wished to take some risk but they were not sophisticated individuals and did not have significant resources or a history of taking high degrees of risk with their money. I am therefore satisfied that what I set out below is fair and reasonable given their circumstances and their objectives when they invested.

To compensate Mr and Mrs G fairly, BAL must

Compare

- The performance of Mr and Mrs G's investment;

with

- The position they would now be in if 50% of their investment had produced a return

matching the average return from fixed rate bonds with 12 to 17 months maturity as published by the Bank of England and if 50% had produced a return illustrated by the FTSE WMA Stock Market Income Total Return Index ("WMA index") over the same period of time.

If there is a loss, BAL should pay this to Mr and Mrs G.

I have decided on this method of compensation because Mr and Mrs G wanted growth and I believe some risk was acceptable.

The average rate from fixed rate bonds would be a fair measure for a consumer who wanted to achieve a reasonable return without risk to their capital. It does not mean that Mr and Mrs G would have invested only in a fixed rate bond. It is the sort of investment return a consumer could have obtained with little risk to the capital.

The WMA index, which is a combination of diversified indices of different asset classes, mainly UK equities and government bonds would be a fair measure for a consumer who was prepared to take a greater risk to get a higher return. I consider that Mr and Mrs G's risk profile was in between, as they were prepared to take some level of risk. I take the view that a 50/50 combination is a reasonable compromise that broadly reflects the sort of return Mr and Mrs G could have obtained from investments suited to their objectives and risk attitude.

Although the comparison may not be an exact one, I consider that it is sufficiently close to assist me in putting Mr and Mrs G into the position they would have been in if things had happened as they should.

how to calculate the compensation?

The compensation payable to Mr and Mrs G is the difference between the fair value and the actual value of the investment. If the actual value is greater than the fair value, no compensation is payable.

The actual value is the value Mr and Mrs G will receive if they terminated the investment on the date of my decision.

To arrive at the fair value, BAL should work out what 50% of the original investment would be worth if it had produced a return matching the average return for fixed rate bonds for each month from the date of investment to the date of my decision and apply those rates to that part of the investment, on an annually compounded basis.

BAL should add to that what 50% of the original investment would be worth if it had performed in line with the WMA index from the date of investment to the date of my decision.

Any additional sum that Mr and Mrs G paid into the investment should be added to the fair value calculation from the point it was actually paid in.

Any withdrawal or income payment that Mr and Mrs G received from the investment should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I will accept if the business totals all such payments and deducts that figure at the end instead of periodically deducting them.

If the plan cannot be encashed (and I believe it cannot) then it should be treated as having a nil value. Bearing that in mind and in order to avoid the risk of double recovery, BAL should have the option of taking an assignment of the investment of the appropriate proportion of

Mr and Mrs G's rights to the value of the investment and any future distribution made from the investment.

my final decision

I uphold this complaint. I consider that fair compensation should be calculated as set out above.

It would appear that Mr and Mrs G's investments were wrapped in a tax efficient ISA and my understanding is that HMRC has made certain provisions so that it may be possible for compensation paid in relation to loss of an investment held in an ISA to be transferred into an ISA wrapper without it counting towards the annual ISA subscription limit.

I also understand that there are certain time limits and other eligibility criteria. However, I am unable to give any more information or advice about this matter. Information can be found on the HMRC website. I can only suggest that if Mr and Mrs G would like to explore this further they contact HMRC directly or seek appropriate independent advice.

If my award is not paid within 28 days of Burlington Associates Ltd receiving notification that Mr and Mrs G have accepted this final decision, simple interest is to be added to the award at a rate of 8% a year from the date of my decision to the date of settlement.

If Burlington Associates Ltd considers that income tax should be deducted from that interest, it must provide a tax deduction certificate so that Mr and Mrs G may reclaim this if appropriate.

Simon Rawle
ombudsman

Copy of second provisional decision

complaint

Mr and Mrs G's complaint concerns their investment of £14,000 in an unregulated collective investment scheme ("UCIS") in 2006. They are contending that, as they did not meet the criteria for promotion of the scheme, Burlington Associates Ltd ("BAL") should not have promoted it to them or supplied them with product literature. Mr and Mrs G consider BAL is responsible for making an unsuitable promotion to them and causing them to invest in a product when they would not have otherwise done so. They ask for appropriate redress for their financial loss.

background

I issued a provisional decision on 7 May 2014 (copy attached) and this forms part of this provisional decision. In summary, I concluded the following:

- BAL arranged the investment and promoted it to Mr and Mrs G.
- BAL breached the statutory requirements for promotion of this UCIS.
- Mr and Mrs G were not suitable for promotion of UCIS and BAL did not obtain sufficient information to assess whether they were suitable for promotion.
- BAL caused Mr and Mrs G to invest in a scheme which was unsuitable for them and in which they would not have invested had the unsuitable promotion and breach not occurred.
- The loss Mr and Mrs G have suffered was foreseeable and has been caused by
- BAL's actions. BAL is therefore liable for that loss.

BAL disagreed with my findings. In summary it made the following points:

- The investment was classified as a Closed Ended Protected Cell Investment Company (PCC) with Limited Liability which has different promotion requirements to a UCIS.
- The promotion of this investment was undertaken not by BAL but by an unregulated property developer.
- It did not induce Mr and Mrs G to invest; it was purely a facilitator for individuals who wished to progress their interest to invest. The financial adviser that spoke to Mr and Mrs G at the time has confirmed this.
- It did not provide advice to Mr and Mrs G; it made arrangements for them to buy shares within an ISA wrapper on a non-advised basis.
- The email communication was of a factual nature, not a sales nature, and does not make any reference to reassurance. It also asked them to seek advice from an independent financial adviser.
- What happened with Mr C's case is outside the scope of the individual concerns and the timeframe under consideration in this complaint; the FCA's investigations were purely in relation to the practices whilst a network member (pre 2006).
- Mr and Mrs G are trying to engineer a complaint fuelled by information received from other parties who had different experiences and undertook different investments via seminars in 2005.
- It should not be held to account for issues with the fund given the extensive risk warnings on the prospectus.

Mr and Mrs G responded to say that they would not be submitting anything further.

my provisional findings

I have reviewed all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. I understand that in considering what is fair and reasonable in all the circumstances of the case, I must take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and (where appropriate) what I consider to have been good industry practice at the relevant time.

was the product a UCIS?

BAL has submitted that the investment in question was not in fact a UCIS. It suggests, instead, it was an issue of shares.

Mr and Mrs G invested in the R2i Select Property Fund, BAL describes this as a 'protected cell' of Business F, a 'closed-ended protected cell investment company'. The company was to issue shares and the capital raised was to be used to invest in property development companies. It was authorised by the Guernsey Financial Services Commission and based in Guernsey. It was not regulated by the FSA (the regulator at the time) in the United Kingdom.

The investments objective was to

"…… maximise capital appreciation via investment in selected and predefined property developments. The Fund will invest into property development companies for which (Business E) *acts as property manager (the 'Property Manager'). The Property Manager has been involved in extensive sales of buy to let property in Eastern Europe to UK investors. In addition, they are co-promoters of a number of Jersey regulated property funds"*

The Financial Services Act 2012 confirms at s.83 that the proper interpretation of a collective investment scheme remains the same as that provided under FSMA 2000. A collective investment scheme is defined under s.235 of FSMA:

s235 — Collective investment schemes.

(1) In this part "collective investment scheme" means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.
(2) The arrangements must be such that the persons who are to participate ("participants") do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions.
(3) The arrangements must also have either or both of the following characteristics–
(a) The contributions of the participants and the profits or income out of which payments are to be made to them are pooled;
(b) The property is managed as a whole by or on behalf of the operator of the scheme.
(4) If arrangements provide for such pooling as is mentioned in subsection (3)(a) in relation to separate parts of the property, the arrangements are not to be regarded as constituting a single collective investment scheme unless the participants are entitled to exchange rights in one part for rights in another.
(5) The Treasury may by order provide that arrangements do not amount to a collective investment scheme–
(a) In specified circumstances; or

(b) If the arrangements fall within a specified category of arrangement.

Exceptions

The Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001/1062 sets out at Schedule 1 those arrangements not amounting to collective investment schemes.

Having considered Schedule 1, I am satisfied the only paragraph that is potentially of relevance here is Paragraph 2, which provides:

2 — Enterprise initiative schemes
(1) Arrangements do not amount to a collective investment scheme if—
(a) The property to which the arrangements relate (other than cash awaiting investment) consists of shares;
(b) The arrangements constitute a complying fund;
(c) Each participant is entitled to a part of the property to which the arrangements relate and—
(i) to the extent that the property to which he is entitled comprises relevant shares of a class which are admitted to official listing in an EEA State or to dealings on a recognised investment exchange, he is entitled to withdraw it at any time after the end of the period of five years beginning with the date on which the shares in question were issued;
(ii) To the extent that the property to which he is entitled comprises other relevant shares, he is entitled to withdraw it at any time after the end of the period of seven years beginning with the date on which the shares in question were issued;
(iii) to the extent that the property to which he is entitled comprises shares other than relevant shares, he is entitled to withdraw it at any time after the end of the period of six months beginning with the date on which the shares in question ceased to be relevant shares; and
(iv) To the extent that the property comprises cash which the operator has agreed (conditionally or unconditionally) to apply in subscribing for shares, he is entitled to withdraw it at any time; and
(d) The arrangements would meet the conditions described in paragraph 1(c) were it not for the fact that the operator is entitled to exercise all or any of the rights conferred by shares included in the property to which the arrangements relate.
(2) In sub-paragraph (1)—
(a) “Shares” means investments of the kind specified by article 76 of the Regulated Activities Order (shares etc.) and shares are to be regarded as relevant shares if and so long as they are shares in respect of which neither—
(i) A claim for relief made in accordance with section 306 of the 1988 Act has been disallowed; nor
(ii) an assessment has been made pursuant to section 307 of the 1988 Act withdrawing or refusing relief by reason of the body corporate in which the shares are held having ceased to be a body corporate which is a qualifying company for the purposes of that Act;
(b) “Complying fund” means arrangements which provide that—
(i) the operator will, so far as is practicable, make investments each of which, subject to each participant's individual circumstances, qualify for relief by virtue of Chapter III of Part VII of the 1988 Act; and
(ii) The minimum contribution to the arrangements which each participant must make is not less than £2000.

Firstly I have considered if the investment would qualify as an enterprise initiative scheme and therefore be except from s235.

My view is that the investment does not qualify as an enterprise initiative scheme:

- Paragraph 2 (1c) clearly does not apply. Each investor would need to be entitled as of right to a part of the property. The 'Cell Particulars' make it clear that the aim of the scheme is to make a (collective) investment and then to realise profits and make a final distribution: it is not for investors to put money in and take it out as they wish.

- There is a provision in the particulars on p.8 regarding Redemption opportunities. This provides however that, "redemptions may only be made at the discretion of the Directors". Furthermore, it makes clear:

  *"Shareholders have **no entitlement*** (my emphasis) *to redeem their Shares and any redemptions are at the sole and absolute discretion of the Directors and on such terms and conditions as the Directors in their absolute discretion may see fit to impose on such redemptions from time to time."*

- The cell particulars make it clear that the investment will be made equitably between various property development companies in which the fund will not have a majority controlling share. The proportions in each investment will be in equal pro rata amounts and the fund will endure for five years. The Particulars state at the bottom of p.5 that at the end of five years:

- *"Upon termination, the Administrator will realise the Fund's Investments and make a final distribution to the Fund's shareholders, after taking into account any costs associated with realising those investments."*

- So investors in the scheme were not entitled to "a part of the property". Accordingly, the investment would not be excepted by Paragraph 2 of Schedule 1 of the Collective Investment Schemes Order.

I have then considered whether the investment would satisfy s235. In doing so, I have taken account of the views of the recent Court of Appeal decision in *Asset Land Investment PLC v FCA [2014] EWCA Civ 435*., which confirmed that the interpretation of s235 was a wide one and which discussed certain key elements in the interpretation of s235:

- Arrangements;
- Shared understanding;
- Day to day control; and
- Management by the operator.

My view is that this investment did satisfy s235:

- It was an arrangement in respect of various properties in Eastern Europe, the purpose of which was to enable those taking part to receive a profit from the acquisition of the property. I am satisfied from my reading of the cell particulars that the investment agreements were clearly 'arrangements' in the broad sense (s235(1) is fulfilled).

- Investors did not have day-to-day control over the management of the property. Investments were made in a number of Eastern European properties. Notwithstanding that investors might have opted to build on land purchased in Bulgaria, it is clear investors' money was invested via Business E and it in turn managed the project (s235(2) is fulfilled).

- s.235(3)(a) is fulfilled. The Distribution Policy on p.8 of the particulars states: *"upon termination of the Fund, the Administrator will realise the Fund's Investments and make a final distribution… to the Fund's shareholders."* This in my view implies pooling; an investment is a collective investment scheme where issues of management "as a whole" and "pooling" are involved.

- s.235(3)(b) is fulfilled. S235 allows for either/both part (a) or (b) to be fulfilled. Even if (a) were not satisfied, the investment was clearly managed by Business E via various property development companies which in turn invested in Montenegro, Croatia and Bulgaria; Business E was then responsible, under the distribution policy, for realising the various investments under the fund and distributing them to the investors. I am satisfied that this constitutes management in accordance with s.235(3)(b).

All in all, I am satisfied that Mr and Mrs G have purchased a collective investment scheme. Further, I note that the definition of a UCIS under the COB Rules that applied at the time was, 'a collective investment scheme which is not a regulated collective investment scheme'. I am satisfied that non-UK collective investment schemes could be a 'regulated CIS' if they were recognised by the FSA where certain criteria were met. The regulator has a register of all recognised CISs. I am satisfied that the R2i scheme was not such a scheme.

In turn, I am satisfied that this investment is a collective investment scheme, which was not a regulated collective investment scheme, and so would be correctly classified as a UCIS.

The definition of a UCIS under the COB Rules that applied at the time was, 'a collective investment scheme which is not a regulated collective investment scheme' (regulated being as regulated in the UK). This investment is a collective investment scheme, as defined in section 235 of the Act. It was not regulated in the UK and so would be correctly classified as a UCIS.

the FCA findings

I do not agree with BAL that I should disregard the FCA's findings which I referred to in the provisional decision. Given the available evidence, as regards this complaint I am persuaded it is likely that the same practices undertaken by Mr C and BAL and identified by the FCA in its Final Notice, were likely to have continued into the period in which BAL was authorised in its own right and in relation to the same type of investment considered here. Specifically, I note the following FCA findings about the activities conducted by BAL whilst it was operating as an appointed representative:

- BAL promoted and arranged investments in R2i UCISs;
- It received and collated prospectus request forms;
- It was integral to the process of eligibility certification and assessed eligibility using a questionnaire that was inadequate for the purpose;
- It received completed application forms and issued prospectuses to potential investors.

As a result, the FCA found that Mr C (a director of BAL) failed to oversee adequately the conduct of such activities with due skill, care and diligence, resulting in 880 investors purchasing investments in the three UCISs on a non-advised basis in breach of the statutory requirements. BAL received substantial income for its role in selling the three UCISs. The investments may now be virtually worthless to the investors.

In my view, there is evidence in the context of Mr and Mrs G's complaint to point to the same

or similar practices being conducted by BAL at the time it did business with them as a directly authorised firm. In particular, I am satisfied that it arranged Mr and Mrs G's investment by providing them with the prospectus, particulars of the fund and by setting up their Transact account. By arrangement, Mr and Mrs G were referred to it by an unauthorised business, (referred to by the FCA as Marketing Co), following an advertising campaign in a property magazine and it was responsible for processing an inadequate investor eligibility questionnaire for them. As I say, I am satisfied it promoted this investment to Mr and Mrs G by inviting them to invest and inducing them to do so. It accepted their business from an unauthorised firm following an advertising campaign; it encouraged them to invest by allaying their doubts and reassuring them in a series of phone conversations; in providing Mr and Mrs G with the particulars of the fund, it described it as a 'unique opportunity' to invest and encouraged them to invest quickly by emphasising the closing dates for the fund.

As a result, I consider the FCA findings regarding these practices (albeit at a time when the business was not directly authorised) to be a relevant consideration which I am required to take into account. BAL suggests that any 'irregular' practises examined by the FCA that might have been in place whilst it was a network member should not be assumed to have been in place while directly authorised (suggesting that those practices were not in place or may not have been in place at that time).

I am not sure that this assists BAL. Taking account of the available evidence I am satisfied it was more likely than not that after it became fully authorised, BAL continued to conduct this UCIS business with consumers in the same manner as it did when it was an appointed representative. To my mind, there is also little doubt that the FCA findings regarding a failure by BAL's approved person to act with due care and skill in overseeing the practices mentioned above would apply equally to the period when BAL was acting as an authorised firm (when the Principles for Businesses in 'PRIN' of the FCA handbook would have 'kicked in' – as they do for all directly authorised businesses).

did promotion take place?

BAL has said that it provided only an administrative function in processing applications for the UCIS. It has said that it did not promote the UCIS and if any promotion did take place it was undertaken by other parties.

As I have outlined above, I do not agree.

The 'Listing' documentation for the investment, supplied by BAL to Mr and Mrs G, records that BAL is the "Promoter and Investment Adviser' for the fund. The document goes into some detail about the status of BAL, recording that;

"Burlington Associates Limited is also acting as the Promoter of the Company. The Promoter will be marketing the Company to prospective investors on the terms of a commission agreement….".

I believe it is clear that BAL were the promoters of the investment and promoted it to Mr and Mrs G but, to recap, I would refer to the following:

- The emails of 12 and 28 July 2006 clearly state that it (BAL) is promoter of the fund and it is providing detail of the investment. It goes on to describe the investment as a'unique opportunity' and emphasises the need to invest quickly as response had been 'very positive' and the fund might in turn close early;
- Guidance is provided about how to invest by completing an application and retrospective eligibility for promotion is attempted by way of an inadequate eligibility

questionnaire;
- I am satisfied that, in a series of phone calls at around the same time as the emails, BAL reassured Mr and Mrs G about the investment and allayed any doubts they might have.

For completeness I am not persuaded by BAL's argument that it could reasonably assume that the unregulated marketing company who had advertised the investment scheme in a property magazine and from whom it had received Mr and Mrs G's business had undertaken a compliant promotion. On my understanding, there has been no evidence whatsoever to indicate that was the case.

All in all, I remain satisfied that BAL did arrange and promote this UCIS to Mr and Mrs G.

was advice given?

In its submissions, BAL makes much of the fact that investment advice was not given by it to Mr and Mrs G. I would reiterate that this issue is largely irrelevant to my findings. Whilst the giving of investment advice can be a strong indicator that inducement and in turn promotion of a product has taken place, it is equally clear that promotion can take place even when no investment advice is given. For all the reasons outlined above, I am satisfied that is the case here.

Mr and Mrs G's submissions

BAL has said that Mr and Mrs G's submissions regarding their phone conversations with it may not be accurate and are not corroborated by the content of the emails sent.

I have given careful thought to what Mr and Mrs G have said they were told in their phone conversations with BAL and have treated their account with some caution, given the passage of time since they took place. Nonetheless, I am satisfied that on balance, their submissions are credible and reliable.

Firstly, I am satisfied the conversations with BAL did in fact take place, and were not conducted with 'some other entity', as BAL has suggested. I note that BAL's initial email to Mr and Mrs G of 12 July 2006 invites prospective investors to contact them with queries by way of a link that takes investors directly to the Burlington Associates web page. I also note that BAL itself refers to a phone conversation with Mr and Mrs G 'earlier this week' in its email to them of 28 July 2006. All in all, I am satisfied that it is most unlikely the conversations in question took place with any business other than BAL.

Secondly, I am satisfied that Mr and Mrs G were more likely than not to have received the reassurances they said they were given by BAL. It is not contested that they were unsophisticated investors with little experience in investments of this type, or indeed any other type, of investment. They confess to being 'naïve' and to acting with some haste following the warning BAL had given them about the possibility of the fund closing early due to high demand. They say that as a result of the conversations, particularly the information they received about ISA allowances, they increased the level of their proposed investment from £10,000 to £14,000. It is clear that they had little to no experience of this type of investment prior to their dealings with BAL. I therefore find it plausible that they were unlikely to have proceeded in this manner if they had not been induced to do so by what they refer to as BAL's guidance and 'reassurances'.

I would only add that I have carefully considered the evidence of Mr H. However, this has not changed my view of the role played by BAL in this matter. In fact Mr H confirms that he has no

real recollection of Mr and Mrs G nor of the email he was asked to consider and unsurprisingly his recollections are general in nature. This can be contrasted with the submissions of Mr and Mrs G, who as outlined above, I consider are credible and reliable.

risk warnings

I have noted and taken into account that there are risk warnings in some of the documentation supplied to Mr and Mrs G about the investment. However that does not alter the fact that Mr and Mrs G were not eligible for promotion and should not have been induced into making the investment. I am satisfied they would not have invested but for BAL's actions.

BAL has asked that regard be given as to whether Mr and Mrs G thought they were investing in a risk free asset. I did confirm in my provisional decision that I believed some risk was acceptable and proposed redress on that basis. I do not, however, believe it is clear that they would have otherwise invested in property and that property would have been in Eastern Europe.

findings as to the promotion

S238 breach: My provisional decision outlines the statutory requirements for the promotion of UCISs. In particular, I outlined the requirements of s238 of FSMA and the exemptions contained in both the FSMA 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 and in COB 3.11.2 of the former FSA Handbook. As I have said, I am satisfied for the reasons outlined in this and my previous provisional decision that BAL did promote this scheme to Mr and Mrs G in breach of the prohibition in s238, as there is no evidence that any of the potential exemptions to that prohibition (particularly art 23A of COB 3.11.2 – self–certified sophisticated investors) could apply.

Fair and reasonable: In any event, even if there had been no breach of s238 FSMA, it is still my opinion that BAL has not acted with due regard to the interests of Mr and Mrs G and has not dealt with them fairly. I agree with the FCA that although it appears a process was agreed with other businesses to sell these UCISs without BAL appearing to carry on any regulated activity, the actual practices put into place by BAL went beyond purely administrative functions to the promotion and arrangement of the UCIS with investors including Mr and Mrs G.

Mr and Mrs G were referred to BAL by a non-authorised business that had advertised the investment in a property magazine. BAL continued to deal with Mr and Mrs G in a manner that encouraged them to invest in a product that was entirely unsuited to them. As I say in my provisional decision, if BAL had put even the most straightforward of questions to Mr and Mrs G in their phone conversations with them, it would have quickly realised it could never be in their best interests to invite them to purchase a UCIS. Given the volatile nature of this type of investment and the high risks to the capital invested, I do not consider BAL has dealt with Mr and Mrs G fairly or acted in their best interests. Further, I agree with the FCA that the arrangement and promotion of these UCISs by BAL was not conducted with due care, skill and attention. I consider this to be the fair and reasonable determination of this dispute.

I remain of the view that the complaint should be upheld, for the reasons above and those contained my provisional decision. In summary:

- BAL was authorised in its own right by the FSA when it arranged this investment business;

- It arranged and promoted the investment, which I am satisfied is a UCIS, and which was purchased by Mr and Mrs G;
- In doing so, it breached the statutory requirements for the promotion of UCIS;
- In any event, it did not treat Mr and Mrs G fairly or pay due regard to their interests;
- In so doing it induced Mr and Mrs G to invest in a scheme entirely unsuited to them and in which they would not have otherwise invested.

fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr and Mrs G as close to the position they would probably now be in if they had not been induced to purchase this UCIS.

I take the view that Mr and Mrs G would have invested differently. It is not possible to say precisely what they would have done differently. It seems likely they wished to take some risk but they were not sophisticated individuals and did not have significant resources or a history of taking high degrees of risk with their money. I am therefore satisfied that what I set out below is fair and reasonable given their circumstances and their objectives when they invested.

To compensate Mr and Mrs G fairly, BAL must

Compare

- The performance of Mr and Mrs G's investment;

with

- The position they would now be in if 50% of their investment had produced a return matching the average return from fixed rate bonds with 12 to 17 months maturity as published by the Bank of England and if 50% had produced a return illustrated by the FTSE WMA Stock Market Income Total Return Index ("WMA index") over the same period of time.

If there is a loss, BAL should pay this to Mr and Mrs G.

I have decided on this method of compensation because Mr and Mrs G wanted growth and I believe some risk was acceptable.

The average rate from fixed rate bonds would be a fair measure for a consumer who wanted to achieve a reasonable return without risk to their capital. It does not mean that Mr and Mrs G would have invested only in a fixed rate bond. It is the sort of investment return a consumer could have obtained with little risk to the capital.

The WMA index, which is a combination of diversified indices of different asset classes, mainly UK equities and government bonds would be a fair measure for a consumer who was prepared to take a greater risk to get a higher return. I consider that Mr and Mrs G's risk profile was in between, as they were prepared to take some level of risk. I take the view that a 50/50 combination is a reasonable compromise that broadly reflects the sort of return Mr and Mrs G could have obtained from investments suited to their objectives and risk attitude.

Although the comparison may not be an exact one, I consider that it is sufficiently close to assist me in putting Mr and Mrs G into the position they would have been in if things had happened as they should

how to calculate the compensation?

The compensation payable to Mr and Mrs G is the difference between the fair value and the actual value of the investment. If the actual value is greater than the fair value, no compensation is payable.

The actual value is the value Mr and Mrs G will receive if they terminated the investment on the date of my decision.

To arrive at the fair value, BAL should work out what 50% of the original investment would be worth if it had produced a return matching the average return for fixed rate bonds for each month from the date of investment to the date of my decision and apply those rates to that part of the investment, on an annually compounded basis.

BAL should add to that what 50% of the original investment would be worth if it had performed in line with the WMA index from the date of investment to the date of my decision.

Any additional sum that Mr and Mrs G paid into the investment should be added to the fair value calculation from the point it was actually paid in.

Any withdrawal or income payment that Mr and Mrs G received from the investment should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I will accept if the business totals all such payments and deducts that figure at the end instead of periodically deducting them.

If the plan cannot be encashed (and I believe it cannot) then it should be treated as having a nil value. Bearing that in mind and in order to avoid the risk of double recovery, BAL should have the option of taking an assignment of the investment of the appropriate proportion of Mr and Mrs G's rights to the value of the investment and any future distribution made from the investment.

my provisional decision

I uphold this complaint. I consider that fair compensation should be calculated as set out above.

It would appear that Mr and Mrs G's investments were wrapped in a tax efficient ISA and my understanding is that HMRC has made certain provisions so that it may be possible for compensation paid in relation to loss of an investment held in an ISA to be transferred into an ISA wrapper without it counting towards the annual ISA subscription limit.

I also understand that there are certain time limits and other eligibility criteria. However, I am unable to give any more information or advice about this matter. Information can be found on the HMRC website. I can only suggest that if Mr and Mrs G would like to explore this further they contact HMRC directly or seek appropriate independent advice.

If my award is not paid within 28 days of Burlington Associates Ltd receiving notification that Mr and Mrs G have accepted any final decision, simple interest is to be added to the award at a rate of 8% a year from the date of my decision to the date of settlement.

If Burlington Associates Ltd considers that income tax should be deducted from that interest, it must provide a tax deduction certificate so that Mr and Mrs G may reclaim this if appropriate.

Simon Rawle
ombudsman

copy of first provisional decision

complaint

Mr and Mrs G's complaint concerns their investment in 2006 of £14,000 in an unregulated collective investment scheme ("UCIS"). They are contending that, as they did not meet the criteria for promotion of the scheme, Burlington Associates Ltd ("BAL") should not have promoted it to them or supplied them with product literature. Mr and Mrs G consider BAL is responsible for making an unsuitable promotion to them and causing them to invest in a product when they would not have otherwise done so. They ask for appropriate redress for their financial loss.

background

Having seen an advert in a property magazine, Mr and Mrs G asked for further information about the investment from an unregulated property developer. They were subsequently emailed by BAL in July 2006.

Mr and Mrs G say that, following several telephone conversations with a representative of BAL, and further emails, they invested £14,000. As the investment has now, by all accounts no value, Mr and Mrs G say that BAL is liable for their loss.

Mr and Mrs G referred their complaint to BAL, who rejected it. Subsequently Mr and Mrs G referred their complaint to this service.

An adjudicator at this service concluded that BAL was liable for Mr and Mrs G's loss. In essence he was satisfied that BAL had actively promoted and arranged a UCIS in breach of the statutory restrictions on the financial promotion of such products. Furthermore the adjudicator could find no evidence that, when considering their circumstances at the time, Mr and Mrs G could be regarded as exempt from such restrictions or that they had 'Qualified
Investor Status'.

He proposed that BAL should compensate Mr and Mrs G accordingly.

BAL did not agree with the adjudicator's assessment. BAL stated that it had not promoted the investment to Mr and Mrs G but had simply provided the requested documentation, 'for their own consideration'. BAL said that it was only acting as a conduit between Mr and Mrs G and the provider of the investment and it was not its responsibility to assess their suitability to invest or their suitability for promotion.

Furthermore the emails provided a warning that the email itself, 'does not constitute advice' and that if they have any doubts they should contact an independent financial advisor. As to any conversations that had taken place between BAL and Mr and Mrs G, it would be incorrect, 'to put any bearing on unsubstantiated telephone conversations'.

Mr and Mrs G responded to the adjudicator's assessment. They said that the documentation confirmed BAL was actively promoting the fund and in an email had said, 'this is a unique opportunity to invest'. With regard to discussing the investment on the telephone, which had been lengthy, Mrs G stated that the advisor;

'had reassured me about the investment and answered any questions and concerns I had. Therefore I believe that Burlington Associates did promote the investment to myself and I also believed that they were providing me with financial advice'.

They said this was supported by the subsequent email in which the advisor stated he was as 'Independent Financial Advisor' employed by BAL.

As the complaint remains unresolved, it has been referred to me for review.

the Financial Conduct Authority's enforcement proceedings and findings

I note that since we have received this complaint, the Financial Conduct Authority ("FCA") has published the results of its enforcement proceedings against Mr C of BAL.

The FCA made findings against Mr C while he was a principal of BAL, when BAL was an appointed representative. But he continued as a principal after BAL became an authorised firm in its own right and, as I will discuss, continued to promote and arrange UCIS.

I am satisfied that based on the evidence that relates to this case that many of the practices investigated and assessed by the FCA continued after BAL became an independent financial adviser ("IFA"), and to that extent, I consider that the FCA's findings in connection with those practices are relevant.

In accordance with its enforcement powers under the Financial Services and Markets Act 2000, the FCA undertook an investigation into the role played by Mr C in the promotion of UCIS investments.

As a result of its investigation, the FCA made findings against Mr C in a final notice dated 12 July 2013. Essentially, the FCA found that Mr C had failed to monitor, adequately, the promotion of UCIS to approximately 2,900 retail investors. He was fined £28,000 and banned from performing accountable significant influence functions at any FCA regulated firm. In its final notice, the FCA has referred to "Director A" who they define as another director of BAL during the relevant period, who orchestrated BAL's involvement in promoting and arranging UCISs.

in summary the FCA found that:

2.2. Mr C breached Statement of Principle 6 because he failed to exercise due skill, care and diligence in managing the business of Burlington for which he was responsible in his controlled function. In particular, he failed to monitor Burlington's involvement in the promotion and arrangement of investments in three UCISs to retail customers. Burlington became concerned in these activities through the actions of Director A. As a result of Director A's actions, Burlington was at risk of breaching its AR agreement. Mr C ought to have identified this risk and taken steps to mitigate it and ensure that retail customers were protected.

2.6. Mr C's failure to oversee adequately Burlington's activities allowed Director A to involve the firm in promoting and arranging investments in the three UCISs, in breach of its AR agreement and possibly the Act and to the detriment of retail consumers. These activities, together with the activities of another IFA and two non-authorised companies, resulted in unsolicited mailshots being sent by email to approximately 15,000 potential

investors, prospectuses being sent to approximately 2,900 retail consumers and investments being made without an adequate assessment of potential investors' eligibility.

2.7. In total, approximately 880 investors invested €38 million in the three UCISs on a non-advised basis. The three UCISs fell into financial difficulties from 2006 and the investors' original investments may now be virtually worthless.

2.8. Mr C has therefore failed to meet the minimum regulatory standards in terms of performing significant influence functions with competence and capability. He is not fit and proper to perform significant influence functions at any authorised person, exempt person or exempt professional firm. Accordingly, the Authority has decided to impose the Prohibition Order on him.

In addition the FCA discussed the background of the promotion of UCIS by BAL:

4.1. Throughout the relevant period Mr C was a director of Burlington, a small IFA firm. Between 12 May 2003 and 2 January 2006, Burlington was an AR acting under the terms of an AR agreement with its principal. During this period Mr C was approved to perform CF1 (Director (AR)) and CF21 (Investment Adviser). He also took on an informal compliance responsibility for ensuring that Burlington met the requirements of its AR agreement.

4.2. Burlington's principal did not permit Burlington to conduct UCIS business. In late 2004, Director A was approached by MarketingCo, a non-authorised property marketing company which was aiming to generate money to invest in property developments in Croatia, Bulgaria and Montenegro. Three UCISs were set up for this purpose, with the help of Director A. By early 2005, Director A had identified an opportunity for Burlington to become involved in selling the three UCISs.

BAL's involvement in promoting and arranging the three UCISs:

4.3. Burlington made two attempts to find out whether its principal would allow Burlington to promote UCISs. On both occasions Burlington's principal made it clear that it would not allow Burlington to be involved in UCIS sales.

4.4. Director A told Mr C that he would seek legal advice on behalf of Burlington about this issue. He told Mr C that the advice that he had received was that Burlington could remain involved in conducting UCIS business if the firm carried out a purely administrative function. Mr C took Director A's assurances at face value, as he did not liaise directly with any lawyers or recall seeing any advice himself.

4.5. Director A devised a process which aimed to circumvent the regulatory and statutory restrictions by allowing a number of businesses to come together to sell the three UCISs without Burlington appearing to carry on any regulated activity. The process was intended to be that:

(a) MarketingCo marketed the investment opportunity to their client base via unsolicited email mailshots and seminars;

(b) Director A arranged for Business D to take responsibility for certifying potential investors as eligible to receive UCIS promotions, and issue prospectuses to them under the name "Burlington Funds" (although in reality most of the administrative aspects of

Business D's duties were to be outsourced to administrators at AdminCo, a non-Authority authorised management services company. Director A was a director and controller of AdminCo and AdminCo operated out of the same building as Burlington); and

(c) Burlington collated investors' applications and passed them to a Jersey based firm, with whom Director A already had a business relationship, which effected the investments.

4.6. While it appeared at the outset that Burlington's role in connection to the three UCISs would be limited to administrative tasks, in fact, Director A extended this role beyond a purely administrative function into promoting and arranging investments in the UCISs, in breach of its AR agreement and in a manner which risked breaching the Act. Burlington received substantial income for its role in selling the three UCISs.

failure to engage with the UCIS sales process

4.7. Mr C knew that Burlington had a role in the sale of the three UCISs. However, he did not seek to increase his understanding of how the process of selling the three UCISs worked. He dealt with matters on a personal ad hoc basis with Director A and took what Director A told him at face value. Mr C did not engage with MarketingCo or AdminCo to establish how the three UCISs would be structured and sold or what Burlington's role would be.

4.8. Mr C did not take any steps to monitor Burlington's involvement in marketing and bringing about investment in the three UCISs. For example, Mr C did not familiarise himself with MarketingCo's marketing materials or know that:

(a) Burlington received and collated prospectus request forms;

(b) Burlington was integral to the process of eligibility certification and assessed eligibility using a questionnaire that was inadequate for the purpose;

(c) Burlington received completed application forms and issued prospectuses to potential investors; and

(d) MarketingCo issued marketing materials directing potential investors' queries to Burlington.

4.9. Mr C's lack of oversight, checking and monitoring enabled Director A to involve Burlington heavily in every stage of the sales process, despite the complete prohibition on Burlington conducting UCIS business in the AR agreement.

I have taken the FCA findings into account as a relevant consideration. Although there is significant overlap in the scope of our respective investigations and considerations, I understand that the FCA's regulatory role in its investigation of Mr C, personally, was different to our statutory duty to resolve Mr and Mrs G's complaint against BAL. Also as outlined above, I am aware that the findings of the FCA relate to the period that BAL was acting as an appointed representative of its principal and I have taken account of the findings of the FCA's final notice in that context.

my provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

the UCIS

The UCIS into which Mr and Mrs G invested was designed to invest in property and/or land development companies, themselves investing in, or hoping to make gains from, undeveloped land in eastern Europe. It was a high risk scheme as the prospectus itself explains. There is little in the way of tangible assets at the outset and no guarantee of return of capital or profit.

the restrictions on the promotion of UCIS:

The adjudicator confirmed the statutory requirements for promoting UCIS investments to Mr and Mrs G. However, for completeness, I will repeat that detail.

The strict regulatory requirements in connection with the marketing of UCIS to retail consumers are derived from Section 238 of the Financial Services and Markets Act (FSMA); this prohibits authorised firms from promoting UCIS except where:

i. An exemption in the FSMA 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 ("the Order") applies; or

ii. An exemption in COB 3.11.2 (in the former FSA Handbook) applies.

'Promoting', in this context, means the communication, in the course of business, of an invitation or inducement to engage in investment activity in relation to UCIS. The Order permits promotion to certain individuals, including the following:

- Certified high net worth individuals (art 21);
- Certified sophisticated investors (art 23);
- Self-certified sophisticated investors (art 23A)

The circumstances in which COB 3.11.2 permitted promotion of UCIS were outlined in COB 3 Annex 5 R:

Category 1: A person who is already, or has been in the last 30 months, a participant in a UCIS or a qualified investor scheme;

Category 2: A person for whom the firm has taken reasonable steps to ensure that investment in the collective investment scheme is suitable and who is either an established or a newly accepted customer of the firm, or of a person in the same group as the firm;

Category 6: An exempt person, if the promotion relates to a regulated activity in respect of which the person is exempt;

Category 7: A market counterparty or intermediate customer.

I have considered if,

- the statutory requirements for the promotion of UCIS were met, and;
- whether Mr and Mrs G were suitable for such a promotion, and;
- whether BAL is responsible for Mr and Mrs G's financial

  loss.

were the requirements for the promotion of UCIS met?

To assess whether the requirements were met I have considered BAL's role (if any) in the promotion of, and in bringing about, the investment in the UCIS.

As discussed, in response to an enquiry from Mr and Mrs G about the property investment, they received an email from BAL on 12 July 2006. To avoid any chance of taking the content of the email out of context I will set out the email in full;

Dear Prospective Investor,

We would like to confirm that based on your request, and in our role as Promoter of the Fund, we are sending you the attached Cell Particulars of the R2i Select Property Fund, Listing Document of the CCAM Special Opportunities PCC Ltd and the application form to the Fund. We believe these documents to be clear, fair and not misleading.

This is a unique opportunity to invest via the R2i Select Property Fund into five property development projects in Croatia, Montenegro and Bulgaria. The Fund has a minimum subscription amount of €10,000.

The R2i Select Property Fund is regulated by the Guernsey Financial Services Commission and not by the Financial Services Authority. However, the Cell Particulars include UK counsel's tax information with regards to investments from Self Invested Personal Pension Schemes, Individual Savings Accounts and Personal Equity Plans.

For you to consider this promotion all of the attached documents should be read in conjunction with one another. If you wish to proceed, please follow the application instructions located on the first page of the Application Form. In addition, should you have any queries regarding this promotion, please contact us at

r2iselect@burlingtonfs.com.

Please see below the SEDOL and ISIN numbers issued for the R2i Select Property Fund cell in CCAM Special Opportunities PCC. The SEDOL (Stock Exchange Daily Official List) number is a code only used by the London Stock Exchange to identify stocks, while the ISIN (International Securities Identification Number) is used internationally.

The fund initial offering is from the 4th May 2006 to the 11th November 2006. The first closing date is the 2nd June 2006 with further monthly dates from the 11th July 2006 to the
11th November 2006. We don't anticipate that the fund will remain open for the entire initial offering period as response to date has been very positive.

Please note that this email does not constitute advice on investment and if you have any

doubt about the suitability of the investment which is the subject of this financial promotion you should contact an Independent Financial Advisor.

Kind regards

Burlington Associates Limited

To my mind it is clear from this email that BAL are promoting the UCIS to Mr and Mrs G; it has stated clearly that it is the promoter of the scheme, which I understand was its role, with employees of BAL present at regular sales seminars or 'road-shows' in which the scheme was promoted. It is also clear, given the statutory restrictions I have set out on the promotion of UCIS that BAL had already at this point breached the restrictions, as it had no knowledge at this point whether Mr and Mrs G would be suitable for promotion of a UCIS but promoted it to them anyway.

BAL sent a further email to Mr and Mrs G on 28 July 2006;

Good to speak to you earlier this week. My colleague should now have emailed you the Transact paperwork. Note however that she has sent you paperwork for a General Investment Account (GIA) rather than an ISA, as it appears that Transact only provide a maxi-equity ISA facility and not the £4k mini-equity facility that I believe you were after. I tried ringing to discuss this point this morning but got an answerphone so please give me another ring when you get a chance.

In any case, as discussed, if you and your husband are planning to invest into the R2I Select Property Fund and think you will be setting up Transact accounts to facilitate this investment, alongside the Transact application paperwork, we also require written confirmation that you wish us to buy into the Fund using your new Transact GIA account once this is set up.

Furthermore, as we will be able to purchase the fund within the Transact system without you completing the wider Fund application form (which was enclosed with the original fund information that was emailed to you sometime ago) we do nevertheless need confirmation that you are eligible to invest into the Fund . This can be done by completing the attached Eligibility statement (which was an important section of the wider Fund application that will not now need completing if you are investing via Transact.)

The written confirmation that you want to purchase the fund in Transact therefore needs to include the following statements (see below) , as well as a completed copy of the attached Eligibility form . (You can either fax, email or post this information to us by reply, following which our administration team will submit your application and buy the Fund on your behalf once your Transact account has been set up.)

'Please accept this as my instruction for you to purchase [confirmation of amount] of the R2i Select Property Fund within my ISA with Transact.

I confirm that I have been provided with the relevant Listing Document and Cell Particulars and that I have not requested or received any advice in respect of this investment.

*I attach / have sent you** the Qualified Investor Status form that I have completed to confirm in which capacity I am eligible to invest in this fund.'*

***delete as appropriate*

Feel free to give me a call if this is not clear.
Regards, (Name of adviser)
Independent Financial Adviser
Burlington Associates Ltd.

It is clear that BAL is enabling Mr and Mrs G to make the investment and arranging the investment for them; it had already sent information about the investment and application forms and in the first email it was creating the impression that Mr and Mrs G would miss out if they did not act quickly. BAL had still not, by this point, investigated or confirmed that Mr and Mrs G would be suitable for the promotion and it seems to me that the email of 28 July was an attempt to do this retrospectively, after Mr and Mrs G had already been induced to invest. So, via its telephone and email communications, BAL promoted and induced Mr and Mrs G to invest in a UCIS before it had established whether Mr and Mrs G qualified for promotion under any of the statutory exemptions.

The provision of tailored financial advice does not affect the restrictions on promotion of UCIS. The restrictions apply whether financial advice has been given or not.

BAL was arranging the investment by promoting, supplying information (including how to apply for their investment) and discussing it with Mr and Mrs G. They are clearly the material party that enabled Mr and Mrs G to invest. So, BAL has made arrangements for them to buy the investment, which is a regulated activity under article 25 of the Regulated Activities Order.

were Mr and Mrs G suitable in any event for the promotion of UCIS?

Mr G was a professional but his work was not related to finance or investments, Mrs G worked part time and again her work did not give her any particular knowledge or expertise in this or any other type of investment. They have said that the only investment they had was £8,000 in shares in a company share-save scheme. They had recently re-mortgaged to carry out some improvements on their home and had some money left over; this was the money they used to invest. They had a mortgage of £135,000.

Given their experience and circumstances I believe it is evident that Mr and Mrs G were not consumers who were suitable for such a complex and high risk scheme, which could bring about the total loss of their investment.

BAL has said that they did not provide tailored financial advice to Mr and Mrs G and did not assess the suitability of the investment for them. Indeed I have not seen any evidence that it sought information from Mr and Mrs G that would allow it to establish whether the investment was suitable (although that does not establish conclusively that they did not give any financial advice). Furthermore, even if I am satisfied that BAL did not give any advice that still does not mean that it is permitted to promote and arrange this particular investment.

BAL also seems to say in response to the adjudicator's assessment that it did not need to establish Mr and Mrs G's suitability for promotion because it did not promote the UCIS. So it seems that it felt it did not need to carry out any action that would evidence that suitability. However, having considered the available evidence it is clear that it did promote the investment. So I have considered if what BAL did obtain would indicate that they were

suitable.

BAL sent a form to Mr and Mrs G for them to complete. BAL says that this was a requirement of the 'Transact platform' to enable investment. This was the 'Qualified Investor Form'. Mr and Mrs G 'ticked' a box to indicate they were 'Experienced Investors'. The description was as follows:

"A person, partnership, or other unincorporated association or body corporate which has in any period of 12 months (whether on his own behalf or in the course of his employment by another person) so frequently entered into transactions for a particular type in connection with

1. open-ended collective investment schemes and/or
2. general securities and derivatives as defined in Schedule 1 of the 1987 Law (in summary, that definition includes equities, bonds, participations in closed-end investment vehicles, warrants, options, futures, contracts for differences and rights on any of those investments)"

'Experienced Investor' is not an exemption under the legislation applying to promotion of UCIS. The only likely exemption with a similar definition is 'self-certified sophisticated investor' (23A of the Order). For the exemption for "self-certified sophisticated investors" to apply, BAL must have ensured, amongst other things:

- that the investor signed, within the period of 12 months ending with the day on which the communication was made, a statement made in compliance with the requirements of the Order;
- that the business (BAL) believed on reasonable grounds that the investor was a self-certified investor; and
- that a clear warning was given that the promotion related to an investment that may expose an individual to a significant risk of losing all of the property or other assets communication in black, bold type.

The statement BAL obtained is insufficient to satisfy these requirements.

Firstly, I note that the statement that BAL obtained from Mr and Mrs G falls quite some way short of the requirements of the statement prescribed by the Order. I further note that although there is a brief mention of the risks of the investment at the bottom of section five of the application form, there is no evidence that a clear warning of the risks of the investment was given by BAL in the prescribed form.

Therefore the BAL promotion, even if it had been made subsequent to BAL obtaining an exemption, was not exempted under art 23A of the Order and none of the other potential exemptions applied.

We have asked Mr and Mrs G why they completed the 'Experienced Investor' section of the Qualified Investor Form' when they did not meet the definition. Mrs G said;

'…. this sounds very naive but after the discussions that I had with (BAL employee), any doubts I had about investing had been allayed and the last conversation I had with him was about investing in ISAs. I was in a hurry to get my application in as soon as possible as (BAL employee) had told me that he thought the fund would be closing early due to the high demand that they had for this fund. After our conversations, I decided to invest £14,000

(£7,000 each) rather than the £10,000 I was originally thinking of as (BAL employee) had explained about the ISA allowances. I then received the email confirming our discussions and attaching the Qualified Investor Status form and wording that I needed to use to buy into the fund through Transact. He did not explain to me the significance of the form and I do remember reading the form wondering which one I was supposed to tick as I wasn't sure which one I fitted into, (with hindsight I can see how stupid this was). I ticked the experienced investor as my husband and I had some shares in the companies we work for through a savings scheme. Again, this seems rather stupid, but as (BAL employee) had sent me the wording that I needed to use to invest through Transact, I just copied these. I didn't really think about the wording in my rush to invest, I was just following the instructions given to me by (BAL employee). I did believe (BAL employee) was advising me in the conversations that we had.

I don't remember how many conversations we had, but I think it was 3 or 4 and I also think that it was (BAL employee) who contacted me after the initial conversation to see what my thoughts were now I had received the prospectus etc. I think the conversations took in the region of 30-40 minutes from memory.

It seems to me that Mrs G simply ticked the box she thought best applied to her in order to make the investment without realising what that meant in terms of the promotion of UCIS. Mr and Mrs G were not suitable for promotion of UCIS but by this point had been encouraged to make the investment and were so far along that process that they simply indicated what description best fitted them. On balance I find that the incorrect promotion of UCIS led to them completing the form when they would not otherwise have done so.

As discussed, in any event, this definition or classification does not meet any of the exemptions referred to earlier that would allow the promotion of UCIS. Investing in open- ended collective investment schemes or general securities or derivatives is not qualified investor scheme ("QIS") investment, which Mr and Mrs G did not have. Mr and Mrs G answering the question in the affirmative should not have given BAL any confidence they were suitable for promotion and it was not evidence that they were suitable.

Materially, the crucial issue is that Mr and Mrs G were clearly not suitable for promotion of a UCIS and BAL's retrospective supply of the form (even if it evidenced suitability, which it did not) so that they could be classified as such does not mean that they were.

is BAL responsible for Mr and Mrs G's loss?

BAL promoted the investment in breach of the statutory restrictions. By the time any investigation was made as to their suitability for promotion, Mr and Mrs G had already been induced to invest by BAL and BAL had already made optimistic comments to them about the UCIS. Mr and Mrs G have said that they completed the 'Qualifying Investor Form' to enable the investment to go ahead, because they did not wish to miss out on the investment and after several communications and conversations with BAL which allayed any concerns.

In my view it is exactly this type of situation that the restrictions are there to prevent; the inducement of unsuitable individuals to invest in complex and high risk schemes where financial loss can be total. The restrictions require an investigation into eligibility before the promotion so that individuals who do not have the experience or financial sophistication to invest in such schemes are not incorrectly induced to invest.

Given Mr and Mrs G's background I do not believe they would have invested if not incorrectly promoted this UCIS by BAL. The nature of the scheme is that total loss of capital was entirely foreseeable and, in fact, envisaged as a possibility at the time of the promotion. Therefore Mr and Mrs G's losses were foreseeable and naturally flow from BAL's actions.
I am therefore satisfied that it is responsible for their financial loss.

I shall now deal with BAL's comments in response to the adjudicator's assessment;

BAL has said that the unregulated property developer promoted the UCIS via the advert they placed in a magazine and it did not promote it. For the reasons I have discussed, I disagree. BAL clearly promoted the UCIS to Mr and Mrs G and was the party that caused them to invest and brought about the investment. It is the party that is materially liable for their loss. For the same reasons I do not agree with BAL's submissions that it was merely a 'conduit' for individuals wanting to invest in the UCIS. The evidence in this case is clear. BAL was promoting the investment and encouraged Mr and Mrs G to invest. It also made arrangements for them to buy the investment, which is a regulated activity. As a result, given the available evidence it would not appear fair and reasonable for BAL to suggest that it had a limited role in the transaction. Rather, in my view BAL played a significant role that led Mr and Mrs G to invest in this unsuitable UCIS.

I have not seen any evidence that Mr and Mrs G sought advice from other parties about the UCIS; they were reliant on BAL to bring about the investment.

BAL says that it merely facilitated the investment onto the 'Transact platform' for investors who wish to place money into the UCIS. I have not seen evidence that 'Transact' promoted this UCIS to Mr and Mrs G and BAL has not supplied any such evidence. In any event, even if that was the case, there is no doubt in my mind that BAL promoted the investment and then arranged for the sale. It had to abide by the statutory restrictions applying to UCIS. It did not do so.

It does seem to me, given the actions taken by BAL and its subsequent submissions, that at the time the investment was made, and likely still now, BAL are at best unclear about what amounts to promotion of UCIS, what the restrictions are and what its responsibilities are when promoting such investments. This is entirely unsatisfactory.

I find that its actions have led to a breach of Section 238 of FSMA and for the reasons set out above I am satisfied that its actions have directly caused Mr and Mrs G's losses.

As a result, I am currently minded to uphold this complaint for the following reasons;

- BAL arranged the investment and promoted it to Mr and Mrs G.
- BAL breached the statutory requirements for promotion of this UICIS.
- Mr and Mrs G were not suitable for promotion of UCIS and BAL did not obtain sufficient information to assess whether they were suitable for promotion.
- BAL caused Mr and Mrs G to invest in a scheme which was unsuitable for them and in which they would not have invested had the unsuitable promotion and breach not occurred.
- The loss Mr and Mrs G have suffered was foreseeable and has been caused by BAL's actions. BAL is therefore liable for that loss.

fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr and Mrs G as close to the position they would probably now be in if they had not been given unsuitable advice.

I take the view that Mr and Mrs G would have invested differently. It is not possible to say precisely what they would have done differently. It seems likely they wished to take some risk but they were not sophisticated individuals and did not have significant resources or history of taking high degrees of risk with their money. I am therefore satisfied that what I set out below is fair and reasonable given their circumstances and their objectives when they invested.

To compensate Mr and Mrs G fairly, BAL must compare

- the performance of Mr and Mrs G's investment;

with

- the position they would now be in if 50% of their investment had produced a return matching the average return from fixed rate bonds with 12 to 17 months maturity as published by the Bank of England and if 50% had produced a return illustrated by the FTSE WMA Stock Market Income Total Return Index ("WMA index") over the same period of time.

If there is a loss, BAL should pay this to Mr and Mrs G.

I have decided on this method of compensation because Mr and Mrs G wanted growth and I believe some risk was acceptable.

The average rate from fixed rate bonds would be a fair measure for a consumer who wanted to achieve a reasonable return without risk to their capital. It does not mean that Mr and Mrs G would have invested only in a fixed rate bond. It is the sort of investment return a consumer could have obtained with little risk to the capital.

The WMA index, which is a combination of diversified indices of different asset classes, mainly UK equities and government bonds would be a fair measure for a consumer who was prepared to a greater risk to get a higher return. I consider that Mr and Mrs G's risk profile was in between, as they were prepared to take some level of risk. I take the view that a 50/50 combination is a reasonable compromise that broadly reflects the sort of return Mr and Mrs G could have obtained from investments suited to their objectives and risk attitude.

Although the comparison may not be an exact one, I consider that it is sufficiently close to assist me in putting Mr and Mrs G into the position they would have been if things had happened as they should

how to calculate the compensation?

The compensation payable to Mr and Mrs G is the difference between the fair value and the actual value of the investment. If the actual value is greater than the fair value, no compensation is payable.

The actual value is the value Mr and Mrs G will receive if they terminated the investment on the date of my decision.

To arrive at the fair value, BAL should work out what 50% of the original investment would be worth if it had produced a return matching the average return for fixed rate bonds for each month from the date of investment to the date of my decision and apply those rates to that part of the investment, on an annually compounded basis.

BAL should add to that what 50% of the original investment would be worth if it had performed in line with the WMA index from the date of investment to the date of my decision. Any additional sum that Mr and Mrs G paid into the investment should be added to the fair value calculation from the point it was actually paid in.

Any withdrawal or income payment that Mr and Mrs G received from the investment should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I will accept if the business totals all such payments and deducts that figure at the end instead of periodically deducting them.

If the plan cannot be encashed (and I believe it cannot) then it should be treated as having a nil value. Bearing that in mind and in order to avoid the risk of double recovery, BAL should have the option of taking an assignment of the investment of the appropriate proportion of
Mr and Mrs G's rights to the value of the investment and any future distribution made from the investment.

my provisional decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £100,000, plus any interest and/or costs that I consider appropriate.

provisional determination and award

I am currently minded to uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Burlington Associates Ltd should pay Mr and Mrs G the amount produced by that calculation (the compensatable loss) - up to a maximum of £100,000.

It would appear that Mr and Mrs G's investments were wrapped in a tax efficient ISA and my understanding is that HMRC has made certain provisions so that it may be possible for compensation paid in relation to loss of an investment held in an ISA to be transferred into an ISA wrapper without it counting towards the annual ISA subscription limit.

I also understand that there are certain time limits and other eligibility criteria. However, I am unable to give any more information or advice about this matter. Information can be found on the HMRC website. I can only suggest that if Mr and Mrs G would like to explore this further they contact HMRC directly or seek appropriate independent advice.

If my award is not paid within 28 days of Burlington Associates Ltd receiving notification that Mr and Mrs G have accepted my final decision, simple interest is to be added to the award at a rate of 8% a year from the date of my decision to the date of settlement. If Burlington

Associates Ltd considers that income tax should be deducted from that interest, it must provide a tax deduction certificate so that Mr and Mrs G may reclaim this if appropriate.

I now invite the parties to let me have in writing any further submissions they may wish to make by 10 June 2014, after which time I will issue my final decision.

Simon Rawle
ombudsman