DRN-5160027

The complaint

1. Mr H says that in June 2008 a little under £35,000 was transferred from a Prudential Additional Voluntary Contributions ('AVC') arrangement into a Hornbuckle Mitchell Self-invested Personal Pension ('SIPP') on the advice of CGM Associates. And that monies in his SIPP were then invested in a Property First Asset Management Limited Property Trust ('Property First') investment.

2. Mr H complains that CGM Associates set up the SIPP and that the advice he received from CGM Associates was unsuitable, because it wasn't appropriate for his needs, circumstances or objectives. Mr H wants compensation from CGM Associates for this.

What happened

3. Reference is made in this decision to more than one advisory firm that a Mr C worked for/traded as. To minimise any confusion, I think it's helpful to provide an overview of these firms before going on to set out what has happened.

4. Mr C previously traded under the name CGM Associates. As I understand it, this was as an appointed representative ('AR') initially, and then from January 2005 until March 2010 as a directly authorised firm. Subsequently, Mr C traded under the name Sydney Johnston Financial Services, a firm that had been authorised since December 2001. Sydney Johnston Financial Services later changed its trading name to Carey and Johnston with effect from 20 September 2018.

5. Mr H had an AVC arrangement with Prudential, this was transferred to a SIPP with Hornbuckle Mitchell in 2008. Hornbuckle Mitchell SIPPs are now provided and administered by Embark Services Limited, but for ease of reference I've simply referred to Hornbuckle Mitchell throughout this decision. A transfer out form was signed by Mr H on 21 May 2008, this was forwarded on to Prudential by Hornbuckle Mitchell the following month.

6. A Hornbuckle Mitchell application form was signed by Mr H on 11 June 2008. A section in the form has been completed to confirm that there is a *"Financial/Professional Advisor".* The details for Mr C of CGM Associates are recorded in the form and CGM Associates' Financial Services Authority ('FSA') regulatory number of 409733 is given. It appears that the form has been signed by Mr C and it's noted that the advisor is to be remunerated by way of an initial payment of £250.

7. A Hornbuckle Mitchell *"Introduction Certificate"* form records Mr H as the applicant, states that face-to-face contact had occurred and that evidence of identity and address had been seen. A declaration in the form has been signed by an administrative manager of CGM Associates, Ms F (it's noted that the signatory must be a person who has seen the original documentary evidence), and CGM Associates' FSA number of 409733 is recorded. A box is also ticked in the form to confirm that a

home visit was undertaken by a member of staff, the name of the staff member is given as Mr O.

8. A supplemental deed for Mr H's SIPP was also signed by Mr H and witnessed by Ms F.

9. Ms F wrote to Hornbuckle Mitchell on CGM Associates headed paper on 17 June 2008, noting that she was enclosing forms to open a SIPP for Mr H, along with Prudential transfer forms and signed documentation for a Property First investment. The footer of this letter refers to CGM Associates, states that Mr C is the principal and that CGM Associates is authorised and regulated by the FSA.

10. Hornbuckle Mitchell wrote to Mr C at CGM Associates on 24 June 2008, acknowledging that it had received the documentation to establish a pension plan for Mr H and confirming that the scheme had been set up. Hornbuckle Mitchell enclosed a copy of the scheme member schedule (this records Mr H as joining the scheme on 19 June 2008) and a copy of the supplemental deed.

11. An internal Hornbuckle Mitchell email from 25 June 2008, with the subject line *"Fee's* (sic) – [Mr H]", records Mr C of CGM Associates as Mr H's advisor and that the commission to be paid was £250 initial and *"nil"* renewal.

12. Also on 25 June 2008, Ms F wrote to Mr H on CGM Associates headed paper and said:

    "Please find enclosed the Member Schedule and Supplemental Deed relating to your private pension with Hornbuckle Mitchell and investment in to Property First Spirit Village.

    If you have any queries regarding this please contact your adviser [Mr O]*."*

13. The footer of the 25 June 2008 letter refers to CGM Associates, states that Mr C is the principal and that CGM Associates is authorised and regulated by the FSA.

14. We've been provided with a second copy of the 25 June 2008 letter, on which there's a handwritten note dated 27 June 2008, this note appears (on my reading of it) to have been initialled by Ms F. From the handwritten note it appears that two things were outstanding, the first being the transfer of the funds to Hornbuckle Mitchell and the second being the signed syndicate agreements from *"*[J] @ *Jamijo".*

15. Hornbuckle Mitchell wrote to Ms F at CGM Associates on 9 July 2008 and explained that it had been in contact with Prudential and that the transfer should be received in the following ten working days. Further that *"Once this has been received, I shall then be in a position to transfer across £30,000 to Weightmans, as requested. This investment shall be with Property First."*

16. On 18 July 2008, Property First wrote to Mr H about the progression of his SIPP investment into a property related syndicate agreement. It was noted that Mr H had completed a trust deed with *"your Financial Advisor,* [Mr O] *of Jamijo"* and that this was with his SIPP provider. It was explained that the acquisition of the property completed on 6 June 2008 and that Mr H would be entering into the syndicate post-completion. Further, that he would need to execute a deed of adherence and that this would also need to be signed by Hornbuckle Mitchell.

17. An email dated 2 September 2008, from Property First to Hornbuckle Mitchell, with Ms F copied in, recorded that it was expected the investment for Mr H would arrive at Weightmans (as I understand it, Weightmans is a law firm) that week. And, the following day, Hornbuckle Mitchell wrote to Weightmans, noting that it was enclosing a completed Property First investment application form. And that a transfer of £30,000 had been requested and funds should be credited that day.

18. We've been provided with copies of some of the annual statements that Hornbuckle Mitchell issued for Mr H's SIPP. In 2010 the annual statement recorded the SIPP value as a little over £33,000, it was a little over £32,500 in the 2011 statement and a little under £31,500 in the 2012 statement.

19. Mr H wrote to Hornbuckle Mitchell in April 2013. Mr H said that to enable his advisor to provide a recommendation for him, he'd like Hornbuckle Mitchell to accept the letter he was sending it as his authority to release information about his pension, together with details of its benefits, to an advisory firm ('Firm S').

20. A letter from Mr S, an employee of Firm S, to Hornbuckle Mitchell dated 16 May 2013 explained that he'd been asked to review Mr H's pension plan benefits and requested information about Mr H's pension plan, including illustrations. Hornbuckle Mitchell then provided information to Firm S, including a copy of the most recent valuation of the scheme and confirmation that the transfer value was (then) currently the same as the valuation.

21. A statement from June 2013 gave the value of Mr H's SIPP as a little under £31,000. £30,000 of this was recorded as being an investment in the Property First investment (it was also noted that the date of valuation for this investment was 3 September 2008). And a statutory money purchase illustration ('SMPI'), dated 25 June 2013, illustrated the benefits that might be available to Mr H at age 66 if illustrative growth rates were achieved and projected a possible pension fund of a little over £62,000.

22. The annual statement from June 2014 gave the value of Mr H's SIPP as a little under £31,000. £30,000 of this was recorded as being an investment in the Property First investment (it was also noted that the date of valuation for this investment was 3 September 2008).

23. A SMPI dated 19 June 2014 illustrated the benefits that might be available to Mr H at age 67 if illustrative growth rates were achieved and projected a possible pension fund of a little over £26,000.

24. Firm S wrote to Hornbuckle Mitchell in August 2014 and asked for an up-to-date valuation and a projected illustration through until age 66. A valuation dated 10 October 2014 was provided, this gave the value of Mr H's SIPP as a little over £30,000, with almost all of this being the investment in the Property First investment. It was also noted that as Hornbuckle Mitchell had been unable to obtain a current value from Property First the book value had been used for the valuation. A SMPI dated 10 October 2014 was also provided, this illustrated the benefits that might be available to Mr H at age 66 if illustrative growth rates were achieved and projected a possible pension fund of £34,300.

25. The annual statement from April 2015 gave the value of Mr H's SIPP as a little over £30,000, with almost all of this being the investment in the Property First investment (it was also noted that the date of valuation for this investment was 3 September 2008). And a SMPI dated 1 May 2015 illustrated the benefits that might be available

to Mr H at age 67 if illustrative growth rates were achieved and projected a possible pension fund of a little over £43,000.

26. A telephone note dated 16 November 2015, records that Hornbuckle Mitchell spoke with Mr H and sent him an email about outstanding fees of a little over £450 plus the minimum balance requirement (which I've read as relating to minimum cash balance for the purposes of meeting ongoing fees).

27. A telephone note dated 24 November 2015, records that Hornbuckle Mitchell spoke with Sydney Johnston Financial Services. The note says that Hornbuckle Mitchell *"called IFA chasing outstanding fees. they said they would pass this information on to the clients* (sic) *adviser and then they would get in touch I gave them CS* (CS appears to have been Hornbuckle Mitchell's recovery team that was chasing the outstanding fees) *email address to send an update to."*

28. Sydney Johnston Financial Services then emailed Hornbuckle Mitchell, again in November 2015, and explained that:

"We were informed that [Mr H] *owes £456.47 for this years* (sic) *fees and is required to keep a minimum of £1250 in cash.*

I have been told by our adviser [Mr C] *that we are no longer* [Mr H's] (sic)

The only contact details we have is his address…"

29. Hornbuckle Mitchell sent a letter dated 8 January 2016, reminding Mr H that there were outstanding fees of £456.47 and that payment could be arranged by disinvesting if there were available assets in the scheme, or by making a contribution into the pension scheme or by way of bank instruction.

30. A telephone note dated 28 January 2016, records that Hornbuckle Mitchell *"called IFA chasing outstanding fees – informed that they are execution only and to contact the client directly regarding this."*

31. There's then a Hornbuckle Mitchell telephone note dated 4 February 2016, which records that:

"Member called following a letter he received. he (sic) *informed he has very little to do with the pension as a financial advisor set it up for him, with him knowing very little. His IFA is no longer allowed by the FCA. He was asking for advise* (sic) *and what he had in his pension. informed him he had a property trust - I have emailed him the latest valuation plus an account info update form. I advised him to speak to a financial advisor."*

32. Hornbuckle Mitchell emailed Mr H on 22 February 2016 about his outstanding fees. Mr H replied the same day and said that:

"I have already been in contact with your company regarding this situation. The amount of £30,000 was inverted (sic) *by a* [Mr O] *who was operating as a financial advisor at the time. He set up the entire thing and transferred the funds from my AVCs which I had with Prudential. As far as I am aware he has been struck off and is no longer in the financial services industry.*

I do not know how all of this works or how indeed I allegedly own (sic) *your company anything! Perhaps you can look into this to see where indeed the £30,000 has disappeared to an* (sic) *what the existing value of any investment made via* [Mr O]*."*

33. Hornbuckle Mitchell responded to Mr H the same day, it clarified that the £30,000 was invested in the Property First investment and that it didn't have an up to date valuation for the investment but that its investments team would look into Mr H's query.

34. There's also a Hornbuckle Mitchell telephone note, again dated 22 February 2016, in which it's noted that:

"MEM stated that he does not have much to do with his pension and his original advisor was struck off. He queried the investment he had and wanted more information. I advised that I have passed this onto our investments team. MEM also wanted to update his address so I advised this would need to be a signed instruction sent to us either by email or by post. Recommend that as we cant not (sic) *advise members that he seeks the help from a financial advisor."*

35. Hornbuckle Mitchell later emailed Mr H on 13 May 2016 and said that:

"Following a request by you to review the investment PFAM Property Trust, we have done a thorough investigation and it would appear that the investment failed in 2012. We have received confirmation that the parties involved have all gone out of business and that the investment is no longer worth anything. We have therefore closed our records on this investment.

Had you been aware of the failings of the investment at that time, you may have made a decision to move to a cheaper provider and not been subject to our fees. Therefore, as a gesture of good will we have gone back to when the investment failed and wish to reimburse the fees we have deducted since then so that you have the opportunity to review whether or not you wish to move. The investment failed in September 2012 and your cash balance at that time was £1,389.63. We therefore intend to re-credit this amount back to your SIPP.

We also wish to offer you a free transfer away from Hornbuckle..."

36. Mr H responded to Hornbuckle Mitchell's email on 16 May 2016, explaining that he'd been concerned about the situation and was worried that he could accrue costs and that the whole thing was spiralling out of control. He asked if the amount should be credited back to his SIPP and where he went from there. Highlighting that he didn't want the situation to arise again at a later date and asking what would happen if he transferred to another provider.

37. Hornbuckle Mitchell replied the same day and said that the point of it putting him back into the position at the date the investment failed was so that he could look at transferring to a cheaper pension plan, and that where an investor only had a small amount of cash Hornbuckle Mitchell wasn't a suitable provider. Hornbuckle Mitchell recommended that Mr H take financial advice. Mr H replied to Hornbuckle Mitchell on 17 May 2016 and requested it to proceed as it had suggested and said he would seek financial advice.

38. In January 2018, Mr H made a claim to the Financial Services Compensation Scheme ('FSCS') about CGM Associates. Mr H explained that:

"In June 2008 I transferred £34,632.21 from my Prudential Teachers' AVC Plan…to a SIPP with Hornbuckle Mitchell on the advice of CGM Associates. This in turn then accommodated an investment through Property First Asset Management Property Trust to acquire property...I believe this advice was unsuitable..."

39. Mr H explained that the name of the individual at the firm (here CGM Associates) who gave advice was Mr O. Elsewhere in the form, Mr H expanded on this and explained that he'd been introduced to CGM Associates by Mr O and that Mr O was an advisor for Openwork Limited ('Openwork'). Mr H said that Mr O had recommended CGM Associates to him and that CGM Associates had set up the investment in 2008. Mr H also explained that at the time of advice he held around £3,000 in cash and savings and that his attitude to risk was low.

40. On 2 March 2018, the FSCS wrote to Mr H and explained that he didn't have a valid claim with it. The FSCS said that it had no information to suggest the former sole proprietor of CGM Associates was unlikely to be able to meet claims. The FSCS also explained that if Mr H wanted to claim against CGM Associates, but didn't have contact details, to let it know and it would consider disclosing those details.

41. Mr H emailed the FSCS on 2 March 2018 and said that he'd searched for a point of contact at CGM Associates, but the telephone number for it didn't seem to work. Further, that the Financial Services Register was showing no results on the Register for *"CGM Associates 11A Cavehill Road Belfast BT15 5GS."*

42. The FSCS responded and said that:

"You are correct that the firm is no longer trading but as my letter explained it was a sole proprietorship.

The sole proprietor – [Mr C] *therefore retains liability to deal with claims for the rest of his lifetime.*

I will now need to write to [Mr C] *under the Data Protection Act to ask if we may release his home address to you"*

43. On 2 November 2018, Mr H first contacted the Financial Ombudsman Service to make a complaint about CGM Associates, he sent a completed complaint form to us on that date. That form includes a box to record *"details of the business you think is responsible for your complaint".* And Mr H entered *"CGM Associates"* into that box.

44. Our complaint form also includes a box for consumers to record what their complaint is about, and in the form we received on 2 November 2018 Mr H said that:

"In June 2008 I transferred £34,632.21 from my Prudential Teachers' AVC Plan…to a SIPP with Hornbuckle Mitchell on the advice of CGM Associates. This in turn then accommodated an investment through Property First Asset Management Property Trust to acquire property...I believe this advice was unsuitable for the following reasons: 1. I was not a high risk investor. 2. I was unaware that the investment carried no regulatory protection. 3. I was not a high net worth or sophisticated investor. 4. I do not believe the advice I received was appropriate for my needs, circumstances or objectives."

45. A box was completed in the form to say that Mr H had first complained to the business he thought was responsible in January 2018 but CGM Associates didn't receive a complaint from Mr H at that date. As mentioned above Mr H had made a

claim to the FSCS about CGM Associates in January 2018, but I've not seen evidence of a complaint from Mr H having been sent to, and received by, CGM Associates in January 2018.

46. Our complaint form also includes a box for consumers to record *"How do you want the business to put things right?",* and Mr H said that:

"I have made a claim through the FSCS…who have investigated my claim and notified me on 2nd March 2018 that they "have no information to suggest that the former sole proprietor of CGM Associates is unlikely to be able to meet claims." Therefore it appears that the sole proprietor of CGM Associates namely [Mr C] *retains liability to deal with claims for the rest of his life. I subsequently wish* [Mr C] *to compensate me accordingly and want the Financial Ombudsman Service to pursue my claim. The FSCS have not given me a contact address and so I have been unable to contact* [Mr C] *directly."*

47. On 15 November 2018, we wrote to Mr H and said:

"Thank you for getting in touch with us recently.

I've searched for the business that you wish to complain about, but I've been unable to locate an entity for them which was regulated in 2008 (when you were given the advice). *To help us locate the correct firm could you please provide a copy of the FSCS decision, and any paperwork you have from the business in question?"* (bold my emphasis)

48. Mr H replied the same day, noting that he was attaching a letter he'd received from the FSCS and some other documentation. As I understand it, documents Mr H provided to us included the following documents (which I've referred to previously above):

- The letter from the FSCS to Mr H dated 2 March 2018.
- The letter from CGM Associates to Mr H dated 25 June 2008.
- The letter from Property First to Mr H dated 18 July 2008.

49. The Financial Ombudsman Service erroneously set up this complaint (under our reference ******79) as being a complaint from Mr H about Openwork. We wrote to Openwork to ask for its submissions on that complaint, and we provided it with a copy of the complaint form in which Mr H had said he wanted to complain about CGM Associates.

50. Openwork then wrote to Mr H and said it wasn't upholding his complaint because it had no record of it, or firms it was responsible for, having advised Mr H on his SIPP. Openwork highlighted that Mr H had said that Mr O referred him to Mr C of CGM Associates and that Openwork wasn't responsible for CGM Associates.

51. One of our investigators subsequently assessed the case and said the evidence indicated that Mr H's advisor for the pension transfer was Mr C of CGM Associates. The investigator also noted that Mr H had referred to CGM Associates as the respondent firm on his complaint form to us. Further, that as CGM Associates wasn't a representative of Openwork, Openwork wasn't responsible for any actions taken by CGM Associates.

52. Separately, Mr H had also written to Mr C at Carey and Johnston on 31 January 2019 and, amongst other things, had said that:

"In 2008 your firm CGM Associates facilitated a Pension Transfer from my Teachers AVC pension with Prudential to a pension with Hornbuckle Mitchell, that was then invested via Property First Asset Management Property Trust into property... Hornbuckle Mitchell have confirmed Carey and Johnston are the current servicing agents noted on the plan.

Under GDPR Subject Access rules please provide me with a copy of my file containing all information obtained / held.

Please provide details of all charges associated with this pension, both at outset and ongoing.

Please provide details of all payments you have received to date, both initial and ongoing, fee or commission, on any of my policies (under CGM Associates, Sydney Johnston, Carey and Johnston or any other association).

Finally please also confirm if any payments were made to [Mr O], *or any other 3rd party, in relation to any of my plans."*

53. The letter didn't say that Mr H was complaining about CGM Associates or Carey and Johnston.

54. On 15 February 2019, Mr H wrote to Mr C at Carey and Johnston's address again. He largely repeated what had been said in his 31 January 2019 letter

55. On 21 February 2019, Mr C replied to Mr H (signed as Partner, Carey and Johnston) and asked for clarification of whether Mr H was seeking information or making a complaint in his 31 January 2019 correspondence. Mr H replied the same day and confirmed that he was making a Subject Access Request ('SAR').

56. On 1 March 2019, Mr C replied to Mr H using his Carey and Johnston email account (signed as Partner, Carey and Johnston). In that correspondence Mr C said that:

"Here are the answers to your questions in your letter dated 15 February and 31st January 2019:

1. *As you note in your letter, we facilitated the pension with Hornbuckle Mitchell at the time, on the instruction of* [Mr O]*, who did not in any way represent or work for our firm.*
2. *Our firm CGM Associates acted in an Execution Only capacity.*
3. *We made no payment to* [Mr O].
4. *The only fee that we received was £250 as an administrative fee for actioning the paperwork with Hornbuckle.*

   …
7. *We are listed as servicing agents on the plan simply because that has never been changed.*
8. *I am not aware of any of the arrangements that* [Mr O] *would have received either directly from yourself, from Property First Asset Management, or any other party associated with the transaction.*
9. *I am not aware that Hornbuckle paid* [Mr O] *any fee or commission..."*

57. Carey and Johnston emailed Hornbuckle Mitchell on 26 March 2019 and asked for

confirmation of any fees that were paid to any of Sydney Johnston Financial Services, CGM Associates, Carey and Johnston, Mr O or Hornbuckle Mitchell. Hornbuckle Mitchell replied explaining that no charges, other than its own fees, had been paid from Mr H's account. Hornbuckle Mitchell did, however, recognise that it was stated on the application form that there was an initial set up fee of £250 requested for the advisor, but looking at the bank account it couldn't see this was paid and it suspected the payment had been missed.

58. Mr H sent a letter of complaint to Mr C at Carey and Johnston's address on 4 October 2019. Amongst other things, Mr H said that:

"Re: Complaint about Inappropriate Advice Received re Pension Transfer - Hornbuckle Mitchell...

In 2008 your firm CGM Associates facilitated a Pension Transfer from my Teachers AVC pension with Prudential to a pension with Hornbuckle Mitchell, that was then invested via Property First Asset Management Property Trust...

I have been in contact with the Financial Ombudsman Service in regard to the inappropriate advice I received and am therefore writing to you to make a formal complaint. It is my belief that CGM Associates were responsible for this inappropriate advice and that as CGM Associates are no-longer trading you are accountable."

59. On 21 November 2019, Firm A wrote to Mr H. It said it had been instructed by Carey and Johnston (formerly Sydney Johnston Financial Services) to look into Mr H's complaint. Amongst other things, it explained that:

- Carey and Johnston first received the complaint around 7 October 2019.
- Carey and Johnston didn't meet with or speak with Mr H at the time the transaction was undertaken. Carey and Johnston only dealt with Mr O of Zurich Insurance.
- Carey and Johnston didn't give Mr H advice to transfer or to invest the transferred monies.
- Carey and Johnston provided execution-only services and was asked *to "execute the mechanics of a transaction upon* [Mr H's] *specific instructions."*
- As far as Carey and Johnston is concerned, Mr H was advised by Mr O of Zurich Insurance about the transfer, investment and overall merits of the transaction.
- Carey and Johnston was asked by Mr O to submit the application forms to Hornbuckle Mitchell.
- Carey and Johnston was provided with two partially completed Hornbuckle Mitchell application forms, one for a SIPP and one for a pension fund bank account. It believes the forms had been completed by Mr O.
- The SIPP application form records the initial fee to be charged as being only £250 and there was no on-going fee.
- Mr H refers to Carey and Johnston as having *"facilitated a Pension Transfer".*
- The usual fee for an advised pension transfer would be 2% - 3% or more and a fee of £250 is far more indicative of a fee for an execution-only transaction.
- The complaint wasn't made within six years of the pension transfer and investment having been effected in 2008.
- An email from Hornbuckle Mitchell to Mr H dated 13 May 2016 explained that, following a review request from Mr H, Hornbuckle Mitchell had undertaken an investigation and the parties involved had all gone out of business and the property investment wasn't worth anything. The email said the investment failed in 2012, this doesn't necessarily mean that Mr H ought to have become aware in

2012 that it had failed but an examination of the SIPP statements might indicate that Mr H should have become aware it had failed.
- Making the enquiry to Hornbuckle Mitchell suggests Mr H had some cause for concern prior to 13 May 2016.
- A reasonable person, having been told an investment had failed, would realise something was seriously amiss and that responsibility for their being in the position of holding a failed investment rested with one or more professionals they had relied on.
- Mr H had three years from 13 May 2016 to raise a complaint with Carey and Johnston but didn't raise a complaint until 4 October 2019, so his complaint hadn't been made in time.

60. We subsequently set up a complaint about Carey and Johnston.

61. Mr H provided us with a timeline of what had happened. In that timeline he noted, amongst other things, that:

- In February 2016, he emailed Hornbuckle Mitchell as he was receiving statements showing a decreasing balance. From a pension forecast he'd received, he still thought that his pension was fine.
- In March 2018, the FSCS rejected a claim he'd made to it. This was the first time he knew Mr C was still in business and he emailed the FSCS to ask for Mr C's details.
- In November 2018, he sent a complaint to us about CGM Associates.
- In January 2019, he wrote to Carey and Johnston requesting information and he subsequently complained to Carey and Johnston in October 2019.
- At the time of transferring his AVCs to a SIPP, he was working with Mr O and CGM Associates who were both *"registered with the FCA"* and he was oblivious to any possibility of wrongdoing by either of these parties.
- CGM Associates didn't conduct a fact find or suitability report to ascertain the suitability of investing in a high-risk scheme for him.
- CGM Associates didn't carry out a compliant risk assessment.
- He wasn't furnished with relevant information, or given sufficient time to ask questions or seek alternative advice.
- He believes that CGM Associates is responsible for the advice given.
- *"My initial person of contact was* [Mr O] *who had been our financial adviser over a number of years in his capacity as an AR of Zurich and Openwork. Through time he had gained our confidence and we had no reason to belief* (sic) *that he was involved in any untoward financial activity. He introduced me to CGM Associates who then gave the advice to make the investment. This is confirmed by* [Mr C's] *signature as adviser on the relevant paperwork."*

62. Carey and Johnston's representative made a number of submissions to us including that:

- Mr C knew Mr O to have been a Zurich advisor for about 20 years.
- Mr O asked if *"the firm"* would act on an execution-only basis for his clients to place pension monies into property and said that his clients were all aware of what was involved.
- *"The firm"* had stressed to Mr O that it had to be execution-only, he'd agreed to that.
- All of the pension transfer and investment advice was given by Mr O.
- The preparation of the applications was by Mr O or Mr H liaising with *"the firm".*
- The fee was £250 as an execution-only fee which was never in fact paid.

- *"The firm"* didn't provide Mr H with advice to transfer his pension monies or to invest the transferred monies.
- *"The firm"* doesn't know when Mr O gave Mr H advice to transfer and to invest, but it was prior to it being asked by Mr O to execute the SIPP application and arrange for the payment by the ceding scheme of funds into the SIPP.
- *"The firm"* was not privy to the advice process but was asked to submit the completed application forms to Hornbuckle Mitchell.
- *"The firm"* was provided with two partially completed Hornbuckle Mitchell application forms, both dated 11 June 2008; one to apply to open the SIPP in Mr H's name and the other to open a pension fund bank account.
- It's believed that the forms completed in Mr H's case were completed by Mr O.

63. One of our investigators looked at Mr H's complaint which had now been set up against Carey and Johnston. The investigator initially said that the complaint had been made late and couldn't be considered by us. Mr H disagreed and asked for the matter to be reviewed by an Ombudsman. There was further correspondence between the investigator and the parties about whether the complaint had been made in time and this culminated with the complaint being passed to an Ombudsman for review.

64. On 21 January 2022, Firm A wrote to us and noted, amongst other things, that:

- Mr C originally traded under the name CGM Associates as an AR and thereafter as directly authorised until March 2010.
- Following this, Mr C traded under the name Sydney Johnston Financial Services, authorised since December 2001, and which changed its trading name to Carey and Johnston with effect from 20 September 2018.
- As Mr C hasn't been bankrupt the FSCS has never declared him, or his original trading name CGM Associates, to be in default.
- The FSCS wrote to Mr C in January 2018, explaining that it was considering a pension advice claim from Mr H relating to advice allegedly given in May 2008. Further, that it needed to understand whether Mr C was in a position to meet claims. The letter asked Mr C to provide full financial information, Mr C didn't provide this as it would have been inappropriate to do so – he had never been in financial difficulty.
- The FSCS wrote again in February 2018, saying that it didn't intend to declare CGM Associates to be in default and that it believed as the former sole proprietor of the firm CGM Associates, Mr C was in a position to meet claims.
- The FSCS wrote to Mr C again in March 2018, explaining that Mr H had asked for Mr C's contact details. On Firm A's advice, Mr C didn't respond to the FSCS as no advice had ever been given by CGM Associates and Mr C, therefore, had no objection to his details being released.
- Thereafter, Mr H sent a complaint letter in October 2019 to Mr C at Carey and Johnston.
- There has been no form of transfer of liability document between CGM Associates and Carey and Johnston for complaints.
- Carey and Johnston didn't take responsibility for Mr H's complaint. Carey and Johnston responded to it because it was Mr H who identified Carey and Johnston as the respondent and because Financial Conduct Authority ('FCA') rules require a firm to respond to any complaint made against it whether justified or not.

65. One of our Ombudsmen reviewed the complaint and issued a provisional decision on 2 February 2022. In summary, they said that the complaint they were reviewing had been set up against the wrong firm and that the correct respondent firm was CGM

Associates. The Ombudsman said that Carey and Johnston didn't give the advice complained about and that there had been no transfer of liability from CGM Associates to Carey and Johnston. Further, that Mr H isn't a customer of Carey and Johnston for the disputed advice and so his complaint against Carey and Johnston couldn't be considered by the Financial Ombudsman Service. The Ombudsman said the complaint against Carey and Johnston would have to be closed and a complaint against CGM Associates would have to be opened.

66. In response to the Ombudsman's provisional decision, Firm A noted, amongst other things, that:

- Mr C had no prior knowledge of the complaint made to the Financial Ombudsman Service in November 2018.
- On receipt of the November 2018 complaint, the Financial Ombudsman Service mis-identified Openwork as the respondent and mis-directed the complaint to Openwork.
- The Dispute Resolution ('DISP') rules don't permit the Financial Ombudsman Service to re-open a complaint once it's been rejected and closed.
- The DISP rules don't permit that the same complainant can raise serial complaints about the same issue against the same respondent.
- For the three-year limitation clock to start ticking, DISP 2.8.2 requires that the complainant knows, or ought reasonably to know, that he has a cause of complaint. The rule doesn't make any mention that he must also know, or that he ought reasonably to know, the identity of the party about whom to complain.
- Frequently, the actual or constructive knowledge of there being cause for complaint is what prompts the complainant to enquire into who may be responsible.
- The Financial Ombudsman Service's failure to correctly direct the first November 2018 complaint to CGM Associates should not be considered an exceptional circumstance that would now allow the Financial Ombudsman Service to consider a complaint from Mr H about CGM Associates.
- The regulator's register records Mr C's role at CGM Associates as that of *"CF7 Sole Trader."* So, Mr C and CGM Associates were one and the same legal person.
- Carey and Johnston is a partnership between Mr C and his wife. In Northern Irish law which applies where Mr C operates, a partnership is not a legal person in its own right separate from the partners. The partnership and the partners are indistinguishable from each other. In addition, the partners are jointly and severally liable for the losses of the partnership.
- Mr C has always considered that there was an unbroken continuity of business operation between his trading under CGM Associates and as Carey and Johnston.
- Mr C is exactly the same legal person as CGM Associates and is also exactly the same legal person as Carey and Johnston.
- Mr C didn't consider CGM Associates and Sydney Johnston Financial Services to be separate firms.
- Mr C recalls that he had *"a casual conversation"* with Mr H sometime in mid-late 2015. Mr C cannot place exactly when this was but knows it was not long before his sister-in-law started work for him as a personal assistant in January 2016. Mr C gained the impression that Mr H already knew, or at least suspected, that the investment was in difficulty and wanted to understand Mr O's connection to Mr C. Mr H also wanted information about who had earned fees.
- Mr C had told Mr H that he/CGM Associates had nothing to do with Mr O, and that Mr O wasn't an agent of CGM Associates. Mr C's recollection is that Mr H

wasn't surprised about this and that Mr H had already worked out the separate status of Mr O and Mr C.

- The reason correspondence from Mr H was addressed to Mr C at Carey and Johnston was clearly because the FSCS had previously informed Mr H that Mr C's (then) current contact details were at Carey and Johnston.
- Had Mr H's letter of 31 January 2019 constituted a complaint, and not merely a data request, there could be no question that a complaint addressed to Mr C/Carey and Johnston in respect of and against *"your firm CGM Associates"* would have been in time and against the correct respondent.
- Mr C treated Mr H's complaint letter of 4 October 2019 as a valid complaint against him in relation to CGM Associates.
- The final response letter being headed up Carey and Johnston was a reflection of how Mr H had addressed his complaint letter. At no point in the final response letter was it suggested that the complaint had been raised against the wrong respondent.
- Had the Financial Ombudsman Service, on receipt of Mr H's complaint in November 2018, searched for CGM Associates in the FCA's register we would have found all the information we needed.
- The Financial Ombudsman Service, when looking at the complaint received in November 2018, was incompetent in any searches it undertook.
- There was little or no need to write to Mr H for more information, the Financial Ombudsman Service could simply have directed the complaint received to Mr C/CGM Associates. The November 2018 complaint would then have been in time and against the correct respondent.
- The Financial Ombudsman Service's failures directly resulted in the November 2018 complaint being considered against the wrong respondent – Openwork. And Mr H was also then required to make a further complaint which is clearly out of time.
- As a direct result of the Financial Ombudsman Service's failings in misdirecting the initial November 2018 complaint only against Openwork, Mr H was then deprived of the opportunity to argue that case for redress from CGM Associates.
- No other statutory Ombudsman acting reasonably could fairly and properly conclude that an admitted failing on its own part could in any way cure the failure of Mr H to refer a subsequent complaint. Doing so would be potentially fraudulent by the Financial Ombudsman Service.
- Any decision by the Financial Ombudsman Service to allow a complaint by Mr H against CGM Associates to be considered almost six years after the three-year limitation was triggered on the basis of exceptional circumstances would be irrational, unreasonable, grossly unfair to the respondent and subject to judicial review.

67. The Ombudsman considered the responses to the provisional decision and proceeded to issue a decision on our jurisdiction to consider the complaint. The Ombudsman said that Mr H was a customer of Mr C trading as CGM Associates for the transactions he wanted to complain about. The Ombudsman said that Mr H wasn't a customer of Sydney Johnston Financial Services and that Mr H wasn't an eligible complainant for the complaint about Sydney Johnston Financial Services/Carey and Johnston. Further, that CGM Associates and Carey and Johnston weren't one and the same. The two firms were different, Mr H wasn't a customer of Carey and Johnston in 2008 and we couldn't consider a complaint about Carey and Johnston in relation to the advice Mr H was complaining about.

68. Following that decision, Firm A emailed us and highlighted, amongst other things, that while an individual who had worked at CGM Associates shared the same

surname as Mr O, they were not Mr O. Mr H also emailed us after the decision and, amongst other things, said that no conversation took place between Mr C and him in 2015 as Mr C alleges.

69. Following the decision on the complaint about Carey and Johnston trading as Sydney Johnston Financial Services, complaint reference PNX-*******-**T5 was assigned on our systems as the reference number for the complaint against CGM Associates that Mr H had referred to us on 2 November 2018 (and we then corresponded with both CGM Associates and Mr H about the complaint using that reference number, which still remains our reference number for the complaint). This correspondence included us, initially, providing CGM Associates and Firm A with a copy of Mr H's complaint form of 2 November 2018 and explaining that CGM Associates should get in contact with Mr H to confirm it was looking into the complaint and that it should send Mr H a final response letter.

70. Firm A wrote to us on behalf of CGM Associates and said, amongst other things, that:

- Mr H said in his complaint form that he'd complained to the business on 12 January 2018 but no such communication was received by CGM Associates.
- It appears that the Financial Ombudsman Service had been holding Mr H's complaint form for 29 months before sending a copy of it to Mr C or CGM Associates.
- The Financial Ombudsman Service is abusing its own rules by allowing an old complaint to be resurrected and pursued afresh when it had become time barred.

71. On 31 May 2022, Firm A wrote to Mr H about his complaint against CGM Associates. Amongst other things, it said that:

- On 29 April 2022, CGM Associates received an email from the Financial Ombudsman Service regarding Mr H's complaint about it.
- Had the Financial Ombudsman Service not made an error then Mr H's complaint would have been pursued against CGM Associates in 2018, and it would have been robustly defended as CGM Associates didn't give Mr H advice.
- Mr H lost the opportunity to pursue that complaint in November 2018 against CGM Associates because of professional failings of the Financial Ombudsman Service.
- What the Financial Ombudsman Service is seeking to do is to resuscitate an already long-closed complaint, this isn't provided for either in law or in the rules that govern the Financial Ombudsman Service.
- In any event, Mr H is now too late to make the same complaint to CGM Associates.
- The pension transfer and investment were effected in 2008, so the six-year time limit has long since expired.
- Mr H had three years from 13 May 2016 within which to raise his complaint with CGM Associates, but the Financial Ombudsman Service didn't raise that complaint for him until 29 April 2022, so the complaint is also out of time on the three-year rule.
- CGM Associates didn't, at any time, give Mr H any advice about the pension transfer or investments and Mr H was very well aware of this.

72. Also on 31 May 2022, Mr H emailed us to confirm that he'd received a response from Mr C (this was the letter of 31 May 2022). Mr H explained that he rejected CGM

Associates' decision and wanted the Financial Ombudsman Service to review his complaint.

73. Following this, I later issued a provisional decision on our jurisdiction to consider this complaint. In summary, I concluded that Mr H had referred his complaint to us about CGM Associates in November 2018, that Mr H's complaint about CGM Associates was referred within the time limits and that the complaint was one we could consider.

74. In response to this provisional decision, Firm A provided us with a record of a call between it and Mr O. It was recorded in the written phone note that:

- Mr O confirmed that he had been an AR of Openwork and thought that all of the clients he had referred to CGM Associates had been his clients at Openwork.
- Mr O thought Mr H may have been a client of his at Openwork, Mr H's wife certainly had been so he assumed Mr H was as well.
- Mr O said that no advice was given to any of the clients either by him or by CGM Associates. The clients had been given information about property schemes and they made their own decisions.
- When asked if they had been clients of his at Openwork why he had not given them advice, Mr O said that he did not do this business with them as Openwork but as Jamijo Ltd ('Jamijo'), which was a company that dealt in property.
- Mr O asked if Mr H had invested in the Property First scheme in Liverpool and Firm A had confirmed this was the case.
- Mr O said that Openwork had nothing to do with these cases.
- Mr O said that, as Jamijo, he had presented the information about the investment schemes to clients like Mr H and let them make up their own minds. If the client wanted to go ahead and if the monies they intended to invest were in pension schemes then they would need to transfer to a SIPP in order to invest.
- As he wasn't representing Openwork, Mr O said he needed an independent financial advisor ('IFA') to open a SIPP and asked Mr C if he would do so on an execution-only basis.
- Mr O said that Mr C's only involvement was to submit the completed SIPP applications. And that CGM Associates' function was execution-only and that it had nothing to do with the property investments.
- Mr O said that he had not met with the clients as a representative of CGM Associates and he had only met with the clients as Jamijo.
- Mr O said that he hadn't paid any fees to CGM Associates or Mr C for his execution-only services.

75. Firm A also provided a detailed response to my provisional decision. I've set out below a summary of what I consider to be the main points made in the response. However, the list isn't exhaustive and before issuing this final decision I carefully considered the response in full.

- Mr O's statements in its phone call with him, do not square with what he led Mr C to believe at the outset or with the documentation on other cases where Mr O asked CGM Associates to assist.
- Mr C originally met Mr O through a mutual client who had an interest in an Olive Tree property scheme, Mr C had nothing to do with this investment.
- Before meeting him, Mr C knew that Mr O had been with Zurich. After meeting him Mr C checked the FSA Register and noted that Mr O was an AR of Openwork.

- Mr O asked Mr C in person about using CGM Associates' agency to set up SIPPs. Mr O indicated that he had around half a dozen clients whom he may introduce to CGM Associates for the purpose of setting up SIPPs.
- Mr C asked Mr O if he was clear that his clients knew what they were doing. Mr O assured Mr C that they did, that he knew them well, had long-term relationships with them and, from what Mr O said, Mr C understood that Mr O dealt with his clients as high net worth and/or sophisticated investors.
- Mr C knew that Mr O had a property company but wasn't made aware that it was to be involved. No indication was given to Mr C/CGM Associates at any time by Mr O that when he met with clients he was doing so as Jamijo.
- Mr O told Mr C that all of his clients were from his Openwork client bank and that he had known the clients for a long time. This was key to Mr C agreeing to accept execution-only referrals.
- The agreement was informal. Mr O would meet with clients, undertake the advice process and would also complete the paperwork.
- CGM Associates' role was to ensure the SIPP applications were fully completed and signed, and package them with anti-money laundering client identification documents to Hornbuckle Mitchell for which it would charge a fee of around £150.
- When the SIPP was opened, CGM Associates would also send the relevant documents to the client.
- This arrangement wasn't formalised in any way by written agreement. It was, and remained, informal.
- There is no written record stating that Mr O would be giving advice to Mr H, this was stipulated and agreed verbally at the very outset in respect of all introduced clients.
- So far as CGM Associates and Mr C were concerned, the relationships between Mr O and CGM Associates, and between Mr O and his clients, had been clarified at outset and needed no involvement from CGM Associates in any advice process.
- When referring a client, Mr O would phone CGM Associates' office to say that he was introducing one of his clients and would then post a completed and signed SIPP application form, execution-only form and client identification to CGM Associates.
- Mr C wasn't a party to the selection of Hornbuckle Mitchell as the SIPP provider.
- Between 2008 and 2009, Mr O introduced eight clients (including Mr H) to CGM Associates on an execution-only basis to open SIPPs. Not all of these clients proceeded.
- Mr C believed that, as an AR of Openwork, Mr O gave the clients the pension and investment advice.
- At no point between an initial meeting in 2007 and September 2023 was Mr C ever made aware that Mr O wouldn't be giving, and hadn't given, any advice.
- The process Mr O described in his discussions with Firm A, amounted to the process adopted by an AR in undertaking an unsolicited real time financial promotion.
- CGM Associates couldn't have known that Mr O had been representing Jamijo when dealing with Mr H. Mr C had believed that it was Mr O, as an AR of Openwork, who advised Mr H on the suitability of transferring his pension to a SIPP.
- Mr C understood that Mr O had a relationship with HD SIPP (a SIPP provider). Mr C thinks that Mr O changed from advising clients to transfer to HD SIPP to instead transfer to Hornbuckle Mitchell because the charges were lower.
- When Openwork rejected Mr H's complaint, Mr H said Mr O *"didn't make it clear he wasn't working for Openwork when he made recommendations to him."* This suggests that, at the time, Mr H believed that Mr O was working for Openwork.

- Mr O allowed both Mr C and Mr H to believe that he worked with Openwork for his regulated business, and Mr C had asked him about that. Mr C was entitled to rely on Mr O's assurance, as an FSA regulated person, that he would give the advice.
- As Mr O allowed himself to be seen as an AR of Openwork then CGM Associates was entitled to rely on Mr O saying at the outset that he would be giving his clients the appropriate advice or, alternatively, that the property investment had been a *"financial promotion"*.
- CGM Associates couldn't have known whether such financial promotions were permitted by Openwork, but it was entitled to assume that Mr O would be so permitted by Openwork.
- It wasn't until later, in 2011, that it came into the public domain through a Money Marketing article that Mr O had been suspended by Openwork for his promotion of unregulated collective investment schemes ('UCIS'), such as the Property First investment, for which he never had Openwork's implied or explicit approval.
- It was Mr O's responsibility to get execution-only forms signed by each of the clients to confirm that CGM Associates wasn't giving any advice.
- Mr C's personal involvement was signing SIPP application forms. Ms F did the bulk of the work with the documents, including seeking to ensure that execution-only forms were signed by all the clients.
- Due to the passage of time and change of IT systems, not all execution-only forms are now available and CGM Associates wasn't obliged to retain them. Mr H would have signed an execution-only form but it's no longer available.
- Mr C knew that Mr O intended that Mr H's SIPP would invest into property.
- In some of the cases Mr O introduced to CGM Associates, identity documents have been certified by "[Mr O] *OPENWORK."*
- Mr O only ever sent CGM Associates the Hornbuckle Mitchell SIPP applications, the anti-money laundering client identity documentation and the pension transfer documentation.
- All of the forms were signed by the clients but sometimes parts had been left blank which CGM Associates' staff then had to complete.
- All that CGM Associates was doing was providing the conduit between Mr O as the advisor and the wrapper provider, on an execution-only basis, for long term clients of Mr O to whom he was giving investment advice.
- CGM Associates didn't issue a client agreement, or a terms of business, or a key facts document, or prospectuses, or anything related to the investment itself inside the SIPP vehicle to Mr H as it wasn't required to do so.
- The definition of *"execution-only"* is that no advice is given.
- From the Hornbuckle Mitchell phone note of 22 February 2016, it's clear that Mr H was concerned about an investment and wanted more information. In his email of the same date Mr H asked Hornbuckle Mitchell about where his £30,000 had disappeared to, this demonstrates knowledge of a problem and a loss.
- Mr H knew, or ought reasonably to have known, by mid-2014 that he had cause for complaint about CGM Associates.
- The 2014 annual statement shows the SIPP bank account had an opening cash balance from 2012 of £0, by 9 May 2013 there was SIPP revenue of £1,390.40 but during 2013 there was virtually no revenue at all. The SIPP bank account showed only a £1.06 return over the whole year. The 2014 statement also showed that after the annual SIPP fee was deducted the cash balance held was £802.94.
- The June 2014 SMPI projected value of £26,000 represented a 58% fall from the previous year's projected possible pension fund of £62,000. And the projected pension fund in (then) today's prices was £18,500.

- The impact of the information provided in the 2014 SIPP statement has to be considered in the specific and contemporaneous context of 2014.
- The 2014 SIPP statement showed the fund had not been revalued since outset, there had been a lack of investment return, an inability to cover annual fees from annual revenue and a substantial fall in the projected future fund value. This should have caused Mr H to see there was a problem that had caused, or may cause, him a loss.
- The 2015 SIPP statement included a warning that a minimum SIPP balance had to be retained and after deduction of an annual SIPP fee the cash balance was £173.50. It also showed a return of £0.36 over the previous year. And the SMPI projected value of £43,100 represented a 30% fall from the 2013 SMPI's projected possible pension fund of £62,000.
- It had asked Mr C some questions about the meeting Mr C had said took place with Mr H in mid to late 2015. Mr C said:

    - Mr H called into the office in what Mr C believes was no later than mid-2015 but it could have been 2014, he doesn't believe it was in winter. A team member can remember Mr H's name from then.
    - Mr H wore a coat and didn't sit down.
    - He wasn't surprised Mr H had lost his investment and that he wanted to find out about Mr O, because Mr H must have known Mr O was out of business and his properties had failed.
    - The visit was a surprise, Mr C wasn't expecting Mr H to ask him about someone Mr H knew well and was disgruntled with. And Mr O had assured Mr C that he only dealt with long standing and well informed clients for property investments.
    - His impression was that Mr H was in no doubt that the investment was in difficulty and that Mr O was at the centre of it.
    - He had explained how his relationship with Mr O worked at the time and that this was not new information to Mr H *"i.e. that he knew that Jamijo was a 'side business' to* [Mr O's] *main role as an Openwork adviser."*

- Mr H would almost certainly have known from Mr S that Openwork had withdrawn Mr O's AR authorisation, that Mr O was out of financial services and, given that the 2014 SIPP SMPI showed a big fall, it's more likely than not that the casual conversation between Mr H and Mr C did take place.
- It's reasonable to assume that the case handler on case XXXXXX79 deleted CGM Associates as the respondent from the case record and substituted Openwork.
- The case handler didn't just change the clerical designation of the complaint but changed the whole nature of the complaint with the effect that, in terms of the DISP rules, there was then at 2 November 2018 no complaint registered with the Financial Ombudsman Service against CGM Associates.
- Even if Mr H's complaint against CGM Associates was received within three years of the trigger email, it ceased to exist when the case handler designated case XXXXXX79 to run against Openwork.
- If the complaint against CGM Associates ceased to exist in 2018 it cannot be considered now.
- Either the complaint that was received on 2 November 2018 was against CGM Associates or it was against Openwork, it cannot be against both.
- Coleridge J, said in *Bunbury v Fuller* (1853) 9 Ex 111 that:

    "Now it is a general rule, that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case

> *upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question, its decision must always be open to inquiry in the superior court."*

- The Financial Ombudsman Service's website gives examples of exceptional circumstances, all of which describe situations personal only to the complainant. None relates to the respondent firm, or errors of the Financial Ombudsman Service.
- Lord Bingham's comments on exceptional circumstances in *R v Kelly* 2 Cr App R(S), 1999 176 were criticised by Lord Chief Justice Wolfe in *R v Offen And Others* [2000] EWCA Crim 96 where (at paragraph 81) he said:

> *"Lord Bingham did not apply his reasoning, that it is necessary to have regard to the purposes of Parliament when considering whether there are exceptional circumstances…when deciding whether a situation is exceptional, we regard it as being of the greatest importance to have in mind the policy already identified which reflects the intention of Parliament."*

- The circumstances in *R (on the application of Gwynn) v The General Medical Council* [2007] EWHC 3145 (Admin) are closely analogous to Mr H's complaint. The Court upheld Gwynn's challenge to the GMC trying to reopen an old, closed complaint. The Court held that Gwynn had a *"substantive legitimate expectation"* that the complaint would not be re-opened and there was no countervailing public interest that justified the GMC frustrating Gwynn's expectation.
- Here, the Financial Ombudsman Service failed to disclose to CGM Associates in 2018 that there had been a complaint. As a result of its own wrong decision substituted Openwork as the respondent, so that there was then no complaint against CGM Associates and closed that complaint. The Financial Ombudsman Service now seeks either to re-open and re-designate that first closed complaint or to say that its own wrong decision in 2018 is *"exceptional circumstances"* to give it a jurisdiction it would otherwise not have.
- In *Gupta v GMC* [2020] EWHC 38 (Admin), the High Court maintained its steadfast approach to appeal time limits. The message that emerged from the ruling was clear: absent something truly exceptional, a late appeal will mean no appeal at all.
- In *Kelly*, Lord Bingham said that it's necessary to have regard to the purposes of Parliament when considering whether there are *"exceptional circumstances"*.
- The purposes of Parliament are expressed directly in Sections 225 and 226 of the Financial Services and Markets Act 2000 ('FSMA'), as amended, and indirectly through the FCA's handbook of rules and in particular the DISP rules. Neither section 225 nor 226 makes any mention of time limits, all of which are provided for in the FCA's Handbook.
- The purposes of Parliament, and of DISP 2.8.2R(2)(b), are clearly intended to limit the power of the Financial Ombudsman Service which cannot, as in *Bunbury*, rely on its own wrong decision to grant itself powers that it doesn't have.
- The Financial Ombudsman Service cannot use its own wrong decision to give itself a jurisdiction that it wouldn't otherwise have.
- Just as in *Gwynn*, CGM Associates has a substantive legitimate expectation that the 2018 complaint wouldn't be reverse designated to run against it and wouldn't be re-opened. There is no countervailing public interest justifying the Financial Ombudsman Service frustrating that expectation.

- Following *Bunbury*, *Gwynn* and *Gupta*, the Financial Ombudsman Service's wrong decision in 2018 doesn't constitute *"exceptional circumstances"*, and the Financial Ombudsman Service is seeking to exercise a power it doesn't have.
- Mr H isn't an eligible complainant to bring any complaint against CGM Associates.
- There's no solid incontrovertible evidence to show that Mr C gave any advice. The circumstantial evidence weighs heavily on the balance of probabilities that Mr C didn't give advice to transfer the pension or to make the investment.
- Mr C's involvement was limited to an execution-only function.
- The layout of the Hornbuckle Mitchell *"Introduction Certificate"* is such that it has to be completed by the regulated firm submitting the SIPP application to Hornbuckle Mitchell and presenting the pension transfer form. There isn't a box to state which regulated firm gave the advice to transfer the pension or to make the investment.
- Section four of the Certificate has a box ticked to confirm that a home visit was undertaken by a member of staff, the name of the staff member is given as Mr O. Mr C says that the only reason that it was completed in this manner was because the design and layout of the form didn't lend itself to explaining that CGM Associates was undertaking this on an execution-only basis.
- Mistakenly stating Mr O to have been a CGM Associates' staff member carrying out the home visit isn't evidence of CGM Associates giving any advice, or what that advice was, or of being responsible for any advice that may have been given.
- Mr O was never a member of staff at any of Mr C's firms.
- A letter of 25 June 2008 from Ms F of CGM Associates to Mr H referred to Mr H contacting his advisor Mr O if there were any queries.
- Property First Asset Management Limited's letter to Mr H of 18 July 2008 noted that Mr H had completed a trust deed with his financial advisor, Mr O of Jamijo.
- In the Prudential transfer out form Mr H signed on 21 May 2008, the advisory firm section was left blank.
- The first section of the Hornbuckle Mitchell SIPP application, which Mr H signed on 11 June 2008, wasn't completed in the handwriting of any CGM Associates' staff member that Mr C recognises.
- The handwriting in the *"Applicant"* and *"Status"* sections of the SIPP application form bears a similarity to the 'Mr H' on the Prudential transfer out form. And the handwriting in these sections bears no similarity to the handwriting in the *"Personal Contributions"* and the *"Financial/Professional Advisor"* sections of the SIPP application (which sections Mr C confirms were completed by Ms F).
- That CGM Associates appears in the Hornbuckle Mitchell SIPP application isn't evidence of it having given any advice.
- The handwriting in the *"Applicant"* and *"Status"* sections of the SIPP application form should be compared with a redacted Olive Tree Application form on which the advisor is shown as being Mr O and giving a Jamijo email address.
- The handwriting in the Olive Tree application is virtually identical to the handwriting in the *"Applicant"* and *"Status"* sections of Mr H's Hornbuckle Mitchell SIPP application.
- Posting documents relating to a regulated investment is not a regulated activity on which a complaint can be founded.
- Article 27 says that:

> *"A person does not carry on an activity of the kind specified by article 25(2) merely by providing means by which one party to a transaction (or potential transaction) is able to communicate with other such parties."*

- CGM Associates' activity was only to the extent of being a conduit by which Mr O could communicate with and transact regulated activity with Hornbuckle Mitchell.
- The available evidence is, at most, evidence only that CGM Associates was involved to the extent of sending documents between contracting parties. Facilitating communications isn't a regulated activity that gives ground for a complaint. Enabling other parties to a regulated activity to communicate isn't a regulated activity in itself.
- Regulation 16(2)(a)(i) of the FSMA (Financial Promotion) Order 2005, provides that the financial promotion restriction doesn't apply to any unsolicited real time communication made by an AR (within the meaning of section 39(2) of FSMA 2000, as amended) where the communication is made by an AR in carrying on the business for which his principal has accepted responsibility for the purposes of section 39 of FSMA 2000.
- As CGM Associates wasn't engaged to, and didn't, advise Mr H, either in respect of the pension or the investment, the record retention rules in COBS 9.5.2R don't apply.
- As the FCA Handbook Glossary definition of *"execution-only"* doesn't direct to any rules other than COBS 10 & 10A on appropriateness, and then only to disapply them, none of the rules in the COB/COBS source book regulate such transactions and there never have been and are no obligations on CGM Associates to have retained any records of such transactions.
- Mr H's comments in phone conversations with Hornbuckle Mitchell on 4 February 2016 and 22 February 2016, along with the email Mr H sent to Hornbuckle Mitchell on 22 February 2016, demonstrates that Mr H identified Mr O as his advisor.
- The £250 fee CGM Associates levied was "*an administrative fee for executing* [Mr H's] *non-advice instructions"*.
- CGM Associates had no dealings with Mr O's unregulated Jamijo company, it didn't know Mr H until introduced by Mr O, it didn't apply to Prudential for a transfer value quotation and it wasn't involved in Mr O giving advice to Mr H.
- CGM Associates' only involvement after Mr H had been introduced to it was to execute the SIPP application and to act as a postman facilitating communication between the parties.

76. Mr H agreed with the provisional decision. Mr H has also said that:

- The only contact he had with Firm S came about as it became the AR for Zurich with which he had some protection policies. No advice on pensions was given to him by Firm S. He was sending us an email from Firm S to corroborate this point.
- He was also attaching a valuation he received from Hornbuckle Mitchell dated 30 April 2015. From this statement, he "*assumed that the SIPP was in rude health".*
- Regarding the alleged meeting/discussion between him and Mr C, he can categorically state that no such meeting or discussion took place.
- He was advised that his Prudential AVC wasn't going to give a good return and that he should transfer his funds from the AVC into a SIPP.
- Mr O introduced him to Mr C of CGM Associates. Mr C gave the advice regarding the transfer of the funds and setting up the SIPP. The reason given by Mr C for the transfer was that Mr H would receive a better return through the SIPP than the AVC.
- He was advised that CGM Associates would look after the transfer and setting up of the SIPP and all of the details.
- He thought that this advice was very reassuring, he was neither a sophisticated nor high-risk investor and was reliant on the advice.
- He was of the opinion his pension fund would be invested in a suitable product.

- Had the high-risk nature of the investment been brought to his attention, he wouldn't have wished to proceed.
- Regarding the Property First investment; he only received annual statements in respect of the investment, he didn't receive any updates on the investment from anyone else.
- He doesn't know what happened with his SIPP following Hornbuckle Mitchell's email of 13 May 2016 or whether £1,389.63 was credited back into it.

77. Hornbuckle Mitchell has since confirmed to us that:

- The payment of £1,389.63, mentioned in its 13 May 2016 email, was credited to Mr H's SIPP cash balance in June 2016 at a time when the SIPP balance had been £0. And, thereafter, the £1,389.63 was used to fund ongoing fees until it was depleted.
- Mr H's SIPP is inactive with a £0 balance.

78. The email from Firm S that Mr H provided stated that:

"Thank you for your message – I have checked our servers and can confirm that we hold no information on you or any pension schemes for which you are a member. I can see records of now lapsed protection policies such as Income Protection, Life Assurance etc so it may be the case that…[Mr S]*, was able to provide some professional insight on advice given by CGM but as no 'advice' was provided – no records have been retained."*

79. Following the provisional decision, CGM Associates provided us with redacted examples of two main different types of execution-only document that were signed by some other consumers introduced by Mr O. From the examples that have been provided, it appears that consumers signed either one or the other of these forms.

80. The first kind of forms, which I'll term 'Type A' were typed and were titled *"Execution Only Transaction",* they say:

"I am writing to confirm the under noted financial contract is being arranged at your own explicit request on an "execution only" basis.

No financial advice has been offered, sought or given with regard to any aspect of this transaction.

Could I please ask you to countersign this letter and return it to me, to confirm that you agree with the above statement and wish to proceed."

81. There was then a section for consumers to sign followed by a series of boxes for items such as business partner, product provider, product name, premium/sum assured/benefits, term fund, client signature and date to be entered. In the copies of this letter we've seen the forms are undated and the only information recorded in the boxes is that Mr O was the business partner and that the product name was HD SIPP.

82. As I understand from other paperwork CGM Associates has provided, at least some of the consumers that completed this form subsequently had Hornbuckle Mitchell SIPPs (as opposed to HD SIPPs) arranged for them. I've noted that, for the examples we've been provided, the Hornbuckle Mitchell SIPPs for those consumers that completed this type of execution-only form were established in 2008 and it also

appears that at least one of these investors invested in either the same, or a similar, investment to Mr H – with Schedule 1 of their application for their investment looking very similar to the Schedule 1 section for Mr H's Property First investment (and with both involving Weightco (7) Limited and Weightco (8) Limited).

83. The second kind of forms were also typed but these were titled *"Execution Only Forms",* there is a section for a consumer's name and address to be entered. There is wording that then reads:

"To: CGM Associates (with its address noted)

I wish it to be understood that I/we wish to effect the under noted plan. I/We understand the nature of the scope of the contract.

I have not sought from, nor have been given, any advice by the Adviser named below relating in any way to the purchase of the contract."

84. There is then a section for product provider, policy type, premium, sum assured and fund to be entered. Following this there are lines for the consumer to sign and date. This is followed by a section that says:

"Had advice been sought by yourself or advice been given by me then a Suitability Letter would have been provided to you setting out the reasons for recommending this product or the product provider."

85. Following this there was a section for the advisor to enter their name and sign and date. We've been provided with several redacted examples of these letters. The ones that are dated are from 2009. Some, but not all, reference Hornbuckle Mitchell and SIPP in the product provider/policy type sections.

86. Having considered the responses to my provisional decision, including new arguments about jurisdiction that were raised, I proceeded to issue a second provisional decision in which I set out my provisional findings on both our jurisdiction to consider the complaint and also on the merits of the complaint. I provisionally concluded that the complaint was one we could consider and that the complaint should be upheld. I provisionally found that CGM Associates didn't act with due skill, care and diligence or treat Mr H fairly and that it didn't meet its regulatory obligations and allowed Mr H to be put at risk of detriment as a result. Further, that but for CGM Associates' failings, Mr H's monies would have remained with his previous provider in the AVC arrangement and that it was fair and reasonable for CGM Associates to compensate Mr H to the full extent of the financial losses he's suffered due to its failings.

87. CGM Associates didn't accept my second provisional decision and Firm A provided a detailed response for my consideration. I've set out below a summary of what I consider to be the main points made in the response. However, the list isn't exhaustive and before issuing this final decision I carefully considered the response in full.

- CGM Associates didn't give pension transfer or investment advice to Mr H, it provided execution-only services.
- As CGM Associates didn't provide any regulated services Mr H isn't an eligible complainant.

- The Financial Ombudsman Service's actions in commencing this current complaint on its own initiative and upholding the complaint displays an actual and apparent bias against CGM Associates that is ultra vires and unlawful.
- Mr H's complaint form of 2 November 2018 was logged as complaint ******79 against Openwork and not CGM Associates. Doing this fundamentally altered Mr H's complaint with the effect that there had never been any complaint of that date against CGM Associates. As such, the time bar clock continued to run.
- This current complaint is out of time.
- In his provisional decision in the complaint against Carey and Johnston, the Ombudsman said that:

  > *"This complaint against Carey and Johnston must now be closed. That is not the firm that gave the disputed advice or was otherwise involved in the disputed transaction.*
  >
  > *The correct respondent firm is* [Mr C] *trading as CGM Associates.*
  >
  > *We therefore need to open a fresh complaint against* [Mr C] *trading as CGM Associates. There would be no point in doing that if that complaint was obviously time barred. I have therefore explained why it is my present view that the delay in referring the complaint was the result of exceptional circumstances*
  >
  > *To assist the parties I have set out above what I presently think is an appropriate way forward in relation to a replacement complaint against the correct respondent firm."*

- In his decision in the second complaint against Carey and Johnston, the Ombudsman said that:

  > *"*[Mr C] *is now a partner with Carey and Johnston and says that CGM Associates are one and the same. But they are not*
  >
  > *We will now open a complaint by Mr H against CGM Associates… All of the arguments about whether that complaint can be considered will be considered and determined on that complaint not this one."*

- Thereafter, the Financial Ombudsman Service initiated this current complaint against CGM Associates.
- Following this we sent CGM Associates details about the complaint this included a copy of Mr H's original complaint form of 2 November 2018 and also a document that said:

  > *"We've been contacted by* [Mr H] *about a complaint.*
  >
  > ***The complaint***
  >
  > *Case type: UCIS and other Non-Standard Investments - Mis-sale - suitability of advice*
  >
  > *Case summary:* [Mr H] *complains that the business gave him unsuitable advice to transfer his AVC pension to a SIPP and then invested in an unregulated investment*
  > *…*

We've included some details below to help you identify [Mr H] *on your records."*

- This complaint is merely a resuscitation of Mr H's original complaint ******79 which the Financial Ombudsman Service directed against Openwork and rejected a long time ago. The Financial Ombudsman Service is unlawfully retrying and deciding the ghost of closed complaint ******79.
- The Financial Ombudsman Service has no power under any of Part XVI of FSMA 2000, DISP 2 or DISP 3 of the FCA Handbook either to reopen a complaint once closed, or to retry a complaint afresh once it has been rejected. Let alone to retry it against a different respondent than the actual respondent who successfully defended and was exonerated of the original complaint.
- The provisional decision doesn't address the legal and regulatory difficulties of the Financial Ombudsman Service's conduct in the three complaints.
- Mr H's complaint of 2 November 2018 was altered and recorded by the Financial Ombudsman Service as running against Openwork. That complaint was rejected and closed, but the Ombudsman in the provisional decision is, in effect, asserting that it remains extant and that CGM Associates is substituted for Openwork.
- The Financial Ombudsman Service has assumed the authority to act as Mr H's representative, by making this third complaint on his behalf.
- The Financial Ombudsman Service's actions don't square with Section 228(2) FSMA 2000. And there is nothing stated in any section of Part XVI of FSMA 2000 that allows the Financial Ombudsman Service to take the side of the complainant and make a complaint for him.
- There is nothing in DISP 3.1 to empower the Financial Ombudsman Service to initiate a complaint of its own accord on behalf of a complainant.
- Fair and reasonable implies impartiality not only as regards the disposal of the complaint but also as regards the process by which the Financial Ombudsman Service reaches a decision to dispose of it.
- The Court of Appeal has held that rules applied by the Financial Ombudsman Service are sufficiently predictable to satisfy Article 6 of the European Convention on Human Rights ('ECHR'), but arbitrariness on the part of the Financial Ombudsman Service, including an unreasoned and unjustified failure to treat like cases alike, would be a ground for judicial review.
- Section 6 of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way that is incompatible with a person's rights under Article 6 ECHR.
- Any party to a complaint being considered by the Financial Ombudsman Service has a justified, reasonable and lawful expectation that the Financial Ombudsman Service will act fairly and impartially.
- The purpose of limitation periods is to prevent stale legal claims from being brought too long after the cause of action accrued.
- CGM Associates doesn't recall disputing that intimation of a complaint directly to the Financial Ombudsman Service would stop the time bar clock ticking provided that the respondent is told about it and acknowledges it. But it does contend that if the respondent firm named by the complainant isn't informed of the complaint, such that it cannot acknowledge it and has never even been given a chance to answer the complaint, that the time bar clock then doesn't stop but continues to tick.
- DISP 2.8.2R(2)(b) requires that it's the specific complaint being considered by the Financial Ombudsman Service against the specific respondent who is answering that complaint that has to be brought within the three years.
- DISP 3.5.1 provides that the Ombudsman will attempt to resolve complaints at the earliest possible stage and by whatever means appear to him to be most appropriate.

- Where it appears to the Financial Ombudsman Service that the complainant might more appropriately complain against some other respondent then DISP 3.5.2.G says that it can inform the complainant. Which is what occurred with Mr H's complaint of 2 November 2018 being directed to Openwork.
- It's CGM Associates' understanding that as soon as a complaint is escalated to the Financial Ombudsman Service it's immediately designated a case number, the case number doesn't alter and is retained until that numbered complaint is resolved. But where a complaint form is submitted directly to the Financial Ombudsman Service, without first being made to the respondent, the process is different.
- The Ombudsman in the decision against Carey and Johnston said that:

> *"In November 2018 Mr H contacted the Financial Ombudsman Service to make a complaint about CGM Associates. He did this by completing and submitting an online complaint form on 2 November 2018.*
>
> *That form includes a box headed details of the business you think is responsible for your compliant [sic]. "CGM Associates" is entered in that box. Such contacts to the Financial Ombudsman Service prior to complaining first to the regulated firm are referred to by the Financial Ombudsman Service as enquiries. That enquiry was allocated the number *****8878."*

- Initially the 2 November 2018 complaint form was just a contact to the Financial Ombudsman Service who registered it as an enquiry about CGM Associates and not as a complaint against CGM Associates.
- The Financial Ombudsman Service then made an initial inquiry, but when it couldn't find CGM Associates in the FCA register it asked Mr H for any papers he had which might show whom he intended to complain about. The Ombudsman in the decision against Carey and Johnston said that papers provided by Mr H:

> *"…showed the involvement of Mr O. [The Financial Ombudsman Service] passed Mr H's complaint form on to Openwork and told Mr H it had done so. It did so under the existing case reference number *****70*
>
> *We said that we could not consider the complaint against Openwork until it had considered the complaint and issued its final response letter in reply or it failed to do so within eight weeks. We did not say anything about CGM Associates."*

- The Financial Ombudsman Service effectively informed Mr H that it was appropriate to make his complaint not against CGM Associates but against a different respondent Openwork, per DISP 3.5.2.G.
- As the Financial Ombudsman Service at the time always used eight-digit case numbers, the reference by the Ombudsman to a 7 digit complaint number *****70 is clearly an error omitting one digit. But the two references that Ombudsman cites, being enquiry ****8878 about CGM Associates and complaint *****70 against Openwork are so different that their differences cannot be ascribed to typographical errors.
- It's reasonable to assume that following the Financial Ombudsman Service's initial inquiries the subject of the complaint form had been changed from the status of an enquiry ****8878 about CGM Associates to the status of being a complaint about Openwork which was designated a different number *****70.
- The provisional decision makes no comment on the differences in the reference numbers.

- The provisional decision also refers to designating a complaint that had been set up under reference ******79 as being a complaint from Mr H about Openwork.
- It is clear that the enquiry ******78 about CGM Associates was, at no point, escalated to complaint ******79 against CGM Associates. Instead, the Financial Ombudsman Service set up complaint ******79 against Openwork, which it clearly treated as the initial complaint because Openwork was given eight weeks to respond to it.
- The Financial Ombudsman Service substituted Openwork as the more appropriate respondent of the 2 November 2018 complaint and designated complaint ******79 for consideration only against Openwork.
- CGM Associates was only ever recorded by the Financial Ombudsman Service as the subject of an enquiry ******78 and no complaint was registered against CGM Associates by the Financial Ombudsman Service until the current complaint.
- The first that CGM Associates knew of the 2 November 2018 complaint form was the Ombudsman's provisional decision of 2 February 2022 in the complaint against Carey and Johnston trading as Sydney Johnston Financial Services.
- CGM Associates didn't receive details of a complaint within three years of the May 2016 trigger email.
- CGM Associates has been unable to find any decisions by the Financial Ombudsman Service in any like for like complaints, nor any High Court decisions, relating to time bar issues of the type that have arisen here. But there are two closely analogous cases in other administrative jurisdictions.
- *Lewis v Creativevents Ltd*: 2200088/2021 and 2206882/2020 is a decision of the Employment Tribunal. The claimant raised an employment complaint against a company with an almost identical name to that of his former employer. The respondent, being his former employer, argued that the claimant had issued two sets of proceedings against the wrong entity, and that the right of complaint against his employer had become time barred.

  It was argued that the tribunal has a general power to amend a claim before it, including adding a respondent as a matter of judicial discretion. The tribunal judge held that the error between the names of the employer and the cited respondent was minor, and the substitution was allowed. The tribunal judged considered the issue of time bar and applied the decision of an earlier case:

  > *"31. The judgment in Cocking also confirmed that where the amendment is to add or substitute a Respondent (the substance of the original complaint being unamended), the issue of time limits is unaffected. The tribunal's jurisdiction to hear the complaint is based on when the Claimant originally presented the claim to the tribunal and not when the new Respondent is joined to the proceedings."*

- The practical and legal effect of substituting the original respondent by the new respondent is that the original respondent is completely removed from the whole complaint process as if the original respondent had never been named.
- The employment tribunal in *Lewis* held that the time bar clock as it related to the substitute respondent stopped at the earlier date when that complaint was first presented and not when the substitute respondent was much later brought into it.
- That the Financial Ombudsman Service considered CGM Associates not to be part of this complaint is emphasised by us not informing CGM Associates of the enquiry.
- Logically, the corollary is that when the original respondent was removed from that complaint, as if it had never been named, the time bar clock doesn't stop but

continues to run as regards the original respondent's involvement in the same grounds of that complaint. If a new and later complaint is raised against the original respondent by the same complainant but on the same grounds, then the issue of time bar as regards the original respondent would again arise and operate to render such later complaint to be time barred.

- The Financial Ombudsman Service's failure to inform CGM Associates of the 2 November 2018 complaint and its removal of CGM Associates from the whole complaint process ensured that the time bar clock as regards CGM Associates continued to run.
- When Mr H's 2 November 2018 complaint form was received it was designated by the Financial Ombudsman Service as an enquiry about CGM Associates not as a complaint against CGM Associates because it hadn't first been made to CGM Associates. When the Financial Ombudsman Service exercised its discretion, per DISP 3.5.2.G, to substitute Openwork as the respondent then Openwork became subject to the same time bar considerations as if it had been cited at the outset.
- As in *Lewis*, when CGM Associates was removed as the respondent of the complaint it was also removed from the application of the three-year time bar considerations relative to the 2 November 2018 complaint form.
- The complaint made by the Financial Ombudsman Service on behalf of Mr H on 28 April 2022, to resuscitate the closed 2 November 2018 complaint, is out of time.
- The complaint had to have been lodged with CGM Associates, or with the Financial Ombudsman Service and also intimated to CGM Associates, on or before 12 May 2019 failing which it was time barred.
- Of the three complaints that have run in his name, Mr H has made only two: one complaint on 2 November 2018 which the Financial Ombudsman Service deemed to be against Openwork and therefore not against CGM Associates; and one complaint against Carey and Johnston on 15 February 2019. As neither of these were pursued against CGM Associates then neither stopped the three-year clock from ticking as regards CGM Associates.
- The provisional decision in this complaint said that the 2 November 2018 complaint form was a complaint against CGM Associates and that it did stop the three-year clock as regards CGM Associates. This view is inconsistent with what the Financial Ombudsman Service has said previously because the complaint was never intimated to CGM Associates at the time.
- There was no complaint against CGM Associates in November 2018, the Ombudsman in the Carey and Johnston complaint confirmed this when he said there had been an enquiry about CGM Associates and the provisional decision in this complaint referred to the complaint as against Openwork.
- The Financial Ombudsman Service has no legal powers to resuscitate a complaint rejected and closed six years ago or to amend an old complaint retrospectively to run against a different respondent.
- The Financial Ombudsman Service's actions in 2018 of directing the complaint to Openwork and of not notifying CGM Associates were considered at the time to have been appropriate.
- The fair and impartial application of the law and rules in 2018 resulted in there being no complaint proceeding against CGM Associates in 2018. The three-year time bar clock didn't stop as regards CGM Associates, the three-year time bar on any complaint being made by Mr H against CGM Associates on the same grounds continued to run and finally came to a halt on 12 May 2019 without a complaint having been made.
- The provisional decision re-assesses the fairness and legitimacy of the Financial Ombudsman Service's actions in 2018 and does so with retrospective effect.

- Even if the 2 November 2018 complaint form can be retrospectively considered to have been brought in time, there is still the insurmountable problem that CGM Associates was not given any notice of that complaint until 2 February 2022, which was well outwith the three-year time limit.
- The discretion in DISP 2.8.2R(3) isn't an absolute discretion. It's a limited discretion that must be exercised by acting reasonably.
- The provisional decision ignores that what was said in *R v. Kelly (Edward)* 2000 QB was later qualified in *R v Offen And Others* [2000] EWCA Crim 96, where it was said that:

  > *"…when deciding whether a situation is exceptional, we regard it as being of the greatest importance to have in mind the policy already identified which reflects the intention of Parliament."*

- The intentions of Parliament in the FSMA 2000, and of the then FSA in drafting the DISP rules under the Act, were to enable the Financial Ombudsman Service to direct a complainant to a more appropriate respondent.
- It must have been Parliament's and the FSA's intention that the Financial Ombudsman Service, having been given that power, would apply it correctly.
- The DISP 2.8.2R(3) discretion cannot be exercised arbitrarily just to extricate the Financial Ombudsman Service from a difficult situation of its own making.
- The second analogous case of *R (on the application of Gwynn) v The General Medical Council* [2007] EWHC 3145 (Admin) arose from a decision of the General Medical Council ('GMC'). In that case the Court held that the GMC's own failings did not constitute *"exceptional circumstances"* to allow a complaint to be considered late.
- Instinctively knowing *"exceptional circumstances"* when you encounter them is subject to the Court's caveat in *Gwynn* that:

  > *"The expression is used so as to confer a discretion capable of dealing fairly with the special features of each particular case."*

- The provisional decision avoids commenting on the similarities between the circumstances in *Gwynn* and the circumstances of Mr H's complaint and it ignores that the Court took the opposite view from the GMC, and held that the GMC's own failings didn't constitute exceptional circumstances.
- By ignoring the Court's decision in *Gwynn* and the Court's stated reasons for deciding as it did the Ombudsman is acting unreasonably and not impartially.
- Gwynn was a consultant breast surgeon against whom a number of complaints had been made which were considered by a panel of the GMC in 2007. One such complaint had been made five years earlier in 2002 but the GMC hadn't (then) told Gwynn about it and it was closed in 2002. The GMC had then sought to reopen it in 2007 to consider along with the other complaints and Gwynn sought to have the panel's decision judicially reviewed.

  The Court upheld Gwynn's challenge to the GMC trying to reopen an old, closed complaint. The Court held that Gwynn had a *"substantive legitimate expectation"* that the complaint, once closed, would not be re-opened and there was no countervailing public interest that justified the GMC frustrating Gwynn's expectation.

  The rules governing the GMC's handling of such complaints effectively impose a time limit on the GMC in that it had to refer the complaint to Gwynn within *"a reasonable time"* and even if the GMC did have power to reopen a complaint at

its own instigation, then it had to do so also within a reasonable time. The Court also held that although the GMC rules don't impose a duty on the GMC to give reasons for deciding whether a complaint should proceed or not, fairness to both the complainant and the respondent requires that reasons are given.

- The Court in *Gwynn* said that:

> *"…'exceptional circumstances' are intrinsically incapable of firm or exhaustive definition. The expression is used so as to confer a discretion capable of dealing fairly with the special features of each particular case. Over time, the discretion holder will often develop a practice guiding the exercise of the power. But such a practice must not evolve into rigid rules. It is critical that flexibility is retained and that each case is decided on its own individual merits."*

But the judge also later said that the GMC:

> *"…must be satisfied that there are circumstances of the case which can fairly be described as "exceptional circumstances", and that proceeding with the case is in the public interest, in those exceptional circumstances."*

And the judge also referred to the decision in an earlier case *Peacock v The General Medical Council* [2007] EWHC 585 (Admin) and quoted Gibbs J saying:

> *"…there would be no later stage in the proceedings when any Tribunal could consider the existence or otherwise of exceptional circumstances, as envisaged by the relevant rule. In my view that is important. The rule under consideration provides a distinct and free-standing safeguard which sets a general prohibition against the pursuit of long-delayed complaints. It provides only for very limited -i.e. exceptional - circumstances in which such complaints may proceed. I am not persuaded that in the event of a wrong decision under that rule which allows a complaint to proceed further, there would be any satisfactory remedy later in the proceedings."*

- In *Gwynn* the Court's decision meant that the failings of the GMC to disclose to the surgeon the complaint five years earlier, closing that complaint and then seeking to re-open it five years later didn't constitute *"exceptional circumstances"*.
- The circumstances that occurred in Gwynn are closely analogous to the circumstances in Mr H's complaint. The Financial Ombudsman Service failed to disclose to CGM Associates in 2018 that there had been a complaint, recorded this as an enquiry about CGM Associates, as a result of its own failings substituted Openwork as the respondent, rejected and closed that complaint and now, six years later, seeks to re-open and re-designate that closed complaint against CGM Associates. And on the basis that its own failings in 2018 are exceptional circumstances to give it a jurisdiction that the proper and fair application of the rules would deny it.
- Just as the Court in *Gwynn* held there to be no further stage in the GMC's procedure to run the closed complaint late, so too is there no further stage in the Financial Ombudsman Service's procedure to subject CGM Associates to a long-delayed and closed complaint.
- There is no public interest issue here that could justify re-opening the November 2018 complaint.
- CGM Associates is entitled to any benefit accruing from the Financial Ombudsman Service's then lawful and proper application of its powers.

- The 2 November 2018 complaint was never intimated to CGM. And, having been rejected and closed five years ago in 2019, CGM has a *"substantive legitimate expectation"* that the same complaint wouldn't be reopened.
- The Financial Ombudsman Service cannot ignore the precedent of *Gwynn* and the reasons for that decision without proper reason and valid justification.
- The Court held in *R (Heather Moor & Edgecomb Limited) v The Financial Ombudsman Service* [2008] EWCA Civ 642 that arbitrariness on the part of the Financial Ombudsman Service in exercising the rules in an unreasoned and unjustified failure to treat like cases alike would be a ground for judicial review. Whilst *Gwynn* may have arisen from a different administrative jurisdiction its circumstances are so alike the circumstances in this case that the Financial Ombudsman Service's failure to treat like cases alike would amount to arbitrariness which may be judicially reviewed.

88. Mr H agreed with my second provisional decision and had nothing substantive to add.

What I've decided – and why

jurisdiction

89. I've considered all the evidence and arguments in order to decide whether we can consider Mr H's complaint. Having done so, I've found that this is a complaint that we can consider.

90. The parties to this complaint have provided detailed submissions to support their position, and I'm grateful to them for taking the time to do so. I've considered these submissions in their entirety. I trust that the parties to this complaint won't take the fact that my final decision focuses on what I consider to be the central issues as a discourtesy. To be clear, the purpose of this final decision isn't to comment on every individual point or question the parties have made, rather it's to set out my findings and reasons for reaching them.

91. The rules I must follow in determining whether we can consider this complaint are set out in the Dispute Resolution ('DISP') rules, which form part of the FCA's Handbook.

Has the complaint been brought in time?

92. DISP 2.8.2R sets out that:

> "The *Ombudsman* cannot consider a *complaint* if the complainant refers it to the *Financial Ombudsman Service*:
>
> (1) more than six *months* after the date on which the *respondent* sent the complainant its *final response, redress determination* or *summary resolution communication;…*
> …
> unless:
>
> (3) in the view of the *Ombudsman*, the failure to comply with the time limits in *DISP 2.8.2 R* or *DISP 2.8.7 R* was as a result of exceptional circumstances; or…
>
> (5) the *respondent* has consented to the *Ombudsman* considering the *complaint* where the time limits in *DISP 2.8.2 R* or *DISP 2.8.7 R* have expired*…"*

93. The respondent in this complaint is CGM Associates. CGM Associates first issued a final response letter to Mr H on 31 May 2022. Mr H then emailed us, also on 31 May 2022 and said that:

"Please find attached the response I have received (Mr H attached a copy of the 31 May 2022 letter)...*I reject their final decision and wish the Ombudsman to review my complaint."*

94. As such, I'm satisfied Mr H's complaint was referred to us within six months of the date on which the respondent, here CGM Associates, sent Mr H its final response.

95. DISP 2.8.2R also sets out that:

"The *Ombudsman* cannot consider a *complaint* if the complainant refers it to the *Financial Ombudsman Service*:
…
(2) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the *complaint* to the *respondent* or to the *Ombudsman* within that period and has a written acknowledgement or some other record of the *complaint* having been received;

unless:

(3) in the view of the *Ombudsman*, the failure to comply with the time limits in *DISP 2.8.2 R* or *DISP 2.8.7 R* was as a result of exceptional circumstances; or…

(5) the *respondent* has consented to the *Ombudsman* considering the *complaint* where the time limits in *DISP 2.8.2 R* or *DISP 2.8.7 R* have expired*…"*

96. For simplicity and ease of reference, below I'll refer to the above as *the six-and-three year rule*.

97. This complaint concerns the transfer of pension monies into a SIPP and the investment of the bulk of the transferred monies into a Property First investment. Mr H says that CGM Associates set up the SIPP and advised on the transfer. Mr H says that the advice he received was unsuitable and that it wasn't appropriate for his needs, circumstances or objectives. Mr H says that he wasn't a high-risk investor, he wasn't a high net worth or sophisticated investor and he wasn't aware that the investment carried no regulatory protection.

98. As I understand it, the transfer into the SIPP was effected in June 2008 and monies were then invested into a Property First investment in September 2008. From the evidence I've seen, I'm satisfied that Mr H didn't refer a complaint about CGM Associates' role in those transactions to CGM Associates *or* the Financial Ombudsman Service within six years of those respective dates. So, I'm satisfied this complaint was brought more than six years after the event complained about.

99. As such, I've gone on to consider whether Mr H referred his complaint more than three years from the date on which he either became aware, or ought reasonably to have become aware, he had cause for complaint.

100. There are a number of points that I think are relevant to this issue:

- In order to be aware of cause for complaint the complainant should reasonably know there's a problem, that they have suffered or may suffer loss, and that someone else is responsible for the problem – and who that someone is. So, in this instance, Mr H needs to have been aware, or ought reasonably to have become aware, that there was a problem which had caused, or may cause, him loss and that CGM Associates might be responsible.

- Mr H transferred around £35,000 into his SIPP in 2008 and around £30,000 of this was invested into the Property First investment in September 2008.

- Mr C says he had a casual conversation with Mr H at some point; Mr C initially said this was before January 2016 but has since clarified that he thinks this was no later than mid-2015. Mr C initially said that from this conversation, he gained the impression that Mr H already knew, or at least suspected, that the investment was in difficulty. Mr C has since clarified that his impression was that Mr H was in no doubt that the investment was in difficulty and that Mr O was at the centre of it. As I understand it, there's no recording or written record of this conversation. Mr H says no such conversation ever took place between Mr C and him.

- Prior to 2016 the annual SIPP statements sent to Mr H recorded a relatively modest fall in the SIPP value and didn't suggest that the bulk of the monies in the SIPP, which had been invested into the Property First investment, had suffered any significant loss.

- Correspondence between Hornbuckle Mitchell and Mr H about outstanding fees led to Mr H suggesting that Hornbuckle Mitchell look into the £30,000 investment that had been made and what its value was. Hornbuckle Mitchell agreed to look into this and, on 13 May 2016, it confirmed to Mr H by email that the Property First investment had failed in 2012. Mr H responded to Hornbuckle Mitchell's 13 May 2016 email on 16 May 2016.

- Whether or not a complaint has been referred to us is ascertainable as a matter of fact. DISP provides the definition of what constitutes a complaint and where a consumer submits a matter to us that meets all the requisite criteria to constitute it being a valid referral and a complaint per the DISP definition of a complaint then the consumer will, as a matter of fact, have referred a complaint to us.

- I'm satisfied that Mr H first referred his complaint about CGM Associates to *"the Ombudsman"* per DISP 2.8.2R(2) on 2 November 2018. He did this by sending us a completed complaint form on that date. That form included a box to record *"details of the business you think is responsible for your complaint".* And Mr H entered *"CGM Associates"* into that box. And elsewhere in that complaint form, Mr H also set out an overview of his complaint about CGM Associates.

- The complaint form contains a written expression of Mr H's dissatisfaction about CGM Associates' role in the transfer and investment of his pension monies and that Mr H wanted the *"the sole proprietor of CGM Associates namely* [Mr C]*…to compensate me accordingly and want the Financial Ombudsman Service to*

pursue my claim." This wasn't a mere enquiry, Mr H was referring a complaint about CGM Associates to the Financial Ombudsman Service and was asking us to investigate it.

- I'm satisfied that complaint was then acknowledged in writing when we emailed Mr H on 5 November 2018 to thank him for contacting us and to explain that we'd look into what he'd sent us.

101. Hornbuckle Mitchell's 13 May 2016 email made it clear that Mr H's SIPP monies had suffered significant losses. And I think, following receipt of Hornbuckle Mitchell's 13 May 2016 email, Mr H either became aware, or else ought reasonably to have become aware, that he had cause for complaint about the issues he's subsequently complained to the Financial Ombudsman Service and CGM Associates about.

102. I've also carefully considered *all* of the submissions/evidence we've received to consider whether or not I think Mr H either became aware, or else ought reasonably to have become aware, that he had cause for complaint about CGM Associates prior to 13 May 2016. And there are some specific points I'd like to address here.

103. Prior to 2016 the annual SIPP statements sent to Mr H record a relatively modest fall in the SIPP value and didn't suggest that the bulk of the monies in the SIPP, which had been invested into the Property First investment, had suffered any significant loss. So, having carefully considered the contents of the annual statements Hornbuckle Mitchell was issuing to Mr H, in my opinion there's nothing contained therein which gives me cause to conclude that prior to May 2016 Mr H became aware, or ought reasonably to have become aware, that he had cause for complaint about the issues he's subsequently complained to the Financial Ombudsman Service and CGM Associates about.

104. I've thought carefully about what Firm A has said about the content of the SMPIs that accompanied the annual statements.

105. The 2011 SMPI projected a future fund value using growth rates of 3% for monies in cash and 7% for Mr H's other investments, in 2013 the growth rates used were 2.1% and 7% respectively, by June 2014 this had changed to 3% and 4% respectively, in October 2014 it was 3% and 5%. It was also explained, amongst other things, in the SMPIs that:

    - Hornbuckle Mitchell had allowed for future inflation to give an indication of how much could be bought with the pension fund. The amounts shown were based on statutory assumptions and weren't guaranteed.
    - An individual's pension may differ significantly from the illustrations as they will depend on what actually happens in practice, which may vary from the assumptions made.
    - Some general assumptions had been made about the nature of investments made and likely performance which may not correspond with the investments actually made nor their actual performance.
    - An individual's final pension would depend on a variety of factors including when the consumer actually retired, the way the consumer's pension fund was invested and the investment growth actually achieved.

106. From what he has said, it seems Mr H wasn't concerned from the content of annual statements (which came with the SMPI enclosure) that he was receiving from Hornbuckle Mitchell. And having thought about this carefully, I think this evidence is

credible. I say this because I don't think a reasonable investor in Mr H's position ought reasonably to have become aware from reviewing the contents of those statements that he had cause for complaint about CGM Associates.

107. With regards to the SMPIs; as I've referenced above, there were changes in the underlying assumptions that were being used to populate potential future fund values. And it was explained that the projections were based on statutory assumptions that weren't guaranteed and that individual's pensions may differ significantly from the projections as they would be based on what actually happens rather than the assumptions. I think a reasonable investor in Mr H's circumstances would have recognised that there had been no significant change in their fund value, that projected benefits in retirement had changed but this was likely due to changing assumptions underpinning those projections (such that it wasn't a like for like comparison across all statements) and that Hornbuckle Mitchell was using statutory assumptions and that these assumptions might differ significantly from what an individual's actual pension fund might be worth in retirement. So, having carefully considered the statement evidence, there's nothing contained therein that gives me cause to conclude that Mr H became aware, or that he ought reasonably to have become aware, that he had cause for complaint more than three years before he referred his complaint about CGM Associates to us in 2018.

108. I've also carefully considered what CGM Associates has submitted about the lack of investment return and the inability to cover annual fees from annual revenue. On the available evidence, I'm not satisfied that Mr H was aware there was a problem with his SIPP or with his Property First investment more than three years before he referred his complaint about CGM Associates to the Financial Ombudsman. I've also considered whether a reasonable investor in Mr H's position ought reasonably to have become aware there was a problem more than three years before Mr H referred his complaint about CGM Associates to the Financial Ombudsman Service in 2018. And, on balance, I don't think they would have done.

109. The bulk of the transferred monies were invested into the Property First investment. I have to reach conclusions premised on the available evidence and there's limited evidence available to me in respect of the investment that was made. But, from the available evidence, which includes the advisory contract relating to Cell 4B Liverpool International Business Park (between Weightco 2007 (7) Limited, Weightco 2007 (8) Limited and Property First Asset Management Limited) and the Trust Deed relating to the PFAM Property Trust No3 and Cell 4B Liverpool International Business Park it appears, amongst other things, that:

- A professional advisor had identified what it considered to be a worthwhile commercial property and had entered into a contract for sale to acquire title to the leasehold.
- The Trustees had then acquired the leasehold title to the Property. The Trustees had borrowed a sum of £1.25 million that would be used, in part, to finance the acquisition of the property.
- The owner wished to own the property and obtain planning permissions for the construction of commercial units upon it.
- The objectives and policies for the Trustees were *"to acquire the property and obtain planning consent, following this the Trustees will enter into negotiations with a lender to obtain construction finance and carry out pre sales."*
- Beneficiaries were investing to achieve income and capital return on investment.

- Upon disposal the net proceeds would be divided between the beneficiaries in such proportion as each class of beneficiary had provided towards the total sum of equity.

110. I don't think property investments of this ilk are short-term investments and I've not seen anything to suggest that it was sold to Mr H as such. Based on the available evidence, I don't think a substantive investment return on a commercial property development of this nature in the short term would necessarily have been expected, and therefore I don't think the absence of such a return ought to have caused Mr H, or a reasonable investor in his position, to conclude there was a problem at any point prior to 2016.

111. I don't think the fact an investment of this type hadn't yet provided a substantive return meant that something had gone very wrong and that an investor might not get back the money they'd invested, or that they weren't going to enjoy a return on their investment, or that they weren't going to enjoy a preferential return to that they would have enjoyed if their monies had been left in a previous pension arrangement.

112. I think an investor who isn't looking to access their pension in the near future, (and Mr H was 41 years old when he invested in the arrangement and was still some years off the age when he would first have been able to access pension benefits) might well not be unduly worried that the investment hadn't yet provided a substantive return. I don't think it's unusual for certain types of investments, for example, property based schemes like the Property First investment, to take a number of years to provide a return, or for there to be delays in the completion of such property schemes, or for the substantive return from such investments to come when the completed property development is sold.

113. So, even though the Property First investment hadn't provided a substantive return by February 2016, I don't think that means that Mr H, or a reasonable investor in his position, ought reasonably to have become aware that the investment was going to fail or that it wasn't going to provide any anticipated return at a future date. And I also don't think there was anything contained within the annual statements, or in any other correspondence that's been provided to us, that ought reasonably to have made Mr H, or a reasonable investor in his position, become aware that the advice he had received might not have been suitable, or that there might be anything wrong with the arrangements CGM Associates had made for him.

114. I also don't think the fact that annual fees for the SIPP had to continue to be paid means that Mr H, or a reasonable investor in his position, ought reasonably to have become aware that there was a problem, or that the investment was going to fail or that it wasn't going to provide any anticipated return at a future date.

115. The February 2016 correspondence between Mr H and Hornbuckle Mitchell, and by this I mean both the phone notes and the emails from February 2016 referred to earlier in this decision, followed on from a letter that had been sent to Mr H on 8 January 2016.

116. Hornbuckle Mitchell had highlighted that there were outstanding fees of £456.47 and that payment could be arranged by disinvesting if there were available assets in the scheme, or by making a contribution into the pension scheme or by way of bank instruction. And my reading of Mr H's correspondence with Hornbuckle Mitchell on 22 February 2016, is that it's come about as a result of the outstanding fees issue and that Mr H is querying why he owes Hornbuckle Mitchell fees when there should be

monies in his pension, and he asks Hornbuckle Mitchell to look into this to see where the £30,000 is.

117. I don't think the content of this correspondence demonstrates that Mr H had cause for complaint about CGM Associates at this juncture or, more generally, that he thought his £30,000 investment was lost or that there was a problem with it. I think Mr H was just seeking clarification on where the £30,000 was, in the context of Hornbuckle Mitchell's outstanding fees request. And that also appears to be how Hornbuckle Mitchell treated the email – as a request for clarification – with it responding to Mr H the same day to clarify that the £30,000 was invested in the Property First investment, that it didn't have an up to date valuation for the investment and that its investments team would look into Mr H's query for him. But, in any event, this is a secondary point because the February 2016 correspondence was within three years of Mr H referring his complaint about CGM Associates to the Financial Ombudsman Service.

118. Further, having considered the content of all the other correspondence I've seen from before May 2016, there's nothing contained therein that gives me cause to conclude that Mr H became aware, or ought reasonably to have become aware, that he had cause for complaint prior to May 2016.

119. It's not clear whether any discussion occurred between Mr C and Mr H in 2014 or 2015. Mr H says it didn't. Mr C says it did. Mr C initially said that from this discussion he gained the impression that Mr H already knew, or at least suspected, that the investment was in difficulty. Mr C has since clarified that his impression was that Mr H was in no doubt that the investment was in difficulty and that Mr O was at the centre of it. We've been provided with no recording or written record of any conversation between Mr C and Mr H in 2014 or 2015, but that's not unusual for a *"casual conversation"* – most casual conversations aren't recorded in writing or otherwise. The corollary of this is that I don't know definitively whether such a conversation took place, or exactly what was said *if* such a conversation did take place, or whether the impression Mr C says he gained (either in his initial submissions on this point or in his subsequent clarification about it) was an accurate one.

120. Overall, and having carefully considered all of the evidence that's been provided to us including Mr C's and Mr H's testimony on any discussion that might have occurred in 2014 or 2015 between them, which seems to have changed over time certainly on Mr C's part, I'm still not satisfied there is sufficient evidence to suggest Mr H became aware, or ought reasonably to have become aware, he had cause for complaint about the issues he's subsequently complained to the Financial Ombudsman Service and CGM Associates about prior to May 2016.

121. As a reminder above, amongst other things, it's explained that we can't look into Mr H's complaint about CGM Associates if it's been brought:

- more than six years after the event complained of;
- or, if later, more than three years after Mr H became aware – or ought reasonably to have become aware – he had cause for complaint;
    - *"unless the complainant referred the complaint to the respondent **or to the Ombudsman** within that period and has a written acknowledgement or some other record of the complaint having been received*"; or
    - unless, in the view of the Ombudsman, the failure to comply with the time limits was as a result of exceptional circumstances. **(Bold my emphasis)**

122. As I've mentioned, I'm satisfied that Mr H first referred his complaint about CGM Associates to us on 2 November 2018 and that we emailed Mr H on 5 November 2018 to thank him for contacting us and to explain that we'd look into what he'd sent us.

123. I'm satisfied that a referral of a complaint to *"the Ombudsman"* (provided that there's a written acknowledgement or some other record of the complaint having been received – as there is here) serves to stop the clock for the purposes of referring a complaint within the time limits provided for in DISP 2.8.2R(2). And that where a complaint has been referred to the Ombudsman within the time limits provided for in DISP 2.8.2R(2), that complaint doesn't then also have to have been referred to the respondent firm within the same time limits for the complaint to be one that we've got the power to consider.

124. As I've highlighted above in emboldened lettering, the relevant proviso makes it clear that referral can be to the respondent ***or to the Ombudsman***. I've noted what Firm A has submitted on CGM Associates' behalf about the respondent also needing to be informed for the time bar clock to stop ticking and I'm not in agreement with that submission. I think the language of the rules is precise, clear and unambiguous and that a referral of a complaint to the Ombudsman alone, even where the respondent isn't informed of the complaint until a later date, serves to stop the clock for the purposes of referring a complaint within the time limits provided for in DISP 2.8.2R(2).

125. I appreciate that CGM Associates might submit that it considers there are some inconsistencies between what was said in the decision on the Carey and Johnston complaint and my findings on this point. My role is to reach findings in *this* complaint and I have to assess matters based on my own judgement. And for the reasons I've explained above, I'm satisfied that my findings on this point are the correct position.

126. I'm satisfied that Mr H *did* refer his complaint to us about CGM Associates in November 2018 and that this was within three years of May 2016. I'm also satisfied there's a record of us having received his complaint form detailing his complaint against CGM Associates in November 2018 and that we sent him a written acknowledgment in response to the complaint form we'd received from him. And having considered all of the evidence and submissions I don't think Mr H became aware, or ought reasonably to have become aware, he had cause for complaint more than three years before his complaint about CGM Associates was referred to us in November 2018.

127. So, I'm satisfied that Mr H's complaint against CGM Associates *was* referred to the Ombudsman within three years of the date on which Mr H became aware, or ought reasonably to have become aware, he had cause for complaint. And, as such, I'm satisfied that this complaint has been brought in time and that it's one we can consider.

128. Having concluded that this complaint was referred in time, and is one we can consider, there are a couple of further points I want to address here for completeness.

Mr H's complaints against Openwork and Carey and Johnston

129. I've noted the submissions that CGM Associates' representative has made about the complaints we set up against Openwork and Carey and Johnston. I'm satisfied that just because we've investigated and assessed whether different respondent

businesses are responsible for issues Mr H has complained about (and set up complaints about those other respondent businesses) doesn't mean we can't look into the complaint Mr H referred to us in November 2018 about CGM Associates. Until now, we have not reviewed the complaint against CGM Associates from Mr H – we have reviewed complaints against Openwork and Carey and Johnston but not against CGM Associates. As I've explained above, I'm satisfied that Mr H *did* refer his complaint about CGM Associates to us within the time limits and, as such, I'm satisfied this is a complaint that we can consider.

130. I've carefully considered *Lewis* and I'm not in agreement with CGM Associates' representative about the impact of that case on this complaint. I think it's worth highlighting that, unlike in *Lewis*, Mr H *had* accurately identified the specific respondent firm he wanted to complain about; CGM Associates, and did then refer a complaint about that firm to us in November 2018. Aside from the substantive factual differences in the circumstances of Mr H's complaint and *Lewis*, I'm also satisfied that *Lewis* doesn't mean that the effect of the Financial Ombudsman Service having investigated and assessed whether different respondent businesses are responsible for issues Mr H has complained about is that Mr H hadn't also, in fact, referred a complaint about CGM Associates to us within the time limits provided for in DISP 2.8.2(R)2.

131. My finding of fact, as explained above, is that Mr H referred a complaint about CGM Associates to us in November 2018. Under FSMA we have a statutory obligation to resolve and determine complaints and once those disputes are determined we must notify the correct respondent of the outcome. And it's the case that, prior to this final decision, we've not previously issued a determination about the complaint Mr H referred to us about CGM Associates. And the fact that we've investigated and assessed whether *different* respondent businesses are responsible for issues Mr H has complained about doesn't mean that the original complaint against CGM Associates ceased to exist – it wasn't withdrawn, nor determined and so it still needs to be resolved in the form of this final decision.

Reference numbers

132. I've also noted the submissions that have been made in respect of our reference numbers. Reference numbers are just the system this Service, like many other organisations, uses to assist with, amongst other things, efficient identification, communication and navigation between distinct work items. Our references are primarily used to allow us to navigate between matters and keep track internally of the cases we have and they don't have any meaning, or statutory basis, beyond that. Similarly, whether or not a complaint reference is closed on our systems is a matter of internal administration as opposed to signalling an end to our powers – for example, we routinely close complaints at view stage that are later reopened on our systems if circumstances change. The way we close a complaint in a formal way, in accordance with our powers in FSMA, is by determining it which means issuing a final decision and which, as I've explained above, prior to this final decision we've not previously done in respect of Mr H's complaint about CGM Associates.

133. Whether or not a complaint has been given any reference number, or which reference number has been applied to correspondence we've received, isn't determinative of whether or not a complaint has, in fact, been referred to us. Rather, as I've explained above, whether or not a complaint has been referred to us is discernible as a matter of fact and DISP provides the definition of what constitutes a complaint.

134. Whether or not that complaint subsequently, when it's added to our system, is given no reference number, or is given one reference number or is given several reference numbers by us cannot, and does not, impact whether correspondence a consumer has sent to us constitutes a complaint (which, as previously mentioned, is discernible by reference to the definition provided for in DISP), or alter the nature of the complaint the consumer has actually referred to us (which is discernible from the content of the contemporaneous record of the consumer's submissions/correspondence they've sent to us about their complaint), or alter the date on which that specific complaint was first referred to us (which is discernible from the record of when the complaint was first received by us).

135. I've noted what CGM Associates has submitted in respect of the November 2018 correspondence constituting an *enquiry* rather than a *complaint* about CGM Associates. And, again, I also appreciate that CGM Associates might submit that it considers there are some inconsistencies between language used in the decision on the Carey and Johnston complaint and my findings in this complaint. As I've explained above, my role is to reach findings in *this* complaint and for reasons I've already explained earlier in this decision, I'm satisfied that the correct position is that Mr H referred a *complaint* to us about CGM Associates in November 2018 and that is within three years of May 2016. I'm also satisfied that there's a record of us having received Mr H's complaint form detailing his complaint against CGM Associates in November 2018 and that we sent him a written acknowledgment in response to the complaint we'd received from him.

DISP 2.8.2R(2) and exceptional circumstances

136. As will be apparent from what I've said above, I'm satisfied that this complaint was made to us in time under the six-and-three year rule and is one we can consider without having to make reference to exceptional circumstances. My findings on this issue are set out in detail above. But, to ensure there's no misunderstanding on this point, I'm satisfied that the language, including the words *"or to the Ombudsman",* in DISP 2.8.2R(2) is unambiguous and that Mr H's complaint about CGM Associates was referred to us, for the purposes of DISP 2.8.2R(2), on 2 November 2018. As I've explained above, I'm satisfied that's fewer than three years from when Mr H became aware, or ought reasonably to have become aware, he had cause for complaint about the issues highlighted in the complaint form he sent to us on 2 November 2018. And, as such, I'm satisfied this complaint was made within the time limits and is one we can consider without any consideration of exceptional circumstances being necessary.

137. However, and for completeness, even if I thought (and I don't), that the referral of the complaint to us by Mr H in November 2018 didn't serve to stop the clock for the purposes of the six-and-three year rule and that the complaint also *had* to have been referred to the respondent firm within the time limits, my conclusion in this case premised on the evidence available is still that the complaint is one we can look into. That's because any suggested failure to comply with the time limits in that scenario would, in my opinion, also be as a result of exceptional circumstances.

138. I've carefully considered what Firm A has said about failings by the Financial Ombudsman Service not constituting exceptional circumstances and what it's said about the cases it has cited. To be clear, while an *example* of exceptional circumstances is provided for in DISP 2.8.4G, there's no set definition of what constitutes exceptional circumstances within the DISP rules. And I remain satisfied that under the DISP rules it's for me to decide whether a failure to comply with time limits in the circumstances of any complaint I'm considering was as a result of

exceptional circumstances. In the same way that it is for me, as the Ombudsman, to decide whether or not a complaint has been made within the time limits or not (as per Sales J in *The Queen (on the application of Bankole) v Financial Ombudsman Service* [2012] EWHC 3555 (Admin)).

139. I've carefully considered *Gwynn* and I'm not in agreement with CGM Associates' representative about the impact of that case on this complaint, much as with *Lewis* I also think *Gwynn* is clearly distinguishable. The facts of *Gwynn* and Mr H's complaint are very different. By way of example, and amongst a number of factual differences not least in terms of the differing organisational functions and applicable rules in the cases, unlike patients SG, VS, JW and JA in *Gwynn* my finding is that Mr H *did* refer his complaint to us within the prevailing time limits. And unlike the GMC in respect of patient CL, having received Mr H's complaint about CGM Associates we didn't review the complaint, conclude it wasn't one it was currently appropriate for us to take forward, explain as such to the complainant, suggest they follow a separate complaints procedure elsewhere and close the complaint. Indeed, the first occasion on which we issued a provisional assessment on Mr H's complaint against CGM Associates was in my provisional decision and this final decision is the only occasion on which we've issued a determination on the complaint. As a secondary point, I also think it's worth noting that the Court didn't hold in *Gwynn* that mistakes on the part of the GMC *couldn't* found exceptional circumstances, it merely found that there weren't exceptional circumstances in that case.

140. In *R v. Kelly (Edward)* 2000 QB 198 the Court said:

"We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."

141. And this guidance was echoed in *GMC v. Gwynn* [2007] in which the Court said:

"…'exceptional circumstances' are intrinsically incapable of firm or exhaustive definition. The expression is used so as to confer a discretion capable of dealing fairly with the special features of each particular case. Over time, the discretion-holder will often develop a practice guiding the exercise of the power. But such a practice must not evolve into rigid rules. It is critical that flexibility is retained and that each case is decided on its own individual merits".

142. Mr H submitted a complaint form to us naming CGM Associates as the respondent business in November 2018, and also provided us with correspondence when asked (later in November 2018) referring to CGM Associates (including correspondence that stated CGM Associates was regulated by the FSA in 2008).

143. We wrote out to Openwork before the end of November 2018, notified it that we'd set up a complaint about it and provided it with a copy of Mr H's complaint form and gave it eight weeks to respond to Mr H's complaint. I think we should also have written out to share details about the complaint Mr H had sent to us about CGM Associates with CGM Associates within a similar timeframe – so before the end of November 2018 – and informed it that it had eight weeks to look into and respond to Mr H's complaint. And, had the Financial Ombudsman Service done this, I'm satisfied CGM Associates would have received details of Mr H's complaint about it from us well within three years of 13 May 2016.

144. I've noted what CGM Associates' representative has submitted about the amount of time it took us to inform CGM Associates that Mr H had referred a complaint about CGM Associates to us. I recognise it took a lot longer than usual for us to inform CGM Associates that Mr H had referred a complaint about CGM Associates to us in November 2018. But I also think that it's apparent that Mr C was, or ought reasonably to have been, on notice from around 7 October 2019 (following the receipt of Mr H's letter of complaint to Mr C that was sent to Carey and Johnston's address on 4 October 2019), that Mr H wanted to raise a complaint about CGM Associates and that he'd been in contact with the Financial Ombudsman Service about the matter.

145. I say that because it's previously been submitted to this Service that Mr C treated Mr H's complaint letter of 4 October 2019 as a valid complaint against him in relation to CGM Associates, rather than a complaint against Carey and Johnston. And I'm satisfied that Mr C was also then aware of how the complaint letter of 4 October 2019 had been responded to and the subsequent progression of the complaint against Carey and Johnston with this Service.

146. So, while I've noted and carefully considered the submission about Mr C and/or CGM Associates not knowing about Mr H's 2 November 2018 complaint form prior to the Ombudsman's provisional decision of 2 February 2022 in the complaint against Carey and Johnston, I also think it's the case that Mr C/CGM Associates knew that Mr H had wanted to complain about CGM Associates at a substantively earlier date.

147. This complaint about CGM Associates is Mr H's and, as I've mentioned above, I'm satisfied that Mr H referred his complaint about CGM Associates to us in November 2018 and within three years of the date on which he became aware, or ought reasonably to have become aware, he had cause for complaint. Any delay in the subsequent progression of that complaint to determination and/or any delay in CGM Associates being notified of the fact that Mr H had, in fact, referred his complaint about it to us in November 2018 aren't as a consequence of anything that Mr H did and therefore I don't think it fair that he be penalised for this.

148. The failure of the Financial Ombudsman Service to share details about the complaint Mr H had sent to us about CGM Associates with CGM Associates more promptly is a circumstance that unfairly affected Mr H, and I'm satisfied that circumstance caused a complaint that would otherwise have been received by CGM Associates within three years of 13 May 2016 to be received outwith that timeframe, through no fault of his own.

149. After careful consideration, I'm satisfied that the Financial Ombudsman Service's failure to share details about the complaint Mr H had sent to us on 2 November 2018 with CGM Associates in a timely fashion *is* an exceptional circumstance that caused a delay in the timely receipt of Mr H's complaint by CGM Associates. And the corollary of this is that even *if* Mr H could be said to have not referred this complaint to us in time, I'm still satisfied that this complaint is one we can look into. That's because the failure to comply with the time limits in that instance is, in my opinion, as a result of exceptional circumstances for the reasons I've set out in detail above.

What is Mr H's complaint?

150. The Financial Ombudsman Service is an informal dispute resolution scheme. A complaint made to us need not be, and rarely is, made out with the clarity of formal legal pleadings. Our Service deals with complaints, not causes of action.

151. Mr H complains that the advice he received from CGM Associates was unsuitable, he says that it wasn't appropriate for his needs, circumstances or objectives. But, having regard to the language used by Mr H, I'm satisfied that his complaint also encompasses CGM Associates' role in the transactions he's complaining about more generally – by which I mean the role it played in setting up and/or facilitating the transactions.

Does the complaint relate to an activity we can consider?

152. We can consider a complaint if it,

> *"relates to an act or omission by a firm in carrying on… regulated activities... or any ancillary activities, including advice, carried on by the firm in connection with them." (DISP 2.3.1R)*

153. Regulated activities are defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 as amended ('RAO'). This is a fairly lengthy Order which has been added to many times over the years since it was first made.

154. CGM Associates contends that it didn't advise Mr H and that it understood Mr O was advising the clients he introduced to CGM Associates. Mr H's testimony on this point has changed at times. The contemporaneous record of Mr H's comments in Hornbuckle Mitchell phones notes and emails, along with Mr H's testimony in his FSCS claim form to the FSCS, suggests Mr H considered at those points in time that the advice he had received was from Mr O. Whereas at some other points, including in his submissions to us, Mr H says it was Mr C of CGM Associates that gave the advice.

155. On balance, having carefully considered the content of all the evidence provided to us, I'm satisfied that Mr O advised Mr H (I provide some more detail about this later in this decision) and that Mr O wasn't acting for CGM Associates. And, overall, I think on the balance of probabilities that CGM Associates didn't advise Mr H on the establishment of the SIPP, the transfer into the SIPP or the subsequent investment of SIPP monies.

156. I've also considered whether or not what CGM Associates did concerned a different regulated activity – and the obvious candidate is the activity called *arranging deals in investments*.

Arranging deals in investments:

157. Articles 25-27 of the RAO at the relevant time said that:

> **Arranging deals in investments**
>
> **25.**
> (1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is—
>
> (a) a security,
> (b) a relevant investment, or
> (c) an investment of the kind specified by article 86, or article 89 so far as relevant to that article, is a specified kind of activity.

(2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a), (b) or (c) (whether as principal or agent) is also a specified kind of activity…

Arrangements not causing a deal

26. There are excluded from [article 25(1)] arrangements which do not or would not bring about the transaction to which the arrangements relate

Enabling parties to communicate

27. A person does not carry on an activity of the kind specified by…[article 25(2)] merely by providing means by which one party to a transaction (or potential transaction) is able to communicate with other such parties.

158. I'm satisfied rights under a personal pension scheme are a security. I'm also satisfied that under Article 25(1), making arrangements for another person to buy and sell these types of investments is a regulated activity. And under Article 25(2), making arrangements with a view to a person who participates in the arrangements buying and selling these types of investments is also a regulated activity.

What does this mean – what did the regulator say?

159. The regulator issues guidance in the PERG part of its handbook, at PERG 2.7.7BG about arranging. PERG 2.7.7BG from 1 July 2005 included the following about Article 25(1):

"The activity of *arranging (bringing about) deals in investments* is aimed at arrangements that would have the direct effect that a particular transaction is concluded (that is, *arrangements* that bring it about)."

160. And the following about Article 25(2):

"The activity of *making arrangements with a view to transactions in investments* is aimed at cases where it may be said that the transaction is "brought about" directly by the parties. This is where this happens in a context set up by a third party specifically with a view to the conclusion by others of transactions through the use of that third party's *facilities*. This will catch the activities of *persons* such as exchanges, *clearing houses* and *service companies* (for example, *persons* who provide communication facilities for the routing of orders or the negotiation of transactions). A *person* may be carrying on this *regulated activity* even if he is only providing part of the *facilities* necessary before a transaction is brought about*."*

161. Article 25 appears to have been updated in 2007, so after the above PERG guidance was issued. And I can see the regulator subsequently updated the wording in PERG 2.7.7BG and *before* there were further updates to Article 25 in 2017. And, by July 2010, the wording in PERG 2.7.7BG had been updated to say the following about Article 25(2) (the same wording as I've quoted above was still said in respect of Article 25(1)):

"The activity of *making arrangements with a view to transactions in investments* is concerned with arrangements of an ongoing nature whose purpose is to facilitate the

entering into of transactions by other parties. This activity has a potentially broad scope and typically applies in one of two scenarios. These are where a person provides arrangements of some kind:

(1) to enable or assist investors to deal with or through a particular firm (such as the arrangements made by introducers); or

(2) to facilitate the entering into of transactions directly by the parties… (such as multilateral trading facilities…exchanges, clearing houses and service companies (for example, persons who provide communication facilities for the routing of orders or the negotiation of transactions))."

162. I think it's clear from the above that whether or not there has been arranging deals in investments depends on the facts.

***Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474**

163. I think the following part of the Court of Appeal's judgment in the *Adams* case is also of relevance when considering Article 25:

At paragraph 99

"…The fact remains that CLP "pre-completed the application form so that [Mr Adams] could just sign it" (to quote Mr Adams' witness statement). It also told Mr Adams of documents he would need to supply for anti-money laundering purposes and explained that the "completed forms and [his] anti money laundering documents will be collected by courier and taken to Carey Pensions UK". "Arrangements" being a "broad and untechnical word" in article 25 of the RAO as well as section 235 of FSMA, it is apt to describe what CLP did."

And at Paragraph 100

"I consider, too, that the steps which CLP took can fairly be said to have been such as to "bring about" the transfers from Friends Life and into the Carey SIPP. Contrary to the Judge's understanding, it does not matter that CLP's acts "did not necessarily result in any transaction between [Mr Adams] and [Carey]" or that "the process was out of CLP's hands to control in any event". Nor is it determinative whether steps can be termed "administrative". CLP's "procuring the letter of authority", role in relation to anti-money laundering requirements and (especially) completion of the Carey application form were much more closely related to the relevant transactions than, say, the advertisement which originally prompted Mr Adams to contact CLP. It is to be remembered that CLP filled in sections of the application form dealing with "Personal Details", "Occupation & Eligibility", "Transfers", "Investments" and "Nomination Of Beneficiaries". In my view, what CLP did was thus significantly instrumental in the material transfers. In other words, there was, in my view, sufficient causal potency to satisfy the requirements of article 26 of the RAO."

What does this mean for Mr H's complaint?

164. Having carefully considered all of the submissions that have been made, I think CGM Associates' activities in Mr H's case amounted to the regulated activity of *"making arrangements"* for the SIPP under one or both of the Article 25 provisions. CGM Associates:

- Checked Mr H's Hornbuckle Mitchell SIPP application form and added its details

to it, confirming it was the *"Financial/Professional Advisor"*.
- *C*ompleted the declaration in the Hornbuckle Mitchell *"Introduction Certificate"* confirming that face-to-face contact with Mr H had occurred and that evidence of identity and address had been seen by the CGM Associates signatory and that a home visit was undertaken by a member of its staff (I am aware CGM Associates submits that what was stated in this form by it isn't entirely accurate).
- Witnessed the supplemental deed for Mr H's SIPP.
- Wrote to Hornbuckle Mitchell enclosing all of the forms to open a SIPP for Mr H, the Prudential transfer form and the signed documentation for the Property First investment.

165. I think the steps CGM Associates took can fairly be said to have been such as *to "bring about"* the transfer from Mr H's existing pension arrangements into the SIPP – they had sufficient causal potency to satisfy the requirements of article 25 of the RAO.

166. I'm satisfied that CGM Associates was making arrangements that would have the direct effect that a particular transaction was concluded and enabling or assisting Mr H to deal with or through a particular firm. And I'm satisfied that CGM Associates carried out the regulated activity of making arrangements for Mr H to buy or sell or subscribe for a security or relevant investment in connection with the switch to the SIPP and investment of his pension funds.

167. Given its close involvement in co-ordinating Mr H's application for the SIPP – including the actions in the bullet points I've noted above – I'm satisfied that CGM Associates was also, at the very least, making arrangements with a view to Mr H buying or selling or subscribing for a security or relevant investment in connection with the switch to the SIPP and investment of his pension funds.

168. So, I'm satisfied CGM Associates made arrangements for Mr H to switch his existing personal pension into a SIPP for investment into Property First under one or both of the Article 25 provisions.

Is Mr H an eligible complainant?

169. DISP 2.7.1R says we can only deal with a complaint if it is brought by or on behalf of an eligible complainant. There are two requirements to meet in order to be an eligible complainant.

170. First, DISP 2.7.3R sets out the categories of eligible complainants and, in so far as is directly relevant here, says:

    'An *eligible complainant* must be a *person* that is:

    (1) a *consumer*;'

171. I'm satisfied that Mr H is a 'consumer'; he is a natural person acting for purposes outside his trade, business or profession.

172. Secondly, DISP 2.7.6R says:

    'To be an *eligible complainant* a *person* must also have a *complaint* which arises from matters relevant to one or more of the following relationships with the *respondent*:

(1) the complainant is (or was) a customer…of the *respondent*;'

173. CGM Associates says it agreed to act for Mr H on an execution-only basis. I've noted the submissions that have been made to the effect that CGM Associates acted merely as a postman, but I don't agree with that analysis.

174. As a minimum, I think CGM Associates checked and added its details to the Hornbuckle Mitchell SIPP application form, thereby confirming it was the *"Financial/Professional Advisor".* It completed the declaration in the Hornbuckle Mitchell *"Introduction Certificate"* confirming that face-to-face contact with Mr H had occurred and that evidence of identity and address had been seen by the CGM Associates signatory and that the home visit was undertaken by a member of its staff (I appreciate CGM Associates submits that what was stated in this form by it isn't entirely accurate) and one of CGM Associates' employees witnessed the supplemental deed for Mr H's SIPP. The same employee wrote to Hornbuckle Mitchell noting that she was enclosing forms to open a SIPP for Mr H, along with Prudential transfer forms and signed documentation for the Property First investment. And also subsequently wrote to Mr H to provide a copy of a Member Schedule and a Supplemental Deed. It was noted in the SIPP application form that was signed by Mr C that the advisor (here CGM Associates) was to be remunerated by way of an initial payment of £250 (I appreciate it appears that the SIPP provider might have failed to pay this sum).

175. As I've mentioned above, I'm satisfied that CGM Associates was undertaking the regulated activity of *arranging deals in investments* under one under or both of the Article 25 provisions. And, having carefully considered all of the evidence, I'm also satisfied that Mr H was a customer of CGM Associates.

176. As such, I'm satisfied that Mr H is an eligible complainant.

177. As I'm still satisfied this complaint is one we're able to consider I've also gone on to set out my findings on the merits of the complaint below.

merits

178.
I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

179. When considering what's fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

180. I've carefully taken account of the relevant considerations to decide what's fair and reasonable in the circumstances of this complaint.

The Principles for Businesses

181. In my view, the Principles for Businesses are of particular relevance. The Principles for Businesses, which are set out in the FCA's Handbook "are a general statement of the fundamental obligations of *firms* under the *regulatory system"* (PRIN 1.1.2G – at the relevant date).

182. PRIN 1.1.9G at the relevant date stated that:

*"*Some of the other *rules* and *guidance* in the Handbook deal with the bearing of the *Principles* upon particular circumstances. However, since the *Principles* are also designed as a general statement of regulatory requirements applicable in new or unforeseen situations, and in situations in which there is no need for guidance, the *FSA's* other *rules* and *guidance* should not be viewed as exhausting the implications of the *Principles* themselves*."*

183. Principles 1, 2, 3 and 6 provide:

Principle 1 – Integrity – A firm must conduct its business with integrity.

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

Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly.

184. I've carefully considered what the Courts have said about the application of the Principles. In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) ('BBA') Ouseley J said at paragraph 161:

"The Principles are the overarching framework for regulation, for good reason. The FSA has clearly not promulgated, and has chosen not to promulgate, a detailed all-embracing comprehensive code of regulations to be interpreted as covering all possible circumstances…The overarching framework would always be in place to be the fundamental provision which would always govern the actions of firms, as well as to cover all those circumstances not provided for or adequately provided for by specific rules."

At paragraph 162 Ouseley J said:

"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirements they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."

At paragraph 77 Ouseley J said:

"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level Principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."

And at paragraph 184 Ouseley J said:

"The width of the Ombudsman's duty to decide what is fair and reasonable, and the width of the materials he is entitled to call to mind for that purpose, prevents any argument being applied to him that he cannot decide to award compensation where there has been no breach of a specific rule, and the Principles are all that is relied on."

185. In *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) ('BBSAL'), Berkeley Burke brought a judicial review claim challenging the decision of an Ombudsman who had upheld a consumer's complaint against it. The Ombudsman found Berkeley Burke had not complied with its regulatory obligations and hadn't treated its client fairly.

186. Jacobs J, having set out some paragraphs of *BBA* including paragraph 162 set out above, said (at paragraph 104 of *BBSAL*):

"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles-based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."

And at paragraph 107:

"The passages in the judgment of Ouseley J. discussed above were essentially directed at the question of whether the FSA could use the Principles to augment the rules. The answer to that question was that it could and there is no suggestion that the concept of augmentation was to be limited in the manner for which BBSAL contended. However, it is also important that the present case concerns the decision of an Ombudsman, rather than the FSA. In that connection, it is clear from the judgment of Ouseley J. that the Ombudsman can permissibly take an even broader approach than the regulator."

And then, after citing more passages from the BBA case, Jacobs J at paragraph 109 stated:

"I consider that these passages, too, are fatal to BBSAL's attempts to put limits on the extent to which the Ombudsman was entitled to use the Principles in order to augment existing rules or duties. The Ombudsman has the widest discretion to decide what was fair and reasonable, and to apply the Principles in the context of the particular facts before him."

187. The *BBSAL* judgment also considers section 228 of the Financial Services and Markets Act ('FSMA') and the approach an Ombudsman is to take when deciding a complaint. The judgment of Jacobs J in *BBSAL* upheld the lawfulness of the approach taken by the Ombudsman in that complaint and included the Principles as relevant considerations that were required to be taken into account.

188. As outlined above, Ouseley J in the *BBA* case held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what's fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in *BBSAL*. I'm therefore satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

189. COBS 2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client)* overlaps with certain of the Principles. I note that in *Adams v Options SIPP* [2020] EWHC 1229 (Ch), HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at paragraph 148:

    "In my judgment in order to identify the extent of the duty imposed by Rule 2.1.1 one has to identify the relevant factual context, because it is apparent from the submissions of each of the parties that the context has an impact on the ascertainment of the extent of the duty. The key fact, perhaps composite fact, in the context is the agreement into which the parties entered, which defined their roles and functions in the transaction."

190. So I need to construe the duties CGM Associates owed to Mr H under COBS 2.1.1R in light of the specific facts of Mr H's case. And I've considered COBS 2.1.1R within the factual context of Mr H's case, including CGM Associates' role in the transactions.

The events this complaint concerns

191. CGM Associates says it believed, as an AR of Openwork, Mr O would be giving the clients introduced to CGM Associates, including Mr H, pension and investment advice. CGM Associates has said that while there's no email or other correspondence to state that Mr O would be giving the advice to Mr H, this is what was stipulated and agreed verbally at the very outset between it and Mr O. And from the contemporaneous record of Mr H's comments in the Hornbuckle Mitchell phone notes and emails I've referred to above, along with Mr H's testimony in his FSCS claim form, it appears that Mr H considered that Mr O had advised him on the transactions this complaint concerns and introduced him to CGM Associates.

192. Mr O, as I understand it, told Firm A during a phone call that he gave no advice to any of the clients he introduced to CGM Associates and that clients were given information about property schemes and made their own decisions. It's been submitted by CGM Associates that this account doesn't square with what Mr O had led CGM Associates to believe at the outset.

193. I'm happy to proceed on the basis that the record of Firm A's call with Mr O that's been submitted to us is credible and accurate. However, I don't consider Mr O's recollections about whether advice was given to be plausible or credible.

194. I don't think it's credible that Mr O introduced a number of clients, and specifically Mr H, to CGM Associates and that those clients independently decided to establish SIPPs without being advised by Mr O about this.

195. It seems that Mr H and/or his wife were previous clients of Mr O as an AR of Openwork. And that Mr O also, separately, ran a company, Jamijo, that was involved with property investments. Mr H has also previously submitted that he was advised by Mr O on the investment.

196. I find Mr H's testimony that he was advised to enter into the transactions this complaint concerns to be plausible and credible. Consequently, I think it's unlikely that Mr H entered into the transactions this complaint concerns without having received and relied upon advice.

197. I note that at different times Mr H has submitted advice was given by Mr O and at others by Mr C of CGM Associates. I've carefully considered all of the evidence, including the contents of Mr H's submissions to the FSCS and what he said to Hornbuckle Mitchell in the 2016 correspondence, along with the submissions CGM Associates has provided in respect of it not having given advice and its understanding that Mr O would be giving advice to clients (including Mr H) *before* they were introduced to CGM Associates. Having done so, I think it's more likely than not, on the balance of probabilities, that advice to transfer Mr H's AVC monies into a Hornbuckle Mitchell so as to make the Property First investment was given to Mr H by Mr O. Further, I'm not satisfied, on the balance of probabilities, that Mr C or CGM Associates advised Mr H on the transfer, establishment of the SIPP or investment of monies within the SIPP.

198. I think it's more likely than not that Mr O didn't expressly tell CGM Associates or Mr H that in respect of any advice he was giving to Mr H he was acting as Jamijo. And I'm not satisfied that what Mr O said in his conversation with Firm A about acting as Jamijo in his dealings with clients like Mr H was made clear to clients like Mr H.

199. So, I think it was Mr O who advised Mr H on, and was driving, establishing a SIPP and transferring monies into the SIPP so as to make a recommended property investment. And I think it's more likely than not that Mr O recommended both the Hornbuckle Mitchell SIPP and Property First investment to Mr H.

What does this mean for CGM Associates' role in the transactions this complaint concerns?

200. CGM Associates' position is that it established a SIPP for Mr H on an execution-only basis. It's also explained it would have received an execution-only letter/declaration that Mr H signed. CGM Associates hasn't been able to provide a copy of an execution-only form signed by Mr H; it says it didn't retain a copy of Mr H's letter and I've noted the reasons it's given for this. CGM Associates has, however, provided redacted examples of letters that were completed for a number of other clients that were introduced to it by Mr O and I've referred to some of these in the *"What happened"* section earlier in this decision.

201. I think it's more likely than not that *if* Mr H signed such a letter then, given the examples we've been provided and what I've said about the period of time they appear to relate to, it would have been the Type 'A' form he completed.

202. I've considered the content of the Type 'A' form. I don't think it would be fair and reasonable to rely on this sort of declaration in isolation, I think it needs to be considered in the context of how the consumer reached their decision. I think such a statement is more persuasive if it's plausible that the consumer hadn't, or wouldn't reasonably, have needed to rely on advice when deciding to invest.

203. I think it's also relevant to take into account the knowledge and experience of someone signing such a statement. And I'm not satisfied Mr H was an experienced or knowledgeable investor and I think he was, on his own admission, reliant on the advice he received in respect of his pensions.

204. The Personal Investment Authority ('PIA') provided some information about execution-only transactions back in May 1997 in its Regulatory Update 33, which was stated in the context of a discussion around the Pensions Review. But I think what the PIA said is also of interest in other cases, like Mr H's, where a transaction involves a complex pension product and an unsophisticated retail investor. The PIA said that:

"Execution-only

As the regulators have always stressed, a true "execution-only" sale is inherently rare. This is especially so where a complicated pension product is involved, and the investor will inevitably need to rely on the firm's expertise. In the specific context of the review, the Standards prevent a firm from classifying a case as "execution-only" unless there is clear and credible evidence to this effect. The "clear and credible" standard is a high one."

205. And, at the relevant time, the FSA's Handbook Glossary definition of an execution-only transaction appears to have been:

"a transaction *executed* by a *firm* upon the specific instructions of a *client* where the *firm* does not give *advice on investments* relating to the merits of the transaction and in relation to which the *rules* on assessment of appropriateness (*COBS 10*) do not apply".

206. As I've mentioned above, CGM Associates says that it established a SIPP for Mr H on an execution-only basis. Further, CGM Associates' position, as I understand it from Mr C's testimony, is that CGM Associates believed that Mr O, in his capacity as an AR of Openwork, would be giving advice to clients (including Mr H) *before* they were introduced to CGM Associates. But if this was correct then it's not clear why CGM Associates needed to be involved at all. I say that because *if* Mr O *had* been acting as an AR of Openwork, was selecting a specific SIPP for Mr H and was advising Mr H, it's fair and reasonable to expect the business would then have been submitted to Hornbuckle Mitchell directly by Mr O in his capacity as an AR of Openwork and with Openwork's (or alternatively Openwork's AR's) details appearing in the financial advisor section of the SIPP application form. But this isn't what happened.

207. I think the most plausible reason for this – which I think ought to have been readily apparent to CGM Associates from the outset – was that Mr O wasn't acting in his capacity as an AR of Openwork and, as such, was choosing not to submit the business through Openwork. This might have been because Mr O was *unwilling* to submit the business through Openwork or it might have been because Mr O was *unable* to submit the business through Openwork, as it wasn't amenable to Mr O writing business like this in his capacity as one of its ARs. I've noted what CGM Associates has said Mr O told it verbally about the capacity in which he was acting, but as I explain in more detail below, I'm satisfied that neither COBS 2.4.4R nor COBS 2.4.6R are applicable to what CGM Associates says it was told about Mr H/Mr H's business by Mr O verbally.

208. I'm satisfied, on the balance of probabilities, that not only did Mr O advise Mr H on the transactions this complaint concerns, but that CGM Associates also understood this would be the case. And I think that's entirely consistent with CGM Associates' submissions on this point.

209. I've noted the submissions CGM Associates has made in respect of Mr O having completed portions of the Hornbuckle Mitchell SIPP application *before* it was sent to CGM Associates. I've also noted what CGM Associates has said about similarities in the handwriting in some sections of Mr H's SIPP application form when considered alongside examples of other documentation Mr O submitted.

210. I'm not a handwriting expert and I can't state definitively that Mr O's handwriting in the other examples that have been provided to us match the handwriting in some sections of Mr H's SIPP application form. But, I still think it's plausible from CGM Associates' broader submissions on Mr O's role, when considered alongside Mr H's previous submissions to the FSCS and Hornbuckle Mitchell in relation to Mr O having advised him, that Mr O *did* partially complete Mr H's Hornbuckle Mitchell SIPP application form and sent it to CGM Associates alongside other paperwork. And, in Mr H's case, I think it's more likely than not that the overriding reason for Mr O having selected Hornbuckle Mitchell as the SIPP provider was that Hornbuckle Mitchell permitted the proposed property investment.

211. However, Mr O didn't take responsibility for finalising the SIPP application form, nor did he record himself as the advisor in the SIPP application form, nor did he submit the paperwork to Hornbuckle Mitchell for the new SIPP to be established, or submit the investment paperwork for the Property First investment to be made. CGM Associates did all these things in circumstances where CGM Associates understood that Mr O had given advice to Mr H on the proposed transactions.

212. This doesn't appear to be a case where Mr H came to CGM Associates independently knowing what he wanted to do and asking CGM Associates to do it. Rather, I'm satisfied that Mr O came to CGM Associates knowing what he wanted to do for Mr H and asking CGM Associates to do it for him. I think it should have been apparent to CGM Associates that what Mr O was doing was advising Mr H and then asking CGM Associates to arrange the transactions he'd advised Mr H to effect. I think Mr O was selecting the SIPP provider and advising clients like Mr H on the transactions, but opting not to transact the business himself through Openwork. And CGM Associates was then undertaking to finalise the completion of the paperwork and submit it to Hornbuckle Mitchell and with CGM Associates being denoted as the advisor in the SIPP application form and levying a fee for the service it was providing.

213. So, in my view, CGM Associates was responsible for arranging transactions which it knew, or ought to have known, that Mr O had advised on *and* that Mr O was opting not to arrange himself as an AR of Openwork.

214. I'm satisfied that Mr H was a client of CGM Associates in his own right. And CGM Associates either was aware, or ought reasonably to have been aware, that the transactions it was arranging for Mr H were the result of advice he'd received from Mr O. I think it ought to have been readily apparent to CGM Associates that this was Mr O introduced-advised business, and by arranging the business for Mr H, CGM Associates would effectively be implementing the advice Mr O had given which he'd been unwilling or unable to submit through Openwork.

215. I don't think agreeing to effect this business as an execution-only transaction given what CGM Associates knew, or ought to have known, was an appropriate way for a regulated firm to behave when it was bound by the 'client's best interest rule' (COBS 2.1.1R) in making the arrangements for Mr H's SIPP. In my view CGM Associates' actions here also conflicted with its obligations under the FSA's Principles for Businesses at the time, including:

    Principle 1 – Integrity – A firm must conduct its business with integrity.
    Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.
    Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly.

216. I'm satisfied that CGM Associates understood that Mr O would be advising clients he was introducing to CGM Associates on the proposed transactions to be effected with their pension monies. I think the proposed arrangement was a highly unusual one, and I think this should have been a concern for CGM Associates. And to act in accordance with its regulatory obligations, and in the knowledge that the SIPP once established would receive monies transferred from an existing pension scheme and with an investment in the Property First investment being made post-transfer, I consider there were only two viable ways for CGM Associates to proceed in dealing with Mr O's request to establish a Hornbuckle Mitchell SIPP for Mr H. These were either to:

    - Decline to get involved in the establishment of the SIPP at all; or
    - Not agreeing to act for Mr H, without him first having received full regulated advice from CGM Associates on the total overall proposition (by which I mean the establishment of the SIPP, the transfer of existing pension monies into the SIPP and the investment of the monies post transfer in the proposed Property First investment).

217. So, I don't think CGM Associates should have agreed to proceed on the basis that it did for Mr H – I think in the circumstances, having understood that Mr O was advising clients like Mr H but, for whatever reason, wasn't submitting the business through Openwork, CGM Associates should have declined Mr O's request to establish a SIPP for Mr H on an execution-only basis. And I think CGM Associates should have declined to get involved *at all* unless it was undertaking to give full advice to Mr H on the total overall proposition.

218. And, in failing to take this step, I think it's fair and reasonable to conclude that CGM Associates didn't act with due skill, care and diligence or treat Mr H fairly. And to my mind CGM Associates didn't meet its regulatory obligations and allowed Mr H to be put at risk of detriment as a result.

Was CGM Associates able to rely on what Mr O told it?

219. CGM Associates has made submissions on a number of things it says Mr O told it and/or agreed to. Mr O's recollections in his comments to Firm A and Mr C's recollections differ significantly. I wasn't a party to the original discussions between Mr C and Mr O at the time, so I can't be sure of what was discussed and agreed.

220. However, CGM Associates has confirmed there was no formal agreement in effect between it and Mr O and has said any agreement that was in effect was verbal and wasn't in writing. CGM Associates has highlighted COBS 2.4.4R to support the contention that it was able to rely on what Mr O had told it verbally.

COBS 2.4.4R and 2.4.6R

221. COBS 2.4.4R at the relevant date initially explains that "This *rule* applies if a *firm* (F1), in the course of performing *MiFID or equivalent third country business*, receives an instruction to perform an *investment* or *ancillary service* on behalf of a *client* (C) through another *firm* (F2)*…"*

222. It's explained in GEN 2.2.6G that 'Expressions with defined meanings appear in italics in the *Handbook*, unless otherwise stated in individual sourcebooks or manuals.'

223. And GEN 2.2.7R says:

> "In the *Handbook* (except *IPRU*, unless otherwise indicated):
>
> (1) an expression in italics which is defined in the *Glossary* has the meaning given there; and
> (2) an expression in italics which relates to an expression defined in the *Glossary* must be interpreted accordingly."

224. *MiFID or equivalent third country business* is a term which appears in italics and which is defined in the Glossary. The Glossary definition of *MiFID or equivalent third country business* includes reference to *MiFID business* in italics, which in turn in its definition includes reference to other terms in italics*,* I've carefully considered all of this.

225. I'm satisfied the business CGM Associates was performing here was arranging deals in investments under Article 25 and in relation to Article 82 investments, i.e. rights under a personal pension. I'm satisfied this isn't MiFID business (and also that it isn't equivalent third country business). So, I'm satisfied that CGM Associates, in its role in the transactions this complaint concerns, wasn't in the course of performing MiFID or equivalent third country business, and that COBS 2.4.4R isn't applicable to what CGM Associates says it was told about Mr H/Mr H's business by Mr O verbally.

226. As such, I've also gone on to think about COBS 2.4.6R (2) but, on its own evidence, CGM Associates states that any agreements in effect/discussions between it and Mr O were verbal and informal. And we've not, for example, been provided with anything in writing from Mr O to CGM Associates from the relevant time in respect of the role he would play (and in what capacity), or about the clients he was introducing only being sophisticated or high net worth clients, or about those clients' knowledge or experience. So, I don't think any meetings and/or verbal exchanges CGM Associates had with Mr O amounts to Mr O providing something *in writing* on which it may have been reasonable for CGM Associates to rely. The corollary of this is that I also don't therefore think COBS 2.4.6R (2) applies to any meetings or verbal exchanges CGM Associates says it had with Mr O.

227. So, I'm satisfied that neither 2.4.4R nor 2.4.6R is applicable to what CGM Associates says it was told about Mr H/Mr H's business by Mr O verbally. But, in any event, I'm satisfied this is a secondary point because, as I've explained above, given that CGM Associates says it understood that Mr O was advising clients like Mr H on the proposed transactions, I'm satisfied that CGM Associates shouldn't have agreed to process Mr H's business as execution-only business. For the reasons I've explained above, I think CGM Associates should have either declined to get involved in the establishment of Mr H's SIPP at all, or else not agreed to act for Mr H, without him first having received full regulated advice from CGM Associates on the total overall proposition.

<u>What would have happened if CGM Associates had undertaken to give advice on the total overall proposition?</u>

228. *If* CGM Associates had explained that it would agree to act for Mr H on the condition that it provided Mr H with full regulated advice on the total overall proposition, and if

CGM Associates had then proceeded to give advice on that basis, I think it's fair and reasonable to conclude it's more likely than not that CGM Associates would have complied with its regulatory obligations and given suitable advice.

229. It's well-established that the suitability of transferring to a SIPP can't be viewed in isolation.

230. At the relevant time, COBS 9.2.2R required a firm giving advice to have a reasonable basis for believing that the transaction meets the client's investment objectives, is such that they're able financially to bear any related investment risks consistent with their investment objectives, and is such that they have the necessary experience and knowledge in order to understand the risks involved in the transaction.

231. I'm not satisfied from the evidence provided to us that Mr H was an experienced or sophisticated investor. And I don't think a reasonably competent body of advisors would have advised Mr H to transfer away from his AVC so as to invest the vast bulk of the transferred monies into a single, unregulated, esoteric, illiquid property investment with the potential for total capital loss. I don't think that would have constituted suitable advice for Mr H. And, as mentioned above, I'm satisfied it's more likely than not that had CGM Associates undertaken to give advice on the total overall proposition it would have given suitable advice.

232. So, in this instance, I think it's more likely than not that CGM Associates' advice to Mr H on the proposed transactions would have been that he shouldn't transfer the monies from his AVC into a SIPP so as to invest in the Property First holding. And I think it's more likely than not that Mr H would then have acted with reliance on that advice. In my view that is consistent with my earlier finding that I'm not satisfied Mr H was an experienced or knowledgeable investor and that he was reliant on the advice he received in respect of his pensions.

233. I think it's clear Mr O was unwilling or unable to submit Mr H's paperwork in his own name, or as an AR of Openwork, to effect the transactions this complaint concerns. And I think Mr O needed to involve a regulated firm (here CGM Associates), for the purposes of arranging the deals in the investments for clients like Mr H, so that the transactions Mr O had advised upon could go ahead.

234. As I've explained above, had CGM Associates acted in accordance with its regulatory obligations I'm satisfied that it should have either declined to get involved, or else given advice to Mr H on the total proposition. And, I'm satisfied that it's fair and reasonable to conclude that if it had done either of these things the transactions this complaint concerns wouldn't have been effected. The corollary of this being that Mr H's monies wouldn't then have been transferred into a SIPP to make the Property First investment and his monies would have remained in the AVC.

235. For completeness, CGM Associates might contend that if it had declined to get involved Mr O might have sought to involve a different regulated IFA to assist with arranging the transactions in question. But I don't think it's fair and reasonable to say that CGM Associates shouldn't compensate Mr H for his loss on the basis of speculation that another regulated IFA would have made the same mistakes as I've found CGM Associates did. I think it's fair instead to assume that in such circumstances another regulated IFA would have complied with its regulatory obligations and therefore would either have:

- Declined to get involved in the establishment of the SIPP at all; or

- Not agreed to act for Mr H, without him first having received full regulated advice from it on the total overall proposition (by which I mean the establishment of the SIPP, the transfer of existing pension monies into the SIPP and the investment of the monies post transfer in the proposed Property First investment). Further, I think it's fair and reasonable to conclude it's more likely than not that such an IFA, if undertaking to give full regulated advice, would have complied with its regulatory obligations and given suitable advice.

236. I'm also satisfied that it's fair and reasonable to conclude that if another regulated IFA had done either of these things (and for identical reasons to those I've given earlier in this section when discussing what would have happened in the counterfactual position if CGM Associates had done either of these things) the transactions this complaint concerns wouldn't have been effected. The corollary of this being that Mr H's monies still wouldn't have been transferred into a SIPP to make the Property First investment and his monies would have remained in the AVC.

Is it fair to ask CGM Associates to pay Mr H compensation in the circumstances?

237. The DISP rules set out that when an Ombudsman's determination includes a money award, then that money award may be such amount as the Ombudsman considers to be fair compensation for financial loss, whether or not a Court would award compensation (DISP 3.7.2R).

238. In my opinion it's fair and reasonable in the circumstances of this case to hold CGM Associates accountable for its own failure to comply with its regulatory obligations and to treat Mr H fairly.

239. The starting point therefore, is that it would be fair to require CGM Associates to pay Mr H compensation for the loss he's suffered as a result of its failings. I've considered whether there's any reason why it wouldn't be fair to ask CGM Associates to compensate Mr H for his loss, including if it would be fair to hold another party liable in full or in part. And I'm satisfied it's appropriate and fair in the circumstances for CGM Associates to compensate Mr H to the full extent of the financial losses he's suffered due to its failings.

240. I accept that it may be the case that Mr O, in advising Mr H and selecting the Hornbuckle Mitchell SIPP, is responsible for initiating the course of action that led to Mr H's loss. However, I think it's also the case that if CGM Associates had complied with its own distinct obligations, the arrangement for Mr H wouldn't have come about in the first place, and the loss he suffered could have been avoided.

241. CGM Associates can have the option to take an assignment of any rights of action Mr H has against Mr O before compensation is paid. And the compensation could be made contingent upon Mr H's acceptance of this term of settlement.

242. I acknowledge that any assignment of any action against Mr O from Mr H *might* prove worthless, but the key point here is that but for CGM Associates' failings I'm satisfied that Mr H wouldn't have suffered the loss he's suffered. And, as such, I'm of the opinion that it's appropriate and fair in the circumstances for CGM Associates to compensate Mr H to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by other parties.

243. I want to make clear that I've carefully taken everything CGM Associates has said into consideration. And I'm of the view that it's appropriate and fair in the circumstances for CGM Associates to compensate Mr H to the full extent of the

financial losses he's suffered due to its failings. And, taking into account the combination of factors I've set out above, I'm not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that CGM Associates is liable to pay to Mr H. The only exception to this is in respect of a £1,389.63 payment Hornbuckle Mitchell credited to Mr H's SIPP in 2016 which I've addressed below.

244. In its 13 May 2016 email Hornbuckle Mitchell said it would credit £1,389.63 into Mr H's SIPP. In my most recent provisional decision I explained that if Hornbuckle Mitchell didn't credit this sum to Mr H's SIPP because he didn't follow the matter up with it, then I wouldn't consider that Mr H took reasonable steps to mitigate his losses in respect of this specific sum. And that in such circumstances CGM Associates may, if it wishes, allow (or ask Mr H's previous provider to allow) for a notional withdrawal of £1,389.63 in the 'Notional value' calculation.

245. Mr H's SIPP provider has confirmed that the £1,389.63 was credited back to Mr H's SIPP cash account on 6 June 2016.

246. By the time the £1,389.63 was credited to Mr H's SIPP in June 2016 I'm satisfied that Mr H knew, or ought reasonably to have known following Hornbuckle Mitchell's 13 May 2016 email, that no other investments were held in the SIPP. In its 16 May 2016 email Hornbuckle Mitchell had offered Mr H the option of a free transfer away from his SIPP. But Mr H didn't take Hornbuckle Mitchell up on this offer and just left the £1,389.63 in cash. Further, as a result, that £1,389.63 has since been completely depleted as it's funded the ongoing SIPP fees.

247. Having considered all of this, in the circumstances, I think it's fair and reasonable to still say that Mr H failed to take reasonable steps to mitigate his losses in respect of this £1,389.63. As such, I've decided that it's also fair and reasonable to say that CGM Associates may still, if it wishes, allow (or ask Mr H's previous provider to allow) for a notional withdrawal of £1,389.63 in the 'Notional value' part of the calculation I've set out later in this decision.

Fair compensation

248. My aim is that Mr H should be put as closely as possible into the position he would probably now be in but for CGM Associates' failings.

249. As I've explained above, I think it's more likely than not that if CGM Associates had either declined to get involved, or else agreed to get involved on the condition that it would advise Mr H on the proposed overall total proposition and then given suitable advice, that the transfer and investment wouldn't have been effected. So, on balance, I think it's fair and reasonable to conclude that but for CGM Associates' failings, Mr H's monies would have remained with his previous provider in the AVC arrangement. I can't be certain that a value will now be obtainable for what the previous policy would have been worth. But, I'm satisfied what I have set out below is fair and reasonable, taking this into account and given Mr H's circumstances when he invested.

Putting things right

250. To compensate Mr H fairly, CGM Associates must:

- Compare the performance of Mr H's pension with the notional value if it had

remained with the previous provider. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.

- CGM Associates should also add any interest set out below to the compensation payable.

- If there is a loss, CGM Associates should pay into a pension plan for Mr H so as to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

- If CGM Associates is unable to pay the compensation into Mr H's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HM Revenue & Customs ('HMRC'), so Mr H won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Mr H's actual or expected marginal rate of tax at his selected retirement age.

- It's reasonable to assume that Mr H is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr H would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

- Pay Mr H £500 for the distress and inconvenience the problems with his pension have caused him. In addition to the financial loss that Mr H has suffered as a result of the problems with his pension, I think that the loss suffered to Mr H's pension provisions has caused Mr H distress. And I think that it's fair for CGM Associates to compensate him for this as well.

- Finally, in order to be fair to CGM Associates, it should have the option of payment of the redress being contingent upon Mr H assigning any claim he may have against Mr O to CGM Associates – but only in so far as Mr H is compensated here. The terms of the assignment should require CGM Associates to account to Mr H for any amount it subsequently recovers against Mr O that exceeds the compensation paid to Mr H by CGM Associates. If it elects to take the assignment then CGM Associates would need to meet any costs in drawing up the assignment. So as to avoid any unreasonable delay in Mr H receiving compensation, if CGM Associates wishes to take the assignment *before* payment of the compensation to Mr H then the assignment must be drawn up and provided to Mr H for completion and return promptly, and certainly within 28 days of receipt of Mr H's acceptance of this final decision. As an alternative CGM Associates can arrange the assignment with Mr H *after* payment of the compensation to him.

251. Income tax may be payable on any interest paid. If CGM Associates deducts income tax from the interest, it should tell Mr H how much has been taken off. CGM Associates should give Mr H a tax deduction certificate in respect of interest if Mr H asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Monies transferred from the Prudential AVC into the Hornbuckle Mitchell SIPP	Inactive with a £0 balance	Notional value from previous provider	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days* of CGM Associates receiving notification of Mr H's acceptance of the final decision)

*If CGM Associates decides to request an assignment from Mr H of any claim he may have against Mr O, and if it also provides Mr H with the assignment for completion and return within 28 days of being notified of Mr H's acceptance of this final decision, then CGM Associates may also add on to the 28-day period in the table above (in which the 'additional interest' won't apply) any *whole* calendar days that occur between the point in time it first provides the written assignment to Mr H for completion and return through until the point in time when Mr H completes and returns the assignment to CGM Associates. By way of example, if it takes five whole calendar days for Mr H to complete and return the assignment after it's provided to him by CGM Associates then the 28-day period in which interest won't apply would instead become 33 days.

Actual value

252. This means the actual amount payable from the investment at the end date. By this I mean the current value of those monies that were transferred from the Prudential AVC into the Hornbuckle Mitchell SIPP. As I understand it, this value may be £0.

Notional Value

253. This is the value of Mr H's investment had it remained with the previous provider until the end date. By this I mean if the monies had remained in the Prudential policy and not been transferred into the SIPP. CGM Associates should request that the previous provider calculate this value.

254. Any additional sum that Mr H contributed into the Hornbuckle Mitchell SIPP should be added to the *notional value* calculation from the point in time when it was actually paid in.

255. Any withdrawal should be deducted from the notional value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. To be clear this doesn't include SIPP charges or fees paid to third parties like an advisor. But it does include any pension commencement lump sums or pension income Mr H took after his pension monies were transferred to Hornbuckle Mitchell. If there is a large number of regular payments, to keep calculations simpler, I'll accept if CGM Associates totals all those payments and deducts that figure at the end to determine the notional value instead of deducting periodically.

256. For the reasons I've explained earlier in this final decision, CGM Associates may, if it wishes, allow/ask Mr H's previous provider to allow for a notional withdrawal of £1,389.63 in the notional value calculation as at the date that sum was actually credited back to the SIPP by Hornbuckle Mitchell in June 2016.

257. If the previous provider is unable to calculate a notional value, CGM Associates will need to determine a fair value for Mr H's pension instead, using this benchmark: For half the investment: FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return index); for the other half: average rate from fixed rate bonds – by this I mean the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis. I'm satisfied this is a fair and reasonable proxy for the type of return that could have been achieved over the period in question. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

Why is this remedy suitable?

258. I've chosen this method of compensation because:

- I think Mr H wanted capital growth and with a small risk to his capital.
- If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.
- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.
- The FTSE UK Private Investors Income ***Total Return*** index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- I consider that Mr H'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. So, the 50/50 combination would reasonably put Mr H into that position. It does not mean that Mr H would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr H could have obtained from investments suited to his objective and risk attitude.

259. CGM Associates should also provide the details of its redress calculation to Mr H in a clear, simple format.

My final decision

260. For the reasons given, I find that this is a complaint we can consider and my final decision is that I uphold the complaint and CGM Associates must calculate and pay fair redress as set out above.

261. Where I uphold a complaint, I can make an award requiring a financial business to

pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend that CGM Associates pays the balance.

262. **Determination and award:** I uphold the complaint. I consider that fair compensation should be calculated as set out above. My final decision is that CGM Associates must pay the amount produced by that calculation up to the maximum of £150,000 (including distress or inconvenience but excluding costs) plus any interest on that amount as set out above.

263. **Recommendation:** If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that CGM Associates pays Mr H the balance plus any interest on the balance as set out above.

264. The recommendation isn't part of my determination or award, CGM Associates doesn't have to do what I recommend. It's unlikely that Mr H could accept a decision and go to Court to ask for the balance and Mr H may want to get independent legal advice before deciding whether to accept this decision.

265. If the loss doesn't exceed £150,000, or if CGM Associates accepts the recommendation to pay the full loss as calculated above, CGM Associates should have the option of taking an assignment of Mr H's rights in relation to any claim he may have against Mr O.

266. If the loss exceeds £150,000 and CGM Associates doesn't accept the recommendation to pay the full amount, any assignment of Mr H's rights should allow him to retain all rights to the difference between £150,000 and the full loss as calculated above.

267. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 27 December 2024.

Alex Mann
Ombudsman