DRN-3871662

The complaint

Mr W complains that Options UK Personal Pensions LLP ("Options" - formerly Carey Pensions) accepted his investment into a self-invested personal pension (SIPP) when, he says, it shouldn't have accepted business from the business who introduced him to Options; Caledonian International Associates (Caledonian). Mr W says Options failed to identify the risks involved by accepting business from Caledonian. Mr W transferred a defined benefit occupational pension into the Options SIPP in late 2012.

Mr W wants to be put back into the position he would have been in had Options not accepted his SIPP application.

The parties involved

Given the various parties involved in Mr W's pension transfer and subsequent investment I've set out a summary of each below.

Options

Options is a SIPP provider and administrator. At the time of the events in this complaint, Options was regulated by the Financial Services Authority ("FSA"), which later became the Financial Conduct Authority ("FCA"). Options was authorised, in relation to SIPPs, to arrange (bring about) deals in investments, to deal in investments as principal, to establish, operate or wind up a pension scheme, and to make arrangements with a view to transactions in investments.

Caledonian

Caledonian was the trading name of MMG Associates, which was registered in the British Virgin Islands. Caledonian was not authorised in the UK to undertake regulated activities and it does not (and did not at the time of the events subject to complaint here) appear on the FCA's Financial Services Register. And there is no evidence it was authorised to carry out regulated activities (where there was any relevant legislation) in any other jurisdiction.

Business C

Business C is an investment manager. The evidence is that Business C agreed to manage or provide oversight of some of the investments taken out by Caledonian's customers after they had transferred their pensions. I shall call the individual representing Business C, who was involved in some of Caledonian's general dealings with Options, Mr P.

Friends Provident International

Friends Provident International (FPI) is registered in the Isle of Man. It provided a bond (i.e. life assurance) wrapper which allows investment in a number of funds with a number of fund providers. Mr W invested in a number of investments within a FPI bond.

What happened

Mr W has explained that Caledonian contacted him by telephone and followed up with a meeting at his home. Prior to this he wasn't aware that he could transfer his Armed Forces Pension Scheme (AFPS) pension. Mr W says that during the initial discussion and subsequent meeting Caledonian told him "*how much better his pension would be if he moved it*", and that "*his pension fund would see substantial increases in retirement if the pension was transferred*". He explained that "*Caledonian seemed knowledgeable*" and told him they were "*looking after the ex-armed forces*". Mr W thought he was receiving advice from Caledonian. And so, he agreed to transfer out of the AFPS, open an Options SIPP and invest in the FPI bond.

The Options SIPP "Application Form For Direct Clients" was signed by Mr W on 18 September 2012 and sent by Caledonian to Options under cover of a letter dated 1 October 2012. The letter gave Caledonian's address as one in 'Switzerland'. Caledonian included a signed letter of authority from Mr W instructing Options to share information with Caledonian.

In summary, on the application form Mr W confirmed his UK address, age, occupation, annual earnings and selected retirement age (55). He also nominated his death benefit beneficiary and confirmed that he'd be making a transfer from the AFPS with an approximate value of £41,500. The form detailed that Mr W would be investing 100% of his fund with FPI. The selected retirement age, details of transferring AFPS scheme and details of the investment were pre-populated, rather than handwritten like the rest of the form. And the box waiving cancellation rights was ticked.

The final page of the application form – headed "12. Declaration" included, amongst other statements, the following:

> "*I agree to indemnify Carey Pensions UK LLP … against any claim in respect of any decision made by myself and/or my Financial Adviser/Investment Manager or any other professional adviser I choose to appoint from time to time*"
>
> "*I understand that Carey Pensions UK LLP and Carey Pension Trustees UK Ltd are not in anyway [sic] able to provide me with any advice*"

The paperwork included a separate page-long indemnity form with a table at the start which detailed the Member Name, Address, Occupational Scheme name, Occupational Scheme type and Adviser. I'll call this the 'Member Declaration'. This was signed by both Mr W and the Caledonian representative. The Caledonian representative was named as "Adviser" and the representative's signature was made in the space for "Adviser Name" in the signature box. The declaration included, amongst other statements, the following:

> "*I confirm that I have received full and appropriate advice from Caledonian International and following this advice I wish to proceed with the transfer*."

The declaration concluded with the statement:

> "*I fully indemnify both Carey Pensions UK LLP and Carey Pension Trustees Ltd at all times against any and all liability arising from this transaction*."

Options received Mr W's application on 2 October 2012 and sent him a welcome pack.

Options, as trustees of Mr W's SIPP, completed the FPI application form for the investment portfolio known as 'Zenith'. On page 13 of the application section (ix) was completed like so:

> "*This application was signed in UK*
>
> *and the advice was given in Jordan*"

In the space for 'Name of Investment Adviser Firm', "Caledonian International Associates" was written. The address for Caledonian was given as being in 'Santiago de Chile'. And Mr C from Caledonian had signed the space for 'Signature of Adviser' earlier, in September 2012.

In January 2013, Mr W's funds (£44,019) were invested into the FPI investment. A statement for Mr W's SIPP account shows that Options paid Caledonian £500 on 14 February 2013. This payment was named '*IFA Fees'*.

In January 2018 Mr W transferred out of the SIPP due to lack of pension growth. The transfer value at the point Mr W's Options SIPP was closed was just under £52,000.

Mr W's complaint

Mr W complained to Options in June 2020, via a Claims Management Company (the CMC).

Mr W said Options failed to identify the risks involved by accepting business from Caledonian – whose advice Mr W said he had heavily relied on – and as a result Mr W had suffered significant financial losses. He said it should have raised Options' alarms that he was transferring a UK registered defined benefit pension scheme into a personal pension scheme on the advice of an "*overseas adviser*".

Options' response to Mr W's complaint

Options investigated Mr W's complaint and gave its final response in August 2020, rejecting it. In summary, it said:

- Options UK provides execution only (i.e. non-advised) SIPP administration services and this was explained to Mr W in all the documentation he signed in September 2012.

- It was Options' understanding that Caledonian were introducers only – Mr W confirmed that he was a direct client who was not receiving any advice.

- Options would have been in breach of COBS 11.2.19 if it had not executed Mr W's specific instructions to make the FPI investment – by virtue of this rule Options are not liable to Mr W.

- Options UK is not permitted to provide advice nor comment on the suitability of a SIPP or the underlying investment for the member, or comment on the introducer a customer has chosen to use.

- Mr W did not inform Options that he had been provided with advice from an unregulated company – Options cannot be held responsible for information that was not disclosed to it.

- Options UK undertook due diligence on Caledonian and had no reason to believe

that it should not accept introductions from this business.

- Caledonian are not known to Options UK as advisers and it is not aware that they held themselves out to be advisers.

- Mr W read and signed documentation which made clear he was a direct client, that he hadn't received any advice, and that his investment choices were his sole responsibility, and which guided him to seek financial advice, but he chose not to do so.

Overall, Options said it had complied with its regulatory and contractual obligations to Mr W and was not liable to him for his loss.

Caledonian and Options

I've set out the background to Mr W's complaint and his dealings with Caledonian and Options above. But alongside those events it's important to understand the underlying relationship between Caledonian and Options.

Options has said that it carried out due diligence checks on Caledonian and has provided supporting evidence of the checks it made.

I have set out below a summary of what I consider to be the key events and/or actions during the relationship between Options and Caledonian, which I have observed from the available evidence (this includes evidence from Mr W's case file and submissions Options has made to us about its due diligence on, and its relationship with, Caledonian).

In **March 2012** a business profile was completed which recorded Options' first meeting with Mr C of Caledonian where he set out their proposed business model. This detailed that Mr C was "***preferred adviser*** (my emphasis) *for the Armed Forces occupational pension scheme*" for clients who were described as:

> "*30 to 50 year olds*
>
> *Had been in the armed forces for between 6 to 10 years*
>
> *Had left the armed forces and wanted to transfer their pension arrangements They had no expectation of long-life expectancy*
>
> *They were living today so wanted to access funds earlier then they could if their pension stayed in the armed forces pension scheme*
>
> *They were generally still resident in UK but some were now living abroad in various countries such as Thailand, Germany, Spain etc.*
>
> *They were now earning quite large salaries circa £70k plus*"

The business profile detailed that clients were referred to Mr C from his armed forces pensions contact or by other clients, and that he was "*currently putting them into an international Friends Provident Bond, the underlying investments were regulated*". It went on:

> "[Mr C] *himself was not a regulated adviser, he was a consultant to these clients and* ***advised*** (my emphasis) *them on their armed forces transfers only, he was a qualified accountant and was a member of the Chartered Institute of Accountants …*
>
> *He was developing a relationship with* [Mr P]*, and may consider* [Business C] *as an alternative investment provider in due course. Although he was currently wanting a relationship with a SIPP provider.*
>
> [Mr C] *was looking at volume business in the region of 50 schemes a month*."

On **16 March 2012** Mr C signed and dated Options' "*Non-Regulated Introducer Profile*". The form began:

> "*As an FSA regulated pensions company we are required to carry out due diligence as best practice on unregulated introducer firms looking to introduce clients to us to gain some insight into the business they carry out …*"

In the company information section Mr C explained that Caledonian had been trading since 1997 and had branches in Chile, Peru, Colombia, Argentina, Brazil and Switzerland. He went on to detail that they dealt with the following products:

> "*Offshore savings plans + investment bonds – Friends Provident International + Generali*"

And indicated that these products had been accepted by other SIPP providers, including Options, and hadn't been declined by any pension scheme operators.

Under the heading "*Sales and Marketing Approach*" the document detailed that clients would be obtained by "*referral*" and that the sales process would be:

> "*Referral – Visit – Analysis – Visit*"

A question on the form about typical commission structure was answered:

> "*7% up front from bond – 0.5% trail*"

Under the heading "*Training and Information*" Mr C explained that agents were provided with "*ongoing product training and accompanied meetings*" and that their pensions training was delivered through "*visits to providers directly*". He went on to say that the business produced by agents was monitored by:

> "*Full administrative structure – Caledonian, Careys – compliance, FPI – compliance*"

Under the heading "*Legal and Regulatory Information*" Mr C confirmed that Caledonian didn't work with any Financial Services Authority (FSA) regulated company or adviser, wasn't a member of any professional or industry body, had no professional indemnity insurance, and hadn't been subject to any FSA supervisory visits or censure.

In response to the question: "*What measures are in place to ensure the Firm engage legal advice on the activities it carries out to ensure regulated activities are not carried out?*" the response read:

> "*Majority of business carried out in unregulated jurisdictions but where regulations apply we are licensed to carry out our activities*."

To the question: "*How does the firm demonstrate it is treating its customers fairly?*" the response read:

> "*Compliance & Procedures in current alignment with FSA TCF*."

Mr C's other responses on the form were that Caledonian's business objective was "*to continue to develop a fully compliant business of PT to HM Forces*" and that with regards to member-directed pension scheme business they were looking to achieve "*compliant business in a regulated structure*."

On **23 March 2012** Options asked Mr C by email for a copy of Caledonian's latest company accounts and a certified copy of each director's/principal's passport. Options chased a response to this email on 3 April. A Senior Consultant at Caledonian then supplied a copy of Mr C's passport (uncertified) and said they'd ask Mr C about the accounts when he returned from a trip. On 4 April Mr C emailed Options:

> "*… my apologies for not having replied before now … I am back tomorrow Thursday and will have te* [sic] *appropriate documents over to you early next week* …"

On **27 April 2012** Options started to receive introductions from Caledonian (Options has confirmed there were 509 introductions to it made by Caledonian between 27 April 2012 and 20 May 2013).

On **1 August 2012**, ahead of a compliance audit, a Team Leader at Options contacted Caledonian to ask again for the certified passports and annual accounts. In an internal email the Team Leader confirmed she'd spoken with Mr C and he'd be "*sending an urgent request for the documentation we require*".

On **4 September 2012** a "*Non-regulated Introducer Agreement Terms of Business*" document between Options and "*MMG Associates Ltd T/A Caledonian International Associates*" was signed and dated by Mr C and Options' CEO. That agreement included, amongst other terms, the following undertaking:

> "*The Business Introducer undertakes that they will not provide advice as defined by the Act in relation to the SIPP – for the avoidance of doubt this includes reference to advice on the selection of The SIPP Operator, contributions, transfer of benefits, taking benefits and HMRC rules;*"

On that agreement document Mr C gave an address in Switzerland as the business address.

Options has said that these terms of business were received by Caledonian in March 2012 - and so it seems there was a delay in Mr C signing and returning them.

On **1 November 2012** Options conducted a 'World Check' (a risk intelligence tool which allows subscribers to conduct background checks on businesses and individuals) on two Caledonian employees – one of which was Mr C. This check did not reveal any issues.

Options has said that in **early 2013**, it "*appointed a dedicated in-house compliance officer and they enhanced the compliance framework within the firm, compliance monitoring programme and risk assessment*."

On **7 March 2013** an internal email was sent by an Options Manager to several other Options employees summarising a call she'd held with Mr C. The summary included these key points:

- Options had explained that following recent FSA reviews and guidance SIPP providers were being asked to look at business received from their introducers against expectations of type and profile.

- Options explained that several applications received recently had moved away from the expected profile of client and queried whether the profile was changing/extending.

- Mr C "*explained that predominantly the members were in the close protection industry which as @5 years ago they all went into. He said that foreign operatives were now coming in in a more organised structure. Some were getting promoted into senior positions. Many were previously divers in the military and so going into Diving elsewhere*."

- Options asked Mr C to put together a note for its CEO to update Caledonian's business profile and expectations.

On **20 March 2013** the Options' Manager sent Mr C an email following up on their conversation. Options asked again for "*an update as to the changes in profile*", and highlighted that a further two applications had been received for individuals outside of the expected profile.

Options has provided a document titled "*Overseas Introducer Assessment Proforma*". This document is undated but, given that it refers to "*recently received business outside of profile*" and also the World Check completed in November 2012 I think it's likely to have been completed around the end of March 2013, and certainly no earlier than November 2012.

I have set out below what I consider to be the most relevant parts of the form recorded, and the level of risk that was noted:

Heading	Notes	Risk
Section 1 - Company Assessment		
Google Search and FCA	"*No adverse comments*"	Low
Regulatory	"*Cannot find any regulatory information from the details held*"	High
Company	"*No UK branch. Cannot see any EEA regulatory details … Unknown company establishment time – cannot find any details from information received. No accounts requested? No Articles of association requested? / received*"	Mainly Medium

Compliance Officer	"*Unknown if have compliance officer or not*"	High
Professional Qualifications	"*No qualifications documented other than meeting note from March 2012 where* [Mr C] *stated he was a qualified accountant …*"	High
Meeting	"*Meeting held at Carey Pensions UK office March 2012*"	Medium
Section 2 - Advice/Client Profile/Investment		
Advice	"*Unregulated – No details of how advice given. No regulatory bodies / permissions seen. Although suggested on email that advice given in Jordan? Advice possibly given in Jordan, although not sure if true for UK based clients*". It was also noted that the funds for investment within the SIPP were to be generated from: "*Transfers from Armed Forces Pension occupational scheme*."	High
Client Profile	"*Client Profile: 30-50 years old. Part of armed forces 6- 10 years. Generally still UK residents, some abroad.* *Now working in security earning c. £70k pa. HOWEVER, recently received business outside of profile*."	High
Investment	"*Initially Friends Provident International bond. Now using James Brearley. Both FCA regulated*."	Low

At the end of the 'Company Assessment' section the overall result was recorded as Amber, a result described as "*Queries to raise*". The wording against this result read:

> "*Company details are a mixture of Green and Amber raise with technical review committee before proceeding*".

The overall result at the end of the 'Advice/Client Profile/Investment' section was recorded as Red, a result described as "*Decline*".

On **26 April 2013** an Options Compliance Officer sent an email to several other Options employees titled "*Review of relationship with Caledonian*". It began:

> "*We have a responsibility to proactively monitor our distribution channels to ensure our products do not end up with customers for whom it is not suitable. Based on recent correspondence with Caledonian I am increasingly concerned by their business practices and therefore believe we should review our relationship with them and the business they have introduced. I will arrange a meeting for next week to discuss. In the meantime we need to determine the answers to the questions below to help facilitate our discussions*."

The Options Compliance Officer then set out 18 questions and statements about Caledonian and the relationship with Options and invited recipients of the email to "*please provide answers to the following where you can*".

On **30 April 2013** another member of the compliance team inserted her answers and comments:

> "*Overview of business*
>
> *Date relationship commenced:* ***April/May 2012***
>
> *What is the agreed profile of clients introduced by Caledonian:* ***Ex Armed Forces Approx age 38, working in the Close protection industry (security), earnings of Approx £70k***
>
> *Number of clients introduced:* ***497 (363 now invested, 134 ongoing)***
>
> *Value of investments held:* ***£16m***
>
> *Nature of investments, i.e. any alternative investments:* ***Friends Provident Int. (Funds) or,*** **[Business J]** ***Investment Platform with*** **[Business C]** ***acting as DFM.***
>
> *Number of complaints from Caledonian introduced clients:* ***None***
>
> *How many transfers were also accompanied by a TVAS* [Transfer Value Analysis]*? Who has provided the TVAS?* ***37 – Only TVs over £100k (from Armed Forces Pension) or any amount no matter how small on other TVs. TVAS provided by*** **[Mr P]** ***(*****[Business C]*****)***
>
> *Overview of Caledonian*
>
> *What due diligence was undertaken on Caledonian prior to establishing the relationship? –* ***Unknown but AML was received.***
>
> *Location of head office:* ***Geneva, Switzerland***
>
> *Do they have a business address in the UK?* ***They confirm that they do not have a permanent place of business in the UK, however they have a business address for correspondence and*** **[Mr C]** ***is based in the UK*** **[address]**
>
> *Where do they meet with clients, i.e. in the UK?* ***Unknown****.*
>
> *What is Caledonian's regulatory status, i.e. are they regulated in their home jurisdiction?* **[Mr C]** ***- The Chartered Insurance Institute - ID Number XXXXX.*** **[Mr C]** ***certifies all ID and signs the investment Application Form.***
>
> *Are they regulated to provide advice in their home jurisdiction?* ***Unknown***
>
> *They have confirmed that they provide advice in Jordan. How does this work? Do they have a place of business in Jordan? Do they need to be regulated in Jordan to provide advice?* ***Unknown - Caledonian provide a Non Solicitation Letter which is sent to Friends Provident with the investment App. A copy of a Non Solicitation Letter is attached***

How did we establish Caledonians knowledge of SIPPs and UK pension rules? ***Unknown***

Based on our contact with Caledonian and reviewing the illustrations they provide to clients, do we have concerns that Caledonian is providing poor advice/ information? ***Yes due to illustrations***

Do Caledonian provide advice on investments within the SIPP? ***Caledonian send to us the Friends Provident Investment Applications with the Application to set up the SIPP. The funds table in the investment App is pre-populated by Caledonian. The Member does see a copy of this document - which we send to them prior to investing their funds.***

What due diligence did we undertake on [Business C]*?* ***Unknown***"

A further reply was made later on **30 April 2013** by Options' CEO. She wrote:

"*To add to* [Options employee's] *information. I attach a business profile which details how the relationship emerged with Caledonian which provides background information, also the process notes that were agreed at a meeting held in our old MK offices which was a workshop to present our SIPP proposition and understand their business better… In answer to some of* [Options employee's] *unknowns*

Where do they meet with clients? Generally abroad depending on where their next assignment is, they will also hold meetings in the UK

Are they regulated to give advice in their home jurisdication [sic]*? No because they are not regulated they are introducers of business*

They have confirmed they give advice in Jordan? When they mean advice they are talking about consultancy they are not regulated in any jurisdication [sic]

How did we establish their knowledge of UK Pension and SIPP marketplace? By meeting with them twice and by running a workshop for them output from which is attached

Based on our contact with Caledonian and reviewing the illustrations they provide to clients, do we have concerns that Caledonian is providing poor advice/ information? I am not sure it is our place to comment on this maybe on the information but not on advice, if we commented on whether we thought even our regulated advisers were providing poor advice I would probably think we would say yes. Think we need to be careful what questions we are looking to answer comfortable on the information piece but not on the advice piece

Do Caledonian provide advice on investments within the SIPP? No they don't, they consult with the client on the feasibility of transferring their Armed Forces Pension Scheme into a SIPP and their partner to manage the investment is [Business C] *…*"

On **10 May 2013** Options' CEO sent Caledonian an email requesting further information. The email confirmed Options was reviewing its terms of business "*in light of recent announcements from the FCA and our internal compliance reviews*".

Options made clear it was keen to continue doing business with Caledonian but must "*do so in a framework that is robust and compliant and will satisfy the regulators*". The email continued, "*so we must start with ensuring we understand each stage of the process, to enable us to develop a robust and compliant process for this business moving forward*." Options said that as a starting point it would like Caledonian to clarify a number of issues. The email read:

> "*1. Can you provide your organisational structure and the jurisdiction in which each is registered and the regulation/regulator that each company operates within. If you are relying on any exemptions please state which exemptions and the reasons you believe you can operate within those exemptions*
>
> *2. Are you giving advice and if so in what capacity and under what regulatory environment are you providing this advice.*
>
> *3. What offices do you have and where, do the jurisdictions in which you have offices have a regulatory regime, if so can you provide details of the regulators in those jurisdictions.*
>
> *4. On what basis are you providing illustrations and the reasons for this basis*
>
> *5. Do you meet all your clients in Jordan, if not why do your Non Solicitation forms signed by yourself confirm the advice was given in Jordan*
>
> *6. Please confirm the profile of your clients*
>
> *7. Please confirm how you receive introductions to your clients*
>
> *8. Can you update information about your team their background, expertise in dealing with pensions*
>
> *9. On the Non Solicitation letters you note that Caledonian does not have a permanent place of business in the UK. However, you request correspondence to be sent to The Pensions Service Centre,* [UK city]*. Please can you clarify Caledonian's presence in the UK and the nature of the office in* [UK city]."

The email closed with a reminder to Caledonian that from 1 May 2013 Options had implemented some changes to its requirements and "*must have a UK FCA regulated adviser providing the TVAS and the sign off for the suitability of transfers from occupational schemes of any values*."

On **15 May 2013** Options sent an internal email which was a summary of a telephone conversation with Mr P of Business C. The summary recorded that:

- Mr P confirmed that an FCA Regulated Adviser would be providing the TVAS reports on all Caledonian introduced clients. This adviser would produce TVAS reports on the back book of business with Caledonian.

- On this understanding Options had agreed they would continue to process applications where the TVAS report was currently being issued by Mr P.

Options says that the last introduction made to it by Caledonian was on 20 May 2013.

On **23 May 2013** Options met with Mr P of Business C and Mr C of Caledonian. In the handwritten summary of that meeting the following was noted:

- Mr C was a consultant to armed forces and not an adviser in the FCA sense.
- The [UK City] address was a postal address and not a working office.
- Mr C met with clients in the UK but initial contact was abroad. The client contacts Caledonian if they want to transfer their pension (it was noted that the documents said that he met them in Jordan and that FPI need a letter about where advice was given).
- Caledonian's website didn't mention that it would give advice, and their documents made it clear no advice was given and clients should take advice from a regulated adviser.
- Mr P explained that the reason for lots of transfers was the market and their relationship with the providers.
- The proposal going forward involved an appointed representative of a Manchester IFA (Business A) being a pension specialist of Business C – it had the necessary qualifications. Going forward the Manchester IFA would deal with business.
- Options agreed to allow Caledonian a four-week window to put the proposal in place.
- The question about advice was irrelevant to Options as no advice is given – FPI want a letter about advice but no advice is given.
- Caledonian said its illustrations were provided to facilitate the business. Options queried whether this was advice.
- A question was noted – is there a terms of business for Caledonian with client?

I have not seen evidence that any of the agreed actions were completed. As noted, Options did not accept any further business from Caledonian after 20 May 2013.

Options decided to review its relationship with Caledonian. Options has provided a copy of its document headed, "*Caledonian Relationship Review 2013*". I have reviewed the document in full, but have only quoted below what I consider to be the key part:

> " … *Following a detailed review of the process and documentation concerns were raised regarding whether the clients could be deemed to be receiving advice through an unregulated entity.*
>
> *Following a request for further clarification on these points we have not been able to satisfy ourselves that this is not the case.*
>
> *We have insisted that they move to a model that all cases are fully advised by an FCA regulated firm/individual, which has been accepted …*
>
> *Following a meeting in the Milton Keynes office … where* [Mr C] *from Caledonian, and* [Mr P] *of* [Business C] *explained their current process and documentation and described their future process,* [and] *further discussions … it was decided that they had not satisfied us enough with their current processes for us to continue to allow*

taking on new business in the interim without the use of a UK regulated firm or individual who was suitably qualified.

[Options] *has instructed the team of this decision so from week beginning 28th May any new business received will be rejected unless it comes through an FCA regulated firm*."

It set out a detailed process by which Caledonian proposed to move to a model where all clients would be fully advised by an FCA regulated firm/individual, and it highlighted the benefits of this new approach as being:

"*All schemes are coming in on an advised basis*

Brings the process and clients into the UK regulated process

Brings the clients into the FSCS and FOS protections

Ensures all occupational schemes undergo analysis and advice"

I have not seen evidence that this approach was ever enacted – again, as noted, no further business introduced by Caledonian was accepted by Options after 20 May 2013.

Our Investigator's view

Mr W brought his complaint to this service in August 2020, and it was considered by an Investigator. The Investigator thought the complaint should be upheld. In summary he:

- Set out the considerations relevant to reaching his view on the complaint, including the Financial Conduct Authority's (FCA's) Principles for Businesses, publications issued by the FCA (and its predecessor, the FSA), and relevant caselaw.
- Explained that he'd considered and concluded that Mr W's complaint had been made within the time limits that apply.
- Accepted that Options was not authorised and had no responsibility to provide advice to Mr W.
- Said Options had a responsibility to carry out due diligence on unregulated introducers and should have been aware before it made the decision to start accepting introductions from Caledonian that doing so would carry significant risk of consumer detriment.
- Said Caledonian was providing advice, Options should have realised Mr W was being advised, and this alone should have led Options to refuse the business, because Caledonian was not authorised to carry on such activities.
- Said the fact Caledonian was not based in the UK or EEA and had no qualifications, and the high volume of business and high level of commission, combined with Caledonian's failure to provide accounts, should have caused Options concern.
- Concluded that Options should have done adequate due diligence at the outset and refused the introductions from Caledonian.
- Explained that the Financial Services and Markets Act 2000 (FSMA) s.27 provides a

further basis on which Mr W's complaint should be upheld as Caledonian carried on a regulated activity in the UK without authorisation, the consumer's agreement with Options came about as a result of that, and Options knew or should have known this.

- Said he believed a Court would not determine it to be just and equitable that the agreement should be enforced (FSMA s.28) in the circumstances.

Finally, our Investigator set out how Options should put things right by putting Mr W as far as possible, into the position he would now be in but for it accepting the business from Caledonian. He said it should calculate redress in line with the FCA's guidance for calculating redress for unsuitable transfers out of defined benefit occupational pension schemes and, if that calculation demonstrates a loss, pay Mr W compensation.

Our Investigator also recommended Options pay Mr W £500 for the distress caused by the knowledge that he has suffered a significant loss of pension funds and valuable benefits from his AFPS pension.

Neither party responded to the Investigator's view.

As no agreement could be reached, the complaint was passed to me to decide.

Prior to my consideration of the complaint, and the evidence both parties have provided, our Investigator wrote to both parties to address a number of outstanding issues. In summary, the Investigator's further letter:

- Acknowledged that Mr W applied for his SIPP more than six years before he made his complaint to Options in June 2020, but explained the Investigator had seen no evidence to suggest Mr W became aware (or ought reasonably to have become aware) that he had cause for complaint more than three years before he complained.

- Updated the considerations relevant to deciding the complaint to include reference to both the judgment of the High Court in *Adams v Options SIPP* [2020] EWHC 1229 (Ch) and the judgment of the Court of Appeal in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. They also explained that these judgements do not mean the Principles should not be taken into account in deciding this case, and highlighted the differences between Mr W's complaint and the issues pleaded in the Adams cases.

- Reiterated the Investigator's findings that Mr W was advised by Caledonian to transfer out of his existing pension and into the Options SIPP, and that the steps which Caledonian took can fairly be said to have been such as to bring about the transfer from the Armed Forces Pension scheme into the Options SIPP. And expanded on their consideration of sections 27 and 28 FSMA.

The Investigator also reiterated, having taken into account the Court of Appeal's supplementary judgment in Adams ([2021] EWCA Civ 1188), insofar as that judgment deals with restitution/ compensation, their view that it would not be fair to say Mr W's actions mean he should bear the loss arising as a result of Options' failings. And, finally, they set out some additional information about why £500 is an appropriate amount to award for the distress and inconvenience caused to Mr W by Options' failings.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and

reasonable in the circumstances of this complaint.

Having done so I've reached the same conclusion as our Investigator did and for broadly the same reasons, I'm upholding Mr W's complaint. I'll explain why.

Relevant considerations

I'm required to determine this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable, I am required to take into account: relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time.

With that in mind I'll start by setting out what I have identified as the relevant considerations to deciding what is fair and reasonable in this case.

The Principles

In my view, the FCA's Principles for Businesses are of particular relevance to my decision. 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). And, I consider that the Principles relevant to this complaint include Principles 2, 3 and 6 which say:

> "*Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*
>
> *Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.*
>
> *Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly*."

I have carefully considered the relevant law and what this says about the application of the FCA's Principles. In R (British Bankers Association) v Financial Services Authority [2011] EWHC 999 (Admin) ("BBA") Ouseley J said at paragraph 162:

> "*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 requirement 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*."

And at paragraph 77 of BBA 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*."

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 considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and had not treated its client fairly.

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*."

The BBSAL judgment also considers section 228 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, which I have described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

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 is 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. So, the Principles are a relevant consideration here and I will consider them in the specific circumstances of this complaint.

The *Adams* court cases and COBS 2.1.1R

I confirm I have taken account of the judgment of the High Court in the case of Adams v Options SIPP [2020] EWHC 1229 (Ch) and the Court of Appeal judgment in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474. I note the Supreme Court refused Options permission to appeal the Court of Appeal judgment.

I've considered whether these judgments mean that the Principles should not be taken into account in deciding this case. And, I am of the view they do not. In the High Court case, HHJ Dight did not consider the application of the Principles and they did not form part of the pleadings submitted by Mr Adams. One of the main reasons why HHJ Dight found that the judgment of Jacobs J in BBSAL was not of direct relevance to the case before him was because "*the specific regulatory provisions which the learned judge in Berkeley Burke was asked to consider are not those which have formed the basis of the claimant's case before me*."

Likewise, the Principles were not considered by the Court of Appeal. So, the *Adams* judgments say nothing about the application of the FCA's Principles to the ombudsman's consideration of a complaint.

I acknowledge that 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 and that this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ("the COBS claim"). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

Although the Court of Appeal ultimately overturned HHJ Dight's judgment, it rejected that part of Mr Adams appeal that related to HHJ Dight's dismissal of the COBS claim on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal did not so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

I note that 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 para 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*."

The facts in Mr W's case are very different from those in *Adams*. There are also significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr W's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened after the contract was entered into. In Mr W's complaint, I am considering whether Options ought to have identified that the introductions from Caledonian involved a risk of consumer detriment and, if so, whether it ought to have ceased accepting introductions from Caledonian prior to entering into a contract with Mr W.

On this point, I think it is also important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I am required to take into account relevant considerations which include: 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. This is a clear and relevant point of difference between this complaint and the judgments in both Adams cases. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

To be clear, I have proceeded on the understanding Options was not obliged – and not able – to give advice to Mr W on the suitability of its SIPP or the FPI investment for him personally. But I am satisfied Options' obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions of business from particular businesses. And this is consistent with Options' own understanding of its obligations at the relevant time. As noted above, the Options' Non-Regulated Introducer

Profile completed at the start of Options' relationship with Caledonian began:

> "*As an FSA regulated pensions company we are required to carry out due diligence as best practice on unregulated introducer firms looking to introduce clients to us to gain some insight into the business they carry out …*"

Sections 27 and 28 FSMA

The Court of Appeal overturned the High Court judgment on the basis of the claim pursuant to S27 FSMA.

S27 FSMA provides that an agreement between an authorised person and another party, which is otherwise properly made in the course of the authorised person's regulated activity, is unenforceable as against that other party if it is made "in consequence of something said or done by another person ("the third party") in the course of a regulated activity carried on by the third party in contravention of the general prohibition".

S27(2) provides that the other party is entitled to recover:

> "(a) any money or other property paid or transferred by him under the agreement; and
>
> (b) compensation for any loss sustained by him as a result of having parted with it."

S28(3) FSMA provides that "If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow–

> "(a) the agreement to be enforced; or
>
> (b) money and property paid or transferred under the agreement to be retained."

The General Prohibition is set out in S19 FSMA. It stipulates that:

> "No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is –
>
> a) an authorised person; or
>
> b) an exempt person."

In Adams, the Court of Appeal concluded that the unauthorised introducer of the SIPP had carried out activities in contravention of the General Prohibition, and so s27 FSMA applied. It further concluded that it would not be just and equitable to nonetheless allow the agreement to be enforced (or the money retained) under the discretion afforded to it by s28(3) FSMA.

At paragraph 115 of the judgment the Court set out five reasons for reaching this conclusion. The first two of these were:

> "i) A key aim of FSMA is consumer protection. It proceeds on the basis that, while consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard

consumers from their own folly. That much reduces the force of Mr Green's contentions that Mr Adams caused his own losses and misled Carey;

ii) While SIPP providers were not barred from accepting introductions from unregulated sources, section 27 of FSMA was designed to throw risks associated with doing so onto the providers. Authorised persons are at risk of being unable to enforce agreements and being required to return money and other property and to pay compensation regardless of whether they had had knowledge of third parties' contraventions of the general prohibition;"

The other three reasons, in summary, were:

- The volume and nature of business being introduced by the introducer was such as to put Options on notice of the danger that the introducer was recommending clients to invest in the investments and set up Options SIPPs to that end. There was thus reason for Options to be concerned about the possibility of the introducer advising on investments within the meaning of article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the RAO").

- Options was aware that: contrary to what the introducer had previously said, it was receiving high commission from the investment provider, there were indications that the introducer was offering consumers "cashback" and one of those running the introducer was subject to a FCA warning notice.

- The investment did not proceed until after the time by which Options had reasons for concern and so it was open to Options to decline the investment, or at least explore the position with Mr Adams, but it did not do so.

I shall address later in this decision how I consider S27 FSMA to be an additional and alternative ground upon which this complaint should be upheld. But before that, I'll address below what I think Options should have concluded from the information it had about Caledonian and what this should have meant for Mr W's proposed pension transfer and investment.

Regulatory publications

The FCA (and its predecessor, the FSA) has issued a number of publications which remind SIPP operators of their obligations and set out how they might achieve the outcomes envisaged by the Principles, namely:

- The 2009 and 2012 thematic review reports.

- The October 2013 finalised SIPP operator guidance.

- The July 2014 "Dear CEO" letter.

The 2009 Thematic Review Report

The 2009 report included the following statement:

"*We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its customers and treat them fairly') insofar as they are*

obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.

It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.

We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.

Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their clients' interests in this respect, with reference to Principle 3 of the Principles for Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for*

advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.

- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*

- *Identifying instances of clients waiving their cancellation rights, and the reasons for this.*"

The later publications

In the October 2013 finalised SIPP operator guidance, the FCA states:

> "*This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*
>
> *All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a "client" for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes.*"

The October 2013 finalised SIPP operator guidance also set out the following:

> "*Relationships between firms that advise and introduce prospective members and SIPP operators*
>
> *Examples of good practice we observed during our work with SIPP operators include the following:*
>
> - *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for unauthorised business warnings.*
>
> - *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
>
> - *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
>
> - *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*

- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

- *Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers.*

Examples of good practice we have identified include:

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*

- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*

- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from nonregulated introducers*"

In relation to due diligence the October 2013 finalised SIPP operator guidance said:

"***Due diligence***

Principle 2 of the FCA's Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers as well as assessing that investments are appropriate for personal pension schemes) to help them justify their business decisions. In doing this SIPP operators should consider:

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*

- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*

- *having checks which may include, but are not limited to:*

    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*

    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*

- *good practices we have identified in firms include having a set of*

benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and

- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax relievable investments and non-standard investments that have not been approved by the firm*"

The July 2014 "Dear CEO" letter provides a further reminder that the Principles apply and an indication of the FCA's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles.

The "Dear CEO" letter also sets out how a SIPP operator might meet its obligations in relation to investment due diligence. It says those obligations could be met by:

- Correctly establishing and understanding the nature of an investment
- Ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation
- Ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)
- Ensuring that an investment can be independently valued, both at point of purchase and subsequently
- Ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc)

Although I've referred to selected parts of the publications, to illustrate their relevance, I have considered them in their entirety.

I acknowledge that the 2009 and 2012 reports and the "Dear CEO" letter are not formal "guidance" (whereas the 2013 finalised guidance is). However, the fact that the reports and "Dear CEO" letter did not constitute formal guidance does not mean their importance should be underestimated. They provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect the publications, which set out the regulators expectations of what SIPP operators should be doing, also goes some way to indicate what I consider amounts to good industry practice and I am, therefore, satisfied it is appropriate to take them into account.

It is relevant that when deciding what amounted to have been good industry practice in the BBSAL case, the ombudsman found that "*the regulator's reports, guidance and letter go a long way to clarify what should be regarded as good practice and what should not*." And the judge in BBSAL endorsed the lawfulness of the approach taken by the Ombudsman.

Like the Ombudsman in the BBSAL case, I do not think the fact that some of the publications post-date the events that took place in relation to Mr W's complaint, mean that the examples of good practice they provide were not good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the

Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

It is also clear from the text of the 2009 and 2012 reports (and the "Dear CEO" letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it is clear the standards themselves had not changed.

I note that HHJ Dight in the *Adams* case did not consider the 2012 thematic review, 2013 SIPP operator guidance and 2014 "Dear CEO" letter to be of relevance to his consideration of Mr Adams' claim. But it does not follow that those publications are irrelevant to my consideration of what is fair and reasonable in the circumstances of this complaint. I am required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time.

That doesn't mean that, in considering what is fair and reasonable, I will only consider Options' actions with these documents in mind. The reports, Dear CEO letter and guidance gave non-exhaustive examples of good industry practice. They did not say the suggestions given were the limit of what a SIPP operator should do. As the annex to the "Dear CEO" letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

To be clear, I do not say the Principles or the publications obliged Options to ensure the pension transfer was suitable for Mr W. It is accepted Options was not required to give advice to Mr W, and could not give advice. And I accept the publications do not alter the meaning of, or the scope of, the Principles. But they are evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles.

What did Options' obligations mean in practice?

In this case, the business Options was conducting was its operation of SIPPs. I am satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business. The regulatory publications provided some examples of good industry practice observed by the FSA and FCA during their work with SIPP operators including being satisfied that a particular introducer is appropriate to deal with.

As noted above, it is clear from Options' "Non-Regulated Introducer Profile", that it understood and accepted its obligations meant that it had a responsibility to carry out due diligence on Caledonian.

I am satisfied that, to meet its regulatory obligations, when conducting its business, Options was required to consider whether to accept or reject particular referrals of business, with the Principles in mind. This seems consistent with Options' own understanding – as Options Compliance Officer noted in their email of 26 April 2013, "*We have a responsibility to proactively monitor our distribution channels to ensure our products do not end up with customers for whom it is not suitable*". And I note in submissions on other complaints Options has told us that "*adherence to TCF*" is something it had in mind when considering its approach to introducer due diligence i.e. the question of whether it should accept business from a particular introducer.

All in all, I am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Options should have carried out due diligence on Caledonian which was consistent with good industry practice and its regulatory obligations at the time. And in my opinion, Options should have used the knowledge it gained from its due diligence to decide whether to accept or reject a referral of business or particular investment.

Summary of my decision

As set out above, the 2009 Thematic Review Report deals specifically with the relationships between SIPP operators and introducers or "*intermediaries*". And it gives non-exhaustive examples of good practice. In my view, to meet these standards, and its regulatory obligations, set by the Principles, Options ought to have identified a significant risk of consumer detriment arising from the business model Caledonian described to it at the outset. And so, Options ought to have ensured it thought very carefully about accepting applications from Caledonian.

I acknowledge Options did take some steps – initially and on an ongoing basis – which did amount to good practice consistent with its regulatory obligations. But I think, acting fairly and reasonably to meet its regulatory obligations and good industry practice, Options had reason at the outset – and certainly by the time of Mr W's application – to have significant concerns about the business Caledonian would be introducing. And it ought to have taken the sort of action it took in April and May 2013 – which effectively ended its relationship with Caledonian – before the relationship with Caledonian began.

Acting fairly and reasonably, Options should have:

- Been aware – or at least concluded there was a significant risk – at the outset of its relationship with Caledonian, that Caledonian was giving advice on the transfer out of consumers' existing defined benefit schemes to the SIPP and the investment in the FPI bond.

- Been aware that Caledonian was arranging the transfer out of consumers' existing defined benefit schemes to the SIPP and the investment in the FPI bond too.

- Sought clarification on where these activities were taking place.

- Concluded Caledonian was, in at least some instances, carrying out regulated activities in the UK.

Further, Options should have recognised, and promptly reacted to, the following risks of consumer detriment:

- Caledonian's staff did not have the qualifications – and therefore expertise – to give advice on defined benefit pension transfers.

- There was no evidence to show a proper advice process had been followed and consumers such as Mr W were therefore unable to make fully informed decisions about the transfer to the SIPP and investment in the FPI bond.

- The high volume of business being proposed/brought about by Caledonian.

- The high level of commission Caledonian was taking.

- That Caledonian had failed to provide its company accounts, despite repeated requests for copies of them by Options.

I think these points – individually and cumulatively – should have led Options, acting fairly and reasonably, to have concluded at the outset – and certainly by the time of Mr W's application (October 2012) – that it should not accept business from Caledonian. And so, Mr W's application should not have proceeded.

It follows that it is fair and reasonable to uphold Mr W's complaint.

I have set out my view in more detail below.

What activities did Caledonian undertake and what should Options have concluded?

Advice

I note that in its response to the Investigator's view Options says it "*did not at any point become aware that Caledonian were providing advice*". This is a surprising assertion, given Options recorded in March 2013, when assessing Caledonian, under the heading "*Advice*":

> "*No details of how advice given. No regulatory bodies / permissions seen. Although suggested on email that advice given in Jordan?*"
>
> "*Advice possibly given in Jordan, although not sure if true for UK based clients*".

And so, it seems Options understood at this point that advice was being given. To ask questions about how and where advice was being given, the conclusion must first have been reached that advice was being given. There is nothing to suggest this was a view it had recently reached – rather it seems that it was an existing understanding which was being flagged as an issue for the first time.

When further action on this point was eventually taken by Options a member of its staff said, on 30 April 2013 "*No they* [Caledonian] *don't* [give advice]*, they consult with the client on the feasibility of transferring their* [occupational pension scheme] *into a SIPP*".

This seems to be an effort to back-track on the earlier answers given to the questions in the 26 April 2013 email, which appear to accept Caledonian was giving advice, although much else was "*unknown*". But, to my mind, describing Caledonian's role as consulting on the feasibility of doing something is simply another way of describing an advisory role. It would also have been clear to Options that Caledonian's role was not limited to advice on the transfer out of the consumer's existing scheme – it was declared on the FPI applications that Caledonian was giving advice on the bond too, and so any "*consulting*" was not solely limited to the transfer out from the existing scheme. This was clearly not viewed by Options as a satisfactory answer to this point in any event as its enquiries continued and, on 10 May 2013, Options asked Caledonian:

> "*Are you giving advice and if so in what capacity and under what regulatory environment are you providing this advice*."

This shows Options was clearly of the view at this point that, at the very least, Caledonian might be giving advice as there is no other basis on which it could have sought clarification from Caledonian as to whether advice was being given.

It seems this was a view Options maintained. As set out above, it later noted:

> "*Following a detailed review of the process and documentation concerns were raised regarding whether the clients could be deemed to be receiving advice through an unregulated entity.*
>
> *Following a request for further clarification on these points we have not been able to satisfy ourselves that this is not the case*."

And it ultimately concluded all business should come to it through a UK IFA with permissions to give pension transfer advice – an unusual step to take if it did not remain of the view there was at least a risk Caledonian was giving advice.

The above suggests to me that Options knew – or suspected – advice was being given from the outset but took a reactive, piecemeal approach to addressing this obvious risk.

Furthermore, from the information available to Options at the very outset of its relationship with Caledonian there was a clear identifiable risk that advice was being given by Caledonian. Caledonian said, at the outset, it was:

> "*preferred adviser for the Armed Forces occupational pension scheme*"
>
> "*a consultant to these clients and advised them on their armed forces transfers only*"
>
> "*currently putting them into an international Friends Provident Bond*"

And Caledonian's sales process was described as:

> "*Referral – Visit – Analysis – Visit*"

Finally, as mentioned, many of the FPI applications I have seen confirm Caledonian was giving advice (in Jordan – a point I'll turn to below) and Options would have been privy to many of these forms from an early stage in its relationship with Caledonian.

I note it was recorded that Caledonian advised on the transfer only, but it was also recorded that it was selecting the investment vehicle (the FPI bond). And it is also very difficult to see how advice on a transfer out did not encompass advice on where to transfer to (i.e. the SIPP) – particularly when it was clearly anticipated that all consumers would be transferring to an Options SIPP. It is not clear how this could happen without those consumers being advised to take this course of action.

Furthermore, the "*Referral – Visit – Analysis – Visit*" process Caledonian describes is a typical advice process involving an initial meeting, information gathering and analysis, and a further meeting.

Options should also have been aware that it is not usual for pension transfers to happen without the consumer receiving advice or a recommendation – and very unusual for this to happen at a rate of 50 a month, which Caledonian was proposing. Options should have concluded that it was simply implausible that such a large volume of consumers were deciding to transfer out of their existing schemes, open a SIPP with Options, and make the same FPI investments within the SIPP without being advised to do so.

I note Options' terms of business with Caledonian, signed September 2012 (but, Options

says, in place since March 2012) said:

> "*The Business Introducer undertakes that they will not provide advice as defined by the Act in relation to the SIPP – for the avoidance of doubt this includes reference to advice on the selection of The SIPP Operator, contributions, transfer of benefits, taking benefits and HMRC rules;*"

I also note the SIPP application form said:

> "*This Form should be used if you are a client establishing a SIPP without advice. You have made this decision independently and are aware of the implications of this decision*".

And:

> "*As you do not have a Financial Adviser, your investment choices are your sole responsibility. You will instruct us and we will act on those instructions as long as it is an accepted investment in the Carey Pension Scheme*."

But Options' Member Declarations included the following:

> "*I confirm that I have received full and appropriate advice from Caledonian International and following this advice I wish to proceed with the transfer*."

So, I do not think the application documents gave Options any basis to conclude advice had not been given – particularly given what I say above. They present a confused, inconsistent, picture.

Taking account of the available evidence I consider that, in this case, Caledonian did provide advice to Mr W on the merits of transferring his pension to the SIPP and investing in the FPI bond. Mr W's own account is that he thought he was receiving advice from Caledonian. He said they contacted him, convinced him they were "knowledgeable" about AFPS transfers, and persuaded him his pension would do better if he moved it.

So, I am satisfied advice was given to Mr W by Caledonian in this case, and that, from the outset of its relationship with Caledonian, Options was (or at the very least ought to have been) aware, generally, that Caledonian was offering advice to consumers, or there was a significant risk it might be doing so.

Arranging

It is also clear from what Options was told by Caledonian at the outset – and from the available evidence in this complaint and others – that Caledonian was heavily involved in the arrangement of the transfer out of Mr W's existing pension scheme to the SIPP and the investment of the cash transferred to the SIPP in the FPI bond. It clearly was not simply introducing Mr W to Options and leaving it to him to proceed with the application. It was involved in the setting up of the SIPP and in arranging the FPI bond and associated investments. It was involved in gathering all the information and documents needed for things to proceed and it sent all the required information, forms, documents etc to all the parties involved, and dealt with any queries arising from these.

I think Options ought to have been aware of this. The extent of Caledonian's involvement was clear from the application documentation Caledonian sent to Options.

Where were the activities taking place?

I have not seen any evidence that, prior to May 2013, Options established where Caledonian was carrying out its activities in relation to each application – including Mr W's.

As set out above, Caledonian told Options at the outset that "*They* [the consumers] *were generally still resident in UK but some were now living abroad in various countries such as Thailand, Germany, Spain etc*". It was also recorded that Caledonian had branches in Chile, Peru, Columbia, Argentina, Brazil and Switzerland. And, as Options later noted, Caledonian also used a UK address.

Caledonian also told Options at the outset the "*Majority of business carried out in unregulated jurisdictions but where regulations apply we are licensed to carry out our activities*."

And, as mentioned, the sales process adopted by Caledonian was set out as "*Referral – Visit – Analysis – Visit*". So, it was clear Caledonian was meeting consumers in person.

Furthermore, the Certificate of Non-Solicitation signed by Caledonian for FPI – to which Options was privy – said in each instance (as far as I'm aware) "*The advice was given in Jordan*".

Caledonian therefore gave what appears to be conflicting information. But Options ought to have been aware, from what was said by Caledonian, that it was possible Caledonian might be dealing with a UK resident consumer in the UK, or dealing with a consumer in any one of a number of different countries, all of which might have different financial services regulatory regimes (or no such regime).

It is fair to say the picture was far from clear – and Options should have been aware it was unlikely all of the information provided by Caledonian could be correct. It is not, for example, clear how the advice in every instance could have been given in Jordan when, by Caledonian's own account, it had a number of offices around the world (none of which were in Jordan), was dealing with consumers who "*were generally still resident in UK*" or "*living abroad in various countries*" and said elsewhere that it was carrying out business in various jurisdictions.

Options did not, however, check any of this at the outset. It was therefore in no position to know what, if any, regulatory regimes applied, and whether Caledonian required any authorisations to conduct the activities it did. Caledonian itself appears to have suggested it needed "*licences*" in some jurisdictions, but I have seen no evidence of it having given details of any such "*licences*".

I think Options should have been particularly concerned – given that, as mentioned, Caledonian told Options the consumers it dealt with "*were generally still resident in UK*" – about whether advice was being given (or any other regulated activity carried on) in the UK, as Caledonian was not authorised by the FSA nor, later, the FCA. There was reason, as I've explained, to think Caledonian might be breaching the General Prohibition against persons carrying on a regulated activity in the UK without authorisation. Despite this, I have seen no evidence to show Options identified this risk until March 2013 when, as set out above, it was noted:

> "*No details of how advice given. No regulatory bodies / permissions seen. Although suggested on email that advice given in Jordan?*"

"*Advice possibly given in Jordan, although not sure if true for UK based clients*".

Then no further action appears to have been taken until 26 April 2013 when, in a further internal email exchange at Options, the following questions were asked, and answers were received on 30 April 2013 (the below, in bold, are the first set of answers provided on this date):

> "*Do they have a business address in the UK?* ***They confirm that they do not have a permanent place of business in the UK, however they have a business address for correspondence and*** **[Mr C]** ***is based in the UK****.*
>
> *Where do they meet with clients, i.e. in the UK?* ***Unknown****.*
>
> *What is Caledonian's regulatory status, i.e. are they regulated in their home jurisdiction?* **[Mr C]** ***- The Chartered Insurance Institute – ID Number XXXXX.*** **[Mr C]** ***certifies all ID and signs the investment Application Form.***
>
> *Are they regulated to provide advice in their home jurisdiction?* ***Unknown***
>
> *They have confirmed that they provide advice in Jordan. How does this work? Do they have a place of business in Jordan? Do they need to be regulated in Jordan to provide advice?*
>
> ***Unknown - Caledonian provide a Non Solicitation Letter which is sent to Friends Provident with the investment App. A copy of a Non Solicitation Letter is attached***"

Despite the uncertainty it was not until 10 May 2013, when Options finally challenged Caledonian on this point (amongst others):

> "*Can you provide your organisational structure and the jurisdiction in which each is registered and the regulation/regulator that each company operates within. If you are relying on any exemptions please state which exemptions and the reasons you believe you can operate within those exemptions*
>
> *What offices do you have and where, do the jurisdictions in which you have offices have a regulatory regime, if so can you provide details of the regulators in those jurisdictions.*
>
> *Do you meet all your clients in Jordan, if not why do your Non Solicitation forms signed by yourself confirm the advice was given in Jordan*
>
> *On the Non Solicitation letters you note that Caledonian does not have a permanent place of business in the UK. However, you request correspondence to be sent to The Pensions Service Centre,* [UK City]*. Please can you clarify Caledonian's presence in the UK and the nature of the office in* [UK City]."

Given what I say above, acting fairly and reasonably, Options should have made these enquiries at the outset. And as set out in the background, these enquiries (along with the other points of query put to Caledonian and then discussed with it) led to Options quickly concluding it should not accept further applications from Caledonian unless they came through a UK IFA with permissions to give pension transfer advice – a restriction which it seems had the effect of no further business being introduced by Caledonian. I think it fair to

say that Options would have reached the same conclusion had it taken this action at the outset of its relationship with Caledonian. And it certainly should have done so, to act fairly and reasonably to meet its regulatory obligations and standards of good practice.

In this case I am satisfied Caledonian carried out the activities in the UK. Mr W says he was visited by the Caledonian representative at his home. Had Options sought clarification from Mr W, which would have been a reasonable course of action in the circumstances, I think Mr W would likely have confirmed that was the case. And, for all the reasons I have mentioned, Options should have concluded it was possible Caledonian was carrying out activities in the UK long before it received Mr W's application, in any event.

Regulated activities in the UK

Under Article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the RAO") (as set out in the version that was current at the relevant time) the following are regulated activities:

> "*Advising a person is a specified kind of activity if the advice is—*
>
> *(a) given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and*
>
> *(b) advice on the merits of his doing any of the following (whether as principal or agent)—*
>
> *(i) buying, selling, subscribing for or underwriting a particular investment which is a security or a relevant investment, or*
>
> *(ii) exercising any right conferred by such an investment to buy, sell, subscribe for or underwrite such an investment*."

Under Article 25 of the RAO (as set out in the version that was current at the relevant time) the following are regulated activities:

> "*(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.*"

There is an exclusion under Article 26 of "*arrangements which do not or would not bring about the transaction to which the arrangements relate*".

Rights under a personal pension scheme are a security.

The investments made within the FPI bond – which Caledonian itself described as "regulated" – were also securities or relevant investments.

Finally, the FPI bond was a contract of insurance, and rights under a contract of insurance were also a relevant investment.

As set out above, I am satisfied Caledonian gave advice and made arrangements. The activities it undertook clearly meet the above definitions. The arrangements it made brought about the transactions (the transfer out of Mr W's existing pension into the SIPP, the opening of the FPI bond within the SIPP and the making of investments within that bond). The arrangements had that direct effect. And advice was given on the merits of transferring out of Mr W's existing scheme to the SIPP in order to invest in the FPI bond – Mr W was persuaded that would give him a better pension in retirement.

So, I am satisfied the activities undertaken by Caledonian in the UK in this case were regulated activities. Caledonian therefore carried out regulated activities without authorisation.

These points about the activities Caledonian was undertaking, where it was undertaking them, and its authorisation to undertake them, are ones Options should have considered individually and cumulatively. And to be clear, I think the fact Caledonian was carrying out regulated activities without authorisation was enough reason, in itself, for Options to have concluded, that it should not accept applications from Caledonian.

This was a significant "red flag". The fact Caledonian was carrying out regulated activities without authorisation calls into question its integrity, motivation and competency. I think the only fair and reasonable conclusion Options could reach in these circumstances was that it should not accept business from Caledonian. And I think this alone is sufficient reason to conclude it is fair and reasonable to uphold Mr W's complaint. But I have nonetheless gone on to consider the further risks of consumer detriment I have summarised above.

Caledonian's expertise

Caledonian's proposed business model, as documented at Options' first meeting with its representative, involved former members of the armed forces who, it said, worked in security related jobs in dangerous areas. The business model was not one involving, say, former financial advisers or other finance professionals.

There was therefore no reason to think that the typical client Caledonian was proposing to introduce to Options had a good level of understanding of pensions or was in a position to work out for themselves if a pension transfer was in their best interests. They would be reliant on Caledonian's advice.

The introductions involved transfers out of a defined benefit pension scheme into a UK SIPP for investment in several investments within an FPI bond. The transfers of defined benefit (final salary) pensions are usually not in the customers' best interests, are complex and present a variety of consequences and matters which the ordinary individual would be hard pressed to understand without professional financial advice. Those giving such advice in the UK are required by the FCA to pass specialist exams, reflecting the risks and complexities involved. Options, as a provider of SIPPs, would or ought to have been aware of this.

Not only did Caledonian's advisers not have the qualifications required by the FCA (or FSA as it then was) to give advice on pension transfers, there is no evidence they had any relevant qualifications. The only qualification of any kind which is mentioned is that Mr C of

Caledonian is a qualified accountant.

I have seen no evidence to show Options noted this obvious risk until March 2013 when it reviewed its relationship with Caledonian and "*Professional Qualification*" was assessed as "*high risk*". The reason for this assessment was "*No qualifications documented other than meeting note from March 2012 where* [Mr C] *stated he was a qualified accountant and member of Chartered Institute of Accountants*."

And, despite this "*high risk*" flag, I have seen no evidence Options took any action until 26 April 2013 when it was asked "*How did we establish Caledonian's knowledge of SIPPs and UK pension rules?*" The answer to this was initially recorded on 30 April as "*unknown*". The later answer on 30 April was, "*By meeting with them twice and by running a workshop for them output from which is attached*". But I do not think this is enough to show Options had sufficiently addressed this risk – it does nothing to show Caledonian's staff had adequate professional qualifications.

Indeed, this (along with the other points of query raised at the time) was a point which led to Options quickly concluding it should not accept further applications from Caledonian unless they came through a UK IFA with permissions to give pension transfer advice – a restriction which had the effect of no further business being introduced by Caledonian. And I think it fair to say Options would have reached the same conclusion had it taken this action at the outset of its relationship with Caledonian. And it certainly should have done so to meet its regulatory obligations and standards of good practice.

The transfer process

As mentioned above, a defined benefit transfer is a complex transaction. It also involves many risks, and potentially the loss of significant guaranteed benefits. For this reason, advice on such transactions is tightly regulated in the UK and there are standards of good practice that those giving the advice are expected to follow. This means several steps need to be taken as part of the advice process and documentation such as fact-finds, suitability reports, transfer analysis reports (TVAS), and illustrations generally feature in the advice process. The purpose is to ensure any advice given takes into account all relevant factors, is suitable, and the recipient of the advice is in a fully informed position, where they understand the benefits they are giving up and the risks associated with the transfer.

I have seen no evidence to show Caledonian followed such a process. In my opinion it would have been fair and reasonable for Options to have identified this as a clear risk of consumer detriment – particularly given that Caledonian's starting point appears to have been that the consumers it dealt with would be transferring out of the defined benefit scheme (i.e. it seems to have taken the view a transfer was suitable for all).

Had Options taken steps to ascertain if a reasonable process was in place, it would have become aware no such process was in place, and consumers were not therefore fully informed before agreeing to make the transfer to the SIPP and the associated FPI bond investments.

Options' reference to "Illustrations" in the list of questions in the 26 April 2013 email, and the initial answers to those questions, appears to be an acknowledgement of this risk:

> "*Based on our contact with Caledonian and reviewing the illustrations they provide to clients, do we have concerns that Caledonian is providing poor advice/ information? Yes due to illustrations*"

Again, this (along with the other points of query raised at the time) appears to be a point which led to Options quickly concluding it should not accept further applications from Caledonian unless they came through a UK IFA with permissions to give pension transfer advice – a restriction which had the effect of no further business being introduced by Caledonian. And I think it fair to say Options would have reached the same conclusion had it taken this action at the outset of its relationship with Caledonian. And it certainly should have done so, on a fair and reasonable basis to meet its regulatory obligations and standards of good practice.

Volume of business

At the outset of the relationship between Options and Caledonian, Options was told that Caledonian would be introducing about 50 applications a month (and I note a similar volume was introduced once the relationship began).

I think on a fair and reasonable basis, Options should have been concerned that Caledonian intended to (and did) make such a high volume of introductions, relating only to occupational pension schemes. In my view this was a further reason for Options to conclude there was a significant risk of consumer detriment – particularly when considered alongside the other points I have set out here.

Firstly, it is not clear how Caledonian would be, or was, bringing about such a high volume of applications without giving advice. It was simply implausible it could bring about this number of applications without influencing consumers' actions through a positive recommendation.

Options also ought to have considered Caledonian's competence to deal with this volume of transfers – there is no evidence to show it had the significant resources this would require. Further, Options should have been aware of the very low likelihood the transfers would all be suitable. At the outset of Options' relationship with Caledonian (and the time of Mr W's application) COBS 19.1.6 G said:

> "*When advising a retail client who is, or eligible to be, a member of a defined benefits occupational pension scheme whether to transfer or opt out, a firm should start by assuming that a transfer or opt out* ***will not be suitable*** (my emphasis)*. A firm should only then consider a transfer or opt out to be suitable if it can clearly demonstrate, on contemporary evidence that the transfer or opt out is in the client's best interest*."

I accept this aims to define the expectation of a regulated financial adviser when determining suitability of a pension transfer, but I'd expect Options, as a pensions provider, to have been aware of this and to have taken account of it.

Finally, Options had cause to question the motivations of Caledonian, if it were bringing about such a high volume of applications. There was a clear risk that Caledonian was putting its own interests above those of Mr W.

Commission

I also think the level of commission that was being paid to Caledonian should have given Options cause for concern.

It appears Caledonian was typically taking around 7% of the transfer amount in commission, and Options was told this was the case at the outset of its relationship. There is no evidence to show Caledonian carried out any of the usual work associated with a defined benefit transfer that would justify such a fee. Nor have I seen any other evidence to show there was

any justification for such a high level of commission in the circumstances. I think this level of commission ought to have been another cause for Options to be concerned that Caledonian was putting its own interests ahead of the interests of consumers, including Mr W. And, of course, it was further reason to consider Caledonian might be giving advice, as commission at this level would have been very likely to motivate it to encourage consumers to proceed, through a positive recommendation.

Overall, when considered alongside the high volumes of near identical introductions of business being made by Caledonian, I think this level of commission raises questions about the motives and role of Caledonian.

Caledonian's Accounts

I note that Options made repeated requests for Caledonian's accounts. It sent several emails to Caledonian between March and August 2012. Options also explained in its email of 23 March 2012 that in order to comply with its own compliance procedures this was needed.

Nevertheless, on 27 April 2012 Options started accepting introductions from Caledonian having not received the accounts – seemingly in breach of its own procedures. Acting fairly and reasonably, Options should have met its own standards and should have checked Caledonian's accounts at the outset before accepting any business from it. And, based on Caledonian's conduct, it seems very unlikely accounts would ever have been forthcoming.

Caledonian's reluctance to provide basic information should also have been a further factor which ought to have led Options to question whether it should enter into or continue a relationship with Caledonian. This again calls into question the competence and motivations of Caledonian and it also calls into question the ability of Caledonian to organise its affairs. It also meant Options was missing information which might be critical to the decision as to whether to enter into business with Caledonian.

It is notable that Options accepted and set up Mr W's SIPP when it was still waiting for this information from Caledonian.

In conclusion

Taking all of the above into consideration – individually and cumulatively – I think in the circumstances it is fair and reasonable for me to conclude that Options ought reasonably to have concluded, had it complied with its regulatory obligations which required it to conduct sufficient due diligence on Caledonian and draw fair and reasonable conclusions from what it discovered, that it should not accept business from Caledonian, including Mr W's application. I therefore conclude that it is fair and reasonable in the circumstances to say that Options should not have accepted Mr W's application from Caledonian.

Did Options act fairly and reasonably in proceeding with Mr W's instructions?

In my view, for the reasons given, Options simply should have refused to accept Mr W's application. So, things should not have got beyond that. However, for completeness, I have considered whether it was fair and reasonable for Options to proceed with Mr W's application.

I acknowledge Mr W signed an Options' declaration. I note this document does give warnings about the loss of benefits that would result in the transfer to the SIPP. And the indemnities sought to confirm that Mr W would not hold Options responsible for any losses resulting from the investments. However, I don't think this document demonstrates Options

acted fairly and reasonably by proceeding with Mr W's instructions.

Asking Mr W to sign a declaration absolving Options of all its responsibilities when it ought to have known that Mr W's dealings with Caledonian were putting him at significant risk was not the fair and reasonable thing to do. I also note that the declaration was based on Mr W having "*received full and appropriate advice from Caledonian International*" where, for the reasons I have given, Options ought to have been aware Caledonian did not have the competency to give such advice and there were questions about its motivations and integrity.

Asking Mr W to sign declarations was not an effective way for Options to meet its regulatory obligations, given the concerns Options ought to have identified about his introduction. So, it was not fair and reasonable to proceed, on the basis of these. I make this point only for completeness – the primary point is Mr W should simply not have been able to proceed, as his application should simply not have been accepted.

Furthermore, as set out above (and I detail below), I am satisfied S27 FSMA offers a further and alternative basis on which it would be fair and reasonable to conclude Mr W's complaint should be upheld.

S27 and S28 FSMA

I have set out the key sections of s27 and s28 above and have considered them carefully, in full. In my view I need to apply a four-stage test to determine whether s27 applies and whether a court would exercise its discretion under s28, as follows:

1. Whether an unauthorised third-party was involved;

2. Whether there is evidence that the third-party acted in breach of the General Prohibition in relation to the particular transaction and, if so;

3. Whether the customer entered into an agreement with an authorised firm in consequence of something said or done by the unauthorised third-party in the course of its actions that contravened the General Prohibition; and

4. Whether it is just and equitable for the agreement between the customer and the authorised firm to be enforced in any event.

Test 1 is clearly satisfied here – Caledonian was an unauthorised third party. Test 2 is also satisfied – for the reasons I have set out above, I am satisfied Caledonian carried out activities in breach of the General Prohibition – and any one regulated activity is sufficient for these purposes so this test would be met if Caledonian had only undertaken arranging (which, for the reasons I have set out, I do not think is the case). Test 3 is satisfied too – the SIPP was opened in consequence of the advice given, and arrangements made, by Caledonian. That brings me to the final test, 4.

Having carefully considered this, I am satisfied a court would not conclude it is just and equitable for the agreement between Mr W and Options to be enforced in any event. I think very similar reasons to those mentioned by the Court of Appeal in the Adams case apply here:

- A key aim of FSMA is consumer protection. It proceeds on the basis that, while consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard consumers

from their own folly.

- While SIPP providers were not barred from accepting introductions from unregulated sources, section 27 of FSMA was designed to throw risks associated with doing so onto the providers. Authorised persons are at risk of being unable to enforce agreements and being required to return money and other property and to pay compensation regardless of whether they had had knowledge of third parties' contraventions of the General Prohibition.

- For all the reasons set out above, Options should have concluded Caledonian was giving advice or have suspected it was (and it seems it did belatedly draw this conclusion); and giving advice to consumers who were not necessarily financially sophisticated.

- As set out above, Options was aware, or ought to have been aware that:

    - Caledonian's staff did not have the qualifications – and therefore expertise – to give advice on defined benefit pension transfers.
    - There was no evidence to show a proper advice process had been followed and consumers such as Mr W were therefore unable to make a fully informed decision about the transfer to the SIPP and investment.
    - The high volume of business being proposed/brought about by Caledonian.
    - The high level of commission Caledonian was taking, which may not have been disclosed.
    - That Caledonian had failed to provide its company accounts, despite repeated requests for copies of them by Options.

- The investment did not proceed until long after all these things were known to Options and so it was open to it to decline the investment, or at least explore the position with the consumer.

I have therefore gone on to consider the question of fair compensation.

Fair compensation

I note Options has said, in response to this Service's findings in similar cases, that it's evident consumers such as Mr W wished to transfer their pensions, whether through Options or another provider and would therefore have suffered the same losses as they did even if it had rejected their applications.

I have seen no evidence to show that Mr W would have proceeded even if Options had rejected his application. He was contacted by Caledonian – which was consistent with its business model of contacting ex-servicemen and encouraging them to consider transferring out of their pensions. And on meeting with Caledonian, he was encouraged to transfer out of his existing pension on the understanding that Caledonian would increase the value of his pension. I've seen nothing to suggest he was looking to make a transfer prior to Caledonian contacting him.

I have not, in any event, seen any evidence that any other SIPP operator dealt with Caledonian. And any operator acting fairly and reasonably should have reached the conclusion it should not deal with Caledonian. I do not think it would be fair to say Mr W should not be compensated based on speculation that another SIPP operator might have

made the same mistakes as Options.

For similar reasons, I am not persuaded Mr W should not be compensated by Options, or his compensation should be reduced, because I have not made the finding that the FPI bond investment, in itself, was not something Options should have accepted. Or because the benefits from Mr W's existing pension were lost once the transfer request was made. If Options had acted fairly and reasonably to meet its regulatory obligations and good industry practice, the application would not have proceeded at all. So, no transfer request or FPI bond investment would have been made.

So, I am satisfied that Options' failure to comply with its regulatory obligations and industry best practice at the relevant time have led to Mr W suffering a significant loss to his pension. And my aim is therefore to return Mr W to the position he would likely now be in but for Options' failings.

When considering this I've taken into account the Court of Appeal's supplementary judgment in Adams ([2021] EWCA Civ 1188), insofar as that judgment deals with restitution/compensation. But ultimately, it's for me to decide what is fair and reasonable in all the circumstances.

Putting things right

A fair and reasonable outcome would be for Options to put Mr W, as far as possible, into the position he would now be in but for its acceptance of his SIPP application. I consider Mr W would have most likely remained in the occupational pension scheme if Options had rejected his application. So, Options should:

1. Calculate the loss Mr W has suffered as a result of making the transfer.

2. Pay compensation for the loss to Mr W.

3. Pay Mr W £500 for the distress and inconvenience caused by its failure to act fairly and reasonably.

I'll explain how Options should carry out the calculation in further detail below:

(1) Calculate the loss Mr W has suffered as a result of making the transfer ("the loss calculation")

Options must undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:
https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter

This calculation should be carried out using the most recent financial assumptions in line with DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr W's acceptance of my decision.

(2) Pay compensation to Mr W for loss he has suffered calculated in (1).

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Options should:

- calculate and offer Mr W redress as a cash lump sum payment,

- explain to Mr W before starting the redress calculation that:

    - their redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and

    - a straightforward way to invest their redress prudently is to use it to augment their DC pension

- offer to calculate how much of any redress Mr W receives could be augmented rather than receiving it all as a cash lump sum,

- if Mr W accepts Options' offer to calculate how much of their redress could be augmented, request the necessary information and not charge Mr W for the calculation, even if he ultimately decides not to have any of his redress augmented, and

- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr W's end of year tax position.

Redress paid to Mr W as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Options may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr W's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

(3) Pay Mr W £500 for the distress and inconvenience caused by their failure to act fairly and reasonably

Mr W transferred his pension away from a valuable defined benefits pension scheme to a SIPP and had to suffer the loss of those benefits. This is money Mr W cannot afford to lose and it has caused him uncertainty about his future retirement plans.

I think it's fair to say this would have caused Mr W some distress and inconvenience. So, I consider that a payment of £500 is appropriate to compensate for that.

Reassignment of rights

If Options believes other parties to be wholly or partly responsible for the loss, it is free to pursue those other parties. So, compensation payable to Mr W should be contingent on the assignment by him to Options of any rights of action he may have against other parties in relation to his transfer to the SIPP and the investments. The assignment should be given in terms that ensure any amount recovered by Options up to the balance due to Mr W is paid to him. Options should only benefit from the assignment once Mr W has been fully compensated for his loss.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

I do not know what award the above calculation might produce. So, for completeness, I have included information below about what ought to happen if fair compensation amounted to more than our award limit.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as shown above. My decision is that Options UK Personal Pensions LLP should pay Mr W the amount produced by that calculation – up to a maximum of £160,000 (including the £500 to compensate for the distress and inconvenience Options' actions caused).

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that Options pays Mr W the balance. This recommendation is not part of my determination or award. Options doesn't have to do what I recommend. It's unlikely that Mr W can accept my decision and go to court to ask for the balance. Mr W may want to get independent legal advice before deciding whether to accept this decision.

My final decision

My final decision is that I uphold this complaint. To put things right Options UK Personal Pensions LLP must calculate and pay Mr W the award set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 11 July 2023.

Beth Wilcox
Ombudsman