

The complaint

Mr P complains that Options UK Personal Pensions LLP (Options) shouldn't have accepted his application to transfer his Armed Forces Pension into a self-invested personal pension (SIPP) and invest the funds in a Friends Provident International (FPI) Reserve bond. He wants Options to put him back in the position he would've been in had Options not accepted his SIPP application.

At the time of the relevant events Options was trading as Carey Pensions UK LLP. But throughout this decision I will refer to the business as Options.

Background

I've set out below the parties involved in Mr P's pension transfer and investment.

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 a trading name of a business called MMG Associates, which was registered in the British Virgin Islands. Caledonian was not authorised in the UK to carry on 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.

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 P invested in a number of investments within a FPI bond.

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.

What happened

Mr P had a defined benefit occupational pension from his time working in the Armed Forces. He said he was approached by '*an unregulated adviser from a firm called Caledonian*

International Ltd. He told us that when he was working abroad *'the adviser'* regularly visited his workplace and had approached some of his work colleagues. He said that during a meeting he gave the adviser details of his existing Armed Forces Pension and the adviser showed him a comparison demonstrating that an Options Pension would perform better than his Armed Forces Pension. Mr P said *'the adviser'* told him that:

'with the Carey SIPP the returns on the investment would be better and I would be able to access it a lot sooner than my existing pension'.

And:

'with the SIPP I would have more control over my pension rather than the military controlling it'.

And:

'He said I could either choose the companies to invest in or let him decide where to invest my funds.'

Mr P said he wasn't told about the guaranteed benefits he'd lose by transferring out of his existing pension, or that he would be investing in any non-standard, high-risk investments, or that the investments could potentially fail and/or become illiquid.

Mr P described himself as a *'medium risk investor with no previous investment experience'*. He said his Army pension was his *'only provision for retirement'* and so he had no capacity for loss. He said he had no cash savings, an outstanding mortgage, and another financial commitment.

He said:

'Although I did have concerns about transferring my existing pension into this SIPP, the advisor assured me I would receive significant returns [and] as the professional I trusted his recommendation.'

Under a cover letter dated 23 July 2012 Caledonian sent Options a SIPP application form with supporting documents on Mr P's behalf. Caledonian included a list of documents attached. Amongst those listed as attached were *'LOA for Caledonian'* and *'Advice'*. The only document listed as not attached was a transfer analysis.

The documents included *'The Carey Pension Scheme Application Form for Direct Clients'*. The application form said, *'SIPP to be established on execution only'* and:

'...you are a client establishing a SIPP without advice. You have made this decision independently and are aware of the implications of this decision'.

Information entered on the form indicated Mr P's permanent home address was in the UK and he worked for a UK-based employer. It said he wanted to transfer funds from an Armed Forces Pension and the transfer value of his pension entitlements in the Armed Forces scheme was nearly £66,000. And it said Mr P wanted to invest all of his transferred funds and any future funds in FPI and that his investment authorisation was execution only – *'Investment manager trades on your instructions only'*.

The application form said:

'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.'

Carey Pensions UK LLP and Carey Pension Trustees UK Ltd will not at any time review any aspects of your appointed investment Manager's financial status or investment and risk strategies nor have any involvement in your investment choices and selection, nor give advice on the suitability of your investment choices. We would always recommend independent advice be obtained from a suitably qualified adviser. If, at any time your position changes and you appoint a Financial Adviser, you must inform us. You are responsible for the ongoing review and monitoring of the investments you have chosen - and remember - all investments can go down in value as well as up. Carey Pensions is not responsible for any investment choices or decisions.'

The application form also said:

'If you are applying for the Restricted Investment SIPP you are limited to 2 'standard investments', see Key Features document. The RI-SIPP does not allow any Alternative Investments.'

Mr P ticked a box saying he waived his right to cancel his SIPP within 30 days of it being established.

The documents attached to Mr P's application form also included a member declaration signed by Mr P and dated 8 May 2012. Amongst other things, the declaration said:

'I confirm that I have received full and appropriate advice from Caledonian International and following this advice I wish to proceed with the transfer. I am fully aware and understand that by giving an instruction to proceed with the transfer of my Occupational Scheme Benefits to the Carey Pension Scheme I may lose substantial benefits. However, being of sound mind and in full possession of the facts I have considered the matter of the transfer and as an individual confirm my decision and instruction to both Carey Pensions UK LLP and Carey Pension Trustees UK Ltd to proceed with the transfer of the Occupational Scheme Benefits. I am fully aware that in acting on my instructions both Carey Pensions UK LLP and Carey Pension Trustees UK Ltd act on an Execution Only Basis. Neither Carey Pensions UK LLP nor Carey Pension Trustees UK Ltd have provided any advice whatsoever in respect of this transaction.'

The declaration listed Mr C of Caledonian as 'Adviser'. And Mr C of Caledonian signed the declaration in the field designated for the 'Adviser'.

A letter signed by Mr P and giving his home address in the UK and dated 8 May 2012 confirmed that he wanted to transfer his deferred benefits in the Armed Forces Pension Scheme to an Options SIPP and that Options was not responsible for his decision and provided an execution-only service.

A further letter signed by Mr P giving his UK address and dated 8 May 2012 gave consent for Options to provide to Caledonian *'any information they may so request in relation to my Scheme and my Scheme's purchase of investments'*.

An *'urgent memorandum'* dated 8 May 2012 from Mr P to the Armed Forces Pension Scheme said:

'I wish to transfer my Armed Forces Pension and request that all discontinuance and discharge papers be sent directly to the administrators of my alternative pension scheme, for the attention of ... Carey ...'

On 24 July 2012 Options wrote to Mr P thanking him for applying for a Restricted Investment SIPP and saying his SIPP was established that day.

Options said it also, on the same day, sent Mr P a welcome pack which included the SIPP terms and conditions and SIPP key features document.

On 6 September 2012 the Armed Forces Pension Scheme wrote to Options, saying:

'Thank you for your letter of 17-Aug-2012 in which you agreed to accept a transfer in favour of Mr P... You will receive, within the next 21 working days, a BACS payment for [nearly £66,000].'

...

Please note that once the payment has been made, the transfer is completed...

On 20 September 2012 Mr P's pension funds were transferred to Options.

On 16 October 2012 Options invested nearly £64,000 in FPI for Mr P.

On 22 October 2012 FPI wrote to Options providing a policy schedule. It said a copy had been sent to 'your adviser'.

Also, on 22 October 2012 FPI wrote to Options saying it had paid commission of 7% to Caledonian 'for introducing the policy to us'. It said, 'If you have any queries, please contact your Financial Adviser or contact us...'

In a statement of account for Mr P's SIPP, Options recorded a payment of £750 to Caledonian dated 21 November 2012 and described it as 'IFA fees'.

Mr P's complaint

In November 2018 Mr P complained to Options about Options accepting his application through Caledonian.

Via his representative Mr P said Caledonian had advised him to make the transfer and investment. He said he wasn't told of the level of risk that the investments carried and didn't understand that Caledonian wasn't regulated by the FCA or what the importance of such regulation was. He said he had some doubts, but Caledonian appeared knowledgeable and professed to have expertise in pensions and investments, and Mr P trusted Caledonian's advice. Mr P '*understood very clearly that he was being advised by Caledonian International Ltd*' about the decision to transfer his pension and make investment choices in a SIPP and that Caledonian was helping him arrange that transfer and investment. Given his '*complete lack of investment experience*', Mr P said, he felt '*entirely unequipped*' to make decisions of this nature without advice and assistance.

Mr P said Options had failed to fulfil its obligations by accepting his business when it was aware he hadn't received regulated advice on the transfer or the investment, but rather had been introduced by an unregulated firm which had recommended the transfer and investment to him. He said it ought to have been obvious to Options from the circumstances that he was following the advice of Caledonian and that he was being assisted by them in

arranging the pension transfer and investment. He said Options should've refused to facilitate the transfer and investment.

Mr P said the transfer and investment were unsuitable for him and he'd suffered significant losses. He said he wouldn't have made the transfer or the investment if Options hadn't accepted his application. He wanted to be put back in the position he would've been in had he retained his pension provision with the Armed Forces Pension scheme.

Options responded in December 2018, rejecting Mr P's complaint. In summary it said the following:

- Mr P was classed as a direct client of Options because Caledonian was not a regulated advice firm and acted only as Mr P's introducer.
- Options provided an execution-only service and made that clear to Mr P who signed acknowledgement of that; it wasn't the role of Options and nor was Options qualified or permitted to advise on the suitability of the SIPP for Mr P, or the underlying investment or the customer's chosen introducer.
- COBS 11.2.19 says a firm must follow a client's specific instruction and that's what Options did in Mr P's case – by virtue of this rule Options was not liable to Mr P.
- Mr P didn't tell Options he was advised by an unregulated company – Options can't be held responsible for information that wasn't disclosed to it.
- By signing the documents Mr P confirmed he understood the risks associated with his choices and that Options wasn't responsible for any of those decisions.
- Options was permitted to receive introductions from non-regulated introducers, and the fact Caledonian was an unregulated introducer was made clear to Mr P.
- Options wouldn't comment on Mr P's interactions with his chosen introducer because Options wasn't party to those interactions. And Options had no control over information Caledonian gave Mr P. Options' relationship was with Mr P only and all correspondence regarding his decisions and instructions came directly from him.
- Options did due diligence on Caledonian and when it accepted Mr P's application its checks gave it no reason to think it shouldn't accept business from Caledonian.
- A breach of the FCA's Principles for Business didn't give Mr P any actionable rights. And, in any case, Options complied with the Principles.
- The regulator's guidance wasn't a rulebook – it wasn't exhaustive or prescriptive. And in any case Options acted in accordance with the conduct described as appropriate in the guidance.
- Mr P hadn't shown that an adviser arranged his SIPP; the actions of an adviser didn't amount to arranging as per Article 25 of the Regulated Activities Order. If a court found that an adviser advised Mr P or arranged his investment in breach of the general prohibition against carrying on regulated activities without permission, the court would exercise its discretion under section 28 of the Financial Services and Markets Act 2000 ('FSMA') to allow Options to enforce its agreement with Mr P.
- Clients of Options had the right to make decisions without advice.

- Caledonian wasn't an adviser. And, if it held itself out to be an adviser, Options wasn't aware of that. Options treated Caledonian as an unregulated introducer and followed its own strict processes for dealing with unregulated introducers and accepting introductions.
- Mr P signed documentation which made clear that he was a direct client who hadn't received any advice and that his investment choices were his sole responsibility. The documentation guided him to seek financial advice, but he chose not to do so.
- If Mr P believed he'd received advice, he didn't say that the application form he completed was the wrong one for him.
- Mr P signed a declaration showing he knew he wasn't receiving financial advice, and that Options was acting on an execution-only basis.
- It was reasonable for Options to accept at face value Mr P's signature confirming he understood the documents. If he didn't agree to or understand them, he shouldn't have signed them.
- As SIPP administrator Options isn't responsible for assessing the suitability of an investment for an individual's personal situation. Overall Options had complied with its regulatory and contractual obligations to Mr P and wasn't liable for his loss.

Mr P referred his complaint to us in April 2019. He said he was affected as follows:

'I originally transferred my Army Pension valued at [nearly £66,000] in 2012. My latest valuation from Carey Pension's dated 31/03/18 showed an investment value of [about £10,000] and a minuscule amount in cash. I have suffered catastrophic losses in comparison to the position I would have been had Carey Pension's refused to facilitate the transaction'

The relationship between Options and Caledonian

I've set out the background to Mr P'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 it carried out due diligence checks on Caledonian, and it's provided evidence of the checks it made.

The relationship between Options and Caledonian began in early 2012. Options said that between 27 April 2012 and 20 May 2013 Caledonian made 509 introductions to Options.

I've 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've observed from the available evidence (including evidence from Mr P's case file and submissions Options has made to us about its due diligence on, and its relationship with, Caledonian).

A business profile was completed which recorded the first meeting between Options and Mr C of Caledonian in **March 2012**. It set out Caledonian's proposed business model. It said Mr C was '*preferred adviser for the Armed Forces occupational pension scheme*'. It said the profile of Caledonian clients was:

'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 than 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 said clients were referred to Mr C from his Armed Forces pensions contact or by other clients, and he was *'currently putting them into an international Friends Provident Bond, the underlying investments were regulated'*. It said:

'[Mr C] himself was not a regulated adviser, he was a consultant to these clients and advised them on their armed forces transfers only, he was a qualified accountant and was a member of the Chartered Institute of Accountants.

His company was trading as Caledonian although the holding company was a BVI company called MMG Associates ...

[Mr C] was looking at volume business in the region of 50 schemes a month.'

On **16 March 2012** Mr C signed and dated the Options *'Non-Regulated Introducer Profile'*. The form described its purpose as follows:

'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.'

Under *'Company Information'* it was entered that Caledonian had branches in Chile, Peru, Columbia, Argentina, Brazil and Switzerland and had been trading since 1997.

Under *'Product Information'*, it was entered that Caledonian dealt with *'Offshore savings plans + investment bonds – Friends Provident International + General'* and that these products had been accepted by Options and other SIPP providers, and hadn't been declined by any pension scheme operators.

Under *'Sales and Marketing Approach'*, it was entered that Caledonian would obtain clients by *'Referral'* and the sales process would be: *'Referral – Visit – Analysis – Visit'*.

A question about the typical commission structure was answered: *'7% up front from bond – 0.5% Trail.'*

Under *'Training and Information'*, in response to the question, *'What training is provided to the agents within the Firm?'* the answer was: *'Ongoing product training and accompanied meetings.'* And that training was delivered through: *'Visits to providers directly'*. In response to how the business produced by its agents was monitored, the answer was: *'Full administrative structure – Caledonian, Careys – Compliance. FPI – Compliance'*.

In response to a question about the kind of service it sought from a SIPP provider, the answer was: *'Administration + Compliance'*.

Under the section headed '*Legal and Regulatory Information*', it was recorded that Caledonian didn't work with any FSA regulated company or adviser, wasn't a member of any professional or trade body, had no professional indemnity cover in place, and hadn't recently been and wasn't currently subject to any FSA supervisory visits, reviews or other regulatory action 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 answer was: '*Majority of business carried out in unregulated jurisdictions but where regulations apply we are licensed to carry out our activities*'.

In response to how Caledonian demonstrates it treats its customers fairly, it was said: '*Compliance & Procedures in current alignment with FSA TCF*'.

Information entered said Caledonian's objectives for the coming 12 months were: '*To continue to develop a fully compliant business of PT to HM Forces*'. And with regards to member-directed pension scheme business, Caledonian was looking to achieve a '*Compliant business in a Regulated structure*'.

On **23 March 2012** Options asked Mr C 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 on **3 April 2012**. A senior consultant at Caledonian replied on the same day and provided a copy of Mr C's passport (uncertified). About the company accounts she said she'd speak to Mr C when he returned from a trip. On 4 April 2012 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. On **1 August 2012**, ahead of a compliance audit, a Team Leader at Options asked Caledonian again for the certified passports and annual accounts. In an internal email the Team Leader said she'd spoken to Mr C and he'd be '*sending an urgent request for the documentation we require*'.

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

'The Business Introducer undertakes that they will not provide advice as defined by [the Financial Services and Markets Act 2000] 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'

Options has said Caledonian received the terms of business on **21 March 2012** – and so it seems there was a delay in Mr C signing and returning the document.

On **1 November 2012** Options did a background check using 'World Check' (a risk intelligence tool which allows subscribers to conduct background checks on businesses and individuals) on two Caledonian employees, one of whom was Mr C. The check didn't 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** a manager at Options sent an internal email to other Options employees, including its CEO, summarising a call Options had held with Mr C. In summary, it said:

- Options had noted that, following recent FSA reviews and guidance, SIPP operators were being asked to look at the business received from their introducers against their expectations of type and profile.
- Options had noted that several applications it received recently had moved away from the expected profile. And Options asked whether the profile was changing.
- Mr C had said *'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 had asked Mr C to put together a note to update Caledonian's business profile and expectations.

On **20 March 2013** the Options manager followed up the conversation with Mr C by email. Options asked again for *'an update as to the changes in profile'*, and noted it had received a further two applications for individuals outside the expected profile.

Options has also provided an undated document called the *'Overseas Introducer Assessment Proforma'*. The document listed a number of criteria and labelled its assessment as *'low risk'*, *'medium risk'* or *'high risk'* with supporting notes on each. This document isn't dated but I think it's likely to have been completed in March 2013 as it refers to Options recently having seen consumers introduced which fell outside the expected profile, which seems to refer to the 7 March 2013 email. I've set out below what I consider the most relevant sections of this document and the level of risk that was noted.

| Heading | Notes | Risk |
|---------------------------------------|--|---------------|
| Section 1 – Company Assessment | | |
| Google search and FCA | <i>'No adverse comments'</i> | Low |
| Regulatory | <i>'Cannot find any regulatory information from the details held'</i> | High |
| Company | <i>'No UK branch. Cannot see any EEA regulatory details ... Unknown company establishment time – cannot find any details from information received. No accounts requested? / received'</i> | Mainly medium |
| Compliance officer | <i>'Unknown if have compliance officer or not'</i> | High |
| Professional qualifications | <i>'No qualifications documented other than meeting note from March 2012 where [Mr C] stated he was a qualified accountant...'</i> | High |
| Meeting | <i>'Meeting held at Carey Pensions UK office March 2012'</i> | Medium |

| Section 2 – Advice/client profile/investment | | |
|--|---|------|
| Advice | <p><i>'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.'</i></p> <p><i>It was also noted that the funds for investment within the SIPP were to be generated from:</i></p> <p><i>'Transfers from Armed Forces Pension occupational scheme'</i></p> | High |
| Client profile | <p><i>'Client Profile: 30-50 years old. Part of armed forces 6-10 years. Generally still UK residents, some abroad.'</i></p> <p><i>Now working in security earning c. £70k pa. HOWEVER, recently reviewed business outside of profile.'</i></p> | High |
| Investment | <i>'Initially Friends Provident International bond. Now using James Brearley. Both FCA regulated.'</i> | 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 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 emailed several other Options employees, with the title *'Review of relationship with Caledonian'*. She said:

'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 Compliance Officer set out 18 questions and statements about Caledonian and its relationship with Options and invited the other employees who received her email to *'please provide answers to the following where you can'*.

On **30 April 2013** another member of the compliance team inserted the answers given (in bold) below.

'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 [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.**

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 given]. [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 Caledonian's knowledge of SIPP's 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 the CEO of Options. The CEO 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 office 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 jurisdiction (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 jurisdiction (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** the Options CEO emailed Caledonian requesting further information. The email said Options was reviewing its terms of business *'in light of recent announcements from the FCA and our internal compliance reviews'*. Options said it was keen to continue to do business with Caledonian but that it must do so: *'in a framework that is robust and compliant and will satisfy the regulators'*, Options said, *'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 asked Caledonian the following questions:

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].'*

Options said that from **1 May 2013** it had implemented changes to its requirements, and that Caledonian had to 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 Business C. The summary recorded that Business C confirmed an FCA Regulated Adviser would provide TVAS reports on all Caledonian-introduced clients and on the back book of business with Caledonian. And that on this understanding Options had agreed it would continue to process applications where the TVAS report was currently being issued by Business C.

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

On **23 May 2013** Options met with Caledonian and Business C. A summary of the meeting said:

- Mr C said he was a consultant to the Armed Forces and not an adviser in the FCA sense.
- Caledonian's UK office was a postal address only and not a working office.
- Mr C met with clients in the UK but initial contact was abroad. It was noted that documents completed by Caledonian had said he met them in Jordan. And FPI needed a letter about where advice was given.
- Caledonian's website didn't mention that it would give advice. And its documents said no advice was given and clients should take advice from a regulated adviser.
- Caledonian said the reason for lots of transfers was because of the market and its relationship with providers.
- The proposal going forward involved an appointed representative of a UK-based IFA being the *'pension specialist'* of Business C and the UK-based IFA dealing with business *'moving forward'*.

- Options agreed to allow Caledonian a four-week window to put the changes in place.
- The question about Caledonian providing a letter stating where advice was being given was irrelevant to Options as Caledonian didn't provide advice.
- Caledonian said its illustrations were provided '*for clients to facilitate the business*'. Options queried whether this was advice.

I haven't seen evidence that any of these actions were completed. As noted, Options didn't accept business from Caledonian after **20 May 2013**.

Options has provided a copy of a document headed, '*Caledonian Relationship Review 2013*'. I've 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 with ourselves [Options staff at the meeting] where [Mr C], and [Business C] explained their current process and documentation and described their future process, further discussions between [initials of various staff members at the businesses] 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' Chief Executive] 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; it brings the process and client into the UK regulated process; it brings the clients into the FSCS and FOS protections; and ensures all occupational schemes undergo analysis and advice'

I haven't seen evidence that this approach was enacted – again, as noted, Options accepted no business introduced by Caledonian after **20 May 2013**.

Our Investigator's view

Our Investigator who looked into Mr P's complaint took the view that the complaint should be upheld because Options ought not to have accepted Mr P's application from Caledonian.

The Investigator said Options had been obligated to do due diligence on Caledonian, as an introducer. And that had Options done sufficient due diligence, or drawn reasonable conclusions from the information it had about Caledonian, it ought to have concluded that Caledonian's business model might lead to consumer detriment. In relation to the investment, the Investigator said the investment itself might reasonably not have given Options cause for concern.

The Investigator set out that Options should put things right by comparing Mr P's current position to the position he would've been in had he not transferred from his defined benefit pension scheme. And Options should pay him compensation. The Investigator also recommended Options pay Mr P £500 for distress and inconvenience caused by its failings.

Mr P accepted the Investigator's view.

Options didn't agree with the Investigator's view. I've summarised below what I consider to be the key points of the response from Options, but I've considered the response in its entirety.

- The Investigator's view didn't reflect the regulatory and legal regime in which Options acted at the relevant time. The duties the Investigator said Options owed Mr P wouldn't be recognised by a Court, and legal liability wouldn't exist in this case.
- Options operated on an execution-only basis. It didn't and wasn't permitted to provide advice or otherwise comment on the suitability of investments.
- Regulatory guidance published after the events that were the subject of Mr P's complaint wasn't relevant; it introduced new expectations which didn't apply at the relevant time.
- Options operated at all times on the basis that Caledonian wasn't advising members. Options made the prohibition on advice clear to Caledonian. Options didn't at any point become aware that Caledonian was providing advice. And there's no evidence Caledonian advised Mr P.
- The Investigator's view hadn't taken into account the relevant law and application of the RAO as considered by the Court of Appeal in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474 (the Adams Appeal judgement).
- The Investigator's view hadn't identified what the law required and on what basis (if any) Options was legally liable for Mr P's loss.
- The duties as described in the Investigator's view held Options to a standard which was unclear, more demanding than is fair or reasonable, and inconsistent with the contract Mr P entered into and the general scheme of the COBS rules at the time (which imposed no duty on Options to assess introducers or investments). The judge in Adams rejected the proposition that Options owed duties of the kinds now being relied upon by reference to any legally actionable COBS rules.
- There was no requirement at the time for a consumer to be advised before transferring a defined benefit pension.
- SIPP providers weren't prohibited from dealing with unregulated introducers. And it was shown in Adams that, at the material time, the FSA regarded as acceptable the approach by Options to accepting business from unregulated introducers.

- It was wrong to say Options had sole liability for investment decisions that Mr P made without any advice from Options.
- The decision by Options to stop accepting business without regulated advice being provided was a broader policy decision that Options made in February 2014. It wasn't a decision made in response to what Options knew of Caledonian's practices. And the decision by Options in August 2014 to stop accepting non-regulated introducer business wasn't about Caledonian specifically.
- SIPP providers should be able to rely on express representations by consumers in signed contractual documentation such as the indemnity signed by Mr P which said: '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 ... I confirm that I am establishing the Carey Pension Scheme on an Execution only basis.'
- Had Options told Mr P it wouldn't accept business from Caledonian, on balance Mr P would've gone ahead with the transfer and the FPI investment. Even if another provider might've reached the conclusions the Investigator said Options should've reached, Mr P was determined to proceed, and another SIPP provider could properly have accepted the investment.
- The Investigator didn't say what information Options would've obtained through better due diligence which would've led it to discover Mr P was advised. For example, the Investigator said Caledonian failed to give Options its accounts, but the Investigator didn't say what the accounts would've led Options to discover and how that would've led Options to refuse Mr P's application.
- Once Mr P's request to transfer was made, Options was obliged to complete the transfer. So, the loss of DB benefits was assured from that point. Even if Options had asked Mr P if he wanted to proceed with the investment, Mr P had lost his guaranteed benefits from the moment he made the transfer request. So Mr P must bear the loss of these benefits.
- Mr P's alleged loss was in the realms of the possible performance of an investment.
- Mere underperformance of an investment doesn't create a wrong or liability.
- Any calculation of loss must have regard to the fact the investment was 'no cause for concern' and mustn't rely on how the investment had performed in hindsight.
- If Mr P had to be put back in the position he would've been in had he not transferred his pension then Options agreed with the basis for calculating compensation set out by the Investigator, except on the following points:
 - If the investments remained with Mr P because they couldn't be returned to Options, compensation should be adjusted to reflect this (just as in Adams a presumptive value was ascribed to the investment).
 - Options hadn't seen any evidence that Mr P should be paid £500 for trouble and upset and Options should have a fair and reasonable opportunity to respond to any such evidence.

Options also requested an oral hearing which it said was necessary to explore the following points in particular:

- The extent of Caledonian's role in Mr P's decision to establish the SIPP, transfer his pension, and make the investment
- Mr P's understanding of his investment and the roles of the parties
- Mr P's motivation for entering the transaction and transferring from a defined benefit pension scheme (including the enhanced death benefits)

Because no agreement could be reached on Mr P's complaint, it was passed to me to review afresh and make a decision.

My provisional decision

In advance of this final decision, I issued a provisional decision in which I said that I thought Mr P's complaint should be upheld.

I also explained why I am satisfied it's not necessary for me to hold an oral hearing. My conclusion about that remains unchanged so I shan't repeat it here.

Options did not respond to the provisional decision. Mr P responded to say he accepted the provisional decision.

As I haven't received any further submissions from either party and haven't been persuaded to depart from my provisional findings, I've repeated my provisional findings below – and have not therefore included any further detail of them in this background summary.

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.

In considering what's fair and reasonable in all the circumstances of this complaint, I've taken 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.

As I haven't received any further submissions from either party, I don't think I need to change my provisional findings. So, I have repeated them below and adopt them as my findings in this final decision.

In my provisional decision I said:

'The purpose of this decision is to set out my findings on what's fair and reasonable, and explain my reasons for reaching those findings, not to offer a point by point response to every submission made by the parties to the complaint. And so, while I have considered all the submissions by both parties, I've focussed here on the points I believe to be key to my decision on what's fair and reasonable in the circumstances.'

I'm minded to reach the same conclusion as our Investigator did. And for broadly the same reasons I intend to uphold Mr P's complaint. I'll explain why. ...

Relevant considerations

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). I consider that the Principles relevant to this complaint include Principles 2, 3 and 6 which say the following:

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

'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 of FSMA and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J in the Berkeley Burke case 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 judgement.

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's case.

Although the Court of Appeal ultimately overturned HHJ Dight's judgment, it rejected that part of Mr Adams's 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's 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, in the High Court case, 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 P'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 P'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 P'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 P.

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'm 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 Adams. That was a legal claim which was defined by the formal pleadings in Mr Adams's statement of case.

To be clear, I have proceeded on the understanding that Options was not obliged – and not able – to give advice to Mr P on the suitability for him personally of a pension transfer or its SIPP or the FPI investment. But I am satisfied that the obligations of Options 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 outset of the relationship between Options and Caledonian said:

'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 of FSMA

The Court of Appeal overturned the High Court judgment on the basis of the claim pursuant to section 27 of FSMA. Section 27 of 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'.

Section 27(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.'

Section 28(3) of 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 section 19 of 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 section 27 of 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 section 28(3) of 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.*

Regulatory publications

The FCA (and its predecessor, the FSA) has issued the following 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 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 clients 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 said:

'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 relievability 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've considered them in their entirety.

I acknowledge that the 2009 and 2012 reports and the 'Dear CEO' letter aren't formal guidance (whereas the 2013 finalised guidance is). However, the fact that the reports and 'Dear CEO' letter didn't constitute formal guidance doesn't 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's 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 don't think the fact the publications (other than the 2009 Thematic Review Report) post-date the events that took place in relation to Mr P'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's 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 didn't 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 doesn't follow that those publications are irrelevant to my consideration of what is fair and reasonable in the circumstances of this complaint. I'm 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 the actions of Options with these documents in mind. The reports, 'Dear CEO' letter and guidance gave non-exhaustive examples of good industry practice. They didn't 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 don't say the Principles or the publications obliged Options to ensure the pension transfer was suitable for Mr P. I accept Options wasn't required to advise Mr P, and couldn't advise him. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But they're 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'm 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's clear from Options' non-regulated introducer profile, that it understood and accepted that its obligations meant it had a responsibility to carry out due diligence on Caledonian.

I'm 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 its own understanding – as the Options Compliance Officer noted in an email on 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' (treating customers fairly) 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'm satisfied that, to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Options should've 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've 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 it received Mr P's application on 24 July 2012 – 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 existing defined benefit schemes to the SIPP and the FPI investment.*
- Been aware that Caledonian was arranging the transfer out of defined benefit schemes to the SIPP and the FPI investment 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've recognised, and promptly reacted to, the following risks of consumer detriment:

- *Caledonian's staff didn't 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 P were therefore unable to make fully informed decisions about the transfer to the SIPP and investment in the FPI bond.*
- *Caledonian proposed/brought a high volume of business.*
- *Caledonian was taking a high level of commission.*
- *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 P's application – that it should not accept business from Caledonian. And so Mr P's application shouldn't have proceeded.

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

Because I've decided to uphold Mr P's complaint on the basis that Options shouldn't have accepted his introduction from Caledonian, it's not necessary for me to consider whether or not Options should've allowed the FPI investment in Mr P's SIPP. I make no findings about Options' actions in relation to the appropriateness of the FPI investment for the Options SIPP.

I've 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 said it didn't at any point become aware that Caledonian was 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 Armed Forces 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 wasn't 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 in May 2013 that 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. Although Options has said it took that step as a wider policy decision and not as a response to concerns about Caledonian, the evidence it gave about that wider policy decision suggested that the wider policy decision was made in 2014, and was based on reviews and considerations which mostly took place after May 2013. The decision as it related to Caledonian appears to be set out in a document from May 2013 headed 'Caledonian Relationship Review 2013'. The above suggests to me that Options knew – or suspected – that advice was being given from the outset, but that it took a reactive, piecemeal approach to addressing this obvious risk.

Furthermore, from the information available to Options at the outset of its relationship with Caledonian, there was a clear identifiable risk that Caledonian was giving advice. 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's 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've 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 the 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 which was signed and dated by Mr P 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 the Options member's declaration 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.'

And, as already mentioned, the FPI application documents confirmed advice had been given.

So I don't think the application documents in this case gave Options any basis to conclude advice hadn't been given – particularly given what I say above. They present a confused, inconsistent, picture. And where the documents expressly said that Mr P had not been advised, they tended to indicate that Options hadn't advised Mr P.

Taking account of the available evidence I consider that, in this case, Caledonian did advise Mr P on the merits of transferring his pension to the SIPP and investing in the FPI bond. It appears most likely that Caledonian proactively suggested to Mr P he consider transferring his occupational pension. Mr P says:

'...the adviser regularly visited my place of work and had approached a few of my work colleagues. During a meeting at my work place, I gave the advisor details of my existing Army Pension and he gave me a brief comparison against the Carey SIPP. He said with the Carey SIPP the returns on the investment would be better and I would be able to access it a lot sooner than my existing pension. I was told with the SIPP I would have more control over my pension rather than the military controlling it.'

I've seen no evidence to suggest Mr P had any intention of transferring his pension before he encountered Caledonian or that he was determined to transfer it irrespective of whether he received any help to do so, or who provided that help. Indeed, Mr P said he had doubts about transferring but trusted Caledonian as 'the professional'. Mr P also said he had no investment experience which I think makes it unlikely that he decided without any advice that he should transfer and invest the pension entitlements held in his defined benefit pension. And although Mr P said Caledonian gave him the option to choose his own investment, Mr P invested in the FPI bond which was the same investment that other Caledonian clients invested in. Again, this means that in my view it's more likely than not that Caledonian advised Mr P about the investment.

So, I am satisfied advice was given to Mr P 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's 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 P'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 P to Options and leaving it to him to proceed with the application. It was involved in arranging the transfer out of Mr P's existing pension to the SIPP, the setting up of the SIPP and in arranging the FPI bond and associated investments. Caledonian played an active part in gathering all the information and documents needed for things to proceed – that is clear from the checklist included with the paperwork sent to Options. It also sent all the required information, forms, documents etc to all the parties involved, and dealt with any queries arising from these, as the named contact in the correspondence.

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 haven't seen any evidence that, prior to May 2013, Options established where Caledonian was carrying out its activities in relation to each application – including Mr P'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've 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 was 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 didn't 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've seen no evidence of it having given details of any such 'licences'.

I think Options should've 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've 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 provided]. [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 wasn't 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, Peterborough. Please can you clarify Caledonian's presence in the UK and the nature of the office in Peterborough.'

Given what I say above, acting fairly and reasonably, Options should've 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've reached the same conclusion had it taken this action at the outset of its relationship with Caledonian. And it certainly should've done so, to act fairly and reasonably to meet its regulatory obligations and standards of good practice.

In Mr P's case, although his permanent address in 2012 was in the UK, he said he was working abroad when he had a meeting with Caledonian. And, although Caledonian had a UK address, the correspondence I've seen in Mr P's case uses an address in Switzerland. So, it seems unlikely that Caledonian carried out regulated activities in the UK in relation to Mr P's case. But that doesn't mean that, in the interests of its customer, Options shouldn't have taken steps to establish the regulatory regime or regimes Caledonian was operating under. I think it's also fair to say that in relation to other applications, from customers other

than Mr P, Options ought to have been aware that regulated activities were taking place in the UK. And if Options had developed that awareness, as I believe it should have, through taking appropriate steps at the start of its relationship with Caledonian, then Options should've declined to enter a relationship with Caledonian at all or at least ended its relationship with Caledonian before accepting Mr P's application. I think this was the only fair and reasonable step it could take in the circumstances.

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. Mr P was working for a private security company when he met Caledonian.

There was therefore no reason to think the typical client Caledonian proposed to introduce to Options had a good understanding of pensions or was in a position to work out for themselves if a pension transfer was in their best interests. They'd 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 transfer of defined benefit pensions are usually not in 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, but there's also no evidence they had any relevant qualifications. The only qualification of any kind which was mentioned was that Mr C of Caledonian was a qualified accountant.

I've 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've seen no evidence Options took any action until 26 April 2013 when it 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 qualifications or capabilities.

Again, this (along with the other points of query raised at the time) was a point which led to Options concluding it shouldn't accept further applications from Caledonian unless they came through a UK IFA with permission 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've reached the same conclusion had it taken this action at the outset of its relationship with Caledonian. And it certainly should've 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've seen no evidence to show Caledonian followed such a process. In my opinion it would've 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 whether a reasonable process was in place it would've 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.

The reference by Options 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 concluding it shouldn't accept further applications from Caledonian except through a UK IFA with permission 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've reached the same conclusion had it taken this action at the outset of its relationship with Caledonian. And it should've 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 Caledonian would introduce 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've 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've set out here.

Firstly, it's 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's no evidence to show it had the significant resources this would require.

Further, Options should've been aware of the very low likelihood that the transfers would all be suitable. At the outset of the relationship between Options and Caledonian (and at the time of Mr P's application) COBS 19.1.6G said:

'When advising a retail client who is, or is 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 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 P.

Commission

I also think the level of commission that was being paid to Caledonian should've 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 with Caledonian. As noted earlier in my findings, there's 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 P. And of course it was further reason to consider Caledonian might be giving advice, as commission at this level would've 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, to comply with its own compliance procedures, it needed the accounts.

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've met its own standards and should've 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 about whether to enter into business with Caledonian, such as, for example, information about the nature, volume and location of Caledonian's business, and its resources to carry on that business.

It is notable that Options accepted and set up Mr P'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's 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 shouldn't accept business from Caledonian, including Mr P's application. I therefore conclude that it is fair and reasonable in the circumstances to say Options shouldn't have accepted Mr P's application from Caledonian.

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

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

I acknowledge Mr P was asked to sign a member's declaration. I note this document gives warnings about the loss of benefits that would result in the transfer to the SIPP. And the indemnities sought to confirm that Mr P wouldn't 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 P's instructions.

Asking Mr P to sign a declaration absolving Options of all its responsibilities when it ought to have known that Mr P'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 P having 'received full and appropriate advice from Caledonian International' where, for the reasons I've given, Options ought to have been aware Caledonian didn't have the competency to give such advice and there were questions about its motivations and integrity.

Asking Mr P 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 P should simply not have been able to proceed, as his application should simply not have been accepted.

Fair compensation

I note Options says, in its response to the Investigator's view, that it's evident that Mr P wished to transfer his pension, whether through Options or another provider and would therefore have suffered the same loss as he did even if it had rejected his application.

I've seen no evidence to show that Mr P would've proceeded even if Options had rejected his application. He encountered Caledonian at his workplace where he said his colleagues had been approached by Caledonian. And his representative said Caledonian approached Mr P – which was consistent with Caledonian's business model of contacting ex-servicemen

and encouraging them to consider transferring out of their pensions. I've seen nothing to suggest he was looking to make a transfer prior to that contact. And Mr P has said he was unsure about transferring but went ahead because he trusted Caledonian as 'the professional'.

I haven't, in any event, seen any evidence that any other SIPP operator dealt with Caledonian. And any operator acting fairly and reasonably should've reached the conclusion that it shouldn't deal with Caledonian. I don't think it'd be fair to say Mr P shouldn't be compensated based on speculation that another SIPP operator might have made the same mistakes as Options.

For similar reasons, I'm not persuaded Mr P shouldn't be compensated by Options, or his compensation should be reduced, because I haven't made the finding that the FPI bond investment, in itself, was not something Options should have accepted. Or because the benefits from Mr P'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 wouldn't have proceeded at all. So no transfer request or FPI bond investment would have been made.

So, I'm satisfied that Options' failure to comply with its regulatory obligations and industry best practice at the relevant time have led to Mr P suffering a loss to his pension. And my aim is therefore to return Mr P to the pension position he would 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.'

Putting things right

In light of my above findings, I require that Options calculate fair compensation by comparing the current position to the position Mr P would be in if he hadn't transferred from his existing pension. In summary, Options should:

1. Calculate the loss Mr P has suffered as a result of making the transfer.
2. Take ownership of any investments which can't be surrendered, if possible.
3. Pay compensation for the loss into Mr P's pension. If that's not possible, pay compensation for the loss to Mr P direct. In either case the payment should take into account necessary adjustments set out below.
4. Pay Mr P £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 set out at 1-3 above in further detail below.

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

In my view Options should calculate this loss in line with The FCA's pension review guidance, in line with the latest guidance in FG17/9, using the most recent financial assumptions published.

I am aware that on 2 August 2022, the FCA launched a consultation on changes to this guidance and has set out its proposals in a consultation document - <https://www.fca.org.uk/publication/consultation/cp22-15.pdf>

In this consultation, the FCA said that it considers that the current methodology in FG17/9 remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

Nevertheless, the basic objective of the proposed amendments still remains to put a consumer, as far as possible, into the position they would be in if the business had advised them to remain in the DB scheme.

A policy statement was published on 28 November 2022 which set out the new rules and guidance – <https://www.fca.org.uk/publication/policy/ps22-13.pdf>. The new rules will come into effect on 1 April 2023.

The FCA has said it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 for the time being. But until changes take effect, firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mr P whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance /rules to come into effect.

He didn't make a choice. So, as set out previously, I've assumed in this case he doesn't want to wait for the new guidance to come into effect.

I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr P.

If the complaint hasn't been settled in full and final settlement by the time the new rules and guidance come into effect, I'd expect Options to carry out a calculation in line with the updated rules and guidance in any event.

(2) Take ownership of any investments held within the SIPP which cannot be surrendered

In order for the SIPP to be closed and further SIPP fees to be prevented, the investment(s) need(s) to be removed from the SIPP. To do this, Options should calculate an amount it is willing to accept as a commercial value for any investments that cannot be surrendered and pay that sum into the SIPP and take ownership of the relevant investments. This amount should be taken into account for the loss calculation.

If Options is unwilling or unable to purchase the investment(s) the value of them should be assumed to be nil for the purposes of the loss calculation if the investments are not readily realisable (or for any portion of the investments which is not readily realisable). I appreciate such investments may have a realisable value in the future. So, for any investments assumed to be nil value Options may ask Mr P to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from those investment(s) in the future. That undertaking should allow for the effect of any tax and charges on the amount Mr P may receive from the investment(s) and any eventual sums he would be able to access. Options should meet any costs in drawing up the undertaking.

If Options doesn't take ownership of the investment(s), and it/they continue to be held in Mr P's SIPP, there will be ongoing fees in relation to the administration of that SIPP. Mr P

wouldn't be responsible for those fees if Options hadn't accepted the transfer of his occupational pension into the SIPP. So, I think it's fair and reasonable for Options to waive any SIPP fees until such time as Mr P can dispose of the investment(s) and close the SIPP.

(3) Pay compensation to Mr P for loss he has suffered calculated in (1)

Since the loss Mr P has suffered is within his pension it is right that I try to restore the value of his pension provision if that is possible. So, if possible, the compensation for the loss should be paid into his SIPP. The compensation shouldn't be paid into the pension if it would conflict with any existing protection or allowance. Payment into the pension should allow for the effect of charges and any available tax relief. This may mean the compensation should be increased to cover the charges and reduced to notionally allow for the income tax relief Mr P could claim. The notional allowance should be calculated using Mr P's marginal rate of tax.

On the other hand, Options may not be able to pay the compensation into the SIPP. If so compensation for the loss should be paid to Mr P direct. But had it been possible to pay the compensation into the pension, it would have provided a taxable income.

Therefore, the compensation for the loss paid to Mr P should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr P's marginal rate of tax in retirement. For example, if Mr P is likely to be a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr P would have been able to take a tax-free lump sum, the notional allowance should be applied to 75% of the total amount.

(4) Pay Mr P £500 for the distress and inconvenience caused by the failure to act fairly and reasonably

Mr P transferred his pension away from a valuable defined benefits pension to a SIPP and had to suffer the loss of those benefits. Mr P said the pension was his only pension at the time. I think it's fair to say this would've caused Mr P some distress and inconvenience. So, I consider that a payment of £500 is appropriate to compensate for that upset.

The compensation resulting from the loss assessment must where possible be paid to Mr P within 90 days of the date Options receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of this final decision to the date of settlement for any time, in excess of 90 days, that it takes Options to pay Mr P this compensation.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

Income tax may be payable on any interest paid. If Options deducts income tax from the interest, it should tell Mr P how much has been taken off. Options should give Mr P a tax deduction certificate in respect of interest if Mr P asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

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 P 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 P is paid to him. Options should only benefit from the assignment once Mr P 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, whilst I acknowledge that the value of Mr P's original investment was within our award limit, for completeness I have included information below about what ought to happen if fair compensation amounts to more than our award limit.

Decision and award: I uphold the complaint. Fair compensation should be calculated as shown above. My decision is that Options UK Personal Pensions LLP should pay Mr P 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) plus interest at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Options to pay Mr P this compensation.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that Options pays Mr P 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 P can accept my decision and go to court to ask for the balance after the money award has been paid. Mr P may want to get independent legal advice before deciding whether to accept this decision.

If Options UK Personal Pensions LLP agrees to pay the full calculated redress, and elects to take an assignment of rights before paying compensation, it must first provide a draft of the assignment to Mr P for his consideration and agreement. Any expenses incurred for the drafting of the assignment should be met by Options UK Personal Pensions LLP.

My final decision

For the reasons given, my final decision is that I uphold this complaint. To put things right Options UK Personal Pensions LLP must calculate and pay Mr P the award set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 21 April 2023.

Lucinda Puls
Ombudsman