

The complaint

Mrs E complains that Options UK Personal Pensions LLP ('Options') shouldn't have accepted her application to transfer her defined benefit pension into a self-invested personal pension ('SIPP') and invest her funds in a Friends Provident International ('FPI') bond. She wants Options to put her back in the position she would've been in had Options not accepted her application.

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

Background

I've set out below the parties involved in Mrs E'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. Mrs E 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

Mrs E had a deferred defined benefit pension from her time working for the Armed Forces. In 2012 she lived in the UK.

Mrs E said she hadn't been thinking of changing her pension, but a former colleague from the Armed Forces told her he'd been talking to Caledonian about transferring. Mrs E thought *'it sounded interesting to get some more facts'* and she decided to contact Caledonian *'for some advice'*.

Mrs E said Caledonian visited her at home and told her she'd have a much better pension if she transferred. And she recalled being shown some paperwork showing expected growth. She said Caledonian talked about high returns and the ability to draw down earlier. She said Caledonian also said there was a time limit to transfer her pension before it was *'frozen'* and if she missed an upcoming deadline she wouldn't be able to transfer.

She said she had no experience in investments and she trusted Caledonian. Her understanding was that Caledonian *'would be our 1 to 1 contact and advisor that would be able to discuss the SIPP at any time and would visit us face to face annually to discuss. Or sooner if any concerns'*. In relation to risk Mrs E said it: *'Seemed very low risk and almost a guaranteed solid investment that would grow our frozen pension considerably [compared] to leaving [it] in [the] military scheme.'*

She said Caledonian sent her pre-populated forms to sign for the Options SIPP and the FPI investment.

Mrs E signed the following documents which were dated 1 June 2012:

- An application form for an Options SIPP requesting to transfer her pension entitlement from the Armed Forces Pension Scheme to an Options SIPP and to invest the funds in the SIPP in FPI. Part of the application was completed by hand. The instruction to invest funds in FPI was typed into the form. The form said amongst other things that Mrs E was a direct client who hadn't received advice and that Options hadn't given advice and Options wasn't responsible for Mrs E's investment decisions. And it recommended Mrs E seek advice. It showed Mrs E's residential address was in the UK and her occupation was *'homemaker'*.
- A member's declaration which listed Mr C of Caledonian as *'Adviser'* and was signed by Mr C in the field designated for the *'Adviser'*. The declaration said, amongst other things:

'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.'

- A declaration saying Mrs E wanted to transfer from the Armed Forces Pension Scheme to an Options SIPP, and saying she understood that: she was forfeiting a

defined benefit; her pension and death benefits under an Options SIPP would depend on investment performance; benefits might be less than those of the Armed Forces Pension Scheme; and Options hadn't given advice and would provide an execution-only service

- A letter of authority giving permission for Options to give Caledonian any information Caledonian might request about Mrs E's SIPP and the purchase of investments in the SIPP. The letter gave an address in Switzerland for Caledonian
- An '*urgent memorandum*' to the Armed Forces Pension Scheme saying she wanted to transfer her pension to an Options SIPP and asking that the relevant papers be sent to Options
- A fee schedule showing SIPP fees that would be charged by Options and Caledonian

Options said it received Mrs E's application on 14 June 2012. On 15 June 2012 Options emailed Mrs E to acknowledge receipt of her application. And it forwarded the acknowledgement to Caledonian. Options said it had established Mrs E's SIPP that day.

Also on 15 June 2012 Options requested the Armed Forces Pension Scheme transfer Mrs E's pension to Options. It enclosed the urgent memorandum that Mrs E had signed.

In July 2012 the Armed Forces Pension Scheme sent Options some forms for Mrs E to complete. Options forwarded the forms to Caledonian for signing by Mrs E.

On 31 July 2012 nearly £34,000 was transferred to Mrs E's SIPP from the Armed Forces Pension Scheme.

On 1 August 2012 Options emailed Mrs E, copying the message to Caledonian. It said it had received her pension funds and would now make the FPI trustee application in accordance with her instructions. An application form for FPI named Caledonian as the financial adviser firm and the investment adviser firm. And it said Caledonian's address was in Chile.

Also on 1 August 2012 Options emailed Caledonian asking it to confirm Mrs E's rank.

On 3 August 2012 nearly £32,000 was invested in FPI by Options on Mrs E's behalf.

On 20 September 2012 FPI wrote to Options with details of Mrs E's investment. And it said it had paid commission of 7%, which was nearly £4,000, to Caledonian for introducing the policy to FPI.

On 26 March 2013 Options wrote to Mrs E as follows:

*'Further to our email notification sent on 11th January 2013 with regards to the appointment of [Business C] as your on-going Discretionary Investment Manager who will be working alongside **your Advisor, Caledonian Associates**, I am attaching your investment Report pack received from [Business C]. (my emphasis)'*

An information booklet was provided with branding from both Caledonian and Business C. It said that over the past year Caledonian had been reviewing the way it managed investments for its clients and had decided to engage the specialist skill of a professional fund management group to review, select and monitor Caledonian's clients' assets. It said Caledonian's relationship with Mrs E wouldn't change, and Caledonian was '*simply offering you a more exclusive investment proposition where experienced, specialist investment managers will be reviewing your assets on a daily basis to ensure that your individual*

expectations are met. It said *'...we strongly believe that this will enhance your investments positions both now and in the future'*. The booklet included an investment strategy and solution which had been *'created and provided with the specific aim of achieving the desired outcome and target returns'*.

On 22 July 2013 Options sent Mrs E the first annual report for her SIPP. The cover letter said if she had any questions she should contact her adviser.

Mrs E told us:

'We did not really understand the investments or statements sent to us once invested. Questioned a few times but the face to face personal advisor seemed to vanish and could not contact them. Quite early the money seemed to be decreasing from what I could see but hard to understand whenever sent anything.'

On 16 January 2019 Mrs E completed an Options form to transfer her entitlements out of her Options SIPP and into an account with a different pension provider. Options transferred part of the value of her pension. Some of the investments in her SIPP appear to have been suspended. On the transfer form Mrs E wrote that the reason for the transfer was:

'Overall service and updates seems to have deteriorated and the scheme seems to always lose money in the whole time.'

Mrs E's complaint

In January 2020 Mrs E complained to Options, via a representative. In summary, her representative said Mrs E made the transfer and investment on advice from Caledonian and Options was responsible for her losses because it failed to identify the risks in Mrs E's introduction from an overseas adviser who advised her to transfer entitlements out of a defined benefit pension. And if Options had acted in accordance with the FCA's Principles for Businesses, Mrs E wouldn't be in the position she was now in.

In March 2020 Options replied to Mrs E's complaint and didn't uphold it. In summary, Options said the following:

- Options provided execution-only services and made Mrs E aware of that.
- Options treated Mrs E as a direct client and wasn't aware she received any advice.
- COBS 11.2.19 obligated Options to carry out Mrs E's instruction to facilitate the pension transfer and invest the funds in the FPI investment.
- Options wasn't prohibited from dealing with unregulated introducers.
- Options did due diligence on Caledonian and had, at the time, no reason to refuse introductions from Caledonian.
- Options didn't and wasn't permitted to give advice.
- Options gave Mrs E sufficient warnings and recommended she take advice.
- Mrs E didn't tell Options she was advised by Caledonian.
- Caledonian wasn't known to Options as an advice firm and Options wasn't aware that Caledonian held itself out as an advice firm.

Mrs E referred her complaint to this service in March 2020 via her representative. She said it was her understanding that she had received advice from Caledonian and Options shouldn't have accepted her SIPP application.

The relationship between Options and Caledonian

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

Options 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 Mrs E'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 ...'

By **27 April 2012** Options had 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 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	<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> <i>It was also noted that the funds for investment within the SIPP were to be generated from:</i> <i>'Transfers from Armed Forces Pension occupational scheme'</i>	High
Client profile	<i>'Client Profile: 30-50 years old. Part of armed forces 6-10 years. Generally still UK residents, some abroad.'</i> <i>Now working in security earning c. £70k pa. HOWEVER, recently reviewed business outside of profile.'</i>	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 Caledonian's 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 was 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 [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' CEO] 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

One of our Investigators considered Mrs E's complaint and said it should be upheld. He acknowledged that Options as the SIPP operator wasn't responsible for assessing the suitability of any advice Mrs E may have received. But the Investigator said Options was responsible for due diligence on Caledonian as an introducer of business to Options. The Investigator said that based on what was known about Caledonian's business model, Options should've refused Mrs E's SIPP application.

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

Neither Mrs E nor Options responded to the Investigator's view. Because no agreement could be reached, Mrs E's complaint was passed to me to review afresh and make a decision.

Prior to my consideration of the complaint and the evidence both parties have provided, one of our Investigators wrote to both parties to address some outstanding issues. The investigator explained that our view of the complaint hadn't changed but that he was providing information about additional considerations. In summary the Investigator said the following:

- Mrs E's complaint wasn't out of time because the Investigator had seen no reason to think Mrs E knew, or ought to have known, about her cause for complaint about Options more than three years before she complained.
- The judgements in *Adams v Options SIPP* [2020] EWHC 1229 (Ch) and *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474 don't mean the Principles

shouldn't be taken into account in deciding this case. And there are differences between Mrs E's complaint and the issues pleaded in the Adams cases.

- Because the Investigator had taken the view that Caledonian carried on the regulated activities defined in Articles 53 and 25 of the Regulated Activities Order, sections 27 and 28 of FSMA offered a further and alternative basis on which it would be fair and reasonable to conclude Mrs E's complaint should be upheld.
- Having taken into account the Court of Appeal's supplementary judgment in *Adams*, insofar as that judgment deals with restitution/ compensation, it wouldn't be fair to say Mrs E's actions mean she should bear the loss arising as a result of Options' failings.
- It would be fair and reasonable to require Options to pay Mrs E £500 for the distress and inconvenience caused by Options' failings because Mrs E would've been worried about having lost valuable defined pension benefits due to a transfer which had caused her significant financial loss, and because Options hadn't done anything to mitigate the loss for Mrs E.

Neither Mrs E nor Options responded to the supplementary view from the Investigator.

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.

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

Having done so, I'm upholding Mrs E's complaint. I'll explain why.

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.

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.

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

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 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 had 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. 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 Mrs E'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 Mrs E'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 Mrs E'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 Mrs E.

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 Mrs E 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 relieviable 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 Mrs E'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 Mrs E. I accept Options wasn't required to advise Mrs E, and couldn't advise her. 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

Taking into account the evidence of Options' relationship with Caledonian, mentioned above, I've considered what due diligence Options ought to have undertaken and what it ought to have concluded about Caledonian's business.

The 2009 Thematic Review Report dealt specifically with the relationships between SIPP operators and introducers or '*intermediaries*'. And it gave 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 think it's fair and reasonable to say that Options should've obtained a full understanding of Caledonian's business model and put in place a clear agreement with Caledonian addressing the risk generally posed to consumers by the introducer.

Although I think Options understood and accepted it had a responsibility to carry out due diligence on Caledonian (as shown by the opening statement of its '*Non-Regulated Introducer Profile*'), I don't think it identified as it should have several issues which ought to have given it cause for concern until it was too late, and it had already accepted Mrs E's application.

Whilst I accept Options did take some steps which could be argued amounted to good practice consistent with its regulatory obligations, I think, with its regulatory obligations and good industry practice in mind, Options ought to have done more at the outset of its relationship with Caledonian. And Options didn't, in any case, draw fair and reasonable conclusions from the information available to it by the time of Mrs E's application. And, had Options done more at the outset and/or drawn fair and reasonable conclusions from what it knew, it ought in my view to have concluded that it shouldn't accept Mrs E's application from Caledonian.

It follows that it's fair and reasonable to uphold Mrs E's complaint.

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

I've set out my findings in more detail below.

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

Advice

I note Options has said it did not become aware that Caledonian was giving advice to Options' clients. 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.

I note that in this case Options was, in correspondence with Mrs E in March 2013, referring to Caledonian as 'your Advisor' – suggesting it was aware and accepted that Mrs E had been advised by Caledonian to open the Options SIPP, transfer her Armed Forces Pension and invest with FPI.

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, that 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 (often 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 Mrs E 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 Mrs E had not been advised, they said in most instances that *Options* hadn't advised Mrs E, rather than that *Caledonian* hadn't advised Mrs E.

Taking account of the available evidence I consider that, in this case, Caledonian did provide advice to Mrs E on the merits of transferring her pension to the SIPP and investing in the FPI bond. It appears more likely than not that Caledonian recommended to Mrs E that she transfer her occupational pension and make the FPI investment. Mrs E said Caledonian told her the transfer and investment would be financially advantageous to her, compared with leaving the pension where it was. And Mrs E transferred to the same SIPP and made the same investment as many other consumers who Caledonian introduced – the SIPP and investment that Caledonian had said it was '*putting*' its customers '*into*'.

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

Arranging

It is also clear from what Options was told by Caledonian at the outset – and from the available evidence in this complaint and others – that Caledonian was heavily involved in the

arrangement of the transfer out of Mrs E'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 Mrs E to Options and leaving it to her to proceed with the application. It was involved in arranging the transfer out of Mrs E's existing pension to the SIPP, the setting up of the SIPP and in arranging the FPI bond and associated investments. Caledonian sent Mrs E pre-populated forms. Caledonian was authorised by Mrs E to receive any information it requested from Options about Mrs E's SIPP and investment. And Options asked Caledonian for information as required, as the application progressed.

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

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 Mrs E'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.

But 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 most instances could have been given in Jordan when, by Caledonian's own account, it had a number of offices around the world (none of which were in Jordan), it was dealing with consumers who '*were generally still resident in UK*' or '*living abroad in various countries*' and it said elsewhere that it was carrying out business in various jurisdictions.

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

I think Options should'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 was not until 10 May 2013 when Options finally challenged Caledonian on this point (amongst others):

'Can you provide your organisational structure and the jurisdiction in which each is registered and the regulation/regulator that each company operates within. If you are relying on any exemptions please state which exemptions and the reasons you believe you can operate within those exemptions

What offices do you have and where, do the jurisdictions in which you have offices have a regulatory regime, if so can you provide details of the regulators in those jurisdictions.

Do you meet all your clients in Jordan, if not why do your Non Solicitation forms signed by yourself confirm the advice was given in Jordan

On the Non Solicitation letters you note that Caledonian does not have a permanent place of business in the UK. However, you request correspondence to be sent to The Pensions Service Centre, [UK city]. Please can you clarify Caledonian's presence in the UK and the nature of the office in [UK city].'

Given what I say above, acting fairly and reasonably, Options should'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 have done so, to act fairly and reasonably to meet its regulatory obligations and standards of good practice.

In Mrs E's case I'm satisfied Caledonian carried out the activities in the UK. Mrs E's home address at the relevant time was in the UK and her occupation was homemaker. Mrs E told us Caledonian came to her home to meet with her. And I've seen nothing to suggest Mrs E met with Caledonian or was advised by them in any other jurisdiction than the UK. Had Options sought clarification from Mrs E, which would've been a reasonable course of action in the circumstances, I think Mrs E would likely have confirmed that she was located in the UK during her dealings with Caledonian. And, for all the reasons I've mentioned, Options should in any event have concluded before it received Mrs E's application that it was possible Caledonian was carrying out activities in the UK.

Regulated activities in the UK

Under Article 53 of the RAO (as set out in the version that was current at the relevant time) the following are regulated activities:

Advising a person is a specified kind of activity if the advice is—

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

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

- (1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is—*
 - (a) a security,*
 - (b) a relevant investment, or*
 - (c) an investment of the kind specified by article 86, or article 89 so far as relevant to that article, is a specified kind of activity.*
- (2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a), (b) or (c) (whether as principal or agent) is also a*

specified kind of activity

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

Rights under a personal pension scheme are a security. The investments made in the FPI bond – which Caledonian itself described as *'regulated'* – were also securities or relevant investments. Finally, the FPI bond was a contract of insurance, and rights under a contract of insurance were also a relevant investment.

As set out above, I'm satisfied Caledonian gave advice and made arrangements. The activities it undertook clearly meet the above definitions. The arrangements it made brought about the transactions (the transfer out of Mrs E's existing pension into the SIPP, the opening of the FPI bond within the SIPP and the making of investments within that bond). The arrangements had that direct effect. And advice was given on the merits of transferring out of Mrs E's existing scheme to the SIPP in order to invest in the FPI bond – Mrs E said Caledonian advised her that she'd be better off transferring to invest in the FPI bond.

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

Pausing here for a moment, as I note above when summarising my findings, these points about the activities Caledonian was undertaking, where it was undertaking them, and its authorisation to undertake them, are ones Options should've considered individually and cumulatively. And, to be clear, I think the fact Caledonian was carrying out regulated activities without authorisation was enough reason, in itself, for Options to have concluded that it shouldn't accept applications from Caledonian.

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

Caledonian's expertise

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

There was therefore no reason to think 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 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 SIPP's 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 should *not* accept further applications from Caledonian unless they came through a UK IFA with permissions to give pension transfer advice – a restriction which had the effect of no further business being introduced by Caledonian. And I think it fair to say Options would'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 Mrs E'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 Mrs E.

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 Mrs E. 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, by 27 April 2012 Options was 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 Mrs E'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 Mrs E's application. I therefore conclude that it's fair and reasonable in the circumstances to say Options shouldn't have accepted Mrs E's application from Caledonian.

Did Options act fairly and reasonably in proceeding with Mrs E's instructions?

In my view, for the reasons given, Options simply should've refused to accept Mrs E'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 Mrs E's application.

I acknowledge Mrs E 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 Mrs E 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 Mrs E's instructions.

Asking Mrs E to sign a declaration absolving Options of all its responsibilities when it ought to have known that Mrs E's dealings with Caledonian were putting her at significant risk was not the fair and reasonable thing to do. I also note that the declaration was based on Mrs E 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 Mrs E to sign declarations was not an effective way for Options to meet its regulatory obligations, given the concerns Options ought to have identified about her introduction. So, it wasn't fair and reasonable to proceed, on the basis of these. I make this point only for completeness – the primary point is Mrs E should simply not have been able to proceed, as her application should simply not have been accepted.

Furthermore, as set out above (and I detail below), I am satisfied section 27 of FSMA offers a further and alternative basis on which it would be fair and reasonable to conclude Mrs E's complaint should be upheld.

Section 27 and section 28 of FSMA

I have set out the key sections of section 27 and section 28 above and have considered them carefully, in full. In my view I need to apply a four-stage test to determine whether section 27 applies and whether a court would exercise its discretion under section 28, as follows:

1. Whether an unauthorised third-party was involved
2. whether there is evidence that the third-party acted in breach of the general prohibition in relation to the particular transaction and, if so
3. whether the customer entered into an agreement with an authorised firm in consequence of something said or done by the unauthorised third-party in the course of its actions that contravened the general prohibition, and
4. whether it is just and equitable for the agreement between the customer and the authorised firm to be enforced in any event.

Test 1 is clearly satisfied here – Caledonian was an unauthorised third party. Test 2 is also satisfied – for the reasons I have set out above, I am satisfied Caledonian carried out activities in breach of the general prohibition – and any one regulated activity is sufficient for these purposes so this test would be met if Caledonian had only undertaken arranging (which, for the reasons I have set out, I do not think is the case). Test 3 is satisfied too – the SIPP was opened in consequence of the advice given, and arrangements made, by Caledonian. That brings me to the final test, 4. Having carefully considered this, I am satisfied a court would not conclude it is just and equitable for the agreement between Mrs E and Options to be enforced in any event. I think very similar reasons to those mentioned by the Court of Appeal in the *Adams* case apply here:

- A key aim of FSMA is consumer protection. It proceeds on the basis that, while

consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard consumers from their own folly.

- While SIPP providers were not barred from accepting introductions from unregulated sources, section 27 of FSMA was designed to throw risks associated with doing so onto the providers. Authorised persons are at risk of being unable to enforce agreements and being required to return money and other property and to pay compensation regardless of whether they had had knowledge of third parties' contraventions of the general prohibition.
- For all the reasons set out above, Options should have concluded Caledonian was giving advice or have suspected it was (and it seems it did belatedly draw this conclusion); and giving advice to consumers who were not necessarily financially sophisticated.
- As set out above, Options was aware, or ought to have been aware that:
 - Caledonian's staff 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 Mrs E were therefore unable to make a fully informed decision about the transfer to the SIPP and investment.
 - Caledonian proposed/brought a high volume of business.
 - Caledonian took a high level of commission, which it may not have disclosed.
 - Caledonian had failed to provide its company accounts, despite repeated requests for copies of them by Options.
- The investment did not proceed until long after all these things were known to Options and so it was open to it to decline the investment, or at least explore the position with the consumer.

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

Fair compensation

I've considered whether Mrs E would've transferred her pension, either through Options or another provider, and would therefore have suffered the same loss as she did, even if Options had rejected her application.

I've seen no evidence to show that Mrs E would've proceeded if Options had rejected her application. Although it seems Mrs E initiated contact with Caledonian, Mrs E said she hadn't thought of changing her pension before she became aware of Caledonian's discussions with her colleague. She said she sought advice from Caledonian and her decision to transfer was based on advice from Caledonian about how her pension would perform if she transferred and invested it compared with what Caledonian said she would have if she didn't transfer. Mrs E said she had no investment experience and didn't understand investments. She relied on the expertise of Caledonian and on arrangements that were made by Caledonian rather than by Mrs E herself. So I don't think Mrs E was sufficiently determined to make the transfer and the investment that she would've done so even if Options had refused to facilitate it.

I have not, in any event, seen any evidence that any other SIPP operator dealt with Caledonian. And any operator acting fairly and reasonably should've reached the conclusion that it shouldn't deal with Caledonian. I don't think it'd be fair to say Mrs E 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 Mrs E shouldn't be compensated by Options, or her 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 Mrs E'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 Mrs E suffering a loss to her pension. And my aim is therefore to return Mrs E to the pension position she would now be in but for Options' failings.

Putting things right

My aim is to return Mrs E to the position she would now be in but for what I consider to be Options' failure to carry out adequate due diligence checks before accepting her SIPP application. I appreciate that Options might not think Mrs E has suffered a loss. But it can't know that until the requisite calculations have taken place. And I doubt very much that the benefits Mrs E will get from the SIPP are equivalent to what she would've got from her occupational pension.

In light of the above, I require that Options calculate fair compensation by comparing the current position to the position Mrs E would be in if she had not transferred from her existing pension.

In summary, Options should:

1. Calculate the loss Mrs E 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 to Mrs E.
4. Pay Mrs E £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 Mrs E has suffered as a result of making the transfer ('the loss calculation')

I consider Mrs E would have remained in her existing occupational pension if Options hadn't accepted her application. Options must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4: <https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter>.

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

I note that it appears that investments held in Mrs E's pension were disinvested in 2019 and transferred to another pension provider. When calculating Mrs E's loss, the current value of any assets transferred should be obtained from Mrs E's new provider and be taken into account in any loss calculation done in accordance with the FCA's rules/guidance if applicable. If any investments remain in the Options SIPP/the Options SIPP is still open, that situation should be dealt with in accordance with (2) below.

(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 Mrs E 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 Mrs E may receive from the investment(s) and any eventual sums she would be able to access. Options should meet any costs in drawing up the undertaking and any reasonable costs for advice required by Mrs E to approve it.

If Options doesn't take ownership of the investment(s), and it/they continue to be held in Mrs E's SIPP, there will be ongoing fees in relation to the administration of that SIPP. Mrs E wouldn't be responsible for those fees if Options hadn't accepted the transfer of her occupational pension into the SIPP. So, I think it's fair and reasonable for Options to waive any SIPP fees until such time as Mrs E can dispose of the investment(s) and close the SIPP.

(3) Pay compensation to Mrs E for loss she has suffered calculated in (1)

If the redress calculation in (1) demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Options must:

- always calculate and offer Mrs E redress as a cash lump sum payment,
- explain to Mrs E before starting the redress calculation that:
 - her redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
 - a straightforward way to invest her redress prudently is to use it to augment her DC pension
- offer to calculate how much of any redress Mrs E receives could be augmented rather than receiving it all as a cash lump sum,
- if Mrs E accepts Options' offer to calculate how much of her redress could be augmented, request the necessary information and not charge Mrs E for the

calculation, even if she ultimately decides not to have any of her redress augmented, and

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

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

Pay Mrs E £500 for the distress and inconvenience caused by Options' failure to act fairly and reasonably

Mrs E transferred her pension away from a valuable defined benefits pension to a SIPP and had to suffer the loss of those benefits.

I think it's fair to say this would've caused Mrs E some distress and inconvenience. She will clearly have been worried that her retirement provision will have been reduced. So, I consider that a payment of £500 is appropriate to compensate for that upset.

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 Mrs E should be contingent on the assignment by her to Options of any rights of action she may have against other parties in relation to her 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 Mrs E is paid to her. Options should only benefit from the assignment once Mrs E has been fully compensated for her loss. Options should cover the reasonable cost of drawing up, and Mrs E's taking advice on and approving, any assignment required.

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 don't know what award the above calculation might produce. So, whilst I acknowledge that the value of Mrs E'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. I think that fair compensation should be calculated as shown above. It's my final decision that I require Options UK Personal Pensions LLP to pay Mrs E the amount produced by that calculation – up to a maximum of £160,000 (including the £500 to compensate for the distress and inconvenience Options' actions caused).

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

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 Mrs E the award set out above.

Lucinda Puls
Ombudsman