DRN-4552566

The complaint

Mr D complains that Options UK Personal Pensions LLP (formerly Carey Pensions) ('Options') shouldn't have accepted a transfer of his occupational pension scheme into a self-invested personal pension ('SIPP'). He wants to be put back into the position he would have been if Options had not accepted his transfer.

Mr D is represented by a claims management company, but for the purposes of this decision, I will refer to Mr D directly. There are also a number of entities involved in Mr D's transfer and subsequent investments, so I've set out a summary of each below.

The entities involved

Options UK Personal Pensions LLP

Options is a SIPP provider and administrator. It was regulated by the FSA at the time of the events complained about – now the FCA. It was – and still is – authorised to arrange (bring about) deals in investments; deal in investments as principal; establish, operate and wind up a personal pension scheme; and make arrangements with a view to transactions in investments.

Caledonian

Caledonian was the trading name of MMG Associates which was registered in the British Virgin Islands. Caledonian wasn't authorised in the UK to undertake regulated activities and it doesn't appear on the FCA's Financial Services Register. There is no evidence it was authorised to carry out such activities in any other jurisdiction.

Business C

Business C is an investment manager based in the Isle of Man. The evidence is that Business C agreed to manage or provide oversight of investments taken out by Caledonian's customers after they had transferred their pensions. I shall call the individual representing Business C, who is mentioned in this decision, Mr P.

Friends Provident International (FPI)

FPI is registered and regulated in the Isle of Man. It provided a bond wrapper which allowed investment in several funds with different fund providers. Mr D invested in a few investments within that bond.

What happened

In late 2012, Mr D met with a representative of Caledonian International Associates. The representative made promises of providing a higher return on his pension than Mr D's current scheme. As a result, Mr D transferred his Armed Forces pension to an Options SIPP.

I'll set out below a high-level background to what happened, although as the parties are both fully aware of the details to this complaint, I don't intend to repeat everything that has already

been rehearsed in correspondence between them and set out in our investigator's opinion.

Mr D had a defined benefit Armed Forces occupational pension following his time in military service. In 2012, Mr D was resident in the UK. He was approached by a representative of Caledonian and agreed to meet with them at his UK home where he was told he'd have a much better pension if he transferred it to a SIPP.

Mr D was not an experienced or sophisticated investor and had no financial expertise, but he believed the representative was acting in his best interests and so he trusted their advice. Having been told the transfer would be "a no brainer" and risk free, he agreed to transfer his pension.

Mr D signed the pre-completed paperwork in December 2012. The new SIPP was set up in January 2013 and the subsequent transfer was completed in March 2013. The investment into a bond wrapper provided by FPI was completed in the same month.

In 2016, Mr D became concerned about the value of his pension as he did not think it was performing as well as he had been promised. And so, after consulting with an Independent Financial Adviser (IFA), Mr D transferred his pension to another provider.

In early 2021, after ex-colleagues raised concerns regarding their transfers, Mr D contacted his representative to establish if he had a claim. Following some investigations, a complaint to Options was made in March 2021.

Mr D is unhappy because he thinks that Options should have recognised that Caledonian had been providing him with advice to transfer a defined benefit pension to a SIPP, something that the regulator, the Financial Conduct Authority ('FCA'), views in most instances to be inherently unsuitable. Mr D was unaware that Caledonian wasn't regulated by the FCA (then the Financial Services Authority ('FSA')) to provide financial advice and thinks Options should have made him aware of the risks of this. Options, as a regulated entity, had a duty of care to Mr D and so should not have accepted the transfer.

Options investigated Mr D's complaint and issued its final response in May 2021 rejecting it. In summary, it said:

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

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

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

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

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

- Options undertook due diligence on Caledonian and had no reason to believe that it should not accept introductions from this business.

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

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

Ultimately, Options said it had complied with its regulatory and contractual obligations to Mr D and was not responsible for any of his losses.

The investigator considered the merits of Mr D's complaint and thought that the due diligence that Options undertook on Caledonian was deficient. If Options had carried out its obligations properly, it would have recognised that Caledonian was likely to be providing unsuitable advice to Mr D, contrary to regulation. It should also have seen that there was a significant risk of consumer detriment in accepting instructions from Caledonian - and hence it shouldn't have accepted any business from it.

So, they recommended that Mr D's complaint be upheld, setting out how Options should calculate Mr D's losses. They also recommended he should be paid £500 in recognition of the distress he was caused by Options' actions in allowing this transfer to be made to its SIPP.

Mr D's representative accepted the opinion but Options didn't agree. It told us it had completed a further review of Mr D's file and now thought the complaint had been made too late. And it didn't consent to us investigating it.

Options says Mr D's SIPP was opened in December 2012 and the complaint was made to Options by Mr D's representative in March 2021. So that's longer than the six years allowed under our rules. Options also says that Mr D should have known more than three years before he complained that he had cause to complain to Options. It says Mr D signed paperwork when he applied for the SIPP, acknowledging the rights that he was giving up from his existing scheme. It further says that Mr D instructed Options to transfer his pension to another provider in 2016, stating the reason for his transfer as *"mis-sold by an unregulated introducer*". And so, it argues Mr D was *"put on notice of potential issues which are relevant to the Complaint and would have left any reasonable person to consider his position vis a vis the SIPP provider."*

In other words, it thinks the events that led to Mr D's transfer request in 2016 ought to have made him aware he had reason to complain to Options more than three years before bringing the complaint in March 2021.

Options also requested an Oral hearing saying: *"In the light of all the matters set out above, Options formally requests that the Investigator holds an oral hearing in order to properly determine whether the complaint is time-barred. It is clearly procedurally unfair, and highly inappropriate, that a fact-sensitive matter such as this should be decided wholly on the papers."*

And so, the matter has now come to me for decision.

My Provisional Decision

In advance of this decision, I issued a provisional decision to the parties in which I said that I thought Mr D's complaint was within our jurisdiction and that it should be upheld. Mr D's representative accepted that decision, but Options didn't respond.

Caledonian and Options

I've set out the background and a summary of Mr D's complaint above. But alongside those events it's important to understand the underlying relationship between Caledonian and Options

Options' relationship with Caledonian began in early 2012. Options has confirmed there were 509 introductions to it made by Caledonian between 27 April 2012 and 20 May 2013.

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

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

March 2012

A business profile was completed which recorded Options' first meeting with Mr C of Caledonian. This set out Caledonian's proposed business model as follows (redacted as appropriate):

"*Mr C detailed his business model,*

*He was **preferred adviser** (my emphasis) for the armed forces occupational pension scheme for individuals who had left the armed forces and were taking up positions in close security work in places such as Iraq/Afghanistan/Iran etc... and also anti piracy positions.*

The profile of the clients was described as:

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

Mr C was provided referrals from the armed forces pensions contact he had and also he received enquiries as a result of his clients speaking to other ex-armed forces personnel.

He had been doing large volumes of QROPS business with a provider called (business M) *but recognised the fact that a UK SIPP was probably more appropriate for the majority of his clients.*

He was currently putting them into an international Friends Provident Bond, the underlying

investments were regulated.

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

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

He was developing a relationship with (Mr P), *and may consider* [Business C] *as an alternative investment provider in due course. Although he was currently wanting a relationship with a SIPP provider.*

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

16 March 2012

Mr C of Caledonian signed and dated Options' *"Non-Regulated Introducer Profile".* The form set out 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*."

On the Non-Regulated Introducer Profile, Caledonian responded to a number of questions. The key points were:

Under the section headed "*Company Information"* the following was recorded:

- It had branches in Chile, Peru, Columbia, Argentina, Brazil and Switzerland.
- It had been trading since 1997.

Under the section headed *"Product Information",* in response to the question, *"what products does the firm promote/distribute"* the answer noted was:

"*Offshore savings plans + investment bonds – Friends Provident International + …..*"

Caledonian set out that the products had been accepted by other SIPP providers, including Options, and they hadn't been declined by other product providers.

Under the section headed *"Sales and Marketing Approach"*, in response to the question as to how Caledonian would obtain clients, the answer was:

"*Referral"*

In response to a request to describe the sales process adopted by Caledonian, it was set out:

"Referral – Visit – Analysis – Visit."

When asked to describe the average profile of the type of client Caledonian took on, the answer was:

"*Income £70,000, Age 36, Self employed in the security industry*."

When Caledonian was asked how much business would be sold through pension arrangements the answer given was:

"*50/50 Pension Transfer/Regular Savings Plan*"

In response to a question about the typical commission structure the answer was:

"*7% up front from bond – 0.5% Trail*."

Under the section headed, *"Training and Information"*, in response to the question, *"what training was provided to its agents"* the answer was:

"*Ongoing product training and accompanied meetings*."

In response to a question about what specific pension training was delivered to its agent the answer was:

"*Visits to providers directly*."

In response to how the business by its agents was monitored, the answer was:

"*Fully administrative structure – Caledonian, Careys – Compliance*."

In response to a question about the kind of service it sought from a SIPP provider, the answer was:

"*Administrative & Compliance.*"

Under the section headed, *"Legal and Regulatory Information"* the following was recorded:

- Caledonian did not work with any FSA regulated company or adviser.
- It wasn't a member of any professional or trade body.
- It had no PI cover in place at the time.
- It hadn't been subject to any (or ongoing) FSA supervisory visits or censure.

In response to a question about what measures were in place to:

"*ensure the Firm engage legal advice on the activities it carries out to ensure regulated activities are not carried out?*"

The following answer was given:

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

In response to the question as to how Caledonian demonstrates it treats its customers fairly it said that:

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

In response to a question about what Caledonian's objectives were for the coming 12 months it was noted:

"*To continue to develop a fully compliant business of PT to HM Forces*"

With regards to members pension scheme business, it was noted that Caledonian was seeking a "*Compliant structure in a Regulated structure*."

An email was sent from Options' compliance department to Mr C, requesting a copy of Caledonian's latest company accounts and certified copy of the passport for its principals/directors.

3 April 2012

Options' compliance department sent a chaser email to Caledonian for the documents it requested on 23 March 2012. A senior consultant at Caledonian replied on the same day and provided a copy of Mr C's passport. The consultant said she would speak with Mr C when he returned from a trip, regarding the company accounts.

4 April 2012

Mr C says he's been in Iraq and will send documents once he's back

27 April 2012

Options started to receive introductions from Caledonian.

1 August 2012

An Options' employee sent an internal email to another Options employee, who it seems was responsible for managing the relationship with Caledonian. The first employee said to the second employee that Options still required certified passports for the principals/directors and company accounts, and that 'compliance' would raise it in the audit that was being completed on that day.

The second employee confirmed on the same day that they had spoken with Mr C. It was noted that Mr C had said the company secretary was on holiday, but he would send an urgent request for the outstanding documentation.

4 September 2012

A "*Non-regulated Introducer Agreement Terms of Business"* document between Options and *"MMG Associates Ltd T/A Caledonian International Associates"* was signed and dated by Mr C. That agreement included:

"*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*:"

Options has said that these terms of business were actually received by Caledonian on 21 March 2012.

1 November 2012

Options conducted a 'World Check' (a risk intelligence tool which allows subscribers to conduct background checks on businesses and individuals) on two Caledonian employees - Mr [A] and Mr C. This check did not reveal any issues.

Undated document likely to have been created in March 2013

Options has provided an undated document called the "*Overseas Introducer Assessment Proforma"*. The document listed several criteria and assessed its internal measurement criteria as 'low risk', 'medium risk' or 'high risk' with supporting notes.

This document isn't dated but the earliest this is likely to have been completed is around March 2013 when Options appears to have been looking more closely at its compliance requirements for Caledonian, having also received some recent business that didn't fit the armed forces profile.

I have set out below what the sections of this document recorded and the level of risk that was noted:

- *Google Search and FCA*

This section was assessed as 'low risk'. The notes set out that there were no adverse comments.

- *Regulatory*

This section was assessed as 'high risk'. The notes said that: "*Cannot find any regulatory information from the details held*."

- *Company*

This section had a mixture of assessments which were mainly medium risk. It was set out that Caledonian had:

"*No UK branch. Cannot see any EEA regulatory details*." And this was classed as 'high risk'.

Caledonian's trading history was recorded as 'medium risk'. The notes set out that: "*Unknown company establishment time – cannot find any details from information received*." It was also noted in relation to Caledonian's accounts that:

"*No accounts requested* ?."

- *Articles of Association*

It was noted that this was 'medium risk' and that: "*No articles of association requested/received*"

- *Advice*

This section was assessed as 'high risk' and it was noted:

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

And:

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

- *Transfer / Switches.*

This section was assessed as 'high risk' and in particular it was noted that the funds for investment within the SIPP were to be generated from:

"*Transfers from Armed Forces Pension occupational scheme*."

- *Client Profile*

This section was assessed as 'high risk'. The notes set out:

"*Client Profile: 30-50 years old. Part of armed forced 6-10 years. Generally still UK residents, some abroad. Now working in security earning £70k pa. HOWEVER, recently received business outside of profile*."

- *Acceptance – Result 1*

This section was assessed as 'medium risk'. The notes don't explain the reason for this. However, the measurement criteria explanation under medium risk set out that:

"*company details are a mixture of green and amber raise with technical review committee before proceeding*."

- *Acceptance – Result 2*

This section was assessed as a mixture of 'high risk' and 'medium risk'. It is set out under the high-risk section that if the section was a mixture of 'red' and 'amber' this section should be declined.

'Professional Qualification' was recorded as 'high risk'. The notes recorded:

"*No qualifications documented other than meeting notes from March 2012 where Mr C stated he was a qualified accountant and member of Chartered Institute of Accountants*."

'Meeting' was recorded as 'medium risk'. The notes recorded: "*Meeting held at Carey Pensions UK office March 2012."*

7 March 2013

An internal email was sent by an Options' manager to other Options employees summarising a call Options had held with Caledonian (Mr C). The summary said:

- Options had noted that following recent FSA (now FCA) review and guidance all SIPP operators were being asked to look at the business received from their introducers against their expectations surrounding the type of profile.

- Options' understanding was that the introductions from Caledonian would be ex-military, aged approximately 36 years old and who were self-employed in the security industry with earnings of approximately £70,000. However, out of the seven new business cases that they reviewed on 6 March 2013, three of them had moved away from the expected profile.

- Options had asked Caledonian if its profile was changing/extending. Caledonian explained:

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 Caledonian to put together a note to update its file as to the business it would receive.

20 March 2013

Options sent Caledonian an email. Options noted that it was waiting for Caledonian to provide an update to the changes in its profile. Options also noted it had received further business that day which was against the expected profile. One was a taxi driver with earnings of £15,000 and the other was a tutor with earnings of £23,000.

26 April 2013

An Options employee in its compliance department sent an email to several Options employees. She raised concerns about Caledonian's business practices. 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 employee asked in April 2013 for answers to several questions, the responses to which I have set out 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….

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? Who has provided the TVAS? 37 - Only TVs over £100k (from Armed Forces Pension) or any amount no matter how small on other TVs. TVAS provided by (Mr P) [Business C]

Overview of Caledonian:

What due diligence was undertaken on Caledonian prior to establishing the relationship?

- Unknown but AML was received.

Location of head office: Geneva, Switzerland

Do they have a business address in the UK? They confirm that they do not have a permanent place of business in the UK, however they have a business address for correspondence and Mr C is based in the UK.

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 [redacted]*. Mr C certifies all ID and signs the investment Application Form.*

Are they regulated to provide advice in their home jurisdiction? Unknown

They have confirmed that they provide advice in Jordan. How does this work? Do they have a place of business in Jordan? Do they need to be regulated in Jordan to provide advice? Unknown - Caledonian provide a Non Solicitation Letter which is sent to Friends Provident with the investment App. A copy of a Non Solicitation Letter is attached

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

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

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

What due diligence did we undertake on (Business C)? *Unknown"*

30 April 2013

An email reply was provided internally by Options in response to some of the queries in the previous email (see above):

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

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

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

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

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

looking to answer comfortable on the information piece but not on the advice piece

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

10 May 2013

Options sent Caledonian an email requesting further information. The email confirmed Options were reviewing the terms of business in light of recent announcements from the FCA.

Options said it was keen to continue to do business with Caledonian, but it must be within the regulatory framework and that it must satisfy "*the regulators should they come in and review this area of our business, 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 a number of questions, which I have set out below.

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, ….. Please can you clarify Caledonian's presence in the UK and the nature of the office in …..*

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

15 May 2013

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

- Mr P confirmed that an FCA Regulated Adviser would be providing the TVAS reports on all Caledonian introduced clients. This adviser would be placed in their Milton Keynes office for a period of time and would produce TVAS reports on the back book of business with Caledonian.

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

20 May 2013

Options says this was the date of the last introduction made to it by Caledonian.

23 May 2013

A handwritten summary was made of a meeting between Caledonian (Mr P and Mr C) and Options. This included the following.

- Mr C said he was a consultant to armed forces and not an adviser in the FCA sense.

- The [….] address was a postal address and not a working office.

- Mr C said he meets with clients in the UK. It was noted that the profile document said that he met them in Jordan. So, a letter was needed about where advice was given.

- The initial contact was abroad. The client contacts Caledonian if they want to transfer their pension.

- Caledonian's website didn't mention that it would give advice. And their documents made it clear that no advice was given and that clients should take advice from a regulated adviser.

- Caledonian explained that the reason for lots of transfers was because of the market and their relationship with the providers.

- The proposal going forward involved an appointed representative of a Manchester IFA being a pension specialist and it had the necessary qualifications. Going forward the Manchester IFA would deal with business.

- Options agreed to allow Caledonian a four-week window to put measures in force.

- The question about providing Options with a letter if advice was being given was irrelevant as Caledonian didn't provide any advice.

- Caledonian said its illustrations were provided to facilitate the transfer of the pensions. Options query was whether this was advice.

- There also appears to be an internal note which said it should be established if

there was a Caledonian terms of business.

I have not seen evidence that any of the agreed actions were completed.

May 2013

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

" … *Following a detailed review of the process and documentation concerns were raised regarding whether the clients* [of Caledonian] *could be deemed to be receiving advice through an unregulated entity.*

Following a request for further clarification on these points we have not been able to satisfy ourselves that this is not the case.

We have insisted that they move to a model that all cases are fully advised by an FCA regulated firm/individual, which has been accepted …

Following a meeting in the Milton Keynes office … where [Mr C] *from Caledonian, and* [Mr P] *of* [Business C] *explained their current process and documentation and described their future process,* [and] *further discussions … it was decided that they had not satisfied us enough with their current processes for us to continue to allow taking on new business in the interim without the use of a UK regulated firm or individual who was suitably qualified.*

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

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

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

Brings the process and clients into the UK regulated process

Brings the clients into the FSCS and FOS protections

Ensures all occupational schemes undergo analysis and advice"

I have not seen evidence that this advised or regulated process described ever came into effect for any applications made by Caledonian.

Mr D's dealing with Options and Caledonian

I've set out above the background to how Mr D came to deal with Caledonian, so I won't repeat that again.

Mr D was promised a better return than he'd get by staying with his Armed Forces Pension. He trusted Caledonian and accepted its advice to transfer into the Options SIPP and FPI investments. He wasn't financially knowledgeable.

I'll refer below to the correspondence that Mr D signed, although he says this was all pre-completed.

6 December 2012 – Mr D signed a letter of authority for Options to provide Caledonian with information about his scheme.

6 December 2012 – Mr D completed Options' SIPP application form. In brief this confirmed his age, residential address in the UK, employment status, details of his Armed Forces pension and defined contribution pension and the intended investment.

The front page of the SIPP application stated the following:

"The Carey Pension Scheme Application Form For Direct Clients. (SIPP to be established on execution only).
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

Please read the Key Features Document, Terms & Conditions and Fee Schedules prior to completing this application form…

Carey Pensions UK LLP, and Carey Pensions Trustees UK Ltd have not provided any advice and are not responsible for the suitability or appropriateness of your decision to establish a SIPP"

Page 4 under the section headed *Transfers* it said that:

"Please Note, whilst we cannot give advice, we recommend that in these circumstances you seek appropriate advice…"

Page 5 under the section headed *Investments* it said that:

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

Carey Pensions UK LLP and Carey Pension Trustees UK Ltd will not at any time review any aspects of your appointed Investment Manager's financial status or investment and risk strategies nor have any involvement in your investment choices and selection, nor give advice on the suitability of your investment choices. ***We would always recommend independent advice be obtained from a suitably qualified adviser****.…[my emphasis]*

You are responsible for the ongoing review and monitoring of the investments you have chosen - and remember - all investments can go down in value as well as up. Carey Pensions is not responsible for any investment choices or decisions."

Page 9 under the section headed Declaration (which was signed and dated by Mr D), it said that:

"I hereby apply for membership as a direct client of the Carey Pension Scheme

I acknowledge and accept the Terms & Conditions of the Carey Pension Scheme and agree to be bound by the Scheme Rules of the Carey Pension Scheme.

I confirm that I have read and understand the relevant Key Features Documents, Terms & Conditions and all aspects of the application form.

I confirm that all details provided are true and complete to the best of my knowledge and belief.

I hereby consent to Carey Pensions UK LLP requesting the transfer of my policies listed in the application form.

I confirm that I will instruct Carey Pensions UK LLP to make the investments as detailed in the application form.

I understand that it is my sole responsibility to make decisions relating to the purchase, retention or sale of any investments held within the Carey Pension Scheme.

I understand that Carey Pensions UK LLP and Carey Pension Trustees UK Ltd are not in any way able to provide me with any advice.

I confirm that I am establishing the Carey Pension Scheme on an execution only basis.

I confirm that I understand that the value of my pension scheme can go down as well as up depending on the performance of the investments chosen."

6 December 2012 – Mr D signed Options' member's declaration form.

This confirmed the following:

"I the above named write to instruct Carey Pensions UK LLP to establish a Self Invested Personal Pension (SIPP) and Carey Pension Trustees UK Ltd to proceed with the transfer of Occupational Pension Scheme benefits from The Armed Forces Pension to the Carey Pension Scheme.

I confirm that I have received full and appropriate advice from Caledonian International and following this advice I wish to proceed with the transfer.
[my emphasis]

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.

Should any tax charges be deemed by HMRC to apply in future these will be paid directly from the fund or by me as the member of the Scheme.

I do not hold Carey Pensions UK LLP or Carey Pension Trustees UK Ltd responsible for any fluctuations in value of either of the Occupational Pension Scheme or the Carey Pension Scheme.

I agree to provide Carey Pension Trustees UK Ltd with any further information and/or documentation they may require prior to completing this transaction.

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

16 January 2013 – A Certificate of Non-Solicitation was signed by Mr C of Caledonian. This document, which was addressed to Friends Provident International and on Caledonian headed paper, confirmed that:

"We have today submitted an application for a policy on behalf of the above named client, where the life assured is also resident in the UK. Since the life assured's address is / the client has signed the proposal form in the United Kingdom we understand that under the Rules of the Financial Services Authority you must treat the application as business regulated by the Financial Services and Markets Act.

Accordingly you will send post-sale information and notice of the right to cancel the contract to the client following issue of the policy.

The company is not authorised to conduct investment business in the United Kingdom. We acknowledge that this means that you are only able to accept the introduction from us if we have not been carrying on investment business in the United Kingdom.

We therefore certify that:

(i) We do not have a permanent place of business in the United Kingdom; and
(ii) We did not approach the above named client.
(iii) The advice was given in Jordan.
(iv) The client approached us directly and requested us to give him advice."

24 January 2013 – Options received all the application paperwork for Mr D's SIPP from Caledonian.

24 January 2013 – Mr D's SIPP was established and a welcome letter was sent to him.

25 January 2013 – An FPI Trustee Application form was signed by Options' (then Carey) Trustees, having also previously been signed by Mr C of Caledonian on 16 January 2013 in his position of adviser. This was sent to FPI to make the investments on Mr D's behalf. It confirmed that the documents had been signed in the UK and advice had been given to Mr D in Jordan.

15 March 2013 – Options arranged for the majority of Mr D's transferred pension of around £65,000 to be invested with FPI.

24 June 2016 – Mr D completes a transfer request form to request his pension is transferred to another provider.

6 January 2017 – Mr D's pension is transferred in full and his SIPP is closed.

22 March 2021 – After carrying out some investigations, Mr D's representative wrote to Options to raise a complaint about its role in accepting his pension transfer and facilitating the investments through FPI.

18 May 2021 – Options sent a final response letter to Mr D in which it didn't uphold his complaint.

20 May 2021 – Mr D told us he was unhappy with Options' response and would like us to consider his complaint.

As explained above, Options didn't agree with the Investigator's opinion as it contended that the complaint had not been brought in time.

Options' request for an oral hearing

Options also say an oral hearing is necessary to properly determine whether the complaint is time-barred, however I do not think this is necessary.

The Ombudsman Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (section 225 of the Financial Services and Markets Act 2000 (FSMA)). DISP 3.5.5R of the FCA Dispute Resolution rules provides the following:

> "If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by any means which the Ombudsman considers appropriate in the circumstances, including by telephone. No hearing will be held after the Ombudsman has determined the complaint."

Given my statutory duty under FSMA to resolve complaints quickly and with minimum formality, I am satisfied that it would not normally be necessary for me to hold a hearing in most cases (see the Court of Appeal's decision in R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service [2008] EWCA Civ 642).

The key question for me to consider when deciding whether a hearing should be held is whether or not "the complaint, and its jurisdiction, can be fairly determined without convening a hearing".

We do not operate in the same way as the Courts. Unlike a Court, we have the power to carry out our own investigation. And the rules (DISP 3.5.8R) mean I, as the Ombudsman determining this complaint, am able to decide the issues on which evidence is required and how that evidence should be presented. I am not restricted to oral cross-examination to further explore or test points.

If I think particular information is required to decide a complaint fairly, then we are able to request this information from either party to the complaint, or even from a third party if necessary. In this case, our Investigator sought further information from Mr D, and his IFA at the time, about his awareness of a cause for complaint against Options, and I'll refer to this below.

I have carefully considered the submissions Options has made. However, I am satisfied that I am able to determine this complaint without convening a hearing as I have sufficient information to decide both the jurisdiction and the merits aspects of Mr D's complaint. So, I do not consider a hearing – or any further investigation by other means – is required. The key question when considering our jurisdiction is whether Mr D knew, or should reasonably have known, that he had cause for complaint. And we have been able to test this to the extent we thought necessary by asking questions of Mr D in writing.

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.

As the parties didn't make any further representations, I don't consider that I need to change the findings that I reached in my provisional decision. I have set these out below and adopt them as my findings in this final decision. I have decided that Mr D's complaint is within our jurisdiction to consider and that it should be upheld.

In my provisional decision I said:

"Our jurisdiction

I've considered all the available evidence and arguments to decide whether Mr D's complaint is within the jurisdiction of the Financial Ombudsman Service.

This service is not able to consider every complaint that is referred to it. The rules in the Dispute Resolution: Complaints ("DISP") section of the Financial Conduct Authority ("FCA") Handbook set limits to the extent of this service's jurisdiction. We are bound to follow these rules and so can only look at a complaint if allowed by the rules.
DISP Rule 2.8.2 R includes rules about general time limits. It says:

> "The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service …
>
> (2) more than:
>
> (a) six years after the event complained of; or (if later)
>
> (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;
>
> unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;
>
> unless:
>
> (3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R … was as a result of exceptional circumstances; or…
>
> (5) the respondent has consented to the Ombudsman considering the complaint where the time limits … have expired …"

In this case Options has not consented to the complaint being considered.

Mr D's complaint relates to events in 2013 when his Options SIPP was opened, and his investments were made with FPI. As Mr D first complained to Options in March 2021, his complaint was made more than six years after the events complained about.

Our investigator found that the complaint was in jurisdiction, as it had been brought to us within three years of when Mr D was aware, or should reasonably have been aware, that he had cause to complain about Options.

Options, however, asserts that Mr D's acknowledgment of the pension rights he was giving up (when he signed the relevant documentation in 2012) coupled with the circumstances that led Mr D to transfer his pension away from Options in 2017, ought to have made him aware he had cause to complain. And so, it thinks the complaint was made too late.

Our investigator asked Mr D and his previous IFA for more information to establish what he was aware of at the relevant time. Mr D told us that in 2016 he was upset as the value of his

pension was far below what had been promised to him, which is why he reached out to the IFA to see what could be done. He was told he had been advised by an unregulated introducer and that the investments were unsuitable for him – mainly due to the high fees.

He was advised to transfer away – which he did – but he doesn't remember being told he could make a complaint to Options about any losses he may have suffered.

Mr D's IFA at the time provided our service with his comments and a copy of the relevant suitability report issued to Mr D in 2016. He said: *"The suitability report should answer your questions. There was no route for a compensation claim in 2016 as he had been the victim of unregulated advice and at the time there was no such compensation route as Due Diligence Neglect by the SIPP provider or any route via the FSCS."* The IFA also confirms he had no further communication with Mr D regarding any compensation claims after 2016.

The suitability report states: *"Your restricted SIPP was set up by an unregulated Adviser transferring your Army DB Pension. Investment was made into a bond with an 8 year establishment charge, I suspect for Commission payments. The SIPP charges are made as a monetary amount instead of a percentage of the fund value so they are high on the small fund value and the result is it's not growing as expected.* ***You confirmed that at no time did you take advice from a regulated adviser who would offer a complaints procedure****…… I have made you aware that it is unlikely any changes will match or beat the benefits you would have received from your Army Pension so the objective of any changes is to get your pension benefits closer to your lost army benefits than your current SIPP arrangement is projected to achieve." (****my emphasis****).*

Having reviewed all the available evidence, I haven't found that Mr D was aware he had reason to complain to Options in 2016 when he decided to transfer his pension to another provider.

In order to be aware of cause for complaint, the complainant should reasonably know there is a problem, that they have or may suffer loss, and that someone else is responsible for the problem – and who that someone is. So, to have knowledge of cause for complaint about Options, Mr D needs to be aware, or ought reasonably to have become aware, there is a problem, which has or may cause him loss and that Options might be responsible for it.

It is clear that Mr D had began to be concerned about the performance of his pension in 2016 and, with the help of his IFA, had realised he had been mis-advised on the transfer of his Armed Forces pension by Caledonian. He was now aware something had gone wrong and that he had suffered a loss. But it is equally clear from his and the IFA's testimony that Mr D wasn't aware that Options might be liable for this loss or that he could bring a complaint against it. I also don't consider that a reasonable consumer at that time would have been aware that they could bring a SIPP due diligence claim against their SIPP provider. And caselaw at the time wasn't sufficiently developed to the extent that this would have been something that Mr D could find out.

Mr D's complaint is that Options didn't conduct sufficient due diligence on Caledonian and should have prevented his pension transfer. The IFA – an expert in the relevant field – was himself unaware of any recourse Mr D could have taken against Options at the time and confirmed to Mr D in the suitability report that there was no complaints procedure available to him. It wouldn't be fair to have expected Mr D to have taken any further steps to investigate his options. Mr D was told he had no other recourse but to transfer in order to attempt to make up some of his losses and it's reasonable for Mr D to have taken this advice at face value, rather than continue to investigate other avenues.

And so, I have found that Mr D wasn't aware, and shouldn't reasonably have become aware,

that he could complain to Options until he made enquiries with his representative in 2021. He was then advised that Options had done something wrong and that he could complain about it. And that was within three years of when he did complain in March 2021.

So, it's my finding that Mr D only knew in early 2021, when he consulted with his representative, that he might be able to complain. And that although six years from when the transfer and FPI investment was made have expired, Mr D has brought his complaint within three years from when he should reasonably have known something was wrong, he'd suffered a loss and could complain to Options about it. So, I've provisionally decided that we can consider the merits of Mr D's complaint.

The merits of Mr D's complaint

In considering what is fair and reasonable in all the circumstances of this complaint, I have 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 this in mind I've set out below what I have identified as the relevant considerations to deciding what is fair and reasonable in this case.

The Principles

The FCA's Principles for Businesses are of particular relevance to my decision. The Principles for Businesses, which are set out in the FCA's handbook "*are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G). And I consider that the Principles relevant to this complaint include Principles 2, 3 and 6 which say:

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

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

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

Regulatory publications

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

- The 2009 and 2012 thematic review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 *"Dear CEO"* letter.

I have set out below what I consider to be the key parts of the publications.

The 2009 Thematic Review Report

The 2009 report included the following statement:

"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its customers and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.

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

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

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

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

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

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

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

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

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

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

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

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

The later publications

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

"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.

All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a "client" for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes." The October 2013 finalised SIPP operator guidance also set out the following:

"Relationships between firms that advise and introduce prospective members and SIPP operators

Examples of good practice we observed during our work with SIPP operators include the following:

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un-authorised 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 non-regulated introducers*

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

"Due diligence

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

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

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

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

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

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

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

- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*

- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach*

HMRC tax-relievable investments and non-standard investments that have not been approved by the firm"

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

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

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

I acknowledge that the 2009 report, the 2012 report and the *"Dear CEO"* letter are not formal guidance, whereas the 2013 finalised guidance is. However, I don't think the fact that the reports and *"Dear CEO"* letter didn't constitute formal (i.e. statutory) guidance means their importance or relevance should be underestimated.

The publications 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 to produce the outcomes envisaged by the Principles. In that respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I'm therefore satisfied it's appropriate to take them into account.

I don't think the fact that the later publications (i.e. those other than the 2009 and 2012 Thematic Review Reports), post-date the events that are the subject of this complaint mean that the examples of good industry practice they provide were not good practice at the time of the relevant events. It is clear from the text of the 2009 and 2012 reports, (and the "Dear CEO" letter published in 2014), that the regulator expected SIPP operators to have incorporated the recommended good industry practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' understanding of how the standards shaped what was expected of SIPP operators changed over time, it is clear the standards themselves had not changed.

The later publications were published after the events complained about, but the Principles that underpin them existed throughout, as did the obligation to act in accordance with those Principles. I am required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time.

That doesn't mean that in considering what is fair and reasonable, I will only consider Options' actions with these documents in mind. The reports, Dear CEO letter and guidance

gave non-exhaustive examples of good industry practice. They did not say the suggestions given were the limit of what a SIPP operator should do. As the annex to the *"Dear CEO"* letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

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

I would also add, that even if I took the view that any publications or guidance that post-dated the events complained of don't help to clarify the type of good industry practice that existed at the relevant time (which I don't), that doesn't alter my view on what I consider to have been good industry practice at the time. That's because I find that the 2009 and 2012 reports together with the Principles provide a very clear indication of what Options could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting any introduction from Caledonian, setting up the SIPP and facilitating the pension transfer into the SIPP.

Ultimately, in determining this complaint, I need to consider whether Options complied with its regulatory obligations as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regards to the interests of its customers, to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Options could've done to comply with its regulatory obligations.

COBS2.1.1R

I've 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'm of the view that neither of the judgments say anything about how the Principles apply to an ombudsman's consideration of a complaint. But to be clear, I don't say this means Adams isn't a relevant consideration *at all.* As noted above, I have taken account of both judgments when making this decision on Mr D's case.

I acknowledge that COBS2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client)* overlaps with certain of the Principles and that this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ("the COBS claim"). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

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

I note that, in *Adams v Options*, 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."

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

I think it is also important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I am required to take into account relevant considerations which include: law and regulations; regulators' 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 v Options SIPP. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

To be clear, I have proceeded on the understanding Options was not obliged – and not able – to give advice to Mr D on the suitability of its SIPP, the pension transfer or the subsequent investments made for him personally. But I am satisfied Options' obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions of business from particular businesses.

I note for completeness that Options wasn't granted permission to appeal the Court of Appeal judgment to the Supreme Court.

Section 27/28 FSMA

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

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

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

"(a) any money or other property paid or transferred by him under the agreement; and

(b) compensation for any loss sustained by him as a result of having parted with it."

s28(3) FSMA provides that "*If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow–*

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

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

.

"No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is –

a) an authorised person; or
b) an exempt person."

In *Adams*, the Court of Appeal concluded that the unauthorised introducer of the SIPP had carried out activities in contravention of the General Prohibition, and so S27 FSMA applied. It further concluded that it would *not* be just and equitable to nonetheless allow the agreement to be enforced (or the money retained) under the discretion afforded to it by S28(3) FSMA.

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

"*i) A key aim of FSMA is consumer protection. It proceeds on the basis that, while consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard consumers from their own folly. That much reduces the force of Mr Green's contentions that Mr Adams caused his own losses and misled Carey;*

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

The other three reasons, in summary, were:

- The volume and nature of business being introduced by the introducer was such as to put Options on notice of the danger that the introducer was recommending clients to invest in the investments and set up Options SIPPs to that end. There were therefore reasons for Options to be concerned about the possibility of the introducer advising on investments within the meaning of article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the RAO").
- Options was aware that: contrary to what the introducer had previously said, it was receiving high commission from the investment provider, there were indications that the introducer was offering consumers "cashback" and one of those running the introducer was subject to a FCA warning notice.
- The investment did not proceed until after the time by which Options had reasons for concern and so it was open to Options to decline the investment, or at least explore the position with Mr Adams, but it did not do so.

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

what did Options obligations mean in practice?

In this case, the business Options was conducting was its operation of SIPPs. I am satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business.

The regulatory publications provided some examples of good industry practice observed by the FSA and FCA during their work with SIPP operators including being satisfied that a particular introducer is appropriate to deal with and a particular investment is an appropriate one for a SIPP.

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.

the due diligence carried out by Options on Caledonian and what it should have concluded

I have considered what a level of due diligence consistent with Options' regulatory obligations and the standards of good practice at the time ought to have revealed. And what, with those same obligations and standards in mind, Options ought to have concluded about Caledonian. And, when doing this, I have taken into account the evidence I have mentioned above.

As set out above, the 2009 Thematic Review Report deals specifically with the relationships between SIPP operators and introducers or "*intermediaries".* And it gives non-exhaustive examples of good practice. In my view, to meet these standards, and its regulatory obligations, set by the Principles, Options ought to have identified a significant risk of consumer detriment arising from business brought about by a business introducing consumers to Options which appeared to be specialising in pension transfers from one occupational pension scheme purporting to be on an execution only (that is, non-advised) basis. And so Options ought to have ensured it thought very carefully about accepting applications from Caledonian and, therefore, Mr D.

I think it is fair and reasonable to say such consideration should have involved Options getting a full understanding of the business model of the introducer, the nature of the investments to be made and putting a clear agreement in place between it and the introducer and ensuring careful thought was given to the risk generally posed to consumers by the introducer.

Options did gain some information about Caledonian, as I have detailed earlier in this decision. In my view, if Options had carried out adequate due diligence on Caledonian, and drawn reasonable conclusions from this, it ought to have been aware of several points of concern and to have concluded it should not accept this business from it in respect of Mr D.

It's clear that Options understood and accepted that it had a responsibility to carry out due diligence on Caledonian – something that we've seen on other complaints that have been brought to us and is confirmed on its statement in the *Non-Regulated Introducer Profile* form of 16 March 2012 that I've referred to above.

I acknowledge Options did take some steps – initially and on an ongoing basis – which it could be argued did amount to good practice consistent with its regulatory obligations.

But 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 didn't, in any event,

draw fair and reasonable conclusions from the information available to it by the time of Mr D's application and by the time of the subsequent investments. 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 Mr D's application from Caledonian.

I've set out my reasons for this in more detail below.

Should Options have been aware that Caledonian was providing advice to Mr D?

In my view, acting fairly and reasonably, including a reasonable level of investigation and due diligence on Caledonian's operation, and based on the information available to it, Options ought to have concluded at the outset of its relationship with Caledonian and certainly before the conclusion of Mr D's application and subsequent investment, that Caledonian was providing advice as to the benefits of transferring his pension to the SIPP.

At the very least there was information that should have caused it to suspect that advice was being given and it should've carried out further investigation into that. If it had done so, I believe it likely that it would have discovered that Mr D had been advised by Caledonian to transfer his pension.

Taking account of the available evidence, I consider that Caledonian *did* provide advice to Mr D as to the benefits of transferring his pension, selecting the SIPP to do so and the investment in the FPI bond to follow.

Caledonian's representatives promised a greater return on Mr D's pension than he would obtain if he were to stick with the Armed Forces scheme. I consider Mr D's testimony to be credible. There would have been no other reason for Mr D to consider a transfer to the Options SIPP, the FPI investment or anything else connected with this transaction had he not received advice from Caledonian to do so.

I consider it to be highly unlikely that Mr D came to his own conclusion to make this transfer and the subsequent investment. Mr D wasn't financially knowledgeable. And enterring into an execution only relationship with Options would only have happened if he'd been advised to do so.

Options argue that it treated Caledonian as a business which was not giving advice. It has submitted that, as far as it was aware, it was receiving introductions from Caledonian on an execution only (non-advised) basis.

Options' terms of business with Caledonian was signed in September 2012; however, Options says this was provided to Caledonian in March 2012. I note the terms made it clear that no advice would be given by Caledonian:

"*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 on the SIPP application form, which was signed and dated by Mr D, it stated that:

"*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."*

However, there is a significant degree of inconsistency between these documents and other documentary evidence.

As highlighted above, in Mr D's Options member's declaration in December 2012, it confirmed that:

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

The member's declaration is in clear conflict with the SIPP application form. As a minimum, these contradictions should have alerted Options to the possibility that Mr D may very well have been given advice – and therefore further steps to clarify this were required. I know that Options considers this to be a simple clerical error. But I think that the fact that there are conflicting statements in the documentation just lends to the assertion that Options' attention to detail was lacking in so far as what was happening between its clients and Caledonian went.

If Options had undertaken a reasonable level of due diligence it should have been aware that there was a significant risk that advice had been given to Mr D to transfer his pension by Caledonian. Similarly, the available evidence also shows that Options should have concluded at the start of its relationship with Caledonian that it may be providing advice as to the benefits of transferring pensions.

In addition, the certificate of non-solicitation, that was signed by Caledonian, recorded that:

"We therefore certify that:

We do not have a permanent place of business in the United Kingdom; and

We did not approach the above named client.

The advice was given in Jordan.

The client approached us directly and ***requested us to give him advice****."* (my emphasis)

This clearly creates, at the very least, the impression that Mr D had received financial advice. Options was privy to the information contained in the investment application and non-solicitation document – and clearly this should have given it cause for concern as to whether advice was being provided by Caledonian.

I would also comment that it is unusual for individuals such as Mr D, with no particular financial understanding or background, to want to carry out what is quite a complex transfer of occupational pension scheme benefits without receiving advice or a recommendation. Given all the evidence, I believe Options should have been aware that there was significant risk that advice was being provided by an unregulated business.

Had Options sought clarification from Mr D, which would have been a reasonable course of action in the circumstances, I think it would likely have been made aware he was receiving advice from Caledonian. Alternatively Options could have simply declined to proceed with the application – given the obvious conflicts (discussed above) about the provision of advice.So I think Options ought reasonably to have been aware advice was being given to

Mr D by Caledonian.

I also think it was reasonably clear from the outset of Options' relationship with Caledonian that Caledonian's business model meant there was a risk that advice would be given on the merits of transferring out of the armed forces scheme to an Options' SIPP and on the investments to be made within that SIPP.

In March 2012, Mr C described Caledonian's business model to Options. It was recorded:

"He was (sic) ***preferred adviser*** (my emphasis) *for the Armed Forces occupational pension scheme for individuals who had left the armed forces and were taking positions in close security work in places such as Iraq, Afghanistan/Iran etc.…and also anti-piracy positions…*

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

He was currently putting them into an international Friends Provident Bond (my emphasis), *the underlying investments were regulated."*

This describes an advice process. It indicates that Caledonian was advising consumers on transfers out of armed forces schemes and *"putting them into"* an investment bond. I think the only reasonable conclusion which could be drawn from that description was that advice was likely being given. Given these statements, it would be difficult to imagine a situation where Caledonian was giving that kind of tailored guidance without giving advice on the merits of transferring.

In the 'Non-Regulated Introducer Profile' signed and dated in March 2012, Caledonian's sales process was described as:

"Referral – Visit – Analysis – Visit"

That clearly involved more than just a simple introduction. It is a description that also supports my finding that Caledonian was involved in an advice process.

At the very least this should have led to further questions being asked by Options of Caledonian and Mr D. In terms of Mr D, a reasonable line of enquiry would have been to ask him if he thought he was receiving advice as to whether to set up a SIPP and/or transfer his pension benefits to it and/or then make subsequent investments within the SIPP. And I think given Mr D's subsequent testimony, the answers to those questions would have led to the conclusion that advice was being given.

On 26 April 2013 an Options employee in its compliance department sent an email to a number of Options employees. She raised concerns about Caledonian's business practices. 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."

There are a couple of different answers to those questions, one expressing more concern than the other. But of critical importance is that following the ensuing internal discussion,

Options asked questions on 10 May 2013 (that I've set out in the history above) about any advice given by Caledonian.

Although we haven't been provided with a copy of the actual response to this e-mail, a discussion of Caledonian's responses to these questions led Options to conclude:

"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 this effectively ended the relationship with Caledonian.

In my view these are investigations and questions, which Options, acting fairly and reasonably to meet its regulatory obligations and good practice at the time, ought to have been undertaking or asking at the outset of its relationship with Caledonian. The need to ask these questions was clear based on the information available to Options before Mr D was introduced to it. Options clearly had its own concerns about Caledonian's operation in 2013 – and this was something that it should and could have explored and interrogated much earlier and certainly before accepting Mr D's introduction and making the investments.

I believe the knowledge that Caledonian was providing advice – whether acquired at the outset of the relationship with Caledonian or before or during the course of Mr D's application – should've been a red flag and given Options significant cause for concern. I say this because it suggests a number of risks/issues, including:

- The potential for breaches of the Principles, regulations and/or law.
- There being no evidence to show Caledonian had competency to give advice, particularly with respect to pension transfers.
- There being nothing to show proper advice processes were being followed.
- The risk of obvious significant detriment to large numbers of individuals to forgo guaranteed pension benefits.

I think these are all things which, acting fairly and reasonably to meet its regulatory obligations and good industry practice, Options should have factored into its thinking.

Where were the activities taking place?

I haven't seen evidence that, prior to May 2013, Options established where Caledonian would be conducting business. It was therefore in no position to know what, if any, regulatory regimes applied.

The business profile completed at the outset of Options' relationship with Caledonian records that Caledonian said its clients, *"were generally still resident in UK but some were now living abroad in various countries such as Thailand, Germany, Spain etc.*". The introducer profile completed at the outset of the relationship records that Caledonian had branches in Chile, Peru, Columbia, Argentina, Brazil and Switzerland.

Options noted in 2013 that, as to the question of where Caledonian was meeting with clients and its regulatory status, the position was, *"unknown".*

So it is fair to say Options wasn't in a position to know whether Caledonian was following any applicable regulations and laws as it simply didn't know where it was carrying out its activities or, at the very least, was aware the activities were potentially being carried out in several different jurisdictions. And then it didn't take sufficient steps to ascertain what regulations and laws applied in each of those countries and whether Caledonian was acting within them.

In this case, I think Options should've been particularly concerned about whether advice was being given (or any other regulated activity carried on) in the UK as Caledonian wasn't authorised by the FSA or, later, the FCA.

On the Non-Regulated Introducer Profile form completed in March 2012, in response to the question asking what measures were in place to "*ensure the Firm engage legal advice on the activities it carries out to ensure regulated activities are not carried out?*", the following answer was given by Caledonian:

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

But, as mentioned above, Options was also made aware that *"generally"* consumers who would be introduced to it were UK residents. So it's not clear how the Caledonian business model worked logistically - how could Options be satisfied, on a general basis, that the relevant activities would not take place in the UK? I think Options should've been alive to the risk that in some of the cases at least, some of the activities might take place in the UK.

Rights under a personal pension scheme are a security and a relevant investment. Under Article 25(1) RAO, making arrangements for another person to buy and sell these types of investments is a regulated activity. And under Article 25(2) RAO, making arrangements with a view to a person who participates in the arrangements buying and selling these types of investments is also a regulated activity.

So, in this case if Caledonian made arrangements – i.e. assisting in the completion of the SIPP application form for onward investment in the FPI bond in the UK, that would be a regulated activity. It is clear Caledonian did undertake this activity in this case and so Options should have been aware a regulated activity had been undertaken by Caledonian in the UK even if it assumed any advice had been given in Jordan or otherwise overseas.

Furthermore, if Options accepted the advice was given in Jordan or overseas, I've not seen any evidence to show it checked that Caledonian had any required authority to undertake this activity in Jordan. And there's no evidence whatsoever that Mr D had any connection to Jordan or ever met anyone from Caledonian there. In fact, the evidence indicates that he met with Caledonian's representative and signed the paperwork in the UK.

Caledonian's competence to undertake pension transfers

The proposed business model involved former members of the armed forces who worked in security related jobs in hazardous areas. The business model was not one involving, say, former financial advisers or other finance professionals.

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

The introductions involved transfers out of a defined benefit pension scheme into a UK SIPP

for investment in several investments within an FPI bond. As discussed, the transfer of defined benefit (final salary) pensions are usually not in the customer's 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.

Given that Options knew that the intention was to introduce around 50 individuals a month, I think it's fair to say Options should've satisfied itself that there was no risk of detriment to these consumers. In any event, as I will refer to later in this decision, it should have had concerns that a small business such as Caledonian could competently deal with such a volume of business.

However, the information Caledonian disclosed to Options revealed that it didn't have any particular qualifications or expertise in pension transfers.

On the Non-regulated Introducer Profile document completed in March 2012, under the section headed *Training and Information*, the following response was given to a question as to what training was provided to its agents:

"*Ongoing product training and accompanied meetings*."

In response to a question about the specific pension training that was delivered to its agents the answer given was:

"*Visits to providers directly*."

There is no mention of any type of professional qualification (whether that be in the UK or any other territorial jurisdiction) relating to pensions.

On the undated *Overseas Introducer Proforma Document*, the section headed Professional Qualification was recorded as 'high risk'. The notes said that:

"*No qualifications documented other than meeting notes from March 2012 where Mr C stated he was a qualified accountant and member of Chartered Institute of Accountants*."

I think it likely this post-dates Mr D's application, but it demonstrates that Options didn't know if any of Caledonian's staff had any qualifications to give advice on occupational pension scheme transfers.

So Options was aware that Caledonian's employees didn't likely have any qualifications to give advice as to pensions. And it seems that any steps to ascertain whether any qualifications were held would have revealed they weren't. The steps taken in May 2013 where Options belatedly made enquiries of Caledonian, which as outlined above I think it should have actioned much earlier and certainly before accepting Mr D's application, resulted in Options requiring all the transfers to be reviewed by a UK FCA regulated adviser.

To my mind, this indicates that when Options did ask further questions about Caledonian's expertise in dealing with pensions, it would appear that not only did it become aware that Caledonian's staff did not possess adequate expertise but it also took steps to try and address that.

So, acting fairly and reasonably to meet its regulatory obligations and good practice, Options should've concluded at the outset of its relationship with Caledonian, or at the very least by the time of Mr D's application and the making of the subsequent investments, that Caledonian was proposing to give advice to bring about a large volume of business relating to a complex product for which it didn't have the appropriate qualifications.

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 value analysis reports (TVAS), and illustrations, all of which 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.

Although the relevant UK regulatory requirements only apply in the UK, I think Options, acting fairly and reasonably, should have satisfied itself that a similar process was being followed here, even if it thought the advice was being given outside the UK. I say this because, 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) there was a clear risk of consumer detriment if consumers were not in a fully informed position and therefore able to understand the risks associated with the transfer.

I do not say Options should have checked any advice that was given – but it should have taken steps to ascertain if a reasonable process was in place and consumers were taking these steps on an informed basis. And I think if it had undertaken such steps and carried out even a cursory investigation of the individuals being introduced to it, then it would have become aware no reasonable process was in place and consumers were not fully informed of the risks. As discussed, I think it would have also quickly discovered that at least some of the individuals being introduced to it, including Mr D, had received what amounted to advice about the transfer from an unregulated introducer. And that this advice may well have been provided, at least partially, in the UK.

It seems Options took these steps, to an extent, belatedly in May 2013. And, in common with the other steps taken in May 2013 that appears to have led it to the conclusion that what was in place was insufficient. However, acting fairly and reasonably to meet its regulatory obligations and good practice, Options should have concluded at the outset of its relationship with Caledonian, or at the very least by the time of Mr D's application and subsequent investment, that there was a significant risk of consumer detriment, that Caledonian didn't have a process in place which supported suitable advice being given or that ensured consumers were fully informed of the risks.

Other issues Options ought to have identified and considered

There were also further issues Options ought to have identified and considered, based on what it knew or ought to have known by the time of Mr D's application and subsequent investments. In summary, Options should've considered that:

- The high volume of business being proposed and brought about by Caledonian suggested a risk of consumer detriment.

- Caledonian was taking a high level of commission, which may not have been disclosed.

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

Volume of business

Prior to accepting Mr D's introduction, Options was told that Caledonian would be introducing about 50 applications a month. I also note that Caledonian introduced around 40 applications a month over the course of its relationship with Options and Options would therefore have been aware a similar volume was being seen in practice.

It's clear that Options kept a good level of management information about the number and nature of introductions that Caledonian had made. I think this is an example of good practice. However, I don't think it was fair and reasonable to simply keep records rather than evaluating that information and taking steps based on it. As highlighted in the 2009 Thematic Review Report, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

I think that Options should have been concerned that such a high volume of introductions from only occupational pension schemes was being referred to it, and according to Options, on an execution only basis. As discussed above, as a professional in the pension industry, Options ought to have known about the following guidance in the FSA (later FCA's) handbook in 2012:

"COBS 19.1.6 G

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 interests."*

I accept this aims to define the expectation of a regulated financial adviser when determining suitability of a pension transfer, but it emphasises the regulator's concern about the potential detriment such a transaction could expose a consumer to. And, being a regulated firm with a requirement to ensure its clients were being treated fairly, I'd expect Options to have been familiar with the guidance contained in COBS – even if it didn't apply to it.

Caledonian's business model, as set out to Options, appears to run counter to this, insofar as the starting point appeared to be an assumption that the transfer *was* suitable. When considered alongside the high volume of business being brought about by Caledonian, Options, acting fairly and reasonably, should've identified a significant risk of consumer detriment.

Options ought to have been aware that the introduction of such a large volume of applications for pension transfers (an estimated 50 a month), including Mr D's application, on a non-advised basis was unusual. I think Options should have been concerned about the motivations and competence of Caledonian and have had adequate risk management controls in place to have allowed it to conclude very quickly that there was a high probability that much, if not all, of the business introduced by Caledonian (which was transfers from occupational pension schemes) carried with it a high risk of significant consumer detriment.

Was it really reasonable to believe that all these introductions would be from non-advised individuals and that significant consumer detriment wouldn't result? And not make further enquiries on that assumption? I don't believe so and I don't believe Options was fulfilling its duties under the Principles by accepting introductions on that basis, and with that knowledge, without interrogating the matter further.

Commission

I also think the level of commission that was being paid to Caledonian was anomalous, given what limited service Caledonian said to Options it was providing. I think this should have given Options cause for concern. In Mr D's case, the initial commission was likely to have been around £4,400, being 7% of his invested pension fund. There was also a further fee to Caledonian of approximately £750. So that's around £5,200 – a significant portion of his pension - for what was an apparently non-advised introduction.

It isn't clear, from the evidence I have seen, that Mr D was made aware of the level of this commission at the time. I think Options would have been privy to the details of this commission at the time, and would have known about similar levels of commission on other applications it dealt with.

In my opinion, the commission paid on what was a relatively small pension pot, was very high for an 'introduction' and should've given Options cause for concern, given the nature of the business being introduced. As noted earlier in my findings, there is no evidence to show Caledonian carried out any of the usual work associated with a defined benefit transfer that would justify such a fee. Nor have I seen any other evidence to show there was any justification for such a high level of commission in the circumstances. I think this level of commission ought to have been another cause for Options to be concerned that Caledonian was putting its own interests ahead of the interests of the customers.

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 and shows an additional risk of consumer detriment.

Caledonian's Accounts

I note that Options made repeated requests for Caledonian's accounts. It sent several emails to Caledonian between March and August 2012. Options also explained in its email of 23 March 2012 that in order to comply with its own compliance procedures this was needed. Options started accepting introductions (including Mr D's) from Caledonian having not received its requested company accounts or the passports of all its directors. This is something that was discussed in August 2012 by Options employees as being required. The 'undated document', but likely of March 2013 - the *"Overseas Introducer Assessment Proforma"* - set out that Options had noted that Caledonian had no UK branch or EEA regulatory details and it could not discover how long it had been trading. It also noted that it still hadn't received any accounts from Caledonian.

But I haven't seen any evidence that the accounts were ever provided. In my opinion, it is fair and reasonable that Options should have met its own standards and should have checked Caledonian's accounts at the outset before accepting any business from it. And, based on Caledonian's conduct, it seems very unlikely accounts would ever have been forthcoming.

Caledonian's reluctance to provide basic information should also have been a further factor which ought to have led Options to question whether it should enter into or continue a relationship with Caledonian. It calls into question the competence and motivations of Caledonian and the ability of Caledonian to organise its affairs. It also meant Options was missing information which might be critical to the decision as to whether to enter into business with Caledonian. It isn't clear why Options accepted introductions without it.

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

In conclusion

Taking all of the above into consideration – individually and cumulatively – I think in the circumstances it is fair and reasonable for me to conclude that Options ought reasonably to have concluded, had it complied with its regulatory obligations which required it to conduct sufficient due diligence on Caledonian before accepting business from it, and to act on information received about the conduct of Caledonian before continuing to accept business from it, that it should *not* accept business from Caledonian, including Mr D's.

I therefore conclude that it is fair and reasonable in the circumstances to say that Options shouldn't have accepted Mr D's application from Caledonian.

I say this because, as discussed in more detail above:

- Options says that at the outset of its relationship with Caledonian the arrangement was to accept introductions on the basis they would be non-advised/execution only. But the evidence should have caused it to question that, including in the case of Mr D.

- Options says it acted on the basis that all of the introductions made by Caledonian would be made so that individuals could transfer pensions from an occupational defined benefit pension scheme.

- Options was aware that there was to be a significant number of such introductions – around 50 a month.

- Options should've undertaken a reasonable level of due diligence as to the introductions to be made and the introductions it was receiving. If it had done so, then it would have likely discovered that Caledonian was giving advice as to transferring pensions and the investments to follow, something Options says was not the basis on which it was to accept introductions.

- Options should've been aware that Caledonian was undertaking one or more regulated activities in the UK, without authorisation. And there was no evidence to show it was meeting any relevant regulations or laws, if activities were taking place outside the UK.

- Options should have been, or were, aware that Caledonian's staff didn't have the qualifications – and therefore expertise – to give advice on defined benefit scheme transfers.

- There was no evidence to show a proper advice process had been followed and Mr D was therefore not able to make a fully informed decision about the transfer.

- Caledonian was taking a very high level of fees and commission for what it said was an execution only service.

- Options hadn't obtained a reasonable level of information about Caledonian as a business before it started accepting introductions – and this persisted for most of its relationship with Caledonian.

Each of these points shows a high risk of potential consumer detriment, and calls into question the motivation and competency of Caledonian. So I think that, acting fairly and reasonably, Options should've declined to accept Mr D's application because of any of these points – and certainly should have done so when considering them cumulatively.

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

In my view, for the reasons given, Options simply should've refused to accept Mr D's application. So things shouldn't have got beyond that. Had Options acted in accordance with its regulatory obligations and best practice, it's fair and reasonable in my view to conclude that it should not have accepted Mr D's application to open a SIPP.

I acknowledge Mr D was asked to sign an Options member's declaration in December 2012 and it would have put some reliance on that. I note this document does give clear warnings about the loss of benefits that would result in the transfer to the Options SIPP. The indemnities also sought to confirm that Mr D wouldn't hold Options responsible for any liability resulting from the investments.

But I don't think this document demonstrates Options acted fairly and reasonably when proceeding with Mr D's instructions.

For the reasons set out, I don't think Options should've accepted the application from Caledonian. So, Mr D shouldn't have got to the point of signing a member declaration as the business shouldn't have come about at all. Furthermore, asking Mr D to sign a declaration absolving Options of all its responsibilities when it ought to have known that Mr D's dealings with Caledonian were putting him at significant risk wasn't the fair and reasonable thing to do. I also note that the declaration was based on Mr D having *"received full and appropriate advice from Caledonian International"* where, for the reasons I have given, Options ought to have been aware Caledonian didn't have the competency to give such advice.

My remit is, of course, to make a decision on what I think is fair and reasonable in all the circumstances. And my view is that it's fair and reasonable to say that just asking Mr D to sign declarations wasn't an effective way for Options to meet its regulatory obligations to treat him fairly, given the concerns Options ought to have identified about his introduction.

I'm also satisfied that, had Options not accepted Mr D's application to open a SIPP introduced from Caledonian, the arrangement for Mr D wouldn't have come about in the first place, and the loss he suffered could've been avoided.

Mr D wasn't actively looking to do anything with his pension. And Caledonian was clearly reliant on Options to facilitate things – but for Options' acceptance of the application, Mr D's business wouldn't have been able to proceed.

In any event, I think it fair to say Mr D should simply have been unable to complete this transaction. I don't think any SIPP operator, acting properly, would have dealt with Caledonian.

Options might argue that another SIPP operator would've accepted Mr D's application, had it declined it. But I don't think it's fair and reasonable to say that Options shouldn't compensate Mr D for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did.

I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted the application from Caledonian, or would have terminated the transaction before completion.

For all the reasons I've set out, I'm satisfied that it would not be fair to say Mr D's actions mean he should bear the loss arising as a result of Options' failings. In the circumstances, I am satisfied that Options should not have asked him to sign the declaration at all and the application should never have been accepted in the first place.

S27 and S28 FSMA

Furthermore, I am satisfied S27 FSMA offers a further and alternative basis on which it would be fair and reasonable to conclude Mr D's complaint should be upheld. I'm satisfied that S27 FSMA applies here, as regulated activities were undertaken by Caledonian, in breach of the General Prohibition. So, Mr D is entitled to recover any money or other property paid or transferred by him under the agreement (i.e. the SIPP), as well as compensation for any loss suffered. I am also satisfied that, in the circumstances, a court would not exercise its discretion to allow the agreement to be enforced; or money paid or transferred under the agreement to be retained.

I have set out the key sections of S27 and S28 above and have considered them carefully, in full. In my view I need to apply a four-stage test to determine whether S27 applies and whether a court would exercise its discretion under S28, as follows:

1. Whether an unauthorised third-party was involved;

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

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

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

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

That brings me to the final test, 4. Having carefully considered this, I am satisfied a court would *not* conclude it is just and equitable for the agreement between Mr D 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 it was giving advice to consumers who were not necessarily financially sophisticated.

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

Putting things right

My aim is to return Mr D to the position he would now be in but for what I consider to be Options' failure to carry out adequate due diligence checks before accepting his SIPP application. Had Options acted appropriately, I think it's more likely than not that Mr D would have remained a member of the Armed Forces scheme rather than transfer into the SIPP.

In light of the above, I require that Options calculate fair compensation by comparing the current position to the position Mr D would be in if he had not transferred from his existing pension.

In summary, Options should:

1. Calculate the loss Mr D has suffered as a result of making the transfer.
2. Pay compensation for the loss either to Mr D direct or into his pension, depending on what he chooses. In either case the payment should consider the necessary adjustments set out below.
3. Pay £500 for the trouble and upset caused to Mr D.

I'll explain how Options should carry out the calculation set out at 1-2 above in further detail as well as explaining my reasons for awarding 3:

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

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

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

2. *Pay compensation to Mr D for any loss he has suffered as calculated in (1).*

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

- always calculate and offer Mr D redress as a cash lump sum payment,
- explain to Mr D before starting the redress calculation that:
    - his 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 his redress prudently is to use it to augment his DC pension
- offer to calculate how much of any redress Mr D receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr D accepts Options' offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr D for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr D's end of year tax position.

Redress paid to Mr D 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 Mr D'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.

If Options believes other parties to be wholly or partly responsible for the loss, it is free to pursue those other parties. So, if Mr D's loss does not exceed £160,000, or if Options accepts my recommendation below that it should pay the full loss as calculated above, the compensation payable to Mr D may be contingent on the assignment by him to Options of any rights of action he may have against other parties in relation to his transfer to the SIPP and the investments if Options is to request this. Options should cover the reasonable cost of drawing up, and Mr D's taking advice on and approving, any assignment required.

If the loss exceeds £160,000 and Options does not accept my recommendation to pay the full amount, any assignment of Mr D's rights should allow him to retain all rights to the difference between £160,000 and the full loss as calculated above.

3. *Pay £500 for the trouble and upset caused.*

Mr D transferred his 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 have caused Mr D some distress and inconvenience. He's clearly upset about how this has all affected him and it has now gone on for some years. So, I consider that a payment of £500 is appropriate to compensate for that.

determination and money award: It's my decision that I require Options to pay Mr D compensation as set out above, up to a maximum of £160,000 plus any interest payable.

As I've said above, until the calculations are carried out, I don't know how much the compensation will be, and it may not be as much as £160,000, which is the maximum sum that I'm able to award in Mr D's complaint. But I'll also make a recommendation below in the event that the compensation is to exceed this sum, although I can't require that Options pays this.

recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I also recommend that Options pays Mr D the balance.

If Mr D accepts this final decision, the money award and the requirements of the decision will be binding on Options. My recommendation won't be binding on Options.

Further, it's unlikely that Mr D will be able to accept my final determination and go to court to ask for the balance of the compensation owing to him after the money award has been paid. Mr D may want to consider getting independent legal advice before deciding whether to accept this final decision.

My jurisdiction decision

It's my decision that this complaint was made in time and can be considered by the Financial Ombudsman Service.

My final decision

It's my final decision that I uphold Mr D's complaint. I require that Options UK Personal Pensions LLP calculate and pay the award, and take the actions, set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 8 February 2024.

Catarina Machado Pinto Simoes
Ombudsman