The complaint

Mr B's representative has complained, on his behalf, that Sebastian & St James International Financial Advisers Limited (SJIFA) gave him unsuitable advice to transfer defined benefits from his occupational pension scheme (OPS) to a Personal Pension Plan (PPP).

What happened

Following contact with a different firm of financial advisers, Mr B contacted a "lead generating" website which resulted in his referral being passed to SJIFA. An SJIFA adviser then contacted Mr B in August 2015, subsequent to which a full advice process was undertaken regarding the transfer of his defined benefits.

SJIFA assessed Mr B's circumstances within a "fact find" and recorded his attitude to risk as being at the "low end of moderate".

SJIFA sought further information about Mr B's defined benefits on his behalf and SJIFA used the services of a pension transfer specialist to assess the suitability of the transfer. Two suitability reports were then provided to Mr B.

It's SJIFA's position that Mr B was advised to not transfer his defined benefits, but that Mr B was insistent on the basis that he wished to repay debts and replace his car. SJIFA has said that it therefore only facilitated the transaction.

Mr B transferred around £102,000 from his OPS, and a small PPP Mr B held with Phoenix was also transferred.

Mr B has said that he complained to SJIFA about the transfer in November 2022, but SJIFA has no record of receiving this.

Mr B's representative then referred his complaint directly to this service in March 2023, which then conveyed the matter to SJIFA for its consideration.

The investigator considered the merits of the case and wrote to both parties in September 2023, setting out his reasons as to why he thought the complaint should be upheld.

SJIFA didn't agree with the investigator's assessment, but also said that it didn't think this service had jurisdiction to consider the matter.

In support of this, it said that SJIFA was regulated by the Central Bank of Ireland at the time of the transfer. Had it received Mr B's complaint in November 2022, it would have communicated the outcome and it would have referred him to the Financial Services and Pensions Ombudsman in Dublin if he remained unhappy with that outcome.

The investigator considered SJIFA's comments, but said that it was also regulated by the Financial Conduct Authority (FCA) in 2015 on an EEA UK Passport basis. He also said that it was his understanding that an SJIFA representative visited Mr B's house and was sending correspondence from an office in the UK.

SJIFA then provided further information as follows:

- SJIFA was incorporated in Ireland and regulated by the Central Bank of Ireland. The decision to issue an authorisation valid for the entire EU was the sole responsibility of the competent authority of the home member state.

- Prior to the UK leaving the EU, it passported into the UK as a firm authorised in one EEA state to conduct business in another EEA state. This was conducted on a "freedom of services" basis from the home member state. And it was on this basis that the adviser visited Mr B at his home.

- As SJIFA was regulated by the Central Bank of Ireland, it was also subject to its Consumer Protection Code which it adhered to. This incorporated a regulated complaints procedure which refers to the Financial Services and Pensions Ombudsman as a recourse for consumers whose complaints couldn't be resolved.

- The correspondence sent to Mr B correctly reflected the basis on which the firm was doing business in the UK. It showed a head office in Ireland, through which the business was placed. The UK administration office was a managed office space where advisers were able to access printing and photocopying facilities, and to also collect post.

- The defined benefit transfer specialist was registered with SJIFA as required by the Central Bank of Ireland and the firm had the necessary permissions under Irish regulation to transact the business.

- The defined benefits transfer report wasn't sent to Mr B, but was discussed in a face to face appointment. That meeting also resulted in Mr B's handwritten letter of the same date requesting that the transfer proceed, despite the recommendation contained in the report.

The investigator wasn't persuaded to alter his view on the matter, however, reiterating that, at the time of the advice, the firm was also regulated by the FCA for advice given within the UK. The advice was given within the UK and the evidence supported that it conducted some of this business from its UK office.

As agreement wasn't reached on the matter, it was referred to me for review.

I firstly considered the matter of whether this service has jurisdiction to consider the complaint, given the objection raised by SJIFA to us doing so. I set out my reasons as to why I thought that it did fall within our jurisdiction in a decision dated 13 February 2024. The following is an extract from that decision.

"This service can't consider every complaint which is referred to it. Where there's a consideration to be made about our rules – in this case whether we have jurisdiction to consider a complaint – this must be determined before we're able to consider the merits of a case.

This service is governed by the Dispute Resolution (DISP) rules which are contained with *the FCA's handbook. And I can't apply discretion to certain rules – the test which I need to apply isn't whether it would be fair and reasonable for this service to be able to consider the complaint. It's a strict interpretation of those rules.*

DISP 2.6.1 R says the following:

(1) The Compulsory Jurisdiction covers complaints about the activities of a firm (including its appointed representatives), of a payment service provider (including agents of a payment institution), of an electronic money issuer (including agents of an electronic money institution), of a CBTL firm, of a designated credit reference agency or of a designated finance platform which:

(a) (except for regulated claims management activities and activities ancillary to regulated claims management activities) are carried on from an establishment in the United Kingdom; or

(b) are carried on from an establishment in an EEA State, in the case of a TP firm, a TA EMI firm, a TA PI firm or a TA RAISP firm with respect to services provided into the United Kingdom; or

(c) are, or are ancillary to, regulated claims management activities.

I can see, from the information provided by SJIFA, that at the time of the advice it was a company regulated by the FCA in the UK. This was confirmed in the terms of business provided to Mr B.

But there is a further consideration here. As set out above, in terms of our territorial scope to consider complaints, we can only consider those about activities by an EEA authorised business which are carried on within the UK, and from an establishment in the UK.

It's SJIFA's position that the correspondence provided (rather than sent) to Mr B showed a head office address registered in Ireland. But although SJIFA has said that the UK office was simply a place where photocopying and printing took place, it appears on its correspondence as the UK office, with a UK contact telephone number.

Mr B was resident in the UK, and received advice from a business which was registered with the UK regulator, from what, in terms of the register definition, was a "UK Office EEA" business, registered as such from 7 June 2012 until 22 March 2017. This encompassed the point in time at which the transfer advice was provided to Mr B in 2015.

I'm therefore satisfied that this was a UK establishment from which a regulated activity was being conducted. This was an "establishment passport" with a physical UK office, rather than a "services passport" under which the business would have no physical presence in the UK. The suitability reports may have been handed to Mr B in person, but I think it's in any case likely, according to SJIFA's description of the activities which occurred in the UK office, that they were prepared and then generated within that establishment for conveyance to Mr B, by whatever means.

Therefore, although I note that SJIFA set out the process of complaint resolution as being through the office in Ireland, I'm satisfied that Mr B is also entitled to complain about the advice given to him through this service."

The investigator then reiterated his findings as to why he considered the complaint should be upheld on the merits, saying the following in summary:

- The advice had been given during the period when this service was publishing information with which businesses could calculate future “discount” rates.

- Whilst businesses weren’t required to use these when giving advice, they nevertheless provided a useful guide as to the kinds of returns deemed feasible at the time of the advice.

- The discount rate was 3.9% pa for the period up to Mr B’s normal retirement date (65). The regulator’s low, mid and upper band projected annual growth rates were 2%, 5% and 8% respectively.

- This compared to a required critical yield to match the scheme benefits at 65 of 8% - and 7% if he retired later.

- Talking this into account, in addition to the composition of assets used to determine the discount rate, Mr B’s medium low attitude to risk, his moderate capacity to absorb losses, and his term to retirement, it was likely that he would receive benefits of a substantially lower overall value by transferring.

- SJIFA had agreed in its suitability report that transferring was unlikely to be in Mr B’s best interests, but that it agreed to facilitate the transfer on an insistent client basis.

- In considering the insistent client basis as set out by SJIFA, the investigator noted that, at the time of the advice, there was no regulatory advice or guidance in place in respect of this. But the COBS rules required a business to “act honestly, fairly and professionally in accordance with the best interests of its client”.

- It also required SJIFA to provide information which was clear, fair and not misleading. This meant that SJIFA’s recommendation needed to be clear and Mr B needed to have understood the consequences of acting contrary to the recommendation.

- Even though SJIFA advised Mr B to not transfer his defined benefits, it didn’t meet the requirements to provide a recommendation which was based on his best interests.

- The suitability report didn’t address Mr B directly, and although SJIFA had said that the recommendation had been discussed in the meeting of November 2015, this wouldn’t have given Mr B sufficient opportunity to fully digest the content of what was being said.

- The report didn’t provide an overview of the scheme benefits which would be relinquished and although it was noted that Mr B wanted to access tax free cash, there was no documented reason as to why. This was important as it needed to understand this in order to decide, and explain, whether this was sufficient in its view to justify relinquishing the guaranteed benefits. SJIFA needed to consider what alternatives Mr B had for meeting those objectives. As it didn’t, the reasons for not recommending the transfer would have been unclear.

- SJIFA undermined its own recommendation when it explained in the same report how Mr B could still proceed with the transfer against its advice. SJIFA said that he would need to explain why he wanted to access the tax free cash and that it would still facilitate the transfer. It also said that it was up to Mr B to evaluate all of the advantages and disadvantages of transferring, thereby underplaying its own role and responsibilities when assessing whether the transfer was suitable. This included consideration of whether Mr B's underlying objectives made the transfer suitable, rather than simply letting Mr B decide.

- The investigator considered it was likely that Mr B misunderstood SJIFA's meaning, or that it was in fact recommending that he transfer.

- It ought to have been clear to SJIFA from its fact finding that Mr B had a very limited knowledge and experience of investments, which meant that they should have taken particular care when considering facilitating the insistent client route. This was especially the case given that Mr B had nearly fallen victim to a possible pension scam. SJIFA didn't therefore demonstrate the necessary care when leaving the weighing up of the advantages and disadvantages to him.

- Although Mr B had provided a statement that he wished to proceed on an insistent client basis, his responses didn't demonstrate that he understood the risks associated with the transfer and what he'd be relinquishing. The evidence didn't support the position that his reasons for transferring were fully assessed and scrutinised by the adviser.

- The fact that the insistent client letter was written within the same meeting as the discussion of the suitability report meant that Mr B was given very little time to digest the advice and think about the consequences of relinquishing the guaranteed benefits for the sake of the tax free cash. That document didn't therefore sufficiently demonstrate that Mr B was truly an insistent client.

- On the basis of the available information, Mr B wasn't in a position to make an informed choice. Had there been the provision of full information and a more in depth analysis of his circumstances and objectives, this would have influenced Mr B's decision to transfer.

- SJIFA didn't do enough to ensure that Mr B understood the transfer wasn't in his best interests, or that he appreciated the potential consequences of transferring. Mr B wasn't advised about the long term nature of pension planning and that there was the risk of funds running out in the case of drawing down.

- It's unusual for an individual who has sought professional advice to then act contrary to that advice. In thinking further about whether Mr B would in any case have proceeded with the transfer even if clear advice had been given, although Mr B had debts of around £14,000, he'd already set up a repayment plan which seemed to be affordable. And the income/expenditure analysis undertaken by SJIFA showed that he had around £425 pm disposable income. And so there wasn't a clear argument or urgent need to relinquish guaranteed benefits for the sake of clearing his debts.

- And although Mr B had said that he needed a new car, had SJIFA looked at alternative ways of achieving this, such as accessing his personal pension benefits, he wouldn't have insisted on relinquishing his guaranteed benefits. Further, the scheme offered the possibility of taking benefits early, and although this was mentioned briefly in the suitability report, no real emphasis was placed on this as being an option for Mr B.

The investigator concluded that, had SJIFA given Mr B sufficient information during the advice process and not made it easy for him to transfer by explaining he could do so in the suitability report, it was unlikely that he would have proceeded with the transfer as an insistent client.

The investigator recommended that SJIFA undertake a loss calculation in accordance with regulator's policy statement PS22/13, and as set out in the regulator's handbook in DISP App 4.

If this determined that redress was due, this could be paid directly to Mr B – and SJIFA could make a notional deduction for the (assumed basic rate) income tax he would have paid on the pension benefits.

SJIFA disagreed, however, saying the following in summary:

- It continued to dispute our jurisdiction to consider the matter and requested that this be reviewed.

- The primary driver behind the transfer was the release of Mr B's tax free cash, which the investigator had himself acknowledged. Evidence which it had recently located demonstrated that Mr B was considering doing this six months previously.

- An email dated 6 August 2015 between SJIFA's adviser and a separate advisory firm showed that Mr B had requested the CETV but that this had expired at the end of 2014. There was also a letter from a further firm about a transfer relating to a Small Self Administered Scheme (SSAS), but SJIFA's adviser stopped this.

- These documents evidenced that Mr B's intention to access his tax free cash wasn't new and had been ongoing for several months. It was queried as to whether this service had asked about why he chose a particular firm relating to the transfer of the SSAS and the intervention of its adviser to prevent a scam from occurring.

- Both Mr B's capacity for loss and attitude to risk were declared as being higher during its advice process than had been demonstrated to this service. And this had also been demonstrated by Mr B's subsequent withdrawals from his pension fund, one of which was to invest in what turned out to be a scam. It was possible that Mr B felt that he could rely on his other OPS benefits.

- There were further emails from Mr B asking for assistance in recovering sums which he'd lost through the scam, and even after this he continued to make further withdrawals. SJIFA proposed that it was the fact that Mr B had used/lost much of his pension fund which was the driver behind the complaint.

- It had acted in accordance with the COBS requirements and the investigator was applying subsequent practices retrospectively. It also disagreed with the assertion that it hadn't afforded Mr B with an appropriate amount of time to consider its advice. The suitability report dated 17 November 2015 wasn't acknowledged by Mr B until 16 January 2016, and so he had plenty of time to change his mind in the interim.

- The comments that the repayment plan was affordable contradicted earlier comments made that Mr B had debts of around £14,000 which he was struggling to pay. The repayment of the debt plan gave Mr B the opportunity to repair his credit rating.

- The funds available from the PPP wouldn't have been sufficient for Mr B's needs. The normal retirement age of the OPS was 65 and it would have been at the discretion of the trustees as to whether he could retire before then – but it would also have been proportionately lower than the £3,370 pa which Mr B could expect at age 65, and wouldn't have supported his needs at the time.

- It disagreed that it didn't have enough information on which to base its advice, as there were several documents which showed why Mr B needed the money. And whilst it also disagreed that it didn't provide enough information for Mr B to be able to make a reasoned judgement, it said Mr B had already made up his mind. It showed him that the transfer wasn't in his best interests, but he wanted to transfer anyway.

- The investigator had listed the concerns which Mr B had expressed regarding the suitability of the transfer, and had also described him as a lay person who wouldn't naturally have acted contrary to SJIFA's recommendation. But this gave it cause for concern, as it was its opinion that the concerns expressed weren't of a lay person, but of his representative which had contrived the complaint on his behalf.

- Much of the commentary made in the consideration of the matter had been subjective rather than based on the merits of the complaint. There was also the matter of Mr B taking some personal responsibility for his actions.

The investigator considered these further comments, but wasn't persuaded to change his view, saying the following in summary:

- He'd already acknowledged that Mr B had been in touch with an adviser previously, but this didn't demonstrate that he'd been insistent upon transferring. There had been concerns about the advice and product which the separate firm was recommending, which was why Mr B stopped that process. He was cold called by that previous adviser and so the idea to access his tax free cash doesn't seem to have originated from Mr B.

- Mr B may have followed up on this idea when he found a new advising firm in SJIFA, but he was still reliant upon it to provide him with clear advice – especially if there were doubts over the previous advice he'd received.

- He hadn't applied the updated requirements around insistent clients to this process – hence his reference to the limited framework in place at the time. However, SJIFA's advice still needed to be clear and not misleading, and he remained of the view that this requirement hadn't been met.

- The withdrawals made by Mr B after the advice didn't change the matter of whether SJIFA followed a fair process when giving that advice or that this meant that Mr B would in any case have proceeded with the transfer.

- There seemed to be no other motive for Mr B other than transferring for the sake of releasing tax free cash for debt repayment. The motives for the further withdrawals seem to have arisen after the transfer. It was unfortunate that this led to Mr B investing in a potential scam, but this further demonstrated that Mr B needed to rely on advice which was in his best interests.

- The investigator emphasised that he wasn't suggesting that SJIFA was responsible for the way in which Mr B had invested after the transfer, and that the proposed methodology for calculating any loss would in any case take into account the withdrawals made.

- Mr B may have thought that the debt repayments were a struggle, but this didn't mean that it was in his best interests to transfer his defined benefits. And the advice report didn't clearly set out the alternatives available to Mr B – one of which was to accept lower defined benefits earlier – this needed to have been presented to Mr B so that he was fully informed and it may well have influenced his decision to transfer.

The investigator said that, as his view was unchanged, he would refer the matter to an ombudsman for a review of the merits. And so it's been passed to me.

What I've decided – and why

I've firstly noted SJIFA's continuing objection to this service considering the merits of the complaint. But as it hasn't articulated any new arguments or points in support of its position, I see no reason to depart from my previous findings on this matter. I remain of the view that the matter does fall within our jurisdiction.

And so I've then proceeded to consider the merits.

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

When considering what's fair and reasonable, and in accordance with the Financial Services and Markets Act 2000 (FSMA) and DISP, I need to take into account relevant: law and regulations; regulators' rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

The following isn't a comprehensive list of the guidance, rules and regulations which applied, but provides useful context for my assessment of the business' actions here.

The FCA's suitability rules and guidance that applied at the time SJIFA advised Mr B were set out in COBS 9. The purpose of the rules and guidance is to ensure that regulated businesses, like SJIFA, take reasonable steps to provide advice that is suitable for their clients' needs and to ensure they're not inappropriately exposed to a level of risk beyond their investment objective and risk profile.

In order to ensure this was the case, and in line with the requirements COBS 9.2.2R, SJIFA needed to gather the necessary information for it to be confident that its advice met Mr B's objectives and that it was suitable. Broadly speaking, this section sets out the requirement for a regulated advisory business to undertake a "fact find" process.

There were also specific requirements and guidance relating to transfers from defined benefit schemes – these were contained in COBS 19.1.

COBS 19.1.2 required the following:

"A firm must:

(1) compare the benefits likely (on reasonable assumptions) to be paid under a defined benefits pension scheme or other pension scheme with safeguarded benefits with the benefits afforded by a personal pension scheme, stakeholder pension scheme or other pension scheme with flexible benefits, before it advises a retail client to transfer out of a defined benefits pension scheme or other pension scheme with safeguarded benefits;

(2) *ensure that that comparison includes enough information for the client to be able to make an informed decision;*
(3) *give the client a copy of the comparison, drawing the client's attention to the factors that do and do not support the firm's advice, in good time, and in any case no later than when the key features document is provided; and*
(4) *take reasonable steps to ensure that the client understands the firm's comparison and its advice."*

Under the heading *"Suitability"*, COBS 19.1.6 set out the following:

"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme or other scheme with safeguarded benefits whether to transfer, convert or opt-out, a firm should start by assuming that a transfer, conversion or opt-out will not be suitable. A firm should only then consider a transfer, conversion or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer, conversion or opt-out is in the client's best interests."

COBS 19.1.7 also said:

"When a firm advises a retail client on a pension transfer, pension conversion or pension opt-out, it should consider the client's attitude to risk including, where relevant, in relation to the rate of investment growth that would have to be achieved to replicate the benefits being given up."

And COBS 19.1.8 set out that:

"When a firm prepares a suitability report it should include:

(1) a summary of the advantages and disadvantages of its personal recommendation;

(2) an analysis of the financial implications (if the recommendation is to opt-out); and

(3) a summary of any other material information."

The regulator's handbook also set out the following:

PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

PRIN 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

I've therefore considered the suitability of SJIFA's advice to Mr B in the context of the above requirements and guidance.

And having done so, as with the investigator, and seemingly also as with SJIFA, hence the insistent client process, my view is that the transfer wasn't in Mr B's best interests. As there seems to be no disagreement on this point, I won't labour it.

Burt for clarity, my views are aligned with those set out by the investigator. From a financial viability perspective, given the critical yield required to match the scheme benefits and the likely growth rates achievable in the years up to retirement, I think the transferred pension funds were likely to provide overall benefits of a materially lower value than those in the scheme. And other than wanting to access tax free cash to repay debts, the merits of which I address below, I haven't seen any other compelling reasons as to why it might have been in Mr B's best interests to transfer.

It is nevertheless SJIFA's position that Mr B acted against its advice and met the requirement of an insistent client.

But in my consideration of this, as with the investigator, I have several concerns about the way in which the insistent client process was conducted, not least of which was the wording within the recommendation report itself, which read as follows:

*"Our opinion, based on the information currently in our possession, is that the disadvantages of a transfer **potentially** outweigh the advantages of a transfer. However, if [Mr B] should wish to proceed, we indicate in the following Appendix 2 the basis upon which we would be prepared to take this matter further" (my emphasis)*

In my view, the inclusion of the word "potentially" significantly waters down the meaning here. I don't think there's an unambiguously clear indication to Mr B that SJIFA considered this not to be in Mr B's best interests. And this is especially the case when Mr B is nevertheless provided with the opportunity to proceed immediately after this.

Even in the absence of the later more clearly defined guidance around insistent clients, I think this falls foul of the requirement to be clear, fair and not misleading.

As with the investigator, it seems very much to me that everything related to a discussion and consideration of options happened very quickly, on the same day. Given Mr B's clearly demonstrated prior susceptibility to making decisions, likely in a short space of time, which weren't in his best interests, this was SJIFA's opportunity to recommend that he take more time to consider his options, including that of beginning to draw his defined benefits. So when Mr B offered to write the letter explaining his reasons for transferring the same day as the discussion of the report, I think he should have been advised to take more time to think things over and then make a decision.

SJIFA has provided notes which indicate that, although SJIFA said with the scheme trustees' consent he could begin drawing on his defined benefits, he said he didn't want additional income at that stage, only tax free cash. But this was the opportunity for SJIFA to inform him that, in certain situations, taking benefits early and reinvesting any surplus income might be the more suitable path than transferring to access tax free cash and losing valuable guarantees.

And again, as with the investigator, I think that had an explanation of the possibility of beginning to begin drawing on his scheme benefits and reinvesting any surplus income which, by the looks of the later withdrawals, if implemented, might in any case have served him well, he would have considered this as an option. There would have been an actuarial reduction due to the benefits being taken early, but they would still be guaranteed and payable for the rest of Mr B's life. Further, Mr B would by age 67 have had a further 19 years' defined benefits accrual upon which he could then draw to top up the income stream, along with the state pension.

My view is that, if SJIFA had re-emphasised the value of the guarantees and explained the above, Mr B would more likely than not have considered things differently. As I've said above, Mr B didn't seem by his nature (and recent history) to be an individual who acted contrary to financial advice. He'd initially accepted a recommendation from the firm which had persuaded him to transfer his defined benefits to a SSAS, and then accepted the advice from SJIFA to halt this process.

Mr B had been cold called about the possibility of accessing his tax free cash in the first place – this wasn't his own initiative. And therefore when he was presented with the possibility of transferring his pension through a company which he considered to be legitimately acting in his best interests, although the headline recommendation may have been not to transfer, without the required detail as to why he shouldn't, and the comparative value of considering an appropriate range alternatives, I don't think it's particularly surprising that he capitalised on the opportunity presented to him both within the report, and on the same day as the discussion around that report, of explaining why he nevertheless wished to proceed.

Although Mr B may have found the debt repayment plan an encumbrance, he nevertheless had over £400 pm disposable income and the additional funds from his PPP under pension freedoms, valued at around £8,600, along with the tax free cash and income which could be produced from his OPS. The amount of tax free cash available to Mr B from the scheme wasn't known, although I don't think it would have been particularly onerous to find this out, but it was known that there was an entitlement greater than 25% of the CETV value (around £95,000 as set out in the report). And so I think it's likely that this would have gone some way in itself to repaying the outstanding debt.

But even if the combined access to the PPP funds and the tax free cash from the OPS wasn't sufficient to repay the debt and buy a replacement car, the additional income produced by the OPS would have helped Mr B to meet, and possibly overpay, the debt repayment schedule.

However, the report set out just three options to Mr B: to do nothing and leave the benefits in the OPS; investigate the possibility of transferring the deferred benefits into his current OPS; or to transfer to an individual arrangement such as a PPP.

Cleary only one of these would assist Mr B in achieving what he wanted, and so it's again not particularly surprising that he would have opted for this, even if it was against the headline, albeit for the reasons set out above somewhat ambiguous, advice. The simple fact is, as noted by the investigator, that there were other options. And I think the restriction of Mr B's options to the above, without setting out the other alternatives, was, in my view, a failure to be clear, fair and not misleading.

Had these been presented to Mr B in writing along with commentary and reemphasis of the guarantees he'd be retaining, I think it's more likely than not that, as he'd done before, he would have heeded the advice given to him and not transferred his defined benefits.

Putting things right

A fair and reasonable outcome would be for the business to put Mr B, as far as possible, into the position he would now be in but for the transfer of his defined benefits.

I consider that Mr B would most likely have retained his benefits in the OPS if suitable advice had been given, but accessed them at that point for the sake of the tax free cash and income. The recommendation report set out that this ought to be possible, subject to confirmation from the trustees, and I've seen no evidence or indication as to why this wouldn't have been the case.

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

The calculation should factor in Mr B beginning to take his OPS retirement benefits instead of transferring, and take account of the withdrawals made from the transferred fund.

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 B's acceptance of my final decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Sebastian & St James International Financial Advisers Limited should:

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

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

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

and

  - a straightforward way to invest their redress prudently is to use it to augment his defined contribution pension

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

- if Mr B accepts Sebastian & St James International Financial Advisers Limited's offer to calculate how much of its redress could be augmented, request the necessary information and not charge Mr B for the calculation, even if he ultimately decides not to have any of its redress augmented,

and

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

Redress paid to Mr B as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, businesses 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 B'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.

Where I uphold a complaint, I can award fair compensation of up to £170,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £170,000, I may recommend that the business pays the balance.

Determination and money award: I require Sebastian & St James International Financial Advisers Limited to pay Mr B the compensation amount as set out above, up to a maximum of £170,000.

Recommendation: If the compensation amount exceeds £170,000, I would also recommend that Sebastian & St James International Financial Advisers Limited pays Mr B the balance.

If Mr B accepts this final decision, the award will be binding on Sebastian & St James International Financial Advisers Limited.

My recommendation wouldn't be binding on Sebastian & St James International Financial Advisers Limited. Further, it's unlikely that Mr B could accept my decision and go to court to ask for the balance. Mr B may want to consider getting independent legal advice before deciding whether to accept my final decision.

Whilst I've include details of our award limit for completeness, I should say that similar recent calculations have determined that, due to current financial conditions, no loss is payable in respect of this kind of define benefit transfer. This may or may not be the outcome here – and if no loss is indeed demonstrated, then Mr B may be comforted that the value of his transferred benefits has exceeded the value of his defined benefits.

My final decision

My final decision is that I uphold the complaint and I direct Sebastian & St James International Financial Advisers Limited to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 25 April 2024.

Philip Miller
Ombudsman