Neutral Citation: **[2024] UKUT 00357 (TCC)**

Case Number: UT-2023-000053 and 000054

**UPPER TRIBUNAL**
**(Tax and Chancery Chamber)**

Hearing venue: The Rolls Building, London

*FINANCIAL SERVICES – whether Applicants conduct reckless and in breach of Statement of Principle 1 – yes – references dismissed so far as prohibition orders under section 56 FSMA and withdrawal of approvals to perform senior management functions under section 63 FSMA concerned – consideration of impact of taxation and appropriate rate of interest to be used in calculating amount to be disgorged in financial penalties under section 66 FSMA – substantial financial penalties in order but calculations to be reviewed*

**Heard on:** 27 September and 1-4 October 2024
**Judgment date: 13 November** 2024

**Before**

**JUDGE MARK BALDWIN**
**MR DUNCAN BLACK**
**MRS JO NEILL**

**Between**

**TONI FOX-BRYANT**
**DAVID BRIAN PRICE**

**Applicants**

**and**

**THE FINANCIAL CONDUCT AUTHORITY**

**The Authority**

**Representation:**

For the Applicants: Mr. Gareth Fatchett of FS Legal Solicitors LLP

For the Respondents: Mr Adam Temple of counsel, instructed by the Financial Conduct Authority

## DECISION

### INTRODUCTION

1. This is the final hearing of the references ("the References") of Ms Fox-Bryant and Mr Price against two Decision Notices ("the Decision Notices") dated 3 May 2023, by which the Authority decided to:

(1) impose on Ms Fox-Bryant a financial penalty of £681,536 under section 66 of the Financial Services and Markets Act 2000 ("FSMA"), a prohibition order under section 56 FSMA and to withdraw Ms Fox-Bryant's approvals to perform senior management functions at CFP Management Limited ("CFP") under section 63 FSMA.

(2) impose on Mr Price a financial penalty of £632,594 under section 66 FSMA, a prohibition order under section 56 FSMA and to withdraw Mr Price's approvals to perform senior management functions at CFP under section 63 FSMA.

2. The Decision Notices arise out of the pension transfer business operated by the Applicants' firm, CFP and its authorised representative, Selectapension Bureau Services Limited ("SBS"). Ms Fox-Bryant and Mr Price were each directors and 50% shareholders in CFP, and CFP was a 30% shareholder in SBS. The other 70% shareholder was Selectapension Ltd, a company that provided financial planning software to independent financial advisers.

3. For the reasons set out below, we have decided to dismiss the Applicants' references as to the prohibition orders and withdrawals of approval. We agree that financial penalties should be imposed on both Applicants, but we have decided that the size of those penalties needs to be reviewed in the light of the comments made below, and we have made further directions as to how that should be done.

### PENSION TRANSFERS

4. It may be helpful to pause at this point and outline (at a very high level) what we mean by "pension transfer business" and the types of issues that arise when someone is thinking about transferring from a defined benefit ("DB") pension scheme to a defined contribution ("DC") scheme.

5. A DB pension is a form of occupational pension, also commonly known as a 'final salary pension'. The amount of a DB pension is related to the member's pensionable salary and years of service. The pension is calculated by applying a fraction or percentage to the member's pensionable salary for each year of service. For example, the scheme may pay 1/60th for each year of service, so a member with 20 years' service would receive a pension for life of 20/60ths of their pensionable salary. The definition of the pensionable salary varies between schemes and can be, for example, the average of the last three years' salary or average career earnings. Pensions are typically increased each year as stated in the scheme rules (subject to statutory rules setting minimum levels of increase in certain situations).

6. With a DB pension, there is no investment risk or charges for the member to worry about. This is all taken care of by the scheme and the employer, which effectively guarantee the payment of whatever pension is due under the scheme. If there is a shortfall in scheme assets, it is the responsibility of the employer to make that good. The Pension Protection Fund provides a measure of security against the scheme assets being insufficient and the employer being unable to make good the deficit, albeit with an element of "haircut".

7. With a DC pension, the member builds up a 'pension pot' usually through contributions or by transferring the value of a DB pension into the DC pension. Those contributions are then invested. The money available to provide a pension depends on the performance of the investments, and any charges deducted by investment managers, etc.

8. As a result of the different pension types and the decisions available to pension holders (the range of which was significantly widened by the Pension Schemes Act 2015 and the Finance Act of the same year, which sought to provide greater freedom and flexibility for consumers to manage their pensions, allowing DB pension scheme members the opportunity to transfer out to a DC scheme in order to access their savings), there are a variety of ways that a client can receive income from the schemes:

(1) A member of a DB pension scheme will receive the payments, for life, under their scheme, usually with an option to have a reduced pension and a tax-free pension commencement lump sum ("PCLS"). The date from which the pension is payable will be determined by the rules of the scheme, which may allow a pension to be drawn down from an earlier date, albeit with a reduction to reflect the fact that the pension will be paid for longer than would otherwise be the case. If the member dies, there is usually provision for a spouse/civil partner to continue to receive an income of 50% to 66% of the member's pension.

(2) Those with a DC pension scheme can access their pension pot from age 55 (without actually retiring) and use it in a number of ways. In particular:

(a) Someone could take up to 25% of their pension pot as a tax-free lump sum (subject to their available lifetime allowance). The rest remains invested, and the individual can then draw funds out to provide a regular income or just take amounts out as and when required.

(b) The individual can leave their money in their pension pot and take lump sums from it when they need to. They can do this until their money runs out or they choose another option. This option is also known as Uncrystallised Funds Pension Lump Sum (UFPLS). Each time they take a lump sum, 25% is, subject to their available lifetime allowance, tax-free. The rest will be taxed as earnings.

(c) They can close the pension and take the whole amount at once. Normally, the first 25% of the amount withdrawn will, subject to their available lifetime allowance, be tax free and the rest taxed as earnings.

(d) They can use the pension pot to purchase an annuity, entitling them to income for life, with or without payments to another in the event of their death (typically, a spouse). This is akin to a DB pension scheme, because they have an entitlement to income for life but no entitlement to any residue of their 'pot' if and when they die.

9. As to the variability in the income that an individual can ultimately expect to receive from their pension:

(1) A DB pension is straightforward. The member will receive an income which typically increases each year.

(2) For a DC pension, the amount to be drawn down is up to the individual, subject to there being funds available. As to the size of those funds, there is the unknowable fact of how the investments will fare into the future, both before and after retirement. There is no automatic ability to receive more income to account for inflation.

(3) Beyond the performance of the underlying investments themselves, there is a further issue with a DC pension from which an individual is drawing a pension: 'sequence of return risk' or 'sequencing risk' relates to the fact that poor performance in early years after retirement can have a disproportionate effect on the pension pot, which may not be recoverable in later years. For example, consider a pension pot of £100,000 from which

a client seeks to draw £4,000 per annum. That amounts to 4% of the initial pot, but if the investments fall by 20%, to £80,000, then the client is now withdrawing 5% in that year. Even if the investments recover, and on average produce returns in line with the assumptions, the fund has been depleted by more than initially intended, and the investments would have to perform even better to make good that loss.

(4) 'Longevity risk' is a further factor:

(a) Recipients of income from a DB scheme, or an annuity, could be said to 'lose out' financially if they die early, but 'win' financially if they live for a long time. At a simplistic level, the 'risk' of an investor living a long time is borne by the DB scheme. A person with a DB pension does not have an asset which is included in their estate on death, although (as mentioned at [8](1)) there will usually be a reduced pension for the deceased's surviving spouse/civil partner.

(b) A person drawing a pension from a DC scheme might do better financially than under a DB scheme if they die early. Their estate will contain the remaining funds, which can be passed on to beneficiaries free of IHT in certain circumstances (although the measures announced in the recent Budget will change this). A surviving spouse/civil partner may do better or worse from this inheritance than they would from a spouse's pension under an annuity or under a DB scheme. On the other hand, if the pension holder lives a long time, they may exhaust their pot of money before they die. Here, not only will the individual need to live their final years without the relevant income, but there will be no remaining pot of money to pass on to beneficiaries.

10. We were told that longevity risk is compounded by a general tendency for people to underestimate their life expectancy.

11. Where a member transfers out of a DB pension into a DC pension, the member gives up their guaranteed benefits in exchange for a 'cash equivalent transfer value' ("CETV"), which the individual will then typically invest in a DC pension. The CETV is essentially the capitalisation of the rights under the DB pension, which the individual foregoes by transferring.

12. When giving evidence, Mr Price explained some of the reasons why someone might want to transfer from a DB to a DC scheme:

(1) It gave some people the benefits of never having to take a pension. Pension funds could be excluded from inheritance tax, so lots of advisers had wealthy clients who would want to keep funds within the pension because it was outside of their estate when they died.

(2) Somebody who was in very serious ill health could take the funds early as a lump sum. Under a DB scheme, if they died while receiving the pension with no dependants, the pension would have died with them.

(3) Some people wanted to clear their debts early, and then have the freedom to then build up more funds afterwards to help with their retirement without mortgage or other financial commitments.

(4) Some clients would have wanted to retire early. They might have wanted to take a higher amount from their pension than they might have been able to from a DB scheme for several years, until their state pension came in, and then they would reduce the amount they took from a DC pension. They wouldn't have had that flexibility in a DB scheme.

13. It will be readily apparent that deciding whether to transfer a DB pension into a DC one is not a straightforward issue for an individual. Indeed, a former Chief Executive of the

Authority told the House of Commons Public Accounts Committee[1] that he considered transferring a DB pension into a DC scheme to involve the most complex piece of financial advice a person can take.

14. Since 6 April 2015, advising on transfers from a DB pension to a DC pension has been a regulated activity: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, Art 53E.

15. Moreover, since 6 April 2015, it has been obligatory for trustees of DB pension schemes to check that a scheme member has received 'appropriate independent advice' prior to making a transfer from a DB pension with a value more than £30,000 to a DC pension: Pension Schemes Act 2015, section 48. The 'appropriate independent advice' must be provided by a person with appropriate permissions under FSMA.

16. This is the world that the Applicants, through CFP and SBS, entered in the Spring of 2015, and it is their alleged failings in relation to the pensions transfer advice they were responsible for between then and the Autumn of 2017 which form the basis of the Authority's criticisms of them and (in due course) the Authority's responses as set out in the Decision Notices.

**OUTLINE TIMELINE**

17. In the hope that it might help readers of this decision, we set out below a high-level outline chronology of some relevant events:

(1) Late 2012 - Discussions begin with Selectapension with regards to CFP providing DB transfer advice to IFA clients who use their software.

(2) April 2015 - The first cases were received.

(3) 4 January 2017 - The Authority contacted CFP for data.

(4) 15 February 2017-The Authority requested data on 8 cases following the initial data provided to them.

(5) 5 April 2017 - The Authority contacted CFP to arrange a site visit on 15 June 2017.

(6) June 2017 - The Authority visited CFP. They would write to CFP with their findings. The Authority called a week after the visit and tried to get CFP to voluntarily give up their pension transfer permissions. This results in CFP agreeing not to make further recommendations on cases in the 'pipeline' and that they would review all cases where recommendations had previously been made but not yet completed.

(7) Later in June 2017 - CFP provided the Authority with more details regarding the cases they would review and how they might change their process following the verbal feedback given during their visit.

(8) 21 August 2017 - CFP received written feedback from the Authority following their visit in June 2017 and in September CFP provided their response to the FCA's written feedback.

(9) 6 October 2017 - The Authority requested 4 further files, which CFP provided.

(10) 30 October 2017 - The Authority held a telephone conference with CFP. During the conference they reminded CFP that they could take further action and suggested that

[1] House of Commons Public Accounts Committee: Investigation into the British Steel Pension Scheme (HC251) published on 21 July 2022 at paragraph 1.4.

CFP give up their pension transfer permissions. CFP agreed to do this and submitted a formal application to vary their permissions on 1 November.

(11) 9 March 2018 - The Authority contacted CFP to set up a telephone conference in relation to CFP's proposal for re-gaining their pension transfer permissions, which was put to the Authority in April.

(12) 25 October 2018 - CFP's application for pension transfer permissions was granted by the Authority.

(13) 18 February 2020 - The Authority called CFP for further details. They requested 20 files initially and for CFP to have a further 20 files ready if they were to be requested. The first 20 files were sent over to the Authority in March. The further 20 files were never asked for.

**THE DECISION NOTICES**

18. The Authority has power under section 64A FSMA to make rules about the conduct of approved persons and directors and employees of authorised persons. These include the Authority's Statements of Principle and Code of Practice for Approved Persons ("APER"). Statement of Principle 1 ("SP1") is that an approved person must act with integrity in carrying out his accountable functions and Statement of Principle 2 ("SP2") is that an approved person must act with due skill, care and diligence in carrying out his accountable functions.

19. The Decision Notices assert that during the period from 21 April 2015 to 31 October 2017 ("the Relevant Period", which is the period between CFP starting its pension transfer business with Selectapension/SBS and CFP agreeing to give up its pension transfer permissions) the Applicants failed to comply with SP1.

*The Authority's Alternative Case*

20. The Authority's Statement of Case at [93] contains the Authority's secondary case:

> 'Further or alternatively, the same facts and matters demonstrated a lack of due skill, care and diligence, contrary to Statement of Principle 2 in APER. The Authority recognises that this alternative case was not expressly raised with the RDC, but considers it to be inherent in the facts and matters that were raised.'

21. The Authority's Statement of Case is dated 3 July 2023, and was therefore pleaded after the Upper Tribunal's decision in *Bluecrest v FCA* [2023] UKUT 00140 (TCC) ("*Bluecrest UT*"), released on 21 June 2023, but before the decision in *Burdett v FCA* [2024] UKUT 00156 (TCC) and *Reynolds v FCA,* [2024] UKUT 00295 (TCC). All three cases concluded that the Upper Tribunal has no jurisdiction to consider alternative cases based on breaches of different Principles/Statements of Principle than those aired before the Regulatory Decisions Committee ("RDC").

22. On 2 October (during the course of the hearing before us) the Court of Appeal released its decision in *FCA v Bluecrest Capital Management (UK) LLP*, [2024] EWCA Civ 1125, reversing the decision of the Upper Tribunal in *Bluecrest UT*. It is now clear that, as a jurisdictional matter, the Upper Tribunal does have jurisdiction to consider alternative cases based on breaches of different Principles/Statements of Principle than those aired before the RDC.

*Ms Fox-Bryant*

23. So far as Ms Fox-Bryant is concerned the Authority says that her actions in relation to the design and operation of the CFP pension transfer model were reckless. Specifically, Ms Fox-Bryant recklessly designed, implemented and oversaw an advice process that:

(1) lacked the requisite safeguards to ensure that CFP's pension transfer specialists only provided DB pension transfer advice when they had gathered sufficient information to do so. The Authority say that they reviewed 21 files, of which 14 contained material information gaps, meaning that it was not possible to assess whether the advice was suitable for the client. Information collection was not compliant with the Authority's rules in 18 of the 21 files reviewed;

(2) enabled CFP's pension transfer specialists to issue suitability reports without having properly considered their clients' financial circumstances and objectives, attitude to risk and capacity for loss. In particular, CFP's pension transfer specialists:

(i) failed to give due consideration to whether clients could financially bear the risks involved in a pension transfer;

(ii) placed undue reliance on their clients' stated objectives regardless of whether they were realistic or financially viable. They failed to weigh those objectives against the benefits of remaining in the clients' DB pension scheme, and failed to investigate or determine whether those objectives could be met by remaining in the current scheme;

(iii) advised clients to transfer even if the transfer analysis did not support the recommendation; and

(iv) advised clients to transfer even when those clients had stated that they wanted the guaranteed income afforded to them within their DB pension scheme; and

(3) permitted CFP's pension transfer specialists to issue suitability reports that were unclear or misleading. The Authority identified suitability reports that:

(i) contained inadequate information about the possible disadvantages of transferring out of a client's DB pension scheme, when considering the client's specific circumstances and objectives;

(ii) contained warnings that contradicted the personal recommendation to transfer, with no explanation; and

(iii) contained the prominent and misleading statement: "It is very important to understand that DB benefits are not guaranteed," without sufficient further explanation or context.

24. The Authority asserts that failures resulted in pension transfer specialists at CFP routinely providing unsuitable or otherwise non-compliant advice to clients. As a qualified pension transfer specialist with 35 years of experience in the pensions industry by the start of the Relevant Period, Ms Fox-Bryant must have been aware of the unacceptably high risk that the Pension Transfer Model would result in the provision of unsuitable advice. However, Ms Fox-Bryant recklessly disregarded this risk.

*Mr Price*

25. So far as Mr Price is concerned, the Decision Notice says that his actions in relation to the operation and oversight of the pension transfer model were reckless. In particular, it is asserted that he recklessly oversaw and participated in the operation of an advice process that:

(1) lacked the requisite safeguards to ensure that CFP's pension transfer specialists only provided DB pension transfer advice when they had gathered sufficient information to do so;

(2) enabled CFP's pension transfer specialists to issue suitability reports without having properly considered their clients' financial circumstances and objectives, attitude to risk and capacity for loss. In particular, CFP's pension transfer specialists:

(i) failed to give due consideration to whether clients could financially bear the risks involved in a pension transfer;

(ii) placed undue reliance on their clients' stated objectives regardless of whether they were realistic or financially viable. They failed to weigh those objectives against the benefits of remaining in the clients' DB pension scheme, and failed to investigate or determine whether those objectives could be met by remaining in the current scheme;

(iii) advised clients to transfer even if the transfer analysis did not support the recommendation; and

(iv) advised clients to transfer even when those clients had stated that they wanted the guaranteed income afforded to them within their DB pension scheme; and

(3) permitted CFP's pension transfer specialists to issue suitability reports that were unclear or misleading. The Authority identified suitability reports that:

(i) contained inadequate information about the possible disadvantages of transferring out of a client's DB pension scheme, when considering the client's specific circumstances and objectives;

(ii) contained warnings that contradicted the personal recommendation to transfer, with no explanation;

(iii) contained the prominent and misleading statement: "It is very important to understand that DB benefits are not guaranteed," without sufficient further explanation or context.

26. The Authority's case is that these failures resulted in pension transfer specialists at CFP routinely providing unsuitable or otherwise non-compliant advice to clients. As a qualified pension transfer specialist with over 30 years of experience in the pensions industry by the start of the Relevant Period, Mr Price must have been aware of the unacceptably high risk that the pension transfer model would result in the provision of unsuitable advice. However, Mr Price recklessly disregarded this risk.

**THE FRAMEWORK FOR THE REFERENCES**

*The Authority's Powers*

27. Section 56 FSMA provides:

> "(1) The FCA may make a prohibition order if it appears to it that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by —
>
> (a) an authorised person …"

28. Section 63 FSMA provides that:

> "(1) The FCA may withdraw an approval under section 59 given by the FCA or the PRA in relation to the performance by a person of a function if the FCA considers that the person is not a fit and proper person to perform the function."

29. Section 66 FSMA provides that:

"(1) A regulator may take action against a person under this section (whether or not it has given its approval in relation to the person) if—

(a) it appears to the regulator that he is guilty of misconduct; and

(b) the regulator is satisfied that it is appropriate in all the circumstances to take action against him.

(1A) For provision about when a person is guilty of misconduct for the purposes of action by a regulator—

(a) see section 66A, in the case of action by the FCA, and

(b) see section 66B, in the case of action by the PRA.…

(3) If the regulator is entitled to take action under this section against a person, it may do one or more of the following —

(a) impose a penalty on him of such amount as it considers appropriate;

…"

30. Section 66A FSMA provides that:

"(1) For the purposes of action by the FCA under section 66, a person is guilty of misconduct if any of conditions A to C is met in relation to the person.

(2) Condition A is that—

(a) the person has at any time failed to comply with rules made by the FCA under section 64A, and

(b) at that time the person was—

(i) an approved person,

(ii) an employee of an authorised person, or

(iii) a director of an authorised person."

31. Section 69 FSMA provides that:

"(1) Each regulator must prepare and issue a statement of its policy with respect to—

(a) the imposition of penalties, suspensions, conditions or limitations under section 66;

(b) the amount of penalties under that section; ...

(2) A regulator's policy in determining what the amount of a penalty should be, or what the period for which a suspension or restriction is to have effect should be, must include having regard to—

(a) the seriousness of the misconduct in question in relation to the nature of the principle or requirement concerned;

(b) the extent to which that misconduct was deliberate or reckless; and

(c) whether the person against whom action is to be taken is an individual.

…

(8) In exercising, or deciding whether to exercise, its power under section 66 in the case of any particular misconduct, a regulator must have regard to any statement of policy published by it under this section and in force at the time when the misconduct in question occurred."

*The Authority's policy on section 66 financial penalties*

32. The Decision Notices set out the financial penalties that the Authority would have imposed but for financial hardship:

> (1) For Ms Fox-Bryant-Bryant, disgorgement of £473,289 plus a punitive fine of £156,100, plus interest, giving a total penalty of £837,636.
>
> (2) For Mr Price, disgorgement of £439,302 plus a punitive fine of £144,900, plus interest, giving a total penalty of £777,494.

33. The Authority accepted that the total penalties would cause each of the Applicants serious financial hardship. The penalties were therefore limited to the disgorgement elements. The Applicants originally argued that financial hardship should diminish financial penalties referrable to disgorgement, but that argument is no longer being pursued before us.

34. So far as the Authority's policy on section 66 financial penalties is concerned, the Authority's Decision Procedure and Penalties manual ("DEPP") sets out at paragraph 6.5.2 the three principles applicable to penalties:

> 'The FCA's penalty-setting regime is based on the following principles:
>
> (1) Disgorgement - a firm or individual should not benefit from any breach;
>
> (2) Discipline - a firm or individual should be penalised for wrongdoing; and
>
> (3) Deterrence - any penalty imposed should deter the firm or individual who committed the breach, and others, from committing further or similar breaches.'

35. At paragraph 6.5B.1 DEPP sets out the Authority's position on disgorgement:

> 'The FCA will seek to deprive an individual of the financial benefit derived directly from the breach (which may include the profit made or loss avoided) where it is practicable to quantify this. The FCA will ordinarily also charge interest on the benefit. Where the success of a firm's entire business model is dependent on breaching FCA rules or other requirements of the regulatory system and the individual's breach is at the core of the firm's regulated activities, the FCA will seek to deprive the individual of all the financial benefit he has derived from such activities.'

*The Tribunal's Jurisdiction*

36. So far as the Tribunal's jurisdiction and powers in relation to the References are concerned, these are set out in section 133 (5) – (7) FSMA, as follows:

> "(5) In the case of a disciplinary reference or a reference under section 393(11), the Tribunal—
>
> > (a) must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter; and
> >
> > (b) on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.
>
> …
>
> (6) In any other case, the Tribunal must determine the reference or appeal by either—
>
> > (a) dismissing it; or

(b) remitting the matter to the decision-maker with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal.

(6A) The findings mentioned in subsection (6)(b) are limited to findings as to—

(a) issues of fact or law;

(b) the matters to be, or not to be, taken into account in making the decision; and

(c) the procedural or other steps to be taken in connection with the making of the decision.

(7) The decision-maker must act in accordance with the determination of, and any direction given by, the Tribunal."

A reference to the Tribunal of a decision by the Authority to impose a penalty under section 66 FSMA is a "disciplinary reference" (see section 133(7A) FSMA), but decisions to impose a prohibition order under section 56 FSMA or withdraw approval under section 63 FSMA are not.

37. *Page v FCA* [2022] UKUT 00124 (TCC) involved fines and prohibitions and the position was explained at [113] to [115]:

> '113. The Applicants' references of the decisions to impose a financial penalty are "disciplinary references" and accordingly… the Tribunal has power to determine at its discretion what (if any) is the appropriate action for the Authority to take. In relation to the Applicants' references of the Authority's decisions to impose a prohibition order, which we shall refer to as the "non-disciplinary references", the powers of the Tribunal as set out in s 133(6) are more limited. The jurisdiction may now be characterised as a supervisory rather than a full jurisdiction. That means that, unless the Tribunal believes the reference to have no merit and therefore dismisses them, its powers are limited to remitting the matter to the Authority with a direction to reconsider their decisions in accordance with the findings of the Tribunal.
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> 114. The Tribunal explained the extent of its powers on a non-disciplinary reference in *Carrimjee v FCA* [2016] UKUT 0447 (TCC) at [39] and [40] as follows:
>
> > "39. If, having reviewed all the evidence and the factors taken into account by the Authority in making its decision, and having made findings of fact in relation to that evidence and such other findings of law that are relevant, the Tribunal concludes that the decision to prohibit is one that is reasonably open to the Authority then the correct course is to dismiss the reference.
> >
> > 40. Alternatively, if the Tribunal is not satisfied that in the light of its findings that the decision is one that in all the circumstances is within the range of reasonable decisions open to the Authority, the correct course is to remit the matter with a direction to reconsider the decision in the light of those findings. For example, that course would also be necessary were the Tribunal to make findings of fact that were clearly at variance with the findings made by the Authority, and which formed the basis of its decision. That course would also be necessary had there been a change of circumstance regarding the applicant which indicated that the original findings made on which the decision was based, for example as to his competence to undertake particular activities, had been overtaken by further developments, such as new evidence which clearly demonstrated the applicant's proficiency in relation to the relevant matters. Such a course

> would not usurp the Authority's role in making the overall assessment as to fitness and propriety but would ensure that it reconsidered its decision on a fully informed basis. In our view such a course is consistent with the policy referred to at [31] and [32] above as it leaves it to the Authority to make a judgment as to whether a prohibition order is appropriate."

> 115. Even in the case where the Tribunal has not accepted all of the factors that led the Authority to conclude that a prohibition order was appropriate and it might therefore be said that the Authority has taken into account irrelevant considerations in deciding whether to impose a prohibition order, it would not be appropriate to remit the decision to the Authority for further consideration where the seriousness of the matters which the Tribunal has found would lead inevitably to the Authority reaching the same decision were that course to be followed: see *Charles Palmer v FCA* [2017] UKUT 0358 (TCC) at [270]."

38. There is no dispute as to the jurisdiction of this Tribunal in relation to the References.

*Statement of Principle 1: Recklessness*

39. As we have seen, SP1 states that 'An approved person must act with integrity in carrying out his accountable functions.' In *Seiler v FCA* [2023] UKUT 00133 (TCC), the Upper Tribunal discussed the concept of integrity, observing:

> "42 … for the purposes of this decision the following points are relevant:
>
> (1) There is no strict definition of what constitutes acting with integrity. It is a fact specific exercise.
>
> (2) Even though a person might not have been dishonest, if they either lack an ethical compass, or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity.
>
> (3) Acting recklessly is another example of a lack of integrity not involving dishonesty. A person acts recklessly with respect to a result if he is aware of a risk that it will occur and it is unreasonable to take that risk having regard to the circumstances as he knows or believes them to be.
>
> (4) To turn a blind eye to the obvious and to fail to follow up obviously suspicious signs is a lack of integrity.
>
> (5) There are both subjective and objective elements to the test of what constitutes a lack of integrity. The test is essentially objective but nevertheless involves having regard to the state of mind of the actor as well as the facts which the person concerned knew.
>
> 43. In these proceedings, the Authority's case is that the Applicants acted without integrity because they recklessly failed to have regard to the Relevant Risks, being aware of those risks. It was common ground that if an Applicant was aware of the Relevant Risks and, viewed objectively, it was unreasonable for the Applicant concerned to take those risks having regard to the circumstances as the relevant Applicant knew or believed them to be, then that would be sufficient to make a finding of recklessness against the Applicant concerned.
>
> …
>
> 46. As the authorities demonstrate, recklessness has both subjective and objective elements. The subjective element focuses on the state of knowledge of the individual concerned as to the risks concerned. The objective element focuses on the question as to whether it was reasonable for the person concerned to have ignored the risk. Clearly, in considering a person's state of awareness in relation to a risk, it is appropriate to have regard to what would

> reasonably have been appreciated or understood by persons in the same position as the individual in question… . As Mr Jaffey submitted, the fact that the first element of the test of recklessness is subjective does not mean that the Tribunal cannot have regard to the inherent probabilities and, in particular, how a reasonable professional would respond in the relevant situation. By having regard to those factors, the Tribunal may conclude that the risks concerned would have been obvious to the person concerned and therefore can draw the inference that he or she was aware of the risks in question."

40. Mr Temple also referred us to *Solicitors Regulation Authority v Chan*, [2015] EWHC 2659 (Admin), where the Solicitors Regulation Authority challenged the decision of the Solicitors Disciplinary Tribunal, which had found that two solicitors, who had operated an aggressive and risky conveyancing scheme designed to avoid stamp duty land tax, had not acted without integrity and, instead, had misunderstood the requirements placed on them. The Divisional Court held that a conclusion that the solicitors had not acted without integrity or independence was unsustainable. Clients and lenders had not been informed of the "potentially disastrous" risks associated with the scheme because the solicitors did not wish to deter them from entering the arrangements from which they would profit. As to the position of lenders Davis LJ said (at [51]) that it was:

> '… of little relevance to say that no lender suffered actual loss: the point is that they should have had the opportunity to decide whether to continue to lend with new entities, such as companies, were being inserted into the purchasing process and when the funds being lent were not always being held to the order of the lenders nor were they being applied strictly as they should have been in the course of the purchasing process and as they would have intended. Moreover, some lenders may well, for reputational reasons, have not wished to involve themselves in such transactions at all: and at the least should have been given the chance to decide'.

**The Authority's Rules and Guidance on Pensions Transfer Advice**

41. The Authority's Conduct of Business Sourcebook ("COBS"), contained in its Handbook, sets out rules for the way firms regulated by the Authority should conduct their business. Applying to all activities of regulated firms such as CFP, including pension transfer advice, is the obligation in 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).'

42. Pension transfer advice is a form of 'personal recommendation' as defined in the Authority's Handbook and is accordingly subject to the rules in COBS 9.2. COBS 9.2.1R states:

> '(1) A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client.
>
> (2) When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client's:
>
> (a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;
>
> (b) financial situation; and
>
> (c) investment objectives;
>
> so as to enable the firm to make the recommendation, or take the decision, which is suitable for him.'

43. By COBS 9.2.2R:

> (1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:
>
> (a) meets his investment objectives;
>
> (b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and
>
> (c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio. …
>
> (2) The information regarding the investment objectives of a client must include, where relevant, information on the length of time for which he wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.
>
> (3) The information regarding the financial situation of a client must include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

44. The first two of the elements in COBS 9.2.2R were described in March 2011 in the Authority's Finalised Guidance FG 11/05 Assessing suitability: Establishing the risk a customer is willing and able to take and making a suitable investment selection. As the title to that guidance suggests, there is a distinction between the risk a customer is willing to take, and the risks that they are able to take. In that Finalised Guidance:

(1) concern was expressed, at paragraph 1.8, that "Although most advisers and investment managers consider a customer's attitude to risk when assessing suitability, many fail to take appropriate account of their capacity for loss."

(2) paragraph 3.1 set out "Key risks for firms to consider" including that "Poor outcomes can occur if firms, in particular… fail to collect and account for all the information relevant to assessing the risk a customer is willing and able to take as part of suitability considerations, for example because they… fail to assess a customer's capacity for loss…".

45. The importance of obtaining such information is also found in COBS 9.2.6R:

> "If a firm does not obtain the necessary information to assess suitability, it must not make a personal recommendation to the client or take a decision to trade for him."

46. For pension transfers there are further specific provisions that apply, in COBS 19.1. By COBS 19.1.2.R (as in force from 8 June 2015)

> '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.'

47. By COBS 19.1.3G:

'In particular, the comparison should:

(1) take into account all of the retail client's relevant circumstances;

(2) have regard to the benefits and options available under the ceding scheme and the effect of replacing them with the benefits and options under the proposed scheme;

(3) explain the assumptions on which it is based and the rates of return that would have to be achieved to replicate the benefits being given up;

(4) be illustrated on rates of return which take into account the likely expected returns of the assets in which the retail client's funds will be invested; and

(5) where an immediate crystallisation of benefits is sought by the retail client prior to the ceding scheme's normal retirement age, compare the benefits available from crystallisation at normal retirement age under that scheme.'

48. This requirement to compare likely benefits is often referred to as the production of a 'TVAS' and is supported by various rules within COBS 19.1 as to the assumptions to be used.

49. During the Relevant Period, the TVAS was required to analyse the investment returns necessary for the individual to purchase an annuity which provided equivalent benefits to the DB scheme that they were considering leaving. This is referred to as the "critical yield" (although that phrase is not used within COBS). As explained in CP15/30 Pension reforms – proposed changes to our rules and guidance:

"8.8 TVA methodology is based on the concept of replicating the benefits of a DB scheme via a personal or stakeholder pension, followed by annuity purchase. Essentially, the process involves projecting the value of the deferred benefits at retirement, allowing for revaluation, estimating the cost of purchasing those benefits via an annuity, then determining the rate of return that would need to be achieved on the cash equivalent transfer value to enable that annuity purchase. That rate of return will then be considered relative to the customer's attitude to risk, among other things, as part of the suitability process.

8.9 The process involves a significant number of assumptions about:

• Revaluation rates of benefits accrued at separate times, and subject to different and, sometimes, complex caps and collars.

• Future annuity interest rates, for different shaped annuities.

• Future mortality."

50. As to the suitability of pension transfers:

(1) COBS 19.1.6G (as in force from 8 June 2015) provides a rebuttable assumption that such a transfer was unsuitable:

"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."

(2) COBS 19.1.7G (as in force from 8 June 2015) provided that:

"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."

(3) COBS 19.1.7AG (as in force from 8 June 2015) provided that:

"When giving a personal recommendation about a pension transfer or pension conversion, a firm should clearly inform the retail client about the loss of the safeguarded benefits and the consequent transfer of risk from the defined benefits pension scheme or other scheme with safeguarded benefits to the retail client, including:

(1) the extent to which benefits may fall short of replicating those in the defined benefits pension scheme or other scheme with safeguarded benefits;

(2) the uncertainty of the level of benefit that can be obtained from the purchase of a future annuity and the prior investment risk to which the retail client is exposed until an annuity is purchased with the proceeds of the proposed personal pension scheme or stakeholder pension scheme; and

(3) the potential lack of availability of annuity types (for instance, annuity increases linked to different indices) to replicate the benefits being given up in the defined benefits pension scheme."

(4) 37.4 COBS 19.1.7BG (as in force from 1 May 2012) provided that:

"In considering whether to make a personal recommendation, a firm should not regard a rate of return which may replicate the benefits being given up from the defined benefits pension scheme or other scheme with safeguarded benefits as sufficient in itself."

**THE EVIDENCE**

51. As well as the Applicants themselves, we heard from three witnesses for the Authority: Rebecca Prestage, Stephen Bell and Susan Purdon. Although the two Applicants gave evidence in quite different ways (Ms Fox-Bryant was on occasion quite belligerent in her defence of her actions and prone to trying to avoid answering difficult questions, whereas Mr Price was quite subdued) we have no reason to disbelieve anything any of the witnesses said to us. The Hearing Bundle contained copies of template documents used by CFP and of a number of client files. These materials were the subject of detailed discussion, particularly between Mr Temple and Ms Fox-Bryant.

*Rebecca Prestage*

52. Ms Prestage furnished a written expert's report dated 19th February 2024. She gave evidence at the hearing. Ms Prestage is a Director at the accountancy firm Grant Thornton UK LLP ("GT"). She is a Chartered Financial Planner with over 25 years' experience working either with or for regulated firms and she holds the Chartered Insurance Institute's (CII) Advanced Diploma in Financial Planning (AFPS) and Pension Transfer Advice qualification (AF7).

53. GT was engaged by the Authority to undertake a review of a sample of client files from somewhere between 80 to 100 firms that had provided advice to their clients regarding transfer of pension from DB to DC schemes, and where the Authority had concerns about the suitability

of the advice provided by those firms. CFP was one of those firms. She was involved in the consideration of the sample files as described more fully below.

54. During the hearing, prior to Ms Prestage giving her evidence, but 8 months after receiving her written report, Mr Fatchett appeared to challenge whether Ms Prestage could in fact be an expert witness, suggesting that she was instead a witness of fact. The Authority's position was that she was entirely open about the fact that she works for GT and that she did not personally conduct the file reviews herself, but she had Quality Assurance ("QA") responsibilities.

55. In the end Mr Fatchett did not pursue these objections and whilst the procedure for expert evidence set out in CPR 35 does not apply to Upper Tribunal proceedings, in practice the Upper Tribunal will adopt a procedure closely mirroring CPR 35, and she was treated to all intents and purposes as complying with its provisions.

56. Her written report exhibited tables setting out GT's analysis of the CFP files on which GT had reported to the Authority. GT concluded that of the 21 pension transfers reviewed, they were unable to assess the suitability of the advice due to insufficient/not compliant information gathering in 14 of the transfers. GT rated these cases as "Not Compliant – Unclear" for information gathering.

57. Of the remaining seven which were reviewed for suitability, two were rated as "Compliant" for information gathering as well as "Suitable" for pension transfer advice. One was rated as "Compliant" for information gathering, and "Unsuitable" for pension transfer advice. Four were rated as "Not Compliant – However enough information to assess suitability" for information gathering and all four of these cases were rated "Unsuitable" for pension transfer advice. Of the 21 pension transfers reviewed, GT rated the disclosure aspects of the file as "Not Compliant" in 17 cases.

58. Ms Prestage explained the process used in the file review. GT engaged a team of specialist pension transfer reviewers who were contracted to perform the reviews. Many of the reviewers had previous experience of giving pension transfer advice themselves. The reviewers attended a two-day training course, which included training on how to use the 'DBAAT' tool for analysing the client files.

59. The DBAAT tool (DBAAT is an acronym for Defined Benefit Advice Assessment Tool) takes the form of an Excel spreadsheet with questions which have to be completed by the reviewer conducting the assessment. It was a diagnostic tool designed by the FCA to assist file review and it has been updated a number of times since its introduction. Ms Prestage's understanding was that GT were the first to use the DBAAT tool, which would have been on or after June 2019. More recent iterations of the DBAAT tool contain new questions to reflect changes in the Authority's DB to DC transfer rules.

60. The foundation for the DBAAT is, Ms Prestage said, the rules in COBS, specifically COBS 9.2 and 9.1 (referred to above).

61. In her report, Ms Prestage explains that GT uses the first section of the DBAAT spreadsheet to assess whether the firm has complied with the FCA's information gathering requirements. The DBAAT template does not make an automatic decision on suitability or advice; instead, it supports the suitability assessor to identify the key information on file and consider whether the firm has collected the "necessary" information to make a personal recommendation and whether there is enough information to make an assessment on the suitability of the pension transfer advice. Where there is enough information, it supports the suitability assessor in assessing whether the advice is suitable. It also captures and identifies the evidence upon which the suitability assessor has based their assessment and records the reasons for the suitability outcome.

62. Ms Prestage explained that where a suitability assessor considered that the firm had collected the "necessary" information for it to make a personal recommendation to the client, the file was rated for Information Gathering as "Compliant". Where a suitability assessor considered that the firm had not collected the "necessary" information to make a personal recommendation to the client, and there is insufficient "necessary" information to assess suitability, the file was rated for Information Gathering as "Not Compliant – Unclear". Where a suitability assessor deemed the firm had not collected the "necessary" information to make a personal recommendation to the client but nonetheless there was sufficient information to assess suitability, the file was rated for Information Gathering as "Not Compliant – However enough information to assess suitability".

63. In her report she stated that, when determining whether there is sufficient "necessary" information on file to assess the suitability of a pension transfer, GT made a holistic assessment of the information on file, with particular reference to the specific circumstances of the case, including the client's needs and objectives and the personal recommendation provided. She said that this determination is unique to each file and involves judgment by the assessor. A specific piece of missing information on one file (for example the lack of any state pension entitlement) may be material to the suitability assessment and therefore would be deemed "necessary". However, the same specific piece of information might not be deemed material to the suitability assessment of another file, and therefore that information would not be deemed "necessary." Where they considered the missing information was unlikely to affect the assessment of suitability, they proceeded to assess the suitability of the pension transfer advice. In contrast, where they considered that the missing information was key to the assessment of suitability (or because in certain circumstances it could render the advice suitable), they did not proceed to assess suitability.

64. Her report sets out four key areas where GT considered whether there was sufficient information to assess the suitability of the advice. They were:

(1) whether the client is or will be reliant on income from the DB scheme;

(2) where the aim of the transfer was to maximise death benefits;

(3) where the aim of the transfer is to maximise flexible benefits;

(4) where the aim of the transfer is to maximise pension commencement lump sum (PCLS).

65. Her report summarised common themes in relation to CFP's information gathering failures, which included, she said:

(1) Spouse/Partner details. There was a common theme in CFP's failure to gather information regarding the spouse or partner. GT's approach was that, whilst a spouse/partner's financial information is not necessary to the assessment of suitability in every case, for example where it can be demonstrated that there is little financial interdependence between the parties, a firm should begin the advice process with an assumption of some interaction of finances. Without information regarding the spouse's financial position, she said it is generally not possible to assess the extent of reliance that the client could have on the ceding scheme, and therefore not possible to assess whether they are able to financially bear the risks associated with transfer, as required at COBS 9.2.2R. Where the spouse has little or no retirement provision or other financial assets, it is possible that they also could be reliant on benefits from the ceding scheme. Conversely, where the spouse has sufficient retirement or other financial assets to cover both the client and spouse's needs in retirement, this would indicate that the client is less reliant on the benefits provided by the ceding scheme.

(2) Financial situation including expenditure. A common failure throughout the files assessed was CFP failing to gather sufficient information regarding the client’s expenditure at the point of advice or expected expenditure throughout the term of retirement. CFP was also obliged to gather sufficient information regarding the client’s overall financial situation, and of the 21 pension transfers, CFP failed to gather sufficient financial information in 14 cases. GT took 'financial situation' to include the source and extent of the client’s regular income, assets including liquid assets and regular financial commitments, as well as comprehensive information regarding any other accrued retirement provision, including state pension information. GT also took 'financial situation' to include the client’s financial liabilities, including any interest rates applicable to these liabilities, and repayment details (for example in the case of a mortgage whether this was on an interest-only or repayment basis, the monthly repayment amount, and redemption date).

(3) Ceding scheme information. When providing pension transfer advice, GT took information regarding the ceding scheme to form “essential facts”, necessary for the firm to carry out the transfer analysis and to consider how the loss of scheme benefits would impact on the client’s objectives and financial situation, and therefore to form an opinion regarding the suitability of the pension transfer.

66. Ms Prestage described the personnel involved in the GT process and her position in it. In summary, the first phase was a case triage process undertaken by a team with suitable pension advice experience to ensure file completeness, organising of the file, capture of key data within the FCA file review template and identification of missing documentation.

67. The second phase involved a team of suitability assessors (with relevant professional qualifications and experience) who assessed whether there was sufficient "necessary" information on file to assess the suitability of the advice, as described above. Third, there was quality assurance of all stages of the workflow by GT employees.

68. Ms Prestage said she did not personally conduct the file reviews, but she had QA oversight responsibility. In cross-examination at the hearing, she stated that she had no involvement with the initial triage or suitability review of the files. Her involvement came later when CFP had responded (in December 2023) in writing to the GT written analysis of the CFP files. At that point, a specialist pensions reviewer (who had not been involved in the initial file review) looked at the files, the DBAATs and CFP's commentary, and checked if any further information had come from CFP. The reviewer then discussed her assessment with Ms Prestage and together they went through some of the CFP files, and they agreed the GT reply commentary which is exhibited to her report.

69. During Ms Prestage's cross-examination Mr Fatchett took Ms Prestage to Excel spreadsheets setting out the DBAAT reviews conducted by GT. Mr Fatchett pointed to the document metadata of the spreadsheets which Mr Fatchett had selected, and this appeared to show that Ms Prestage had modified the spreadsheet at the time of the initial review in 2019. This appeared to contradict her testimony that the first time she had seen or accessed this or any file or DBAAT relating to CFP was in December 2023 when responding to CFP's written commentary.

70. Ms Prestage was adamant in cross-examination that she had not accessed the files at the earlier time, and she could only speculate that her name appeared in the metadata as having modified the document if, as part of the original upload of the completed DBAAT to the FCA working domain, she had opened the document to check that all the boxes in the DBAAT had been completed. In re-examination, the Authority did not take the Tribunal to any explanation for this occurrence.

71. In closing, Mr Fatchett for the Applicants did not accuse Ms Prestage of dishonesty, but he did say Ms Prestage should have checked before giving her evidence what her involvement was, and she should have had some better explanation as to how the metadata showed the documents were modified in her name in 2019. Mr Temple said that this was an attack on process rather than engagement with the bigger issue, namely the conclusions reached by GT as to the inadequacy of CFP's transfer files and process.

72. Whilst the metadata issue concerning file access does remain unexplained (and we accept that this is clearly not ideal), the Tribunal accepts Ms Prestage's evidence that she did not take part (at least in any material sense) in the original transfer file review, DBAAT completion or QA of the files during the review in 2019. Even if the Tribunal is wrong on that, it is difficult to see what difference any material earlier involvement (prior to 2023) by Ms Prestage would have made to GT's findings. Although Mr Fatchett said it would amount to Ms Prestage "marking her own homework" we accept Mr Temple's view that it does not engage with the bigger issue which is that CFP's information gathering was deficient.

73. A second material challenge by the Applicants to GT's work related to the absence of contact between GT and CFP during the file review process in 2019.

74. Mr Fatchett referred in his written opening skeleton argument to a YouTube video featuring Ms Prestage entitled "FCA's Defined Benefit Advice Assessment Tool". A short excerpt of the video was played to the Tribunal during which Ms Prestage spoke on the topic of files where the DBAAT analysis determines that it is unclear whether advice was suitable, owing to a lack of information on file. In the video she states that it is advisable to go back to the firm to find out if there is any other relevant information which would make it possible to make the suitability determination. Mr Fatchett contrasted this recommendation with the approach taken in CFP's case, in which there was no contact between GT and CFP at the initial review stage, and the only interaction occurred much later from December 2023 onwards when the written comments on the files were exchanged between the Applicants and the Authority in the course of these proceedings.

75. Ms Prestage explained that GT's retainer with the Authority did not require any contact between GT and CFP. GT's role was to perform the file review and DBAAT process and pass the results to the Authority. She explained that where there was missing information, GT would point this out to the Authority, and it was open to the Authority to approach CFP to seek further information.

76. The Authority says this challenge amounts to nothing because all Ms Prestage was saying in the video is that it is perfectly reasonable to go back to the adviser if necessary and query whether there was any other information available to the adviser at the time the advice was given, beyond what is shown on the file being reviewed. The Authority points out that GT had all the information that had been available to CFP at the time the transfer advice was given, when GT were reviewing CFP's files. COBS 9.2.6R says that, if a firm does not obtain the necessary information to assess suitability, it must not make a recommendation. The Authority pointed out that the Authority (and hence GT) had been provided with the whole paper file for each client so it could see what information had been available to CFP at the time it gave its advice.

77. The Tribunal notes that CFP/SBS did not itself generally liaise with or communicate directly with the clients to whom it was giving transfer advice beyond sending them standard form letters; generally, any communication was with the IFAs who were referring the business.

78. The Tribunal also notes that the Applicants themselves took some persuading to give the Authority the feedback on the files which the Applicants say GT should themselves have previously sought from the Applicants. The files in question were provided to the Authority by

the Applicants on 30th March 2020. The compelled interviews were held on 8th and 9th September 2020. The Authority issued Decision Notices to both Applicants on 3 May 2023 which both Applicants then referred to the Upper Tribunal. The Authority's Statement of Case dated 3 July 2023 contained at Annex I the GT Review of the files.

79. On 11 October 2023 the Authority applied for directions in relation to the References. Judge Anne Redston gave directions on 24 October 2023. She struck out certain paragraphs of the Applicants' Reply to the Authority's Statement of Case in which the Applicants alleged they had not been given access to the CFP files, holding that allegation was incorrect, and the Applicants did have the files. The directions ordered the Applicants to serve an amended Reply to the Authority's Statement of Case, to contain proper particulars of their response to Annex I of the Authority's Statement of Case (which contained the outcome of the GT Review). That was framed as an 'Unless Order' to be complied with by the Applicants by 31 December 2023. In other words, the Applicants incorrectly denied they had access to the files, and it took an 'unless' order to make them give their feedback on the GT review.

80. Ms Prestage's report responds to the Applicants' comments, which were provided in their Amended Reply dated 28 December 2023. Her responses are exhibited to her report. She said that she carefully reviewed the Applicants' comments and concluded they did not contain any additional contemporaneous evidence or any other information that would have made it necessary to revise the overall outcome of the GT assessment. She noted however that certain minor factual details in GT's DBAAT needed to be corrected on the basis of the comments provided by the Applicants. She said those corrections were not material to GT's assessment and did not lead to an amendment of the overall ratings.

81. When she was cross-examined by Mr Fatchett, she was not taken to any of those amendments and the Tribunal does not understand the Applicants to be challenging those subsequent changes or disputing that they were not material.

*Stephen Bell*

82. Mr Bell is a Lead Associate in the Authority’s Retail and Regulatory Investigations Directorate. He explained how he had taken the second of two New Business Registers for CFP provided by the Applicants and filtered the data in it using a PivotTable function to work out the total number of pieces of advice (1,718) given by CFP in relation to DB transfers during the Relevant Period and the number of those clients who were advised that a transfer was suitable (1,680). He calculated that 98.4% of clients received a recommendation to transfer their DB pensions to DC pensions. The Authority had previously analysed a different new business register provided by the Applicants and had calculated that 99% of clients received a recommendation to transfer their DB pensions into a DC scheme.

83. Although he was asked some questions by Mr Fatchett in cross-examination, his evidence on how he had calculated these figures was not challenged.

*Dr Susan Purdon*

84. Dr Purdon is a professional statistician with considerable experience in complex sample design and analysis. She was retained by the Authority to provide an expert opinion on what can be extrapolated from the sample of 21 pieces of advice considered by GT. Dr Purdon was not called for cross-examination and so we accept her (unchallenged) expert evidence.

85. Dr Purdon expresses no opinion on the regulatory judgments made by GT and the Authority, but she gives her view that it is possible to extrapolate the results of a sample within a population to predict the results of the whole population as long as the sample is a random one. Dr Purdon reviewed the approach taken by the FCA to draw the random sample of 21 advice instances. She described it in her report and said that she believed it to be sound.

86. Dr Purdon explained that the precision of a prediction will depend on the sample size, with the precision being reflected in the "95% confidence interval" around the findings. A small sample will give a prediction with a relatively low precision (and a wide confidence interval); a large sample will give a prediction with greater precision. In lay terms, a confidence interval around a sample statistic is a 'plausible range' for the population value (that is, the statistic that would have been derived if all units of the population had been assessed, in this instance all pieces of advice). It is standard to use '95%' confidence intervals. With these one can be 95% confident that the interval covers the population value. If more certainty is needed then 99% confidence intervals are commonly used.

87. Dr Purdon noted that each of 21 files in the sample have been assessed by the FCA as to whether they were unsuitable or contained material information gaps ("MIG"). 19 of the total, or 90%, were judged unsuitable/MIG. She estimated the 95% confidence interval around the sample percentage of 90% to be "(69%, 98%)". That is, she is 95% confident that, if the advice instances of all clients had been reviewed by the FCA, at least 69% would have been judged to be unsuitable/MIG. The fact that some of the advice instances related to the same client had been factored into her calculation. The 99% confidence interval around the sample percentage of 90% is "(61%, 98%)". That is, she is 99% confident that if the advice instances of all clients had been reviewed by the FCA, at least 61% would have been judged to be unsuitable/MIG.

88. Dr Purdon considered whether the sample of 21 advice instances was of adequate size. Based on the confidence interval calculations set out above, her view is that it is. The sample gives a 95% confidence interval where the lower bound of the interval is 69% unsuitable/MIG across the population of advice instances. She said that, if the Authority were of the view that a 69% or above unsuitable/MIG percentage is unacceptable, then the sample gives definitive results and there is no reason to take a larger sample.

*Ms Fox-Bryant*

89. Ms Fox-Bryant outlined her qualifications. She is an associate of the Chartered Insurance Institute, a Fellow of the Personal Finance Society, a Member of the Chartered Institute for Securities and a Chartered Financial Planner. She holds the IMC (Investment Management Certificate) and a Diploma in Pensions Administration. She agreed with Mr Temple that some of these bodies have CPD requirements and on average she did about 50 hours CPD a year in the period 2015-17. This would have included reading guidance and consultation papers produced by the Authority and attending seminars to discuss consultation papers. In 2015-17 she was focusing on pensions transfer work and going to seminars (including a seminar organised by the Authority that focused on high-risk business including DB transfers) focusing on such advice.

90. Mr Temple took Ms Fox-Bryant to the text of some of the Authority's rules and guidance. She agreed with the statement in COBS 2.1.1 that a firm should act "honestly, fairly and professionally in accordance with the best interests of its client". Generally, she agreed that she was familiar with the Authority's rules in the 2015-17 period. She agreed that she would have read the document "Finalised guidance – Assessing suitability". That document draws a distinction between a risk a customer is willing to take and a risk that a customer is able to take and she agreed that there was such a distinction. In paragraph 1.3 of that document the Authority raised concerns that roughly half of the advice reviewed was unsuitable on the grounds that the investment selection failed to meet the risk the customer was willing and able to take. Although most advisers considered a client's attitude to risk, many failed to take account of their capacity for loss. Ms Fox-Bryant agreed that she was aware that the Authority was concerned about advisers' approaches to capacity for loss and that it is important in any financial advice to consider how far the customer can afford to lose value of their investments. She agreed that, in a pensions context, the same logic applies to the income people expect to

get from their pensions, but added that "you have to weigh that up against what their requirements are and try to balance the two".

91. As far as COBS 9.2.2 is concerned, she also agreed that the three issues identified (making sure that a transaction meets a client's investment objectives, that the client can financially bear related investment risk and that the client has the necessary experience and knowledge in order to understand the risks involved) were issues she would have in her head when advising clients, but she caveated this by saying that "we did all of these on the knowledge that the client would have ongoing financial advice as well to assist them with the knowledge, experience and managing of the risks".

92. She agreed that it is relevant to get information on the source and extent of a client's regular income at the time of advice and anticipated in retirement, but many people had no idea of their requirements in retirement. In relation to one case (Client A) she said:

> "One case I looked at on the review on the [Client A] file, and when he had his income requirements now and his income requirements in retirement, I could see he had almost halved his basic outgoings for council tax rates, electricity, and other utilities. And that is not viable. They don't go down that much in retirement. So, there are certain instances where the clients, even when they think they know what they need, that they still not the right -- you are not going to get to the right number."

93. She agreed that it is relevant to have information on the source and extent of a client's assets and income in retirement as well as anticipated requirements. In relation to a client's regular financial commitments, she said:

> "It's a question that you, with hindsight, possibly would have got more data on, but the clients that we were dealing with, I think most of them don't know what they are going to need in retirement. … It's a subjective thing depending on what their requirements are. … [T]heir requirements will change. That is the point of ongoing financial advice and regular reviews."

94. Mr Temple referred to the Authority's publication "Pension reforms – proposed changes to our rules and guidance" from October 2015, which stressed the importance (despite the increased flexibility and choices introduced that year) of income sustainability in retirement. Mr Temple suggested that sustainability of income ought to have been a primary concern when CFP was providing advice and Ms Fox-Bryant replied that "It's a concern, yes." She agreed that income sustainability is related to capacity for loss and that she would need to know if a client's intended income withdrawals would leave them unable to meet their financial commitments in retirement.

95. She has been working in the financial services industry since 1979, always in the pensions environment. She was appointed as a Director of CFP in March 2011. She is also a Pension Transfer Specialist. She passed the G60 qualification in about 1995. She had done the ACII pensions examinations before then and some pensions analysis institute exams. As a result, she said that she had sufficient knowledge of how a DB scheme worked to be able to understand it and explain it to a client and to explain the options in a DC environment to a client. She said that obviously the rules changed over time. So, she tried to keep up with the changing rules to make sure that any advice she gave was correct at the time. Mr Temple took Ms Fox-Bryant to the syllabus for the G60 exam. This referred to the need to understand a client's financial needs in retirement and Ms Fox-Bryant agreed that an adviser needs to know what a client is looking to do in retirement and their resources and finances.

96. During the Relevant Period she was approved by the Authority to perform the controlled functions of CFl (Director), CFlO (Compliance Oversight) and CF30 (Customer) at CFP.

97. Ms Fox-Bryant explained how CFP came to be involved in the pensions transfer business. CFP was based in the same town as Selectapension and used their software. SBS was set up on 23rd August 2012 with the intention of getting involved with pension transfer advice. Initially they were talking to another one-man band IFA to provide that actual advice and Selectapension would have been providing the software. One of CFP’s staff, David Harman, was an ex-colleague of David Stammers from Selectapension. They both used to work for NPI. Following a discussion between them in late 2012 an approach was made to CFP to host SBS as an Appointed Representative (AR). At the time the industry was changing substantially following the Authority’s Retail Distribution Review and the tie-up seemed like a good idea. Whist all this was going on their more traditional advisory business continued, although they were not looking for new clients.

98. People had been doing pension transfers before 2015, but in the 2014 budget George Osborne (the then Chancellor of the Exchequer) announced the new pension freedoms that the Conservative Government wanted to bring in. As Ms Fox-Bryant put it, pensions “went from being a pension pot that was just used to provide you with an income to something that could be used more widely. For the first time you could take all your money out of the pension, provided you paid the appropriate tax. You didn't have to then take any money out of the pension. You could then instead, effectively, leave it to pass on to beneficiaries when you died”. These flexibilities were open to people in a DC environment but not a DB one. This was a major turning point for pension transfers and led to far more enquiries from potential clients than had been anticipated.

99. Ms Fox-Bryant said that, whilst the FCA had retained the PIA 's regulations in respect of pension switches, there were no such regulations relating to pension transfers. In the period between the Budget and the legislation allowing for flexi-access pensions, no regulations were passed by the FSA. This meant that a switch of pension providers for a money purchase pension plan was subject to more stringent rules than a transfer from a DB scheme to a DC scheme. As she put it in cross-examination:

> “[T]he PIA came out with rules and you followed them, and there is a set format. Whereas the FCA's rules were -- they were not rules. It is -- I know they are in the rulebook, but it is more -- it never seemed to us as advisers that those PIA (inaudible) FCA, it's here's the guidance, here is the rules, but it is advisers are perhaps more left to interpret them and -- no, that is not even quite right. The PIA gave strict "this is what you do". Whereas the FCA, it is guider notes, consultation papers, you have got the rulebook and there is not the same forceful "do this, do that". It is consideration.”

100. In cross-examination Ms Fox-Bryant agreed that she was aware of COBS 19.1 during the Relevant Period, that all of COBS 19.1 related specifically to pension transfers and this included a rebuttable assumption that a pension transfer was unsuitable. She agreed that this was not very different from the PIA rule that advisers needed to explain why the product they were recommending was at least as suitable as a stakeholder pension. She also agreed that, if an Authority rule required a firm to obtain such information as was necessary, that was an obligation, although as between the PIA rules and COBS there were (as she put it) “not as many specific tick boxes written down”.

101. In terms of process, Ms Fox-Bryant explained that the clients CFP dealt with had previously discussed their requirements with an authorised financial adviser and, as a result of that discussion, had been recommended to CFP as a pension transfer had been noted as a possible option for them. In these circumstances, the clients had been “pre-screened” and would have had some knowledge of a pension transfer before they had contact with SBS. However, Ms Fox-Bryant later agreed that the introducers were not necessarily pension transfer

specialists, were not contractually obliged to pre-screen clients and they were just pointing people to CFP if a pension transfer was a possible option, not necessarily because they thought a transfer was likely to be suitable for them.

102. Looking at the requirement in COBS 19.1.6 to demonstrate that a transfer is in the client's best interests, Ms Fox-Bryant agreed with Mr Temple that a client's best interests are not always aligned with their personal objectives and that it was her role to see whether their objectives could be met in a way that was consistent with their capacity for loss. He put to her an example of a client who wanted to effect a pension transfer to free up money to build a kitchen and asked whether, if that would leave them with insufficient money to pay their bills in retirement, it would be in their best interests to transfer. Her answer was that this would depend on a range of factors. Mr Temple put it to her that, in order to consider that, she would sit down with the client and discuss all these points, and her answer was, "If we had the option to do that. We didn't have the option to sit down with these clients because they were spread all over the country."

103. When an introducer requested details of the pensions transfer service SBS sent them an introducer pack containing CFP's disclosure document, an introducer agreement, a client agreement and a timeline document. Ms Fox-Bryaant said that enquiries where the client's objective was obviously unsuitable would be "killed" at this early stage.

104. Once this was received SBS would check the details on the Financial Services Register to ensure the introducer was an active financial adviser.

105. Introducers were made aware that CFP would not deal with any transfers into existing policies. They would also not deal with any requests where the client intended to self-invest without the assistance of an ongoing financial adviser. Nor would CFP agree to act for insistent clients.

106. When a case was received from an introducer who had passed due diligence, SBS set the client up on CFP's tracker. This enabled the introducer to track the progress of the case. The tracker was updated regularly as a case proceeded. This was CFP's main dialogue with the introducer during the process as from then on, CFP's interaction was with the client. An e-mail was then sent to the introducer to confirm that CFP had received the case together with their log in details to access the case tracker. A file was then set up and relevant checklists started. A check was also made to ascertain the client's state retirement age.

107. The file then passed to a senior pension administrator of CFP who would check the overall documentation received for any missing information and to ensure that all relevant forms and letters of authority were signed by the client. Where forms were not completed or signed correctly, these were returned to the client for completion and return.

108. If a CETV had been provided the guarantee date (the date when the CETV calculation expired) was checked. If CFP did not have sufficient time before the end of the guarantee period, they sent the client their initial letter confirming they had received their paperwork, together with a clear warning that CFP could not guarantee to meet the deadline. CFP would explain their interim report service, which would give the client the chance to see what the potential outcome would be on the information CFP had and also offering the opportunity to wait until a revised CETV could be obtained.

109. The initial letter also enclosed a copy of CFP's disclosure document together with a copy of the client data gathering form including their risk profile answers, reminding the client that CFP's report would be based on that data and giving the client opportunity to alert CFP if the data was not clear or correct. The client's objective was also confirmed in the initial letter, again asking the client to let CFP know if the objective was correct and if not, for them to provide

further clarification. The letter went on to outline CFP's fee. The risk profile rating was then ascertained from the answers provided in the client data gathering form. CFP initially used the Distribution Technology system but over time switched to the Finametrica system. CFP also ran a Money Laundering Smartsearch check on the client.

110. Mr Temple took Ms Fox-Bryant through CFP's template documentation. The documentation made it clear that CFP would be providing pensions transfer advice and the introducing IFA would not be involved; they would not even be sent copies of correspondence. IFAs could keep track of what was going on, but they were not responsible for the pensions transfer advice. There could be several reasons for IFAs not wanting to be involved in this work. They may not have been qualified to do so. Others just did not want to do it or may not have been allowed to by their PI insurers.

111. Under the heading "Advice Required", the introducer's agreement asked IFAs to "Please detail the specific area of advice required and any specific matters to be taken into account, together with the reasons for these requests, remember the more 'soft' facts we know the better we will be able to tailor our advice to your Clients objectives." Ms Fox-Bryant agreed with Mr Temple that this was focusing on the client's desires/objectives; its primary interest was why people went to the IFA to ask about a pension transfer. Clients were never shown what their IFAs told CFP about their objectives. Ms Fox-Bryant said that was because they were trying to get the client's own view. If there was a mismatch between what IFAs and clients said, CFP would have followed up.

112. The client agreement explained that "Any advice or recommendation offered to you by SBS will be based on your stated investment objectives, acceptable level of risk, tolerance to loss and any restrictions you wish to place on the type of investment or policies you are willing to consider." Ms Fox-Bryant agreed that this was intended to reflect the Authority's rules. The attached data gathering form, which Ms Fox-Bryant was involved in designing, did not ask anything about a client's income needs in retirement. Ms Fox-Bryant repeated her comment that clients would not necessarily know this, but Mr Temple said that surely they would know about costs like heating, insurance and council tax. As he put it, most of the necessities in life are capable of being ascertained, and they could have been asked about on this form. When asked why this was not done, Ms Fox-Bryant replied, "I cannot -- it was not a deliberate ploy not to ask for it. It just, at the time when we were drafting the form, this was the information we thought we needed." Similarly, there was no question about the current pension, the size of the current pension entitlement under the current employer's pension scheme. The form asked for the pension provider, plan name and number. Ms Fox-Bryant said they could have got a letter of authority and asked for more information if they wanted it, but they did not do that as a matter of course. When asked if CFP regularly asked clients about other pension entitlements, she replied "Not regularly, no, I can't say that we did that."

113. The form asked about other assets, including house and mortgage, savings/investments, cash, other assets and other debts. There were no questions about their desired or expected date of retirement. Given the Authority's published view that this was fundamental, she was asked why not and was unable to answer. She did not know whether the issue was discussed, and they decided it was unnecessary or it was just an omission.

114. The document goes on to ask about attitude to risk, where clients were asked to say whether they agreed with certain statements. One was "I would rather know that I was getting a guaranteed rate of return than be uncertain about my investments." However, if clients agreed with that Ms Fox-Bryant could not guarantee that they would have been asked why they were interested in a pension transfer (given that DB pensions tend to produce a more stable cash flow).

115. There were no questions on the form about when the client intended to use the money invested, how much they could afford to lose without having a significant impact on their standard of living and how likely it was that a client would need to cash in the investment if they needed sudden access to a lump sum. Ms Fox-Bryant said that CFP didn't ask these questions; the "system" just came up with the printed answers. CFP was just using the system for attitude to risk. Ms Fox-Bryant agreed with Mr Temple that whoever designed the system clearly thought that a client would be asked questions along these lines. When asked whether she stopped to think that she should be asking questions like these, she said that in her mind they were dealing with different things. She hadn't used this system since mid-2017 and can't remember what input had been made by the user.

116. In some instances, the client' s needs could be met from the existing pension and in those cases CFP would not recommend a transfer but would assist them in drawing their benefits from the existing scheme.

117. The CFP senior pensions administrators would then review any scheme details provided at this stage and send a letter together with the client's authority letter to the Trustees requesting any missing information required to complete a TVAS, along with other relevant scheme details such as funding level, a copy of the scheme booklet and whether a partial transfer was available and relevant details for this where applicable.

118. Once all the relevant details had been obtained a TVAS was then calculated by Selectapension. This would then be checked by a senior member of Selectapension's team and passed to CFP for a full report to be prepared. Once the file was received by the CFP report team, the TVAS was re-checked and this together with client overall situation was considered to check suitability or not of a transfer and a draft recommendation report was prepared. The report was prepared by a G60 qualified member of the CFP report team and was then checked by another G60 qualified member of the CFP report team to thoroughly check the file and client overall circumstances to ensure agreement to the given recommendation.

119. If at this stage CFP was working on an old, or shortly out of date, CETV an interim report would be issued. This allowed the client to consider the comments before agreeing to proceed to obtain a revised CETV, for which the ceding scheme trustees may have charged.

120. Mr Temple asked Ms Fox-Bryant whether a client's intended retirement age was an input into the TVAS. She confirmed that it was, but added that it was not always important to know the specific client's intended retirement age because people's views change. She also agreed that it would be quite easy to produce multiple TVAS reports (using different retirement ages) for a single client. Mr Temple took Ms Fox-Bryant to paragraph 2.3.1 of Thematic Review TR14-12 (which she agreed was the kind of publication she would have read although CFP did not do enhanced pension transfers, which is what the Review was focused on), which says that "The member's preferred retirement age is fundamental to making a suitable personal recommendation about pension transfer and achieving a fair outcome for the member." Mr Temple explained that the Review identified as examples of bad practice cases where the member's preferred retirement age was not recorded on file, or a file did not contain sufficient information to support an objective exploration of the member's capacity for loss. In answer to Mr Temple's question whether a file should contain information to support an objective exploration of a capacity for loss, she said "You have to consider it and you have to take into account the information about the client's assets and requirements."

121. If CFP's recommendation was not to transfer, then no transfer or new provider application forms would be issued. If a transfer was recommended and sufficient time was available to meet a guaranteed date a full report and recommendation would be issued with all supporting documentation to proceed with a transfer. CFP also issued a checklist of all the

documentation it required to be returned and the client was asked to sign a confirmation letter which confirmed their objectives and any requests for a pension commencement lump sum or other taxable income. This letter also re- confirmed CFP's exact fee for arranging a transfer as both a percentage and monetary amount.

122. Mr Temple discussed the template report with Ms Fox-Bryant. It contains text which is included in all reports and other material (highlighted in yellow) which can be amended to reflect an individual client's circumstances. Yellow (so, alterable) text included an assumption that a client had "no or very little investment experience and that your 'capacity for loss' that is, the amount of your pension you could afford to lose is all/some/low/none". Sentences that indicated that a client would want a particular level of pension or had particular objectives (described as "bucket list") in the template were routinely deleted without speaking to clients. Mr Temple quizzed Ms Fox-Bryant on what she understood by the descriptions of capacity for loss in the report. She said that neither term was tied to a percentage figure; she would have taken a judgment call based on her experience.

123. The template included text in bold that said "On the basis of the financial analysis of pension benefits alone I might/would not recommend a transfer." This was because it was unlikely that the DC scheme would attain the required critical yield. Ms Fox-Bryant agreed that typically a pension transfer would be negative from a purely financial perspective. The text went on to say (a few pages later) "To sum up, your objective was [copy from section 1]" and then adds "This objective can be met but only be transferring your ... [DB] scheme to a personal pension plan" and concludes "On this basis a transfer to a personal pension plan will be suitable …" She agreed that the template was set up on the basis that a client's objective can only be met by a pension transfer, even where the critical yield was high. The template did not factor capacity for loss in, but Ms Fox-Bryant said this would feature in the reasoning behind the recommendation.

124. Mr Temple took Ms Fox-Bryant to one of the sample reports (for Client B). Ms Fox-Bryant had signed the suitability check. It recorded his objectives (taking 25% as a lump sum and said "you do not require an income" and do not want to commit to an annuity purchase due to inflexibility). The report did not record what the client wanted to spend his lump sum on and Ms Fox-Bryant said that in such a case it was unlikely that CFP would have asked him. Equally, she thought CFP had probably not explored what the client meant by flexibility. Apart from £4,500 in cash, his pension was his only asset, and his DB scheme would produce a £5,500pa pension. The critical yield was 50%. The client was not asked for his intended retirement age, but Ms Fox-Bryant said that, at his age (60), critical yield would inevitably have been high. She agreed that the client had a zero capacity for loss (the report said his loss capacity was "low") and yet at 86 might have faced a cliff edge when his income dried up. The recommendation says that a transfer would not be recommended on the basis that it would give a much lower pension in retirement, but later says that it would be in his interests to meet his objectives. When asked whether the report was non-compliant, Ms Fox-Bryant said that "With hindsight I would change things, yes." She would have asked the client about his plans for retirement, what he wanted the tax-free cash for, what his expenditures were.

125. In her work outside SBS/pension transfers, Ms Fox-Bryant agreed that she would typically have clients into the office or go to visit them to discuss the background to their objectives. This was not done with pensions transfer clients, nor was it part of CFP's standard procedure to have a telephone call with them. When put to her by Mr Temple, she denied that this was an expedited process that was insufficiently personalised for clients.

126. Moving to another client (Client C), his IFA had written to CFP that he wanted to leave his employer and take the pension or CETV (cash equivalent transfer value) and needs some

analysis done. He could defer benefits until 60/62. The TVAS was only calculated at 60 not 62. The critical yield was over 23%. An email from CFP to Client C asks him to "let me know the reasons why you wish to consider transferring the funds into a drawdown contract. It's often these 'soft reasons' that enable us to recommend a transfer, without them we can only make a financial analysis, and it is rarely in an individual's financial interest to transfer out of a defined benefit scheme." Ms Fox-Bryant said the writer was reflecting the Authority's position, but it is not always against an individual's financial interest to transfer out of a DB scheme; there might be other reasons why someone might want to transfer out. The IFA came back with a list of reasons and some of these were reflected in the suitability report, but CFP did not check any of this with the client.

127. On a third file (for Client D) Ms Fox-Bryant was the principal writer of the report. Her stated objectives were to transfer her DB scheme to an environment where she could leave a legacy on her death and the ability to access the funds would (she said) enhance her retirement planning. Her fact find referred to her partner and children, but CFP did not ask about their finances, and she did not discuss any of this with the client. She did not discuss what the client's insurance cover was (e.g., to pay off a mortgage or provide for the children), and CFP had no idea of her liabilities beyond her mortgage. The client had indicated that she would like consideration for a future guaranteed income option, but CFP did not explore what she meant by this. Information provided by the DB scheme indicated the client could have taken a pre-commencement lump sum and a lower pension, but there is no evidence on the file that CFP explored what lump sum the client could have taken or the possibility of her taking the lump-sum, putting it aside for her children and then living off the reduced pension. Ms Fox-Bryant agreed that the client's objectives could be met by staying in the scheme and could not explain how enhancing the client's retirement planning would not be addressed by the lump sum and reduced pension.

128. Next, turning to Client E, he wanted to consider a transfer of a DB scheme to provide a tax-free lump sum to clear debts, give flexible income for his family and death benefits. He had a house with a small mortgage and no other assets. The fact find did not show his debts. The recommendation stated that a transfer would not be in the client's financial interests but would allow him to meet his aims by allowing him to take a tax-free cash sum. The original suitability report (written by Ms Fox-Bryant) indicated that his DB pension would have produced a PCLS of £23,712 at aged 65, whereas a transfer could have produced a tax-free lump sum of £15,587 at Client E's current age of 56. Ms Fox-Bryant, however, scribbled out the reference to the PCLS under the DB scheme in the draft report, and the final report includes no mention of it. Ms Fox-Bryant disagreed with Mr Temple's suggestion that the comparison between the two lump sums (under DB and DC schemes) was deleted here because it showed that the DB scheme lump sum would allow the client significantly to reduce his mortgage debt and showed that a transfer would be a very bad idea. There was no assessment of what PCLS the DB scheme could have produced if he sought early retirement. There was no information on the debts, which he apparently intended to pay off with the lump sum, so CFP could not calculate if the interest on those would outweigh the difference in lump sum.

129. White text in the template report suggests that "It is very important to understand that the benefits provided by a Defined Benefit scheme are not guaranteed. The scheme only promises to pay the benefits subject to there being sufficient assets in the fund. As recent legislation has made the sponsoring employer legally bound to make good any shortfall in funding, this is usually only a problem when the scheme has insufficient assets and the company becomes insolvent." It then talks about the Pension Protection Fund. This was standard text and was included (for example) in Client E's letter where his DB scheme was 99% funded. Mr Temple suggested that this language might give rise to unnecessary concern for clients.

130. If, after receipt of a full recommendation report, the client decided not to proceed, or if CFP's recommendation was not to proceed then CFP would arrange for their minimum fee to be paid by the client.

131. If the client accepted a recommendation to proceed, CFP would check that all the required documents had been returned and take steps to effect the transfer. The client's confirmation letter confirmed that they had read CFP's report and went on to say that they understood that their objectives could only be met by a pension transfer, and that they would be accepting investment risk and could receive a considerably lower retirement income and be giving up dependents' pensions. Ms Fox-Bryant agreed that CFP could have done a cash-flow analysis to show how much lower pensions might be but did not do this. Mr Temple criticised the confirmation letter as being too generic. In the case of Client B, for example, he had £4,500 in cash, no home, and no other assets. CFP told him that his case was suitable for a transfer. Mr Temple again criticised CFP for not addressing his capacity for loss and suggested that, if Client B's confirmation letter had truly reflected his position, it should have read "I would be receiving a lower income and I can't afford that lower income." Ms Fox-Bryant replied that the letter "says what it says".

132. Ms Fox-Bryant confirmed that she was involved in developing CFP's pension transfer process, although she said CFP had used compliance consultants to help in the process. The Tribunal asked her about the advice she had taken, as follows:

> "Q: Did you take any advice from anybody about how to build the system?
>
> A: Not specifically. I mean, it kind of --it was a bit organic to start with, because as I say, we were talking about it for two years before we actually started it. So it was a bit organic. We looked at that, our existing CFP business model, and I suppose used that as a -- a starting point, but we were trying to -- working with SBS as well, Selectapension, trying to -- something that we all felt that we could work with, and as I say, we did have a compliance consultant at that time that we talked to. As I say, at that time when we were doing it, we had no idea that the pension freedoms would come out, and it would be such a larger scale.
>
> Q: What sort of advice would you get from the compliance consultant?
>
> A: Just generally. As I say, we went on some courses by providers, different industry people, just talk to them generally about -- we had already been doing some DBs, transfers ourselves in the past, so we had a CFP sort of model. We just sort of worked on from that."

133. She confirmed that under 5% of the people CFP wrote reports for were told a transfer was unsuitable, although there were "many" cases that came through from advisers that did not get to that stage. She said that there were a lot of calls from IFAs where they were not comfortable with what was being proposed and they did not take the matter on. CFP has no record of these cases or of people who were rejected before CFP wrote a report for them. CFP's new business register basically records the people they wrote suitability reports for. The 95% who were advised that a transfer was suitable were people whose objectives could only be met by a transfer.

134. In early 2017 CFP took advice from some compliance consultants, who reported, in relation to each file they looked at, that it ""… was consistent with the process adopted by the firm. The client was issued with ... Pension Transfer Report ... which detailed the benefits which will be lost by transferring and, thus, the transfers would not be advisable but to meet his overall objectives a transfer would be in his best interest." Mr Temple suggested that Ms Fox-Bryant should have been alerted by the consultant's view that transfers were not advisable,

but Ms Fox Bryant said she was reading it as the consultant reflecting CFP's approach: on the numbers alone, a transfer would not be advisable, but to meet the overall objective a transfer would be in a client's interests.

135. In terms of fees, Ms Fox-Bryant agreed that CFP got far more money if a client effected a pension transfer. Ms Fox-Bryant said that in the period her income went up by about £100k with pension contributions. A lot of CFP's extra income was paid away. Total fees paid by clients were close to £9m but Ms Fox-Bryant did not think that created a conflict of interest and CFP still dealt with each client individually.

136. After the 2017 Authority visit CFP redesigned its forms and started asking for more information, but it still did not ask about intended retirement dates. After that visit CFP did not take on any new cases. It just reviewed cases "in train".

*David Price*

137. In his witness statement Mr Price effectively confirmed the evidence given by Ms Fox-Bryant. He too has worked in financial services for a long time, since 1980. He is an associate of the Chartered Insurance Institute, a fellow of the Personal Finance Society, and he held an investment management certificate, and was a chartered financial planner, but he retired about three years ago. He was a pension transfer specialist and held the G60 qualification.

138. He was involved in discussions as CFP designed its pensions transfer process. He saw draft documents and commented on them. In terms of specific clients, he wrote some of the reports.

139. In terms of the 2015 pensions freedoms, he got up to speed going on some courses and reading lots of the material that came out at the time. He observed that it was big news, and there was quite a lot available. He did lots of CPD and had done for many years.

140. He was aware that pension transfer advice was seen as high risk and agreed that, at least in part, it would be because it is easy to get wrong without good systems in place.

141. Mr Temple took Mr Price through the same Authority rules and publications he had taken Ms Fox-Bryant through. He agreed that the effect of COBS 9.2.2(b) was that a firm had to have a reasonable basis for believing that a client could bear associated financial risk, not just to warn of those risks. Mr Temple questioned Mr Price at length about the circumstances in which a firm could consider that a transaction was suitable if it left a client with a reduced income they could not live on. Mr Price's repeated position was that you would need to look at other circumstances and be very clear about the loss or potential loss. He agreed that he would have read the Authority's guidance on assessing suitability and that he would have reflected on whether he had enough information in particular cases. Mr Temple discussed with Mr Price the extensive range of issues and factors that should be canvassed to decide whether a product was suitable for a client and whether they could afford to lose their investment.

142. In terms of analysis, he would test capacity for loss by looking at matters such as a client's income, outgoings, other debts. If a client had a particular objective (say a new kitchen) that would generally be fine. As he put it, "The whole idea of pension freedoms was that people had this asset which they could use for their benefit which would serve them the best way. I wouldn't go around and check it was a nice kitchen. If they wanted to spend it on particular things, then that is okay." If someone had an idea that would be difficult to attain, he would make that clear. As far as risk was concerned, he understood his duty to be to spell risks out, so that clients could make an assessment. They would be giving up a guaranteed income to obtain something else. He does not remember anyone querying the risk warnings.

143. Mr. Price agreed with Mr Temple that CFP should have had a question in the fact find that explored a client's capacity for loss, looking at the matters Mr Price had earlier identified.

He did not know why CFP did not ask any questions about current or future expenditure until after the Authority's visit. Mr Temple suggested to Mr Price that, if he had read the Authority's publications at the beginning of the period, as he said he had, then he would know that he needed to get more information than he was actually getting. Mr. Price said that the document would suggest that that was the case. Mr Temple asked Mr Price whether he accepted that the fact finds used before June 2017 failed to ask enough questions to assess the client's capacity for loss and Mr Price commented that the fact that CFP changed the fact find means that they did realise they needed more information. He said that it was possible, if he had stopped to think about it, having read the Authority's publications, he would have realised that back in 2015. However, he does not think that it occurred to him at the time that CFP was not collecting enough information.

144. Mr Price agreed that he would have read the Authority's commentary on the 2015 changes, which observed that increased choice means that people will have more decisions to make which posed significant new risks, including investment risks, exposure to charges and sustainability of income in retirement.

145. Mr Temple asked Mr Price to say if he disagreed with anything Miss Fox Bryant had said in giving evidence, but he did not.

146. Mr Price was a second director of CFP along Ms Fox-Bryant and the two of them managed CFP. He said that the decision to get involved with SBS was a joint one. The minutes of a SBS board meeting record Miss Fox-Bryant reconfirming that with her additional staff she would aim to achieve 50 reports signed off a week. Mr. Price said that that was a long-standing target imposed on them. He is not sure whether they ever met it. He agreed that SBS were pushing CFP to achieve a higher turnover but said that this did not mean that they deviated from doing what was necessary.

147. CFP had to take on extra staff. To meet the target, each of their six pension transfer specialists would need to get through just under two cases a day. Those files would also need to be checked by a second specialist. The six transfer specialists did both the primary report writing and the checking. Specialists would need to spend about half a day on each report they drafted and then maybe an hour to check someone else's.

148. Mr Price was also working in CFP's traditional business and so he would do less of this work than other people, who in consequence would need to do more. The pension specialists would also need to deal with the incoming initial calls. All of that was why, Mr Price said, CFP never hit the 50 reports a week target.

149. Although half a day is not a lot of time for a report, Mr. Price said that with more experience it was possible to pick things up more quickly.

150. Although Mr Price's name does not appear on a lot of the reports as the person writing it, he accepted that he was responsible for making sure that a lot of the recommendations were suitable. He was very clear that not signing off reports was not a way of trying to distance himself from the advice in the reports, and he frankly admitted that he could not distance himself from the business.

151. Mr Temple took Mr Price to Client D's file. He was the checker on this. In the fact find, her objectives were a death benefit and flexibility to enhance her retirement planning. She had a husband and two children. She was not asked about the priority of who she wanted to leave something to. This was despite the fact that, if her primary concern was that her husband should have an income, that might be achieved through a widower's pension under the DB scheme. Mr Price agreed that the primary purpose of a pension is to provide an income in retirement and, if someone thinks that their spouse or children need money in the event of their death, the

usual way to achieve this is to obtain life insurance. The problem with relying on the DC pension for death benefits, is that there is only any money left if the individual hasn't used it to provide a pension. A DC pension transfer is only a good way of providing for beneficiaries if the client does not use the pension pot to provide an income in retirement. CFP did not ask Client D whether she intended to draw on her pension. There was a reference to her NHS pension, but she was not asked how large it was or how much income it would produce. CFP didn't know how large this other pension was and did not ask. Her report says that she would get a lower income in retirement, so Mr Temple suggested that there would be a surplus each month from the DB pension, but CFP did not discuss with Client D whether she would be better off using the higher income from the DB scheme to fund death benefits for her children, which Mr Price accepted she could do particularly if she was acceptable for life insurance. He agreed that in his traditional business, sitting down with a client and discussing these sorts of issues are things that he might have done, and that, in this area of his work, alternative ways of meeting objectives outside of pensions transfers were not addressed.

152. The fact find did reveal her other assets, but not her income in retirement or her current or expected expenditure. She was not asked about her non-mortgage debts. Mr Temple suggested that, in terms of getting a rounded understanding of an individual's financial position, this was wholly deficient. Mr Price said that that was eventually recognised when CFP renewed their procedures and got more information. He agreed that under his traditional model, when he was dealing face-to-face with a client, all of these issues would have come up and he would have asked for more information. He agreed that it has become obvious that the fact find was just not doing the job of gathering sufficient information.

153. In her attitude to risk survey, Client D had said that she would like consideration for a future guaranteed income option. Mr Price had thought she was referring to a particular financial product but accepted that he had not compared that product with the DB scheme in detail. He could not say why he did not pick up the phone to Client D and discuss what she was looking to get out of the pension transfer.

154. Mr Temple asked Mr Price how he would go about assessing capacity for loss, the amount of a pension Client D could afford to lose in retirement. Mr Temple asked how this could be done given that they did not have details of her NHS pension scheme entitlement or what her expenditure was.

155. The discussion of capacity for loss in the template report is in the section which addresses the question whether someone should invest in active or passively managed funds. Mr Price agreed that capacity for loss was only addressed in that part of the report and not elsewhere. He agreed that that was a clear indicator that capacity for loss was not on his mind when he was writing the transfer suitability part of the template, although he knew that it really should have been. In the discussion of pension transfers, the report says that a transfer would give her a lower pension in retirement, but there is no discussion here about her ability to absorb that lower income. The report concludes that, "on this basis" (which refers back to the previous paragraph which discusses her objectives) a transfer would be suitable, given her current circumstances. Mr Price agreed with Mr Temple that this is the objective driving the suitability conclusion.

156. Mr Price agreed that the information gathering comprised a very narrow set of questions compared with the more wide-ranging discussions he had with other clients. Mr Price accepted that CFP now acknowledged that they could have done with getting more information in.

157. We looked at Client A's file. His attitude to risk is stated to be very low. His objective was to use a pension transfer to take out a 25% lump sum to use for home improvements. Mr Price never asked what the home improvements were. CFP was not able to assess how much

income the client would need in retirement. Mr Price accepted, in respect of Client A that the statement of assets in his fact find simply did not allow him to assess capacity for loss, although the suitability report referred to him having a low capacity. The report says that based on the financial analysis a transfer would not be recommended, but again a transfer was held to be suitable, although a client with a low capacity for loss was being advised that they would receive a lower pension.

158. Another client (Client F) explained that he was married and his wife had taken her retirement from an NHS pension and returned to working part time. One of his objectives was to spend more time with his wife. Mr Price agreed that it would have been quite important to understand their joint finances, but no questions were asked about the wife, apart from her date of birth and health. In the traditional model, Mr Price would have met them, probably at home, and picked up a lot more information. This individual had a number of other pensions, any one of which could produce some income from the age of 55 and achieve his objective of spending more time with his wife. This possibility was not suggested to him as a way of meeting his objective. He also had an existing DC pension, so another alternative would be to use up his DC pension, spend more time with his wife and keep his DB pension for later, getting a full pension. That was not discussed with him either. Each of the pension plans were reported on separately, but they were not all considered together as part of the individual's overall financial planning, which Mr Price accepted should have been done. The report said that the individual's objectives could be met but only by transferring his retained benefits into a DC scheme. However, Mr Temple suggested that that was just wrong. The individual had flexibility from the six different schemes he was a member of.

159. The final file we reviewed was that of Client G. He was a member of a number of DB pension schemes and was thinking about retiring early. No consideration was given to the possibility of Client G being able to access his DB pension at an earlier retirement date, even though information provided to CFP by one employer made it clear the early retirement was possible. Some information was provided, but not analysed. The individual's other objective was to provide some benefits for his children. Death benefits may not have been available to his daughters under the DB scheme, given their age, but the early retirement objective could have been met by the DB scheme. The capitalisation of his rights within his DB pension was over £1m. He had other assets, but this was very much his most significant asset. Given the size of his scheme, he was going to pay £15,000 in fees for this advice and Mr Temple suggested that that might justify a phone call to discuss the DB pension he was giving up. The report refers to his objective as being to transfer his pension from a DB to a DC scheme as he intends to retire early and requires flexibility.

160. We returned to Client G a number of times. His case indicates the complexity of these transfer decisions. As Mr Fatchett pointed out, were he to die the next day, a pension transfer would look like a very good piece of business because the £1m would be available for his family. But, as Mr Temple observed, Client G was only 50 years old and looking for early retirement. He could have achieved that with a DB pension. If he had lived for another 50 years, he would have been drawing on the funds in a DC scheme all the time. The £1m is not a "pot" that is perpetually there for the children. It is there to provide an income and it is only what is left that can be used to provide for dependants in a DC environment. In addition, in a DB scheme with such a large value, it would be open to Client G to take a pension commencement lump sum, use that to provide for his children and still have a pension.

#### THE APPLICANTS' SUBMISSIONS

161. On the question of whether we should consider the Authority's alternative case of a breach of SP2, Mr. Fatchett says that the tribunal should not exercise its jurisdiction to widen the case from the Decision Notices. In particular, he is concerned that, if the case were to be

broadened now, potentially different sanctions would be engaged. Mr. Fatchett would want an opportunity to make specific points on SP2 and the sanctions which might flow from a breach of it. To some extent a case on SP2 is very different and needs to be dealt with separately.

162. After 2015 there was an upturn in "pension freedom" based work and interest in people taking benefits away from DB schemes. CFP adopted a system of working which it thought through. Clearly, with the benefit of hindsight, there are some deficiencies in it, but they were just missed at the time. The flaws were not designed into the system. For the fact-finding element they used an industry accepted risk profiling tool. CFP worked with Selectapension, which has historically been a provider of pension bureau services and had significant expertise. All this is evidence of the care that was gone to into putting the system together. CFP did not enter into a joint venture with someone who did not understand the inherent risk of pensions transfers.

163. The majority of the work came from other financial advisors who would undoubtedly have known the detail of their clients' financial positions. Their model would have been very much like CFP's traditional business. Referring IFAs would have already looked at the circumstances of the client and agreed that this kind of advice will be needed. It was then passed onto a firm like CFP who can actually do it. The referrers would understand financial planning intimately. This shows the parties behind CFP wanted to make sure that the clients had good financial advice.

164. The new business register gives an impression of a very high percentage of people being advised to transfer, but this did not record people who were turned away at an early stage because their proposals were simply not viable. People who were weeded out at an early stage were not charged and not recorded.

165. Mr Fatchett accepts that the recording of information was patchy, but this was based on a system which CFP believed to be sufficient at the time. The system simply did not pick up all the information required by the rules. However, the outcomes the clients desired and were keen to achieve were met in the vast majority of cases. A file can have missing information, but the outcome for the client can still be positive. The Authority have simply not bothered to look at anything beyond the original GT DBAAT analysis.

166. When the Authority came to visit CFP in June 2017, they looked at its systems and controls. The Authority allowed CFP to go back and reconfirm their advice to customers in the pipeline. He says that that the Authority cannot possibly have believed that the processes CFP used were so bad and so likely to cause harm. If they thought that, the only option would have been to close CFP down. Later in the year, having completed the pipeline and a significant number of additional pension transfers, they were asked to vary their permissions voluntarily. CFP agreed to do this while they sorted out their system and made some improvements. They were allowed to reapply for permission to do pensions transfer work, and in October 2018 the Authority granted those permissions. Again, Mr Fatchett says that it is inconceivable that the Authority would do this if they thought that CFP or the Applicants were reckless or lacking in integrity. The Authority had full visibility of what CFP was doing and could have stopped CFP permanently on more than one occasion, but they chose not to do that.

167. Mr Fatchett asks what brought about the change in the Authority's approach. His answer is that it comes from the Authority's general policy view that led to tightening in the market for pensions transfer advice. This fundamentally changed following the well-publicised problems with the British Steel Pension Scheme transfers. He says that the Authority's position appears to be that no pension transfer could be suitable, due to the giving up of valuable guaranteed benefits. However, the objectives of clients more often than not have been ignored or set aside by the Authority. He described this approach as "The FCA knows best". The Client

G case is a prime example of this. The GT reviewer commented that they "consider that there is a low risk of a poor financial outcome in this case". None of the clients in the sample have been asked about their aims and objectives; this amplifies the Applicants' view that the Authority have simply imputed their own view on each case. That view being no transfer is beneficial to a client.

168. After the GT review, the Authority wrote Informed Position Letters to FP's clients telling them that the Authority was concerned with the pension transfer advice of the firm. This letter pointed investors to the FSCS, where a maximum of £85,000.00 redress could be available. This approach invites investors (without cost or risk to them) to apply for compensation. There was a low level of clams against CFP upheld by the FSCS. In fact, out of the 21 pieces of advice GT reviewed, only one gave rise to a successful claim, and then only on appeal (which Mr Fatchett suggested had been the result of persuasion by a delegation of the Authority's staff which met the FSCS about this case). Mr. Fatchett finds that quite a surprising position in view of the Authority's argument the CFP was a badly run business likely to give rise to bad outcomes. He says that with one case determined to be negligent (and nothing else) and no mention of any recklessness or lack of integrity, the facts plainly suggest that the Applicants were at worse, negligent. Negligence on such a small number of cases, does not normally lead to prohibition, fines and disgorgement.

169. Finally, Mr Fatchett says that the liquidator of CFP has not brought proceedings against the Applicants for malfeasance, relating to the operation of the systems in the company. A very similar analysis, in terms of conduct would be undertaken by the liquidator.

**THE AUTHORITY'S SUBMISSIONS**

170. As far as SP1/SP2 issue is concerned, Mr Temple says that the decision of the Court of Appeal in *Bluecrest* makes it clear that there is no jurisdictional issue with the tribunal hearing arguments on SP2 as well as SP1 given that there is a real and significant connection between SP2 and the facts in the Decision Notices. The Authority was entitled to plead a breach of SP2 in the alternative and reflected this in its Statement of Case. There has been no application to strike the allegation out or otherwise to suggest that the Authority was not entitled to pursue that argument. On the contrary, Mr Fatchett's written submissions for this hearing assumed that the alleged breach of SP2 was still an issue. In fact, the Authority was the only party that raised the question of jurisdiction and there was no suggestion of unfairness in the Tribunal considering the alternative case. So, were we to find that a breach of SP1 had not been made out, it would be open to us to move on to SP2.

171. As to any submission that some comfort can be taken from the fact that 'only' £1.5 million has been paid out to date by the FSCS to CFP customers, Mr Temple says:

(1) The damages paid out by the FSCS are far from small and the £1.5m figure omits the fact that clients who complained to the FSCS appear to have uncompensated losses of c. £750,000.

(2) The damages only represent a snapshot at the current moment in time. Many individuals will not have retired and may yet claim from the FSCS. If the Tribunal agrees that CFP's advisory model was fundamentally flawed it should not take into account a transitory position on FSCS claims.

(3) It was suggested by the Applicants that it is 'relatively easy to obtain redress out of' the FSCS. This is unevidenced. In fact, in the FSCS's 2023/2024 report, it noted decreasing compensation in 'LDII' (life distribution and investment intermediation), noting that the FSCS was:

> 'upholding fewer claims. The uphold rate decreased from 67% in 2022/23 to 60% in 2023/24. This was due to a greater number of 'no loss' outcomes (where it was determined that the customer did not lose money) for pension claims.'

172. The Authority disagrees with Mr Fatchett's suggestion that the lack of action by CFP's insolvency practitioner against the Applicants as directors is somehow telling. The Authority engaged in a detailed exercise in examining CFP's processes and case files, involving the expertise of pension transfer specialists. It is not suggested, and cannot realistically be assumed, that the insolvency practitioner did any such thing.

173. As to the suggestion that the CFP business model was designed in good faith in conjunction with compliance advisers, Ms Fox-Bryant's evidence was that there was some discussion with a compliance adviser but nothing to substantiate the assertion that the model was designed in conjunction with them. There is no evidence, for example, that the fact find was specifically considered by a consultant.

174. Mr. Fatchett made a number of points about the Authority's approach to pensions transfers. Its position is not that a pensions transfer is inevitably unsuitable. The Authority has always expected advisers to start from the position that a pension transfer is not suitable, but they accept that there are occasions when it is in the client's best interest to transfer.

175. Turning to the lifting of the VREQ in October 2018 and the pipeline cases, Mr Temple says that with the benefit of hindsight these were clearly wrong decisions. It would seem from the correspondence that the view was taken that the new systems at both stages, both the brand-new system in October 2018 and the pipeline system from about June 2017, looked to the Supervision Department like it would fix some of the areas the Authority was concerned about. When those decisions were made, the Authority did not have the information it has now. There had been no extensive file reviews by GT. The Authority had not seen CFP's template documentation. As a result, it did not have a view of the process that was being used. The Applicants had not been interviewed and they had not been asked about the files that had been reviewed.

176. As to the Applicants' evidence, from Mr Price's evidence it is clear that he was aware that the SBS clients were treated very differently from clients in CFP's 'traditional model' which involved spending time with each client, building up a picture of their financial position and discussing what the clients actually wanted, and prioritising their objectives.

177. When advising SBS clients, his approach to capacity for loss was that it was essentially irrelevant. He (correctly) accepted that the suitability report only referred to capacity for loss in the context of investments within the DC pension and not in relation to the pension transfer. He was aware of the requirement to consider capacity for loss in advising on a transfer. Objectively, set against the requirements of COBS 9.2.2R, a financial adviser with integrity would not have advised that a transfer was suitable in those circumstances.

178. As to Ms Fox-Bryant, she betrayed a surprising approach to the Authority's rules, comparing them with the approach under the (pre-FSMA) PIA rules. This is itself a reckless approach to the Authority's rules. COBS 9.2.2R contains various requirements, which are clear. Her answers on the importance of retirement age and information on capacity for loss also betrayed a reckless approach to advice. She suggested at one point that discussing issues with clients would help to clarify whether a proposed step was in a client's interests 'If we had the option to do that' but could not because they were 'spread all over the country'. CFP advisers did not have the time or the capacity to find out, and the fact-find did not attempt to do so.

179. When discussing the transfer of clients back to introducing advisers, she inadvertently slipped into demonstrating that SBS's business model was driven by introducers who actively sought a transfer to DC pensions.

180. The defects in the advisory process justify a financial penalty extending to full disgorgement. The statistical analysis provides supportive evidence of the overall defects, in that it gives the Tribunal confidence that, having found failings in 19 out of 21 cases, it is reasonable to extrapolate from that sample with a high degree of confidence that failings would be found throughout the 1,718 pension transfer recommendations provided by CFP.

**DISCUSSION**

181. Before we start our discussion, we should mention certain points made by Mr Fatchett to which we have not ascribed any great weight. First, he raised the small number of complaints to the FSCS. Only one of the clients whose files were reviewed by GT complained to the FSCS. Overall, there had been 28 successful complaints. We do not know why people complained (or decided not to complain). It could be, for example, that they have not retired or drawn a pension and do not know whether they are worse off in a DC environment that they would have been in if they had stayed with their DB pension. Market performance since transfer may mean that clients feel perfectly happy with their DC pensions. To the extent there were complaints, a decision of the FSCS is irrelevant to the Tribunal as it is a separate body considering different evidence. The same is true of the liquidator of CFP. We do not know what investigations they made and why they decided to take no action against the Applicants. Finally, we do not consider that the Authority's decisions to allow CFP to re-review incomplete cases in June 2017 or give CFP its pension transfer permissions back in October 2018 are of any assistance. As Mr Temple said, these were decisions made by the Authority when it did not have all the facts it has now.

182. Although we have looked at several of the Authority's rules in some detail, the important point to remind ourselves of at the outset is that the Authority's complaint against the Applicants is not that they breached a particular rule but rather that their conduct viewed in the round was reckless and in consequence a breach of SP1.

183. Mr Temple accepted that a breach of a COBS rule is a necessary but not a sufficient part of the Authority's claim. In essence, what he says is that, where a system is set up in a way that cannot meet the rules, that is powerful evidence of a reckless design in the system. Mr Temple also says that obtaining information on a client's overall financial situation, and considering capacity for loss are basic requirements for the provision of advice, and any adviser who proceeds without basic information is reckless.

184. So far as recklessness is concerned, we have seen that there are two elements to this. Firstly, a person must be aware of a risk and, secondly, they must go on to take that risk in circumstances where it is unreasonable for them to do that taking account of what they know.

185. We have not found the additional authority cited by Mr Temple, *SRA v Chan,* to add very much to our understanding of recklessness, although it is a useful example of a failure to warn of a risk grounding a finding of a lack of integrity, and it is also helpful in reminding us that it is of little relevance that no one suffered loss. Mr. Fatchett made much of the lack of clients seeking redress from the FSCS. That is irrelevant for the reason we gave at [181], but it is also irrelevant because outcomes and recklessness have little to do with each other. If I perceive a risk and unreasonably take it, my behaviour does not cease to be reckless just because I happen to avoid a bad outcome. If a bad outcome is unlikely, that might suggest that the risk is in fact a reasonable one to take, but once it is decided that taking a risk is unreasonable, the result of taking it is nihil ad rem.

186. We do not consider that there can be any real doubt that giving financial advice to people without properly collecting all the information necessary to enable their circumstances to be considered is reckless. It runs the risk, especially where capacity for loss is involved, of allowing someone to take a risk, in this case of having insufficient funds for their retirement, which they cannot afford. Similarly, allowing a client's objectives to justify advice that a particular course of action is suitable, despite having concluded that the proposed course of action is not to be recommended based on the financial analysis, exposes a client to similar risks.

187. The Authority's rules and guidance set out the standards expected of people in the position of the Applicants. We agree with Mr Temple when he says that it is not automatically reckless for someone to break one of these rules or not to follow a piece of guidance, but we do consider that to do so consciously and on a large scale would suggest that the person involved knew that they were doing something which carried a level of risk for their clients.

188. If we look at the requirements in COBS, we see first of all a requirement that, when making a personal recommendation, a firm must obtain the necessary information regarding a client's knowledge and experience in the investment field, financial situation and investment objectives to enable it to make the recommendation which is suitable for him. That includes obtaining information so that they can be satisfied that the recommendation meets the client's investment objectives, is one that he understands and that he can bear any investment risks consistent with his objectives. The particular importance of assessing capacity for loss is seen in the guidance and commentary produced by the Authority.

189. It is made crystal clear that a firm which does not obtain the necessary information to assess suitability must not make a personal recommendation.

190. We will come back to the question of risk warnings, but COBS 9.2.1R(1) makes it very clear that a firm's responsibility is to take reasonable steps to make sure that its advice is suitable. That is the core responsibility of a firm like CFP, to give suitable advice, not to give Delphic or unsuitable advice hedged around with caveats and risk warnings.

191. There are further detailed requirements for what a firm must do in the context of pension transfer advice. In particular, the Authority was clear that a firm should start pensions transfer advice by assuming that a transfer will not be suitable. A firm can only consider a transfer to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer is in the client's best interests.

192. To our mind these requirements all serve to demonstrate the importance, in the context of pensions transfer business (although it is not obvious to us that the same approach should not apply more generally), of rigorous fact-finding and conservative, careful advice. A person who knows that decisions on pensions transfers are complicated and difficult decisions which carry risk, and therefore need careful, fact-informed advice, but yet advises that a pension transfer is suitable without having gathered sufficient information to come to a view on suitability, or who too readily advises a client to go ahead with a transfer, would be acting recklessly.

193. As far as the Applicants are concerned, we can deal with the question of their knowledge quite shortly, as we are sure that they knew perfectly well how important rigorous fact-finding and careful, conservative advice were in this field. They were exceptionally well qualified professionals, with lots of experience of advising private clients and of working in the pensions sphere. Both Applicants were keen to tell us how much CPD they did and that they read the Authority's publications in this area as they came out. They were also aware that pensions transfer work was high risk, and that many IFAs could not (or did not want to) do this kind of business. That, of course, was the foundation of CFP's pensions transfer advisory business.

They both had experience of advising more traditional clients and knew how much effort was involved in properly collecting information. They both accepted in cross examination that it would be desirable to meet with clients and discuss their position and requirements. As Mr Price put it, things always come out in discussion.

194. We turn now to consider whether, despite knowing how important these factors were, the Applicants nevertheless went ahead and allowed CFP to operate a system where advice could be given without these factors being taken into consideration.

195. The most important piece of evidence in this regard is GT‘s analysis of the sample files. This indicates that, out of 21 pieces of advice considered, in 14 cases there was insufficient evidence collected to enable reliable advice to be given. It is not the case, as Mr Fatchett suggested, the GT was unable to come to a view on these files and left them in limbo. They came to a clear conclusion, that advice had been given based on inadequate fact finding.

196. At [65] we summarised the information-gathering failures GT identified. From the discussions between Mr Temple and the Applicants and their review of template and "live" client forms, we can see the CFP's information gathering form failed to ask about the financial assets or liabilities of a client's partner. The form did not ask any questions about a client's or their family's financial outgoings, either at the time the form was completed or anticipated in retirement. Although CFP asked clients to identify whether they were members of a pension scheme, it did not ask for information about pension benefits and Ms Fox Bryant said that CFP did not regularly ask for this. The form did not ask about a client's intended retirement age, even though the Authority's view was that this was crucial. The template form in the Hearing Bundle (dated August 2016) asked about other (non-mortgage) debts but the earlier sample fact finds did not, suggesting that at least until August 2016 no questions were asked about non-mortgage debts. The form asked about investment objectives, but asked nothing about what the client proposed to do with money invested or when they would want to access it. The form did not ask clients about how much they could afford to lose without this having an impact on their standard of living, although Ms Fox-Bryant accepted in cross-examination that the loss of income for someone with zero or low capacity for loss could potentially be disastrous. It will be readily apparent that there is considerable overlap between the information-gathering failures GT identified and the lacunae in the information gathering forms, and those failure clearly arise because of the design of the template information-gathering form. Ms Fox-Bryant and Mr Price both accepted that they were involved in this process.

197. No evidence was put before us of CFP having taken serious external advice on the design of the information gathering form or its process more generally. At [132] we have set out Ms Fox-Bryant's answers to Judge Baldwin's questions about the external advice the Applicants took and it is quite clear from that exchange that there was no specific, detailed advice from external compliance experts.

198. Turning to CFP's process, both Applicants made it clear that CFP did not follow-up with clients in a meeting or on the telephone and contrasted that approach with what they would do for their "traditional" clients. As a result, we see cases such as Client D not being asked about staying in her DB scheme, which might provide continuing benefits for her husband after her death and using surplus income to provide benefits for her children, nor was her interest in guaranteed income explored. Client G (the man aged 50 with a £1m DB "pot" and who wanted to retire early and also make provision for his daughters) was not asked about taking a tax-free lump sum out of his DB scheme to make provision for his daughters and still having a reduced (but guaranteed) pension in what could be a long retirement. Inconsistent answers to the 'attitude to risk' statements were not probed. Ms Fox-Bryant explained that CFP relied on software to produce the client's attitude to risk (though they ignored its prompts as to capacity

for loss – see below). However, even where that software indicated that the answers were inconsistent and produced text referring to discussion with the client to ensure understanding of the questions, CFP had no such discussions.

199. As to the advice on suitability itself, we have seen that the template client report said that "On the basis of the financial analysis of pension benefits alone I might/would not recommend a transfer." Ms Fox-Bryant agreed that typically a pension transfer would be negative from a purely financial perspective. However, the text went on to say (a few pages later) "To sum up, your objective was [copy from section 1]" and then adds "This objective can be met but only by transferring your .. [DB] scheme to a personal pension plan" and concludes "On this basis a transfer to a personal pension plan will be suitable …" Ms Fox-Bryant agreed that the template was set up on the basis that a client's objective can only be met by a pension transfer, even where the critical yield was high.

200. Although we accept that CFP had screened out at an early stage, and did not include in their new business register, clients whose proposals were obviously unsuitable (the apocryphal "Lamborghini-man"), so it might be expected that more transfers would be rated as suitable than in a case where an adviser was recording advice given to such people, nevertheless the Authority's calculation that 98.4% of clients had been advised that a pension transfer was suitable is quite a remarkable figure given the presumption against suitability, and that level of suitability recommendations ought to have given the Applicants pause for thought. The answer to why it did not may be found in Ms Fox-Bryant's comment in cross-examination that the business model was driven by introducers who actively sought a transfer to a DC pension environment. During her cross-examination (when talking about the number of clients who went back to the IFA who introduced them to CFP) she said:

> "There were one or two who never went back to their introducer, and so CFP took them on as ongoing clients, to make sure that they were still getting that ongoing advice, because that wasn't the SBS model, but that fell into the CFP model. It wasn't many, because, you know, the whole point of this, the introducer wanted to get the clients into a DC environment, talk about them -- to them again about all of their ongoing retirement planning, and dealing with anything that might have come out of that. …"

201. We should pause for a moment and look at one of the DBAATs (for Client D) where GT found the information gathering to be non-compliant but still felt able to assess the recommendation to transfer (as non-compliant), GT noted the following deficiencies in CFP's advice:

> (1) The client will be reliant on at least some of the income from the scheme. The client had 24 years pensionable service in XYZ Scheme, but it should also be noted that she had 12 years pensionable service in the NHS Pension arrangements at point of sale; however, no estimate of the potential pension entitlement from the NHS Scheme was captured or discussed by the adviser. Despite the lack of detail, we know that even if the client stayed in the NHS Scheme until age 60, most of her combined pensionable service would still be in respect of her XYZ DB membership. The adviser has not attempted to quantify the client's income in retirement need or stated any information in respect of their current expenditure; hence, it is difficult for us to infer what the client's income in retirement need will be. However, on the basis that the entitlement will form most of her private pension provision, then we can state that there will be some reliance on it to provide income in retirement needs (unless the income in retirement need was especially low, or could be met by other sources, which is not evidenced from the information on file).

(2) Given these uncertainties, we do not believe the recommendation to transfer complies with the requirements detailed in COBS 9.2.1R(1)(a) that the adviser should take overarching steps to ensure a personal recommendation is correct and in COBS 9.2.2R(1) which includes having a reasonable basis for believing that the recommended course is such that the client is able to financially bear any related investment risks consistent with their objectives.

(3) One of the aims of the transfer was to improve the death benefits available to the client's family. However, the suitability report does not mention any whole of life or term assurance quotations. A lower risk alternative to transferring her main pension provision would have been available to the client but this has not been investigated by the adviser.

(4) The suitability report stated the client was looking for flexibility. However, the fact find indicated that the client was interested in guaranteed income options and the risk questionnaire confirmed the client would rather have a guaranteed rate of return than be uncertain about her investments. From these statements, it is inferred that the client has concerns over the transfer to a flexible access arrangement and there is no evidence on file to suggest the client is likely to access funds in an unplanned way, or that guaranteed income is not important to her. Given the client's stated preference for guarantees, the file does not demonstrate the advice was in the client's best interests.

(5) Although not stated explicitly as an objective, the client stated in the fact find that she wanted options to access the capital. Despite this, there is no information captured within the file documentation to confirm the available PCLS from the scheme and nothing to confirm whether accessing a capital sum whilst taking benefits from the scheme was an option for the client.

(6) The firm's assessment of the client having an attitude to risk rating of 'Average' seems too high, given she stated in the risk questionnaire that she would prefer a guaranteed return rather than investment uncertainty.

(7) The TVAS did not support the recommendation to transfer. The required critical yield (CY) to age 60 was 8.77%, a yield that would be difficult to achieve, even for higher risk investors. This was disclosed by the adviser in the pension transfer report and was accompanied by commentary suggesting the yield was highly unlikely to be achieved. But note also that the TVAS did not calculate any potential CYs based on taking PCLS and a reduced pension from the ceding scheme, nor were any estimated figures obtained from the ceding arrangement. Furthermore, it is not stated in any correspondence with the client that she had the option of taking PCLS and a reduced pension from the scheme. Therefore, despite the adviser confirming the CY was highly unlikely to be achieved, we do not consider that the firm has complied with the requirements in COBS 19.1.3R and COBS 19.1.4R to compare the benefits likely to be paid under the DB scheme with the benefits available from a flexible arrangement.

(8) Although the suitability report does confirm to the client the benefits that will be given up, the client held no other investments and had no prior experience or knowledge of managing investments or paying for investments to be managed. Taking all the above into account, GT did not believe the client had the required knowledge and experience to understand the risks involved in transferring the DB pension.

202. We can see that GT identified several shortcomings in this single piece of advice. Going back to the approach evidenced in the template, both Applicants relied on giving risk warnings or an appeal to unspecified "other circumstances" as their justification for advising that a transfer was suitable, despite the financial analysis pointing to a different conclusion. Ms Fox-Bryant had this exchange with Mr Temple:

> “Q: If I have a capacity for loss and the transfer exceeds my capacity for loss, don't the rules say that you should tell them that it's unsuitable for them?
>
> A We warned them that they could be potentially worse off.
>
> Q That wasn't my question. If they have a capacity for loss and this exposes them to a loss they don't have capacity to bear --
>
> A Yes.
>
> Q -- doesn't COBS 9.2.2 tell you that it's unsuitable to transfer?
>
> A Again, in certain circumstances, yes. In others it depends on what their overriding objectives were.”

203. Mr Price had this exchange with Mr Temple:

> “Q So you as the adviser weren't meant merely to warn the client but to ensure to your satisfaction that they could bear the risk, is that right?
>
> A Yes, very well, yes.
>
> Q So if a transaction creates risks in excess of a client's capacity for loss, then you can't meet this obligation, can you?
>
> A I think you can make clear to the client what he is losing but what he is gaining is so very important to him then he has to accept he has to be prepared to make this -- to make this loss or to take this risk.
>
> Q So it's your view, is it, that it can be in the client's best interests to take a transaction even though they can't bear the risks of that transaction?
>
> A I think the client may know his own best interests best, but we must make clear to him what he is taking on.”

204. Ms Fox-Bryant’s only example of special circumstances that might override a transaction that exceeded the client’s capacity for loss was a client who was terminally ill. Mr Price’s example was a client who needed to clear a debt, or who was anxious to pass on the fund to their children. In the former example, one would need to know more than CFP knew about the client to assess how urgent the repayment of debt was and whether there were any other options (where CFP often did not even know what debts were to be paid off: see the example of Client E). In the latter example, it is not right that a desire to pass on an inheritance justified an unwise transfer which created unaffordable risks. That approach is contrary to COBS which starts with an assumption of unsuitability where pensions transfers are concerned and identifies the issues to be taken into account when considering suitability; these all concern a client’s investment objectives/knowledge and financial situation. The role of an adviser such as CFP is to decide if a pension transfer is financially suitable as an investment proposition and only recommend it if it is. It follows that the approach taken in drafting and using the template advice letter outlined at [199] was fundamentally misconceived.

205. After the hearing all three of us looked at all the client files in the Hearing Bundle for ourselves; in particular, we looked at the recommendations given by advisers. We agree that an approach commonly taken, where a transfer is recommended, is for the adviser to acknowledge that, based on financial analysis alone, they would not recommend a transfer, but then go on to review the client’s objectives and conclude that, on that basis, a transfer to a DC arrangement would be suitable. This is not a universal approach, however. In the case of Client H the adviser said that they “might” recommend a transfer based on financial analysis alone, before going on to refer to wider objectives and conclude that a transfer would be suitable, followed by a warning that by transferring the client would be assuming investment risk. In two cases (Clients I and J) the author of the report recommends a transfer based on an

analysis of pension benefits. This is because the adviser concluded that a client willing to take the level of investment risk these clients were prepared to take could reasonably expect their DC pension to match the DB one. The adviser then went on to say that a transfer would meet the client's wider objectives and so would be suitable and to warn that by transferring the client would be taking on investment risk and giving up potentially valuable benefits. From our review, it would seem that a client's wider objectives are always used as a justification for a transfer. Often, but not always, this is the sole justification in the face of the financial analysis.

206. We do not agree that caveating a recommendation with risk warnings turns an unsuitable recommendation into a suitable one. As discussed at [189], COBS required firms to take reasonable steps to make sure that their advice was suitable, not merely to provide generic risk warnings that the client might run out of money at some point and leave it to the client to work out whether that meant that the transfer was suitable.

207. We also do not agree that a recommendation which is unsuitable based on the factors the Authority requires an adviser to consider is rendered suitable if it is a (even the only) way a client can achieve their wider objectives.

208. For these reasons, as far as the second limb of recklessness is concerned, we find that both Applicants were involved in designing, overseeing and personally operating an advisory process which:

(1) was not designed to capture all the information required to enable thorough, reliable advice to be given, including information the Authority required to be gathered;

(2) did not allow areas of ambiguity or uncertainty or approaches other than pension transfers to be explored with clients;

(3) was designed to use a client's objectives as a purported justification for a pension transfer even where a transfer had already been found to be negative from a purely financial perspective.

209. As we have already found (at [193]), both Applicants knew perfectly well how important rigorous fact-finding and careful, conservative advice were in this field. They knew that this model was very different from their traditional model, and they were well aware of the Authority's rules, guidance and discussion papers in this area.

210. For the reasons summarised at [208], we have concluded that the advisory process the Applicants developed and operated gave rise to a real risk of unsuitable advice being given to clients on a topic which was both complicated and of great financial importance, and so, given what they knew, it was unreasonable of the Applicants to design and operate this process.

211. For these reasons, we find that both Applicants' behaviour during the Relevant Period was reckless and amounted to a breach of SP1.

212. So far as the seriousness of the breach is concerned, GT reviewed 21 pieces of advice. We know, of course, that significantly more pieces of advice (1,718 on a conservative calculation by Mr Bell) were given. This is where Dr Purdon's evidence comes in. Her expert evidence is that she is 95% confident that, if the advice instances of all clients had been reviewed by the Authority, at least 69% would have been judged to be unsuitable or to contain material information gaps. That evidence was unchallenged by the Applicants. On that basis, over the Relevant Period at least 1,185 pieces of advice were given by CFP which were either unsuitable or contained material information gaps. That is a staggering figure, and it follows that the Applicants' breach of SP1 is very serious indeed.

213. Given our conclusions on SP1, we do not need to go on to consider the Authority's alternative case on SP2. Given the Court of Appeal's decision in *Bluecrest,* it is clear that in

appropriate cases the Upper Tribunal has jurisdiction to consider alternative cases based on breaches of different Principles/Statements of Principle than those aired before the RDC. The alternative case here is based on the same factual matrix as lies behind the Authority's principal (SP1) case and, as the alternative (SP2) case was raised by the Authority in its Statement of Case and addressed by Mr Fatchett in his skeleton argument, we can see no jurisdictional or case management reason why, had it been necessary, we would not have gone on to consider the alternative (SP2) case.

**PROHIBITION ORDERS UNDER SECTION 56 FSMA AND DECISION TO WITHDRAW APPROVALS UNDER SECTION 63 FSMA**

214. Given that CFP is in liquidation and no longer trading, Mr Price is retired and Ms Fox-Bryant semi-retired and working outside the regulated, financial services arena, Mr Fatchett said that, were we to find the Applicants to be in breach of SP1, the orders under sections 56 and 63 FSMA would have no practical effect and he did not raise any particular arguments against them.

215. Given our findings as to the seriousness of the Applicants' breaches of SP1, we consider that the Authority's actions under sections 56 and 63 FSMA were well within the spectrum of regulatory responses open to it. Indeed, we cannot really see how the Authority could have acted differently.

**FINANCIAL PENALTY UNDER SECTION 66 FSMA**

216. Under section 66(3) FSMA the Authority may impose a financial penalty on any approved person if it is satisfied that he has failed to comply with a Statement of Principle.

217. The Authority's policy on imposing a financial penalty is set out in that part of the Authority's Handbook known as DEPP.

218. As set out in DEPP 6.5.3, the Authority applies a five-step framework to determine the appropriate level of financial penalty. In cases such as this the five-step framework operates as follows:

(1) Step 1: Disgorgement

The Authority seeks to deprive an individual of the financial benefit derived directly from the breach where it is practical to quantify this.

(2) Step 2: The seriousness of the breach

The Authority will determine a figure that reflects the seriousness of the breach which is based on the percentage of the individual's relevant revenue from the employment connected to the breach, being the relevant income earned by the individual in the twelve months preceding the end of the breach. The percentage to be applied depends on the seriousness of the breach which will be assessed on a scale of 1 (least serious) to 5 (most serious) depending on the impact and nature of the breach and whether it was committed deliberately or recklessly.

(3) Step 3: Mitigating and aggravating factors

The Authority may increase or decrease the amount of financial penalty arrived at after step 2, to take into account factors which aggravate or mitigate the breach. Any such adjustment will be made by any of a percentage adjustment to the figure defined at step 2.

(4) Step 4: Adjustment for deterrence

If the Authority considers that the figure arrived at after step 3 is insufficient to deter the individual who committed the breach, or others, from committing further or similar

breaches then the Authority may increase the penalty through the application of a multiplier to the figure arrived at after step 3.

(5) Step 5: Settlement Discount.

This step is only relevant where the matter has been settled by agreement with the Authority.

219. As this Tribunal indicated in *Tariq Carrimjee v FC*A [2015] UKUT 0079 (TCC), the Tribunal is not bound by the Authority's policy when assessing a financial penalty on a reference, but it pays the policy due regard when carrying out its overriding objective of doing justice between the parties. In so doing the Tribunal looks at all the circumstances of the case.

220. This approach was followed by the High Court in *FCA v Da Vinci Invest Limited and others* [2015] EWHC 2401 where Snowden J said in the context of the imposition of a penalty for market abuse at [201]:

> "It was the FCA's submission, and I accept, that in determining any penalty under section 129, the starting point for the court should be to consider the relevant DEPP penalty framework that was in existence at the time of commission of the market abuse in question. To do otherwise would risk introducing an inequality of treatment of defendants depending upon whether the proceedings were taken against them under the regulatory route or the court route and depending upon how long the proceedings had taken to come to a conclusion. By the same token, however, in common with the Upper Tribunal, the court is not bound by that framework, or by the FCA's view of how it should be applied. But if the court intends to depart from the framework in a particular case, it should explain why it considers it appropriate to do so. It occurred to me that in this regard there is some analogy with the approach of the criminal courts to the application of the sentencing guidelines produced by the Sentencing Council."

221. The Applicants did not raise any points on the financial penalty, beyond pleading the financial hardship they say the penalties would cause them. They now accept that financial hardship is not relevant where disgorgement is concerned. However, the Tribunal raised three issues related to disgorgement in which we were particularly interested: (a) the effect of taxation; (b) the interest rate of 8%; and (c) the relevance of the other business ("traditional" wealth advisory work as distinct from the DB/DC pensions transfer business we are concerned with) carried out by CFP.

222. Whilst the Applicants did not originally raise any of these issues (before the RDC or in their pleadings in these proceedings), they now say that they are issues the Tribunal should pursue. For his part, Mr Temple told us that the Authority does not seek to take pleading points. Mr Temple in fact went further than that and made some very helpful submissions, for which we are very grateful.

223. As to the principles behind disgorgement, Popplewell LJ in *Bluecrest* at [97] confirmed that "It is plainly in the public interest for a firm to be required to disgorge profit made as a result of wrongdoing irrespective of loss to consumers". We respectfully agree with that statement and with Mr Temple when he says that the same logic applies to individuals and applies whether the wrongdoing consists of a reckless process adopted in breach of SP1, or a negligently bad process in breach of SP2.

224. The Authority accepts that tax has not been deducted (or otherwise considered) in the disgorgement calculation. The effect of taxation is not addressed in DEPP and, as far as Mr Temple is aware, has not previously been raised before the Upper Tribunal. He tells us that the Authority does not have a 'one size fits all' approach to the deduction of tax and, depending

on the facts of particular cases before the RDC, tax may be deducted from disgorgement figures where that appears appropriate.

225. In terms of the approach to take in principle, Mr Temple referred us to the general law on unjust enrichment, and the defence of change of position. In relation to taxation, Goff and Jones (10th ed) para 27-25 refers to taxation as 'reversible expenditure' and observes that:

> "The foregoing cases suggest that a wider principle is emerging, that transactions entered by a defendant do not count as detriment if they can be unwound: in the words of an Australian judge, a qualifying change of position "must be legally or practically irreversible or there must be significant difficulties in reversing the change". This principle seems to be at work in several cases where the courts have refused the defence in respect of tax payments made on the defendant's receipts, because these could be recovered from the tax authorities. Also in point is *Investment Trust Companies (In Liquidation) v HMRC*, where money was mistakenly paid by a consumer to a supplier of services who accounted for it to HMRC in the mistaken belief that it was due as VAT. Lord Reed held that in principle the supplier would have been unable to plead change of position in answer to a claim by the consumer to the extent that the supplier's change of position was "reversible" because it had a claim against HMRC under the VAT Act 1994 s.80."

226. A footnote to that text refers to authorities including two English decisions, of which only one appears to have been fully reported: *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862. In that case, at 904, Knox J stated:

> "the liability to tax should not in my view be allowed as a defence except to the extent that Hillsdown is unable to recover the tax. The Commissioners of Inland Revenue were not represented before me and there was no argument as to the recoverability of the tax paid. The fact that the tax was actually paid by the HF trustee on behalf of Hillsdown is neither here nor there. The liability to tax was Hillsdown's and there is no relevant change of position in having to pay the tax leviable on the footing that the transaction was lawful. On the other hand, I do accept that Hillsdown should not be made to account for irrecoverable tax. But that would merely be mitigation of liability and not enough to ground a defence on change of position."

227. Mr Temple tells us that, in the context of restitution orders under section 382 FSMA, taxation does sometimes arise as an issue. In *FSA v Anderson* [2010] EWHC 1547 (Ch) at [70], Vos J was willing to assume tax had been paid at 40%, and deducted that sum from a gain-based award. On the other hand, in *FCA v Avacade* [2020] EWHC 2175 (Ch), Stephen Houseman QC (sitting as a Deputy High Court Judge) stated that he would not have deducted any sum for potential income tax liabilities in circumstances where it was unclear what was owed (due to the use of an EBT and HMRC challenge). This was obiter, as he had already decided that the same sum should be paid where the gross profits were used as a proxy for losses.

228. These authorities make it clear that taxation can be a relevant issue where restitution is concerned. As to whether it should be taken into account where disgorgement is concerned, it seems to us that, as the disgorgement calculation is looking to "deprive an individual of the financial benefit derived directly from the breach" and not to go further and punish them (which is the, perfectly legitimate, role of later steps in the calculation of financial penalties), the possibility that tax has eroded the value of a benefit should always be considered in the context of disgorgement. If the receipt of £100 triggers a tax liability of £45, it seems to us that the "benefit derived directly from the breach" cannot sensibly be said to be £100. The benefit to the recipient must be the £55 they retain. That said, taxation can be a complicated, difficult

and sometimes uncertain matter, so there must be limits to how far tax can be taken into account. However, at least to the extent that it is permanent (clearly, if the payment of the penalty reverses the tax liability triggered by the receipt of the benefit, so that the tax can be reclaimed, no credit should be given for it) and capable of being calculated (or, at least, reasonably estimated), we consider that a liability to tax which erodes a benefit should be taken into account in the calculation of the amount to be disgorged.

229. Here the Applicants seem to have taken money out of CFP by way of dividend and pension contributions. Clearly, there is likely to be an immediate income tax liability on the receipt of dividends. There will be no immediate income tax liability when the pensions contributions are made, but there will likely be when pension withdrawals are made (including, we imagine, in a case where withdrawals are made to fund these financial penalties). A more thorough analysis than this will be required (including a consideration of the impact of the Applicants' personal circumstances on their tax liabilities), but it seems to us that taxation may significantly erode the value of the benefit derived by the Applicants from CFP and, if it does, this should be considered.

230. So far as the charging of interest is concerned, DEPP 6.5B.1 says that the FCA will ordinarily charge interest when calculating disgorgement, but does not set out a rate. In PS10/4, the FSA stated that it would:

> "determine the relevant interest rate, and the date from which it will apply, on a case by case basis. In deciding what interest rate to use, we may have regard to the interest rates applied by the Financial Ombudsman Service and the civil courts."

231. The rate of interest to be applied was considered in *Page v FCA,* [2022] UKUT 00124 (TCC), where it was recorded that the Authority used 8% as the interest rate both up to and after the date of the decision notices. At [848] the Tribunal observed:

> "Step 1: The Authority calculates an amount of £186,933 to deprive Mr Page of the financial benefit derived directly from his breaches of Principle 1, inclusive of interest calculated as described below, up to the date of Mr Page's Decision Notice. The Authority seeks continuing interest on the principal amount of that benefit at the rate of 8% per annum from the date of the Decision Notice, consistent with the policy set out in DEPP 6.5B.1G which states that the Authority will ordinarily charge interest on the amount of the benefit. The rate of 8% per annum is consistent with the judgment debt rate of 8% simple per year under s 17 Judgements Act 1838 (as amended by Article 2 Judgements Debts (Rate of Interest) Order 1993). This rate of interest is also consistent with the amount of interest typically awarded by the FOS and in our view is the appropriate rate to be applied in the current circumstances."

232. The reference to interest to the date of the Decision Notice "as described below" may not be entirely clear, but Mr Page's Decision Notice confirms that interest had been applied at 8% up to the date of the Decision Notice.

233. As we have already noted, disgorgement is looking to "deprive an individual of the financial benefit derived directly from the breach". It seems to us that, at a time when prevailing commercial interest rates could be very much lower, automatically applying an 8% interest rate, just because it is the judgment debt rate and is consistent with the amount of interest typically awarded by the Financial Ombudsman Scheme, may go further than depriving an individual of the financial benefit derived directly from the breach. It seems to us that the interest rate used to calculate the amount to be disgorged in such a case should be one which reflects the value today of the benefit a person received some time ago. That could be based on the interest a person could have earned by depositing the amount of the benefit or (if greater)

the interest a person saved by repaying existing indebtedness using the benefit. To our mind, charging more than that is going further than depriving the person of the benefit "derived directly from the breach" and risks taking into account amounts an individual could have derived indirectly by investing the benefit.

234. So far as the proportion of benefits derived from CFP that is referrable to the DB/DC pensions transfer business is concerned, the Authority's draft Annotated Warning Notices provided to the Applicants did proceed on the basis that not all of CFP's income was attributable to DB/DC pensions transfer business; it calculated that 98.2% of generated income came from this business, by taking the DB/DC pension business income from CFP's new business register and comparing this with CFP's total turnover. The Applicants did not challenge these figures, and in the Warning Notice the RDC decided that, as the revenue was almost entirely derived from the flawed pension transfer business, the whole of the Applicants' financial benefit from CFP should be used in line with DEPP 6.5B.1G. Again, this was not challenged by the Applicants before the RDC, and they did not challenge it in their Reference Notices.

235. Much of Mr Price's evidence related to his "traditional" advisory business and we were exercised for a while by the thought that a meaningful proportion of the economics derived by Mr Price (at least) from CFP might have nothing to do with its pension transfer business and we considered whether it would be fair and just to give the Applicants a further opportunity to demonstrate whether a material part of the benefits they derived from CFP came from sources other than its pensions transfer business. On reflection, given that this issue was raised at an early stage and the Applicants have had plenty of opportunity to alert the Authority to this point (if there is a point here at all) and did not do so, we have concluded that it would not be appropriate to allow that issue to be reopened now.

236. As the Authority made clear in its Statement of Case, it would have imposed additional financial penalties (of £156,100 for Ms Fox-Bryant, and £144,900 for Mr Price) by way of punishment but it decided not to impose those sums because of evidence that payment of the penalty would cause them serious financial hardship. If the recalculation of the amount to be disgorged produces a materially lower figure than the current financial penalties, then the Authority should be able to review its decision not to impose any of those additional financial penalties to the extent that the Applicants can now pay an additional amount by way of penalty without suffering serious financial hardship. That is where the relevance of this discussion lies. It is accepted that financial hardship is not relevant to the calculation of the amount to be disgorged (Step 1 in the penalty calculation), but that it is relevant at Steps 2 and 3. On that basis, it seems to us that, where (as it is accepted is the case here) financial hardship is in point, particular care should be taken to make sure that the Step 1 disgorgement amount is no greater than it ought to be.

**OUR OVERALL CONCLUSIONS**

237. For the reasons set out above, we have decided that:

(1) the behaviour of both Applicants during the Relevant Period was reckless and amounted to a clear and very serious breach of SP1;

(2) the prohibition orders and the withdrawal of the Applicants' approvals to carry out senior management functions at CFP are clearly within the range of regulatory responses open to the Authority; and

(3) a substantial financial penalty on each of the Applicants under section 66 FSMA is clearly also required; but

(4) we are not satisfied that the financial penalties have been correctly calculated. In particular, the calculation of the disgorgement element should take account of the incidence of taxation and further consideration should be given to how interest should be charged on the benefits the Applicants derived from CFP.

**DISPOSITION**

238. So far as the prohibition orders under section 56 FSMA and the withdrawal of approvals to perform senior management functions at CFP under section 63 FSMA are concerned, the References are dismissed.

239. So that there can be no doubt on this point, we repeat that, as far as the financial penalties under section 66 FSMA are concerned, we entirely agree with the Authority that material penalties are in order and the Applicants must be made to disgorge all the benefits they derived from CFP's flawed pensions transfer business. However, the penalties need to be reviewed in the light of the comments made at [228]-[233] and [236] above. Because we do not have the material to hand to calculate appropriate financial penalties ourselves, we direct that:

(1) Within 30 days of the release of this decision, the Applicants are to file with the Tribunal and serve on the Authority any representations they wish to make about whether, and if so how, the financial penalties should be re-calculated in the light of our comments. If they wish the Authority to take tax into account in calculating the disgorgement amount, they must provide the Authority with full details (with supporting material) of how they have calculated the relevant amount of tax.

(2) Within 30 days of the Applicants serving their representations (or 60 days from the date of this decision if the Applicants do not provide any representations), the Authority is to review the financial penalties in the light of our comments and any representations from the Applicants and file with the Tribunal and serve on the Applicants details of its conclusions and any consequential recalculation of those penalties.

(3) Within 14 days of the Authority's serving on them their calculations of the financial penalties, the Applicants may file with the Tribunal and serve on the Authority any submissions they wish to make about the Authority's calculations.

240. The Tribunal will then dispose of the References so far as the financial penalties are concerned. Our intention would be to do so without a hearing, and so any submissions made to us should be clear and comprehensive.

**MARK BALDWIN**
**UPPER TRIBUNAL JUDGE**

**Release date: 13 November 2024**