DRN-3247089

The complaint

Mr H has complained about a transfer of his Aviva Life & Pensions UK Limited personal pension to a small self-administered scheme ("SSAS") in June 2015. Mr H's SSAS was subsequently used to invest in The Resort Group (TRG) plc and Dolphin Capital loan notes. These investments now appear to have little value. Mr H says he has lost out financially as a result. He is represented in his complaint by a Claims Management Company (CMC).

Mr H says Aviva failed in its responsibilities when dealing with the transfer request. he says that it should have done more to warn him of the potential dangers of transferring, and undertaken greater due diligence on the transfer, in line with the guidance he says was required of transferring schemes at the time. Mr H says he wouldn't have transferred, and therefore wouldn't have put his pension savings at risk, if Aviva had acted as it should have done.

What happened

It appears that Mr H signed a letter of authority (LoA) allowing Capital Facts Limited to obtain details, and transfer documents, in relation to his pension. Mr H says this approach followed an unsolicited email he received. On 24 February 2015 Aviva heard from Capital Facts, enclosing Mr H's LoA. It requested information on Mr H's pension including the relevant forms to make a transfer overseas. Aviva sent Capital Facts the requested information on 5 March 2015. Capital Facts wasn't authorised by the Financial Conduct Authority (FCA).

However on the same day, Aviva also wrote to Mr H providing a copy of a seven page booklet (dated July 2014) which the Pensions Regulator (TPR) was encouraging providers to use. This highlighted the risks of pension scams with real-life examples. Aviva's covering letter said:

> *'Most pension transfers are problem-free. However, there are a number of companies who are seeking to persuade pension holders to access their pension funds early - also known as 'pension liberation'. We enclose a leaflet produced by The Pensions Regulator designed to give you some important information about the potential risks to your pension fund from pension liberation.'*

On 19 March 2015 Mr H set up, as director, a new non-trading company registered to his home address. He then authorised First Pension Review Services (FRPS), an unregulated firm, to apply to Rowanmoor Group plc to establish a new SSAS, with Mr H's company as the sponsoring employer. It appears Mr H had by that point expressed interest in a certain plot in the Llana Beach Hotel resort in Cape Verde. The new SSAS was registered with HMRC on 29 April 2015 with Mr H as member trustee.

The transfer request to the SSAS was received by Aviva through the Origo 'Options' online platform on 2 June 2015. Aviva hasn't kept any images of the request in Origo but has provided the notes it made of the request when received. Aviva phoned Mr H to check his pension wasn't subject to a Pension Sharing Order on 3 June 2015, and the transfer of £56,864 was completed the next day.

Of this, £35,150 was invested in The Resort Group (TRG) plc – a 1/6th fractional investment in a plot of hotel accommodation in Cape Verde. Another £10,000 was invested in 'Dolphin

Capital .80 Projekt' 5yr loan notes – a German property development offering a yield of 10%pa, which would be rolled up into the capital invested.

A single payment of £100 was facilitated from the SSAS to Strategic Alternatives Limited (also an unregulated firm). This firm had completed their details as the *'adviser who will provide advice on the scheme to the member trustee'* on Rowanmoor's application form. Mr H's CMC refers to this as the 'section 36' adviser – as s.36 of the Pensions Act 1995 requires a trustee of an occupational scheme to obtain and consider independent advice.

A valuation of the SSAS in May 2018 confirmed the holding in Dolphin Capital had already been rolled up to £12,000. It appears an extra 10% bonus was promised at the end of the 5-year term, but no more interest payments were in fact added after 2018. The quarterly income of about £100-£200 from TRG also stopped. Both investments are believed to be illiquid and inaccessible.

In August 2020 Mr H complained to Aviva. Briefly, his argument is that Aviva ought to have spotted, and told him about, a number of warning signs in relation to the transfer, including (but not limited to) the following: the SSAS was newly registered, there wasn't a genuine employment link to the sponsoring employer, high returns were being promised, the catalyst for the transfer was unsolicited contact and he had been advised by an unregulated business.

Aviva didn't uphold the complaint. It considered there was no explicit regulatory obligation for it to ask Mr H questions about his transfer in 2015, and it was not in a position to give him financial advice. In any event, none of the information it had about the transfer at the time gave it cause for concern, given that the transfer came from a reputable SSAS administrator through a commonly-used electronic system.

Aviva said its *'actual experience is that many clients in this scenario are insistent'*, and Mr H had a statutory right to transfer to a SSAS which it had to comply with. It also referred to the 'Scorpion' booklet it had sent to Mr H in March 2015: *'The leaflet explains what problems may arise and emphasises that members should check the regulatory status of the advisers or agents that they personally appoint.'*

Our investigator reached the view that Aviva carried out insufficient due diligence into the transfer. However, he wasn't satisfied that led to a conclusion that Aviva was responsible for the losses that Mr H went on to suffer. He noted that Mr H also received a leaflet from Aviva to which he didn't react adversely, despite the similarities in that leaflet to the steps he was taking. So on balance, the investigator didn't agree that Mr H would have changed his mind about transferring if Aviva had drawn out the specific points of concern in his transfer and highlighted those to him.

On behalf of Mr H, the CMC didn't agree with the investigator. The key points of what it said were:

- Strategic Alternatives would have sent Mr H a "trustee advice" letter endorsing the advice he'd already received from FRPS to invest in TRG.
- If Aviva had taken a printout from the Origo system, this would either have shown there was no financial adviser, or that it was Strategic Alternatives Ltd.
- Aviva made phone contact with Mr H to ask him one question, so it had an opportunity then to ask the key questions it needed to as part of its due diligence.
- It sent him the Scorpion booklet three months before it knew what the identity of the receiving scheme was. This was not the same as a due diligence exercise – and its covering letter only referred to pension liberation, which was not the issue.
- Other pension providers at around the same time were doing much more than Aviva and providing 'bespoke letters' after a focused fact-finding exercise.

- It wasn't reasonable to take into account Mr H's inaction on receiving the booklet – when this was an inadequate step – to decide the outcome if Aviva behaved correctly.
- The investigator had ignored Mr H's oral comments that receipt of the booklet would have led him to reconsider the transfer, when this showed he was acting in the way a 'reasonable person' would have acted.

The investigator was unable to resolve the dispute informally, so the matter was passed to me to decide.

What I've decided – and why

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

<u>The relevant rules and guidance</u>

Personal pension providers are regulated by the FCA. Prior to that they were regulated by the FCA's predecessor, the Financial Services Authority (FSA). As such Aviva was subject to the FSA/FCA Handbook, and under that to the Principles for Businesses (PRIN) and to the Conduct of Business Sourcebook (COBS). There have never been any specific FSA/FCA rules governing how personal pension providers deal with pension transfer requests, but the following have particular relevance here:

- Principle 2 – A firm must conduct its business with due skill, care and diligence;
- Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly;
- Principle 7 – A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading; and
- COBS 2.1.1R (the client's best interests rule), which states that a firm must act honestly, fairly and professionally in accordance with the best interests of its client.

In February 2013, The Pensions Regulator (TPR) issued its Scorpion guidance to help tackle the increasing problem of pension liberation, the process by which unauthorised payments are made from a pension (such as accessing a pension below minimum retirement age). In brief, the guidance provided a due diligence framework for ceding schemes dealing with pension transfer requests and some consumer-facing warning materials designed to allow members decide for themselves the risks they were running when considering a transfer.

The Scorpion guidance was described as a cross-government initiative by Action Fraud, The City of London Police, HMRC, the Pensions Advisory Service (TPAS), TPR, the SFO, and the FSA/FCA, all of which endorsed the guidance, allowing their names and logos to appear in Scorpion materials.

The FSA's endorsement of the Scorpion guidance was relatively informal: it didn't take the form of Handbook Guidance, because it was not issued under s.139A of the Financial Services and Markets Act (FSMA), which enabled the FSA to issue guidance provided it underwent a consultation process first. Nor did it constitute "confirmed industry guidance", as can be seen by consulting the list of all such FSA/FCA guidance on its website. So the content of the Scorpion guidance was essentially informational and advisory in nature. Deviating from it doesn't therefore mean a firm has necessarily broken the Principles or COBS rules. Firms were able to take a proportionate approach to transfer requests, balancing consumer protection with the need to also execute a transfer promptly and in line with a member's right to transfer.

That said, the launch of the Scorpion guidance in 2013 was an important moment in so far it provided, for the first time, guidance for personal pension providers dealing with transfer requests – guidance that prompted providers to take a more active role in assessing those requests. The guidance was launched in response to widespread abuses that were causing pension scheme members to suffer significant losses. And the guidance's specific purpose was to inform and help ceding firms when they dealt with transfer requests in order to prevent these abuses and save their customers from falling victim to them.

In those circumstances, I consider firms which received pension transfer requests needed to pay regard to the contents of the Scorpion guidance as a matter of good industry practice. It means February 2013 marks an inflection point in terms of what was expected of personal pension providers dealing with transfer requests as a matter of fulfilling their duties under the regulator's Principles and COBS 2.1.1R.

The Scorpion guidance was updated in July 2014. It widened the focus from pension liberation specifically, to pension scams more generally – which included situations where someone transferred in order to benefit from "too good to be true" investment opportunities such as overseas property developments. An example of this was given in one of the action pack's case studies.

In a similar vein, in April 2014 the FCA had also started to voice concerns about the different types of pension arrangements that were being used to facilitate pensions scams. In an announcement to consumers entitled "Protect Your Pension Pot" the increase in the use of SIPPs and SSASs in pensions scams was highlighted, as was an increase in the use of unregulated and/or illiquid investments. The FCA further published its own factsheet for consumers in late August 2014. It highlighted the announcement to insurers and advisers in a regulatory round-up published on its website in September 2014.

There was a further update to the Scorpion guidance in March 2015, which is relevant for this complaint. This guidance referenced the potential dangers posed by "pension freedoms" (which was about to give people greater flexibility in relation to taking pension benefits) and explained that pension scams were evolving. In particular, it highlighted that single member occupational schemes were being used by scammers. At the same time, a broader piece of guidance was initiated by an industry working group covering both TPR and FCA regulated firms: the Pension Scams Industry Group (PSIG) Code of Good Practice. The intention of the PSIG Code was to help firms achieve the aims of the Scorpion campaign in a streamlined way which balanced the need to process transfers promptly with the need to identify those customers at material risk of scams.

<u>The March 2015 Scorpion guidance</u>

The March 2015 update to the Scorpion guidance asked schemes to ensure they provided their members with "regular, clear" information on how to spot a scam. It recommended giving members that information in annual pension statements and whenever they requested a transfer pack. It said to include the pensions scam "leaflet" in member communications.

In the absence of more explicit direction, I take the view that the member-facing Scorpion warning materials were to be used in much the same way as previously, which is for the shorter insert (which had been refreshed in March 2015) to be sent when someone requested a transfer pack and the longer version (which had also been refreshed) made available when members sought further information on the subject.

When a transfer request was made, transferring schemes were also asked to use a three-part checklist to find out more about a receiving scheme and why their member was looking to transfer.

<u>The PSIG Code of Good Practice</u>

The PSIG Code was voluntary. But, in its own words, it set a standard for dealing with transfer requests from UK registered pension schemes. It was "welcomed" by the FCA and the Association of British Insurers (amongst others). And several FCA regulated pension providers were part of the PSIG and co-authored the Code. So much of the observations I've made about the status of the Scorpion guidance would, by extension, apply to the PSIG Code. In other words, personal pension providers didn't necessarily have to follow it in its entirety in every transfer request and failure to do so wouldn't necessarily be a breach of the regulator's Principles or COBS. Nevertheless, the Code sets an additional benchmark of good industry practice in addition to the Scorpion guidance.

In brief, the PSIG Code asked schemes to send the Scorpion "materials" in transfer packs and statements, and make them available on websites where applicable. The PSIG Code goes on to say those materials should be sent to scheme members directly, rather than just to their advisers.

Like the Scorpion guidance, the PSIG Code also outlined a due diligence process for ceding schemes to follow. However, whilst there is considerable overlap between the Scorpion guidance and the PSIG Code, there are several differences worth highlighting here, such as:

- The PSIG Code includes an observation that: "*A strong first signal of [a scam] would be a letter of authority requesting a company not authorised by FCA to obtain the required pension information; e.g. a transfer value, etc*." This is a departure from the Scorpion guidance (including the 2015 guidance) which was silent on whether anything could be read into the entity seeking information on a person's pension.

- The Code makes explicit reference to the need for scheme administrators to keep up to date with the latest pension scams and to use that knowledge to inform due diligence processes. Attention is drawn to FCA alerts in this area. (I noted the contents of some of those alerts earlier in my decision.)

- Under the PSIG Code, an 'initial analysis' stage allows transferring schemes to fast-track a transfer request without the need for further detailed due diligence, providing certain conditions are met. No such triage process exists in the 2015 Scorpion guidance – following the three-part due diligence checklist was expected whenever a transfer was requested.

- The PSIG Code splits its later due diligence process by receiving scheme type: larger occupational pension schemes, SIPPs, SSASs and QROPS. The 2015 Scorpion guidance doesn't distinguish between receiving scheme in this way – there's just the one due diligence checklist which is largely (apart from a few questions) the same whatever the destination scheme.

TPR began referring to the Code as soon as it was published, in the March 2015 version of the Scorpion action pack. Likewise, the PSIG Code referenced the Scorpion guidance and indicated staff dealing with scheme members needed to be aware of the Scorpion materials.

Therefore, in order to act in the consumer's best interest and to play an active part in trying to protect customers from scams, I think it's fair and reasonable to expect ceding schemes to have paid due regard to both the Scorpion guidance and the PSIG Code when processing transfer requests. Where one differed from the other, they needed to consider carefully how to assess a transfer request taking into account the interests of the transferring member. Typically, I'd consider the Code to have been a reasonable starting point for most ceding schemes because it provided more detailed guidance on how to go about further due diligence, including steps to potentially fast-track some transfers which – where appropriate – would be in the interest of both parties.

The considerations of regulated firms didn't start and end with the Scorpion guidance and the PSIG Code. If a personal pension provider had good reason to think the transferring member was being scammed – even if the suspected scam didn't involve anything specifically referred to in either the Scorpion guidance or the Code – then its general duties to its customer as an authorised financial services provider would come into play and it would have needed to act. Ignoring clear signs of a scam, if they came to a firm's attention, or should have done so, would almost certainly breach the regulator's principles and COBS 2.1.1R.

<u>The circumstances surrounding the transfer: what does the evidence suggest happened?</u>

The CMC has explained that Mr H worked in management and held considerable debts including credit cards and a mortgage of £180,000. He had no savings or investment experience. Mr H told our investigator that he received an email encouraging him to get a free pension review. He felt this might be useful so he responded. He later spoke with either Capital Facts or FRPS about transferring his pension into a SSAS and investing in overseas property.

He was attracted by the potential returns of around 10-15%pa, possibly up to 17% (he was told additional returns could be achieved by reinvesting the rental income the TRG investment provided). They suggested that the transfer was government-backed – and that setting up a limited company beforehand was a 'tax liability' thing. It was pushed as *a 'nothing could go wrong, gilt-edged'* proposition. He doesn't appear to have been offered any other incentive to make the transfer.

We know that Capital Facts was involved (because it sent Aviva Mr H's LoA), and FRPS was involved from a later point (because it certified Mr H's identity and agreed to submit the SSAS application on Mr H's behalf on 26 March 2015). That's consistent with Mr H being referred from Capital Facts to FRPS to receive advice, which I think is likely to have happened because FRPS has known links to TRG and would have had a vested interest in this transfer proceeding.

Mr H told our investigator that he used to have someone in Bristol call each year and go through a review of his pension. So, he was surprised he didn't receive a call when the transfer was arranged (other than, it appears, Aviva's call to check if he was subject to a Pension Sharing Order). He thought 'normal companies' would want to try to keep his money and find a new product to match what he was now getting.

He was able to recall details of the investments he was told he'd be making and the charges: he'd gathered the investment would return £800 per quarter after charges of £200, but it's turned out the other way around. Mr H also preferred the idea of accessing tax-free cash in stages using flexible drawdown, which he understood was an extra feature the SSAS offered him. But he was clear that he knew he could not begin that process until age 55.

Our investigator also showed Mr H a further copy of the Scorpion booklet which Aviva sent to him on 5 March 2015. Mr H says the letter and booklet weren't received, but I note they were addressed to the house he lived in at the time and which was used as the address for his SSAS. His CMC says this was his mother's address, and he moved out in approximately August 2015 (which would be after the letter was sent). Mr H's response to seeing it was that, if he'd got it at the time, it would have made him think more about the transfer.

<u>What did Aviva do and was it enough?</u>

The Scorpion insert:

For the reasons given above, my view is that personal pension providers should, as a matter of course, have sent transferring members the Scorpion insert or given them substantially the same information.

In this particular case, Aviva has provided evidence that it sent Mr H the July 2014 version of the longer form Scorpion booklet – which was current at the time it contacted Mr H on 5 March 2015 in response to Capital Facts' transfer pack request. Mr H says he didn't receive the letter, but it was correctly addressed to where he resided at the time and on the balance of probabilities, I consider it likely it was received. Mr H told our investigator that he received Aviva's subsequent confirmation of the transfer, sent to the same address.

The letter referenced a *"leaflet produced by The Pensions Regulator"* and in both the files provided to Mr H's CMC and this service, the longer Scorpion booklet appears as one continuous printout with this letter. Other than asserting that the letter wasn't received, the CMC hasn't questioned whether the version of the leaflet attached would have been the longer booklet. Instead it says that the warning wouldn't have been effective in Mr H's case, even if it was received.

However, for completeness I will say that I'm aware this isn't the only case our service has dealt with where Aviva provided evidence of attaching the longer booklet to one of these letters. That would also stand to reason because Aviva wasn't simply inserting the shorter version (which was known as the 'insert') into a transfer pack. It sent the transfer pack directly to Capital Facts. Instead, Aviva was sending a separate letter to Mr H, the purpose of which was to warn him directly about pension scams.

It's understandable that the longer version of the booklet would be used in this instance, and I've no reason to conclude that it wasn't used in the way Aviva has evidenced here. So that means Aviva exceeded the minimum expectation of the TPR guidance by sending the seven-page booklet to Mr H which gave further information, including examples of people who had been affected by scams. I'll return to the significance of that later in this decision.

Due diligence:

As explained above, I consider the PSIG Code to have been a reasonable starting point for most ceding schemes. I've therefore considered Mr H's transfer in that light. But I don't think it would make a difference to the outcome of the complaint if I had considered Aviva's actions using the 2015 Scorpion guidance as a benchmark instead.

I've firstly looked at what due diligence Aviva carried out in this case to consider whether it was sufficient. On their file Aviva's case-handler commented that it "*looks as if no due diligence was completed"*. They went on to say, *"I think if this case had been looked at you would have expected due diligence to have been triggered given it was recently established SSAS for an individual, SSAS name was address plus date of birth. Additional due diligence may then have thrown up cold calling, no authorised adviser and investments in Cape Verde and property investments in Germany. Whilst Rowanmoor has been on referral list since 2016 I cannot establish it was ever on the confirmed provider list."*

Aviva's internal discussions at that time recall that someone at Aviva had correspondence with Rowanmoor 'several years ago' where it sought explanations as to Rowanmoor's operating model, and didn't find the response satisfactory. That looks to have been after Mr H's transfer, as the comments above show that Rowanmoor was only added to a list of schemes about which Aviva was concerned in 2016. However in my view this underlines the point that no SSAS provider should have been exempt from further scrutiny without good reason.

I note that at the time of the transfer Rowanmoor was a long established SSAS provider and had some repute in the industry. Rowanmoor Trustees Limited also had legal and fiduciary duties as a professional trustee. There's an argument, therefore, that Aviva could have taken comfort from this. I disagree. The Scorpion guidance gave ceding schemes an important role to play in protecting customers wanting to transfer a pension. It would defeat the purpose of the Scorpion guidance for a ceding scheme to have delegated that role to a different business – especially one that had a vested interest in the transfer proceeding.

An important aspect in this is the fact that there is little regulatory oversight of SSASs like this; they don't have to be registered with TPR. In the absence of that oversight, Aviva was assuming, in effect, that Rowanmoor would want to maintain its standing in the industry and the trustee subsidiary would comply with its legal and fiduciary duties. In the context of guarding against pension scams – and an environment where providers and trustees clearly didn't always act as they should have done – I don't consider this to have been a prudent assumption.

The fact that a different part of Rowanmoor's business was regulated by the FCA doesn't change my thinking on this. The key point is that Rowanmoor Group Plc and Rowanmoor Trustees Limited (both of which were involved in the operation of the SSAS) *weren't* FCA-regulated so I see no reason why Aviva should have expected they would operate with FCA regulations and Principles in mind – or why their actions would have come under FCA scrutiny. As such, I'm not persuaded Aviva could, reasonably, have derived sufficient comfort about the Rowanmoor SSAS as a destination for Mr H's transfer.

Aviva also told our investigator that, as this transfer request was submitted through the Origo system, all providers using Origo had to sign up to the terms and conditions and be 'approved'. We've been sent some evidence of the checks Origo carried out on new members, but these don't go far enough in my view to give confidence that an isolated SSAS operated by a new provider couldn't be exploited (often by third parties not known to Origo) in a scam.

I'm not therefore persuaded this meant that the transfer request came from a recognised 'club' or group, which was one of the initial filters for transfers at low scam risk under the PSIG Code. The example PSIG gave of a recognised club or group was an association of pension schemes: the Public Sector Transfer Club. This was mostly large schemes in the public sector who would be making transfers between each other on a regular basis. It would be relatively unusual to be making a transfer to a scheme which had recently joined that club, and understandably some comfort could be drawn from that. I don't think the same would apply to Origo Options, which was a platform for processing transfers that potentially any scheme administrator could join.

The PSIG Code did allow a pre-vetted 'clean list' of schemes to which transfers could be made without further due diligence. But Aviva has already said that at the time of this transfer, Rowanmoor wasn't on its 'confirmed provider' list (which I take to be the same thing). That's not in itself surprising, given TPR was highlighting in the March 2015 update to the Action Pack that *'Pension scam models are also changing. Many scammers are directing members to transfer into single member occupational schemes in an attempt to escape scrutiny'*.

So, the initial triage process should have instead led to Aviva asking Mr H further questions about the transfer as per Section 6.2.2 ("Initial analysis – member questions"). I won't repeat the list of suggested questions in full. Suffice to say, at least three of them would have been answered "yes":

- Did receiving scheme/adviser or sales agents/representatives for the receiving scheme make the first contact (e.g. a cold call)?

- Have you been promised a specific/guaranteed rate of return?
- Have you been informed of an overseas investment opportunity?

Under the Code, further investigation should follow a "yes" to any question. The nature of that investigation depends on the type of scheme being transferred to. The SSAS section of the Code (Section 6.4.3) points to the following as being potential areas of concern:

a) Employment link: a lack of an employment link to any member of the SSAS.

b) Geographical link: a sponsoring employer that is geographically distant from the member.

c) Marketing methods: a SSAS being marketed through a cold call or an unsolicited approach.

d) Provenance of receiving scheme: a SSAS registered within the previous six months or a recently registered sponsoring employer or administrator operating from 'virtual' offices, or using PO Boxes for correspondence purposes.

Underneath each area of concern, the Code set out a series of example questions to help scheme administrators assess the potential risk facing a transferring member.

Not every question would need to be addressed under the Code. Indeed, the Code makes the point that it is for scheme administrators to choose the most relevant questions to ask (including asking questions *not* on the list if appropriate). But the Code makes the point that a transferring scheme would typically need to conduct investigations into a "wide range" of issues to establish whether a scam was a realistic threat. Given the relatively limited information it had about the transfer, I think in this case Aviva should have addressed all four sections of the SSAS due diligence process and contacted Mr H to help with that.

<u>What should Aviva have found out?</u>

Had it done so, I think Aviva would have established under part (a) above that Mr H wasn't genuinely employed by the SSAS's sponsoring employer: the creation of that employer was simply a prerequisite for establishing the SSAS, and Mr H was employed elsewhere. That applied even though under part (b), the sponsoring employer appeared to be registered to Mr H's home address – because it was, in effect, a dormant company that wasn't going to trade. I don't think the fact that Mr H was a director of that employer would have alleviated any concerns, because that was precisely the situation in the example of a scam given in the Action Pack. So the way this SSAS was being used was a warning sign.

Under part (c) I think Aviva would have learned that Mr H had been emailed with an offer of a pension review and promised returns of over 10%pa from a range of investments, several of which were overseas. When he spoke to our investigator, Mr H was knowledgeable about the investments being made within his SSAS. I'm satisfied that he would have been able to convey the same information to Aviva, and this would have indicated that the investments he was making were also of a similar type to the example in the Action Pack.

It's not very clear who Mr H would have considered was advising him on this transfer. Aviva should already have been aware of the initial contact it received from Capital Facts, but they seem to have performed more of an administrative role. The CMC is saying that Strategic Alternatives gave the actual advice to Mr H under s.36 of the Pensions Act 1995, but that this was confirming earlier advice FRPS likely given him to make the transfer itself.

I've seen an example of the suitability letters Strategic Alternatives was sending when it performed this 's.36 advice' role, as Mr H's CMC will also have done. The letter comments only on the suitability of the investments being made for the SSAS, and not on any wider issues such as whether a transfer should be made to the SSAS. Strategic Alternatives' terms of business, which I've also seen, emphasized that it was not a regulated firm and that precluded it giving advice on regulated investments (and Mr H's existing personal pension was a regulated investment).

So taking all of this into account, I think it's most likely that Mr H would have named FRPS as being the party that gave him advice to transfer from Aviva to the SSAS. That's also consistent with FRPS's involvement in establishing the SSAS so that the transfer could be made. However, it doesn't particularly matter if Mr H had alternatively - or in addition - named either of the other firms (Capital Facts and Strategic Alternatives); or for that matter if Strategic Alternatives had been printed on the Origo request. None of these firms were authorised by the FCA.

Even though there would have been little concern about the valid registration of the SSAS itself under part (d), I think Aviva would have had reason to be concerned about the close similarity between the steps Mr H was taking and the example in the Action Pack of someone who became the victim of a scam. And it should have been particularly concerned that being *advised* by an unauthorised firm to transfer benefits from a personal pension plan would have been a breach of the general prohibition imposed by FSMA, which states no one can carry out regulated activities unless they're authorised or exempt.

Anyone working in this field should have been aware that financial advisers need to be authorised to give regulated advice in the UK. The PSIG Code (and the Scorpion guidance) make much the same point. Indeed, the PSIG Code says firms should report individuals appearing to give regulated advice that aren't authorised to do so. So Aviva should therefore have been concerned by the involvement of FRPS (or Capital Facts, or Strategic Alternatives, should Mr H have indicated these were involved in advising on the transfer) because it pointed to a criminal breach of FSMA. On the balance of probabilities, I'm satisfied such a breach occurred here.

<u>Would Aviva acting on what it found out have made a difference?</u>

Had it done more thorough due diligence, there would have been a number of warnings Aviva could have given to Mr H in relation to a possible scam threat as identified by the PSIG Code (and the Scorpion action pack). These included the unsolicited approach, the employment of an artificial SSAS structure involving Mr H being made a director of a company, and overseas investments promising returns that looked 'too good to be true'. Aviva should also have been aware of the close parallels between Mr H's transfer and the warnings the FCA gave to consumers in 2014 (and subsequently passed on to firms) about transferring to SSASs in order to invest in unusual investments.

On identifying a transfer at risk of being a scam, TPR expected Aviva *to 'contact the member to establish whether they understand the type of scheme they'll be transferring to and send them the pension scams booklet'*. However Aviva had already sent an earlier version of this booklet (the July 2014 version) to Mr H in March 2015.

The most egregious oversight was Aviva's failure to uncover the threat posed by a non-regulated adviser. With its obligations under PRIN and COBS 2.1.1R in mind, it would have been appropriate for Aviva to confirm to Mr H that the person he had been advised by was unregulated and could put his pension at risk. Aviva should have said only authorised financial advisers are allowed to give advice on personal pension transfers, so he risked falling victim to illegal activity and losing regulatory protections.

I obviously therefore need to take into account that Mr H had already received a version of the Scorpion booklet. But I also need to consider whether him being reminded directly by

Aviva of the similarities between what he was doing and known scams – as well as a clear warning that known unregulated individuals were putting his pension at risk – would have convinced Mr H out of making the transfer in a way that the 2014 Scorpion booklet hadn't done.

Mr H's CMC says that the 2014 booklet wouldn't have been impactful as it was introduced by Aviva as only being about pension liberation – where that is regarded as the individual gaining access to their own pension funds via unauthorised payments (such as before minimum pension age). But I don't think I can reasonably credit Mr H with the same level of understanding as his CMC of the difference between this type of liberation and pension scams more generally.

I think the comment in Aviva's letter that liberation related to *'a number of companies who are seeking to persuade pension holders to access their pension funds early'*, on a reasonable basis, would still have stirred enough interest from someone in Mr H's position to read the booklet – if only to better understand whether what he was doing involved accessing the funds early; or, alternatively, that this was nothing for him to worry about.

Our investigator showed Mr H a copy of the 2014 booklet. His own response to the investigator doesn't indicate that he would have thought nothing in the booklet applied to him. He said it would have led him to think more about the transfer. That's understandable as the booklet didn't just discuss 'early release' pension liberation:

- It said that 'one off pension investments' were being used to entice savers: *'For most people the offers will be bogus and you will probably lose most, if not all, of your savings',* and *'Once you've transferred your pension, it's too late.'*
- It told Mr H to look out for phrases such as 'free pension reviews' and 'government endorsement', being approached out of the blue and investing overseas. **All** of these echo features of how he's told us he came to invest in the SSAS.
- One example given of a scam is about 'Henry' who was tempted by an unsolicited offer of a free pension review to invest in property developments overseas. He suffered substantial penalties both from not fulfilling his duties as director of a company, and from making an unauthorised payment from his pension, even though that payment wasn't made to him.

In my view reading this booklet, which it was reasonable for Mr H to do, would have led to the inescapable conclusion that the transfer he was making was at risk of being a scam. If anything, the example in the later (mid-March 2015) booklet, which Aviva could otherwise have sent Mr H at the end of its due diligence, was less similar to Mr H's situation than the 'Henry' example: it included an incentive payment more closely associated with pension liberation. The message in the booklet Mr H received was that he needed to take care when making *any* investment, whether or not there was an incentive – if it turned out to be bogus he could not only lose all the money but face unauthorised payment charges on top.

I agree with Mr H that he would have become concerned on reading the booklet for the reasons I've given above – except that unlike Mr H I'm not in a position to conclude he didn't receive the booklet. What's also notable is that the booklet said if Mr H was concerned, he should check if his adviser was authorised on the FCA's website, and call TPAS's helpline before he signed anything.

The purpose of Aviva asking Mr H the due diligence questions I've set out above was to help establish his understanding of the course of action he was taking, but in my view there was a substantial overlap with the booklet itself in the significance of those questions. I can't fairly say that Aviva explaining the significance of his adviser being unregulated, or that the investment might be bogus and he might lose all his money, would have had a materially different outcome than the messages conveyed in the booklet about this.

Mr H's recollections suggest that he was relying on Aviva to stop him if it thought he was taking the 'wrong' course of action. Despite Aviva's failings, I don't think that the booklet Mr H received and should have read made it reasonable for him to shift all responsibility onto Aviva in the way he has suggested. If anything I think the surprise Mr H admits having that no-one contacted him to express concerns about the transfer, would have acted as a reminder to him to be particularly careful in view of what he had read in the booklet.

Mr H's CMC says that on receipt of a more targeted warning from Aviva, he would either have backed out of the transfer or taken FCA regulated advice. But on balance, I think he should already have had enough concerns from reading the Scorpion booklet to consider backing out of the transfer. Mr H has also correctly remembered the person in Bristol giving him reviews as being the previous (regulated) financial adviser who arranged the plan in 2009. So he did have some experience of getting regulated advice, and would have been reminded that at least one of the firms he was using (Strategic Alternatives) was *not* regulated. So could have returned to his former (or another) regulated adviser based on what he'd read in the booklet, had he wanted to do so.

This means I think it's unlikely on the balance of probabilities that Mr H would have changed his mind about transferring even if Aviva had specifically highlighted to him the number of similarities in what he was doing with known scams, and reiterated the risk of proceeding with the unregulated adviser he was known to be using.

The CMC says a booklet sent at the end of the process would have more impact than at the beginning, but I don't think Mr H could ignore the example he would already have read of a scam very similar to his. And at the time he received this, it was very pertinent to the steps he took a few weeks later to create the company and SSAS structure. If anything, the timing of the leaflet should have been even more helpful to Mr H in avoiding making commitments to becoming a director and SSAS trustee that could be implicated in a scam, if he'd wished to do so.

My final decision

I do not uphold Mr H's complaint and make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 31 March 2025.

Gideon Moore
Ombudsman