DRN-5195830

Financial Ombudsman Service

The complaint

Mr K has complained, with the help of a professional third party, about the transfer of his Zurich Assurance Ltd ('Zurich') personal pension to a small self-administered scheme ("SSAS") in 2014. Mr K's SSAS was subsequently used to invest in an overseas property development with The Resort Group ('TRG'). The investment now appears to have little value. Mr K says he has lost out financially as a result.

Mr K says Zurich 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 K says he wouldn't have transferred, and therefore wouldn't have put his pension savings at risk, if Zurich had acted as it should have done.

What happened

Mr K says he was cold called and offered a pension review. He says this was carried out by First Review Pension Services ('FRPS') whom he met with in person. Mr K says FRPS advised him to transfer his personal pension and invest in TRG. FRPS was not authorised or regulated by the Financial Conduct Authority ('FCA').

On 3 September 2013, Mr K signed a letter of authority ('LOA') giving Zurich permission to share details and transfer documents in relation to his pension with two businesses. The first was 'Moneywise' (which was Moneywise Financial Advisors Limited). Moneywise was regulated by the FCA. The other was FRPS. This was sent to Zurich via fax on 6 September 2013. The covering sheet, which requested information about the pension and the forms to enable a transfer, was on FRPS headed paper but referred to Moneywise's FCA registration number.

Zurich replied to FRPS on 12 September 2013, providing its transfer pack.

In December 2013, a company was incorporated with Mr K as director. I'll refer to this company as K Ltd. In January 2014 a SSAS was then set up. K Ltd was the SSAS's principal employer and Cantwell Grove Limited ('CGL') was the administrator. The trust deed for the SSAS was witnessed by a representative of FRPS. HMRC confirmed in writing to CGL that the SSAS had been registered with it on 29 January 2014.

On 17 February 2014, CGL wrote to Zurich enclosing completed paperwork and requesting the transfer of Mr K's pension benefits to the SSAS. The covering letter said CGL was aware of concerns around 'pension liberation', it supported the efforts of the pension industry and that its business model, as a pensions administrator, had been vetted by HMRC. It also said CGL supported the 'Scorpion' campaign of The Pension Regulator ('TPR'), had spoken to Mr K and confirmed no cash incentive or other inducements had been offered and access to pension benefits before age 55 was not being sought. And it said that the 'Scorpion' information leaflet had been shared with Mr K.

CGL enclosed completed application forms, a confirmation letter from Mr K, copies of the

scheme trust deed and rules, the HMRC registration confirmation and a scheme details Q&A document which gave answers to some general questions about the receiving scheme.

The Q&A document said that the investments under consideration were a commercial property investment provided by TRG and a discretionary fund management ('DFM') service. The document said that appropriate advice, under section 36 of the Pensions Act 1995, was being taken by the trustees of the SSAS from Sequence Financial Management Limited (SFML'). SFML was registered and authorised by the FCA. And the DFM provider was also noted as being FCA registered.

The confirmation letter which CGL referenced was signed by Mr K. This letter said he was aware there had been a rise in cases of pension liberation fraud and he was aware of the issues relating to this. The letter said Mr K wanted to confirm he was requesting a transfer to take advantage of investment opportunities, none of which were connected with pension liberation. And it stated he was not seeking to access his pension before age 55 and had not been offered a cash or other incentive to transfer.

On 25 February 2014, Zurich wrote to Mr K directly. The letter said that before considering the request further, Zurich wanted to ensure he wasn't being misled. It said that the Scorpion leaflet was enclosed, and the Scorpion campaign logo was present on the letter itself. The letter summarised that pension benefits couldn't be accessed before age 55 and to protect customers Zurich wouldn't transfer pensions to a receiving scheme where it believed the payment would be treated as unauthorised. It said the potential consequences of transferring to a pension liberation arrangement included significant tax penalties, high charges, fees or commission, lower income at retirement and the fund *"may be invested in assets which are often high risk, located overseas and may not be subject to regulatory controls".* Zurich said Mr K should read the Scorpion insert and, if he hadn't already done so, it recommended he seek advice from an *"appropriately qualified UK regulated financial adviser"*. It concluded by saying that if, after reading the letter and Scorpion insert, Mr K still wanted to proceed, he needed to sign a form that was enclosed.

I've seen a letter dated 3 May 2014, that Broadwood Assets Limited ('Broadwood') wrote to Mr K. The letter said it understood he was considering appropriate investments for his newly established SSAS for which he'd be sole trustee and member. And it understood he was considering an investment into an overseas commercial property in Cape Verde through TRG. The letter said Mr K, as trustee, was required to take advice under section 36 of the Pensions Act 1995 and had appointed Broadwood to provide that advice. It went on to say the advice was only given to Mr K in his capacity as the trustee of the SSAS. *And Broadwood said the advice was only on the potential suitability of the TRG investment "both as a specific example of an overseas commercial property investment, and more generally as an investment to be held within a SSAS"*. Broadwood said it had not advised on the establishment of the SSAS, was not providing advice that would be deemed regulated - as Broadwood was not regulated or authorised by the FCA – and wasn't advising on whether the TRG investment was *"suitable for the particular needs and objectives of the members of beneficiaries of the SSAS"*.

The document that had been enclosed with Zurich's letter to Mr K was returned on 23 May 2014. This was incomplete, so Zurich wrote to Mr K again on 13 June 2014, asking him to complete the document again. The fully completed version was sent back to Zurich by CGL on 27 June 2014.

Zurich wrote to Mr K again on 3 July 2014, acknowledging receipt of his confirmation that he wished to proceed. It said before it could proceed with the transfer payment, it needed to be satisfied HMRC would consider this an authorised payment. So, it would now contact HMRC to confirm that the receiving scheme remained validly registered and that a transfer can be

made. The letter explained that confirmation the transfer could be made should not be taken as an endorsement by Zurich or HMRC of the receiving scheme or product and Mr K should still carry out his own checks to satisfy himself the transfer was suitable. And it said if he had not yet been advised by a UK regulated financial adviser, Zurich recommended that he obtain such regulated advice. It included a link to a service to contact regulated advisers near to where he lived as well as a link to the FCA register so Mr K could check if a financial adviser was regulated.

Zurich confirmed to CGL and Mr K on 8 September 2014 that it had actioned the transfer, with the letter to CGL enclosing a cheque for £28,340.37 representing the total value of Mr K's pension benefits. Mr K was 57 years old at the time.

I've seen evidence £22,500 of Mr K's pension funds were then invested with TRG. And Mr K took £3,408.87 from the pension in December 2014 as tax free cash.

Statements for the SSAS bank account indicate that the TRG investment was providing credits to the pension bank account (returns) every few months until November 2019. I understand that those credits then ceased and there is little market for re-sale of the investment.

Mr K complained to Zurich in August 2021. Briefly, his argument is that Zurich ought to have spotted, and told him about, a number of warning signs in relation to the transfer. These included (but were not limited to) the following: the SSAS and the sponsoring employer were newly registered, there wasn't a genuine employment link to the sponsoring employer, CGL not being regulated by the FCA, Mr K had been cold called, the proposed investment being unregulated, high risk and involved investment abroad, there was not a regulated financial adviser involved and FRPS had recommended the transfer. Mr K said if Zurich had properly informed him of the warning signs and the risks, he wouldn't have transferred.

Zurich didn't uphold the complaint. It said the letter of authority Mr K had completed confirmed that FRPS was acting on behalf of Moneywise, an FCA regulated adviser. Zurich had set out the risks to Mr K, including providing the Scorpion insert. And it said he'd been required to take positive action to continue – completing the form it had sent with its letter of 25 February 2014. Mr K had chosen to go ahead with the transfer, which he had a statutory right to do. So, Zurich didn't think it had done anything wrong and was satisfied it had conducted an appropriate level of due diligence given the requirements of the time.

The complaint was referred to the Financial Ombudsman Service. I issued a decision in November 2024, explaining that this was a complaint that we had jurisdiction to consider – after Zurich questioned this. And this decision will look at the merits of Mr K's complaint – as our investigator was unable to resolve the dispute informally.

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.

When doing so I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

I note Zurich's representative has referred to conclusions reached in other complaints that they believe to be very similar or even the same as Mr K's and they have stressed the importance for consistency. I should make it clear that my decision is based on the specific circumstances in Mr K's individual complaint. And whilst complaints can look similar at first glance, slight differences in the individual circumstances of the complaint can make a difference to the overall outcome of the complaint. Ombudsmen are also independent decision makers and where a finding is based on the balance of probabilities and weighing up the evidence on a particular case, different ombudsman can come to different decisions. I'm not bound by decisions made by another ombudsmen.

In any event, I note that the complaints Zurich have referred to do have material differences to Mr K's complaint. In one of the complaints the ombudsman made the finding that it was reasonable for the ceding scheme to rely on an Origo request referring to Moneywise as being the regulated adviser involved. In the other the transfer happened a few days after the update to the Scorpion guidance in July 2014. The ombudsman considered given their due diligence process (which had also included the information from the consumer that they hadn't been cold called or been advised) had essentially concluded, it was reasonable for the ceding scheme to proceed on this specific occasion. The circumstances of Mr K's transfer are different. I refer Zurich to a decision against them which in fact is far more similar to Mr K's complaint which is DRN-4407908.

The relevant rules and guidance

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 Zurich 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 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.

The Pensions Schemes Act 1993 gives a member of a personal pension scheme the right to transfer the cash equivalent value of their accrued benefits to another personal or occupational pension scheme if certain conditions are satisfied (and they may also have a right to transfer under the terms of the contract). This right came to be exploited, with people encouraged to transfer to fraudulent schemes in the expectation of receiving payments from their pension that they weren't entitled to – for instance, because they were below minimum retirement age. At various points, regulators issued bulletins warning of the dangers of taking such action. But it was only from 14 February 2013 that transferring schemes had guidance to follow that was aimed at tackling pension liberation – the "Scorpion" guidance.

The Scorpion guidance was launched by TPR. It 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 guidance was updated on 24 July 2014 (which was before Mr K's transfer was completed). It widened the focus from pension liberation specifically, to pension scams – which it said were on the increase. I cover the Scorpion campaign in more detail below.

In late 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.

The Scorpion guidance

The materials in the Scorpion campaign comprised:

- An insert to be included in transfer packs (the 'Scorpion insert'). The insert warns readers about the dangers of pension scams and identifies a number of warning signs to look out for.

- A longer booklet issued by TPAS which gives more information, including example scenarios, about pension scams. Guidance provided by TPR said this longer leaflet was intended to be used in ongoing communications with members so that could become aware of the scam risks they were facing.

- An 'action pack' for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should "watch out for" various warning signs of a scam. If any of the warning signs applied, the action pack provided a check list that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request. Where a transferring scheme still had concerns, they were encouraged (amongst other things) to contact the member to establish whether they understood the type of scheme they were transferring to and – where a member insisted on transferring – directing the member to Action Fraud or TPAS.

TPR issued the guidance under the powers at s.12 of the Pension Act 2004. Thus, for the bodies regulated by TPR, the status of the guidance was that it provided them with information, education and/or assistance, as opposed to creating any new binding rule or legal duty. Correspondingly, the communications about the launch of the guidance were predominantly expressed in terms that made its non-obligatory status clear. So, the tenor of the guidance is essentially a set of prompts and suggestions, not requirements.

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.

I take from the above that the contents of the Scorpion guidance was essentially informational and advisory in nature and that deviating from it doesn't necessarily mean a firm has 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 rights.

That said, the launch of the Scorpion guidance 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 transfer 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.

What did personal pension providers need to do?

For the reasons given above, I don't think personal pension providers necessarily had to follow all aspects of the Scorpion guidance in every transfer request. However, I do think they should have paid heed to the information it contained. In deciding how to apply the guidance, they needed to consider the guidance as a whole, including the various warning signs to which it drew attention, the case studies that highlighted different types of scam, and the checklist and various suggested actions ceding schemes might take. And where the recommendations in the guidance applied, absent a good reason to the contrary, it would normally have been reasonable, and in my view good industry practice, for pension providers at least to follow the substance of those recommendations:

1. As a first step, a ceding scheme needed to check whether the receiving scheme was validly registered.

2. The Scorpion insert provided an important safeguard for transferring members, allowing them to consider *for themselves* the scam threat they were facing. Sending it to customers asking to transfer their pensions was also a simple and inexpensive step for pension firms to take and one that wouldn't have got in the way of efficiently dealing with transfer requests. So, all things considered, I think the Scorpion insert should have been sent as a matter of good industry practice with transfer packs and direct to the transferring member when the request for the transfer pack had come from a different party.

3. I also think it would be fair and reasonable for personal pension providers – operating with the regulator's Principles and COBS 2.1.1R in mind – to ensure the warnings contained in the Scorpion insert were provided in some form to a member before a transfer even if the transfer process *didn't* involve the sending of transfer packs.

4. The Scorpion guidance asked firms to look out for the tell-tale signs of scams and undertake further due diligence and take appropriate action where it was apparent their client might be at risk. The guidance points to the warning signs transferring schemes should have been looking out for and provides a framework for any due diligence and follow-up actions. Therefore, whilst using the action pack wasn't an inflexible requirement, it did represent a reasonable benchmark for the level of care expected of transferring schemes and identified specific steps that would be appropriate for them to take, if the circumstances demanded.

5. The considerations of regulated firms didn't start and end with the Scorpion guidance. 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 the Scorpion guidance – 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.

The circumstances surrounding the transfer – what does the evidence suggest happened?

Mr K says he was cold called about a review of his pension. He agreed to allowing the person he spoke to obtain information about his pension form Zurich and to a face-to-face meeting at his home. Mr K says that the person he met with recommended transferring his pension benefits to the SSAS and investing in TRG. He was told that he'd own a portion of a hotel room and as the investment was in property returns would be safe. Mr K says the adviser said the hotel room would be rented out and he'd receive returns of 9% per year. Risks were not discussed. Mr K says the adviser was informative, knowledgeable and professional and didn't make it clear at any stage that they were not regulated. And he says they also reassured him that any contact he received from Zurich was just a formality and everything was in hand due to the adviser's involvement – which he says he didn't have any reason to doubt.

Mr K has said the promise of increasing his pension savings through greater returns was what motivated him to transfer. And I don't have any reason to doubt this. I also think, based on what he says was discussed that he was advised to transfer. The emphasis of high guaranteed returns seems to have represented comparing the prospective benefits of the two schemes and suggesting the new scheme was more beneficial. And I think this advice was the catalyst for the transfer. I've not seen anything to suggest Mr K had any great experience of pensions and investments. Nor have I seen anything about his circumstances that leads me to think he'd likely have embarked on this rather complicated arrangement on his own – setting up a new company, opening a SSAS, transferring his existing pension and investing overseas. So, I think it likely was the advice and promise of better returns that persuaded him to transfer.

As I've set out earlier, there were several different businesses involved in the transfer, and others that were named but I think were not involved.

The 'Q&A' document which CGL sent to Zurich referred to SFML providing advice. But it was clear this was section 36 advice to the scheme trustees. So, SFML's role was clearly defined. Zurich should have known that section 36 advice, given to Mr K as trustee of the SSAS, was not regulated financial advice about the suitability for him of the proposed transfer out of his personal pension scheme in favour of the proposed new investment. And the documents from CGL did not suggest he was taking advice of that kind, but only *"advice on whether the proposed investment(s) are satisfactory for the aims of the scheme"*. And it appears SFML did not actually do this anyway. Broadwood, which was not FCA regulated, provided Mr K with written section 36 advice.

The 'Q&A' document also mentioned an FCA regulated DFM. But this was only in the capacity as a potential product provider, with no suggestion it would provide advice. And there is no evidence it did, or that its services were actually engaged as a provider.

The LOA that Mr K completed in September 2013 gave authority to FRPS, an unregulated business, and Moneywise, which was FCA regulated. It was FRPS though that sent this document to Zurich. And Zurich appears to have only replied to FRPS. A representative of FRPS was directly involved in the transfer process several times in the months after the LOA was signed. They witnessed the trust deed for the SSAS. Several weeks later, the same representative witnessed the application for the SSAS bank account. And I note that the forms, which Zurich only sent to FRPS, formed part of the application submitted by CGL,

indicating FRPS sent these on to CGL.

Although named in the LOA, I haven't seen anything to suggest that Moneywise was actually involved or provided any advice to Mr K. And in the lack of any further mention of Moneywise in the documentation, I don't think it would have been reasonable for Zurich to assume it was providing advice.

Based on the available evidence, on balance of probabilities, I think it was FRPS that Mr K discussed his pension with. FRPS appears to have remained involved throughout the application process. And I think it was likely FRPS that recommended the investment and that Mr K transfer his pension in order to invest – even though FRPS was not regulated to give such advice.

I also think Mr K is correct when he says that the investment likely now has little value. As I've noted, I understand returns from the investment to his pension ceased in late 2019 – which is consistent with what we've seen in a large number of other complaints involving investment in TRG. We've also seen several complaints where consumers have been told it is their responsibility to attempt to sell the investment – but they have been unable to do so, and there is no recognised secondary market for re-sale of the investment. So I believe the investment is now likely to be largely illiquid.

What did Zurich do and was it enough?

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.

Zurich's letter to Mr K on 25 February 2014 refers to a leaflet published by TPR being included. The letter also repeated a lot of the relevant warnings from the version of the Scorpion leaflet that was applicable at the time – the one issued in February 2013. And the letter included the Scorpion logo from TPR's campaign. So, I'm satisfied that the letter included the relevant Scorpion insert. This focussed on pension liberation but said, amongst other things, that financial advisers should be regulated by the FCA and consumers should find out about their background online, consumers could contact TPAS for impartial information and guidance and speak to Action Fraud if someone thought they'd been made an offer to liberate.

In addition, the letter Mr K signed as part of the transfer application, said his reasons for transferring did not involve pension liberation. Which indicates that he had been made aware of the risks the Scorpion insert, at that time, sought to warn him about.

So, on balance, I think Mr K was provided with the Scorpion insert applicable at the point he applied to transfer and that he had likely read that information.

The transfer wasn't completed until after the Scorpion guidance was updated. But I don't think Zurich needed to send another leaflet to Mr K, as a matter of course, when the July 2014 update to the Scorpion guidance was released. His application to transfer had been received prior to that and was being considered.

However, I do though think Zurich needed to take the updated guidance into account when reviewing the application to transfer. Its enquiries appear to have still been ongoing when the guidance was updated. Zurich had written to Mr K in early July 2014, saying it was still making enquiries of HMRC. And, as the transfer didn't complete until September 2014, it's

reasonable to conclude that these enquiries – which was part of the due diligence around the transfer – were not concluded until that time. So, given it was still undertaking checks on the transfer well after the Scorpion guidance was updated, I think Zurich should've considered whether this updated guidance indicated there should be concerns about the transfer request, particularly in light of the requirement for Zurich to act in Mr K's best interests.

Due diligence:

In light of the Scorpion guidance, I think firms ought to have been on the look-out for the tell-tale signs of a pension scam and needed to undertake further due diligence and take appropriate action if it was apparent their customer might be at risk.

The information that Zurich received as part of the application made it aware that there was at least one feature of Mr K's transfer that the Scorpion action pack for businesses said was a potential warning sign. Which was that the receiving scheme, the SSAS, had been newly registered.

Zurich had though also received a letter signed by Mr K as part of the application confirming that he'd carefully considered the request to transfer, was aware of the risks of pension liberation, confirmed that he wasn't planning to access his pension before age 55 (although being 57 this wasn't a risk here anyway) and hadn't been offered an incentive to transfer. Although pre-prepared, I don't think it would have been unreasonable for Zurich to have believed Mr K had read and understood this letter before signing it. Or for it to have taken the declaration at face value. So, at that stage, I think Zurich could have been reasonably assured that the risk of pension liberation was minimal.

But again, the Scorpion guidance was updated in July 2014 and said scams could take many forms, not just liberation, and were on the increase. And again, Zurich's due diligence was still ongoing. So, it would've been good practice therefore for Zurich to take the updated guidance into account.

As well as the scheme having been newly registered, Zurich would also have known that the transfer potentially involved investment overseas – as the Q&A document CGL sent to it explained that investment in TRG was being considered, and all of TRG's properties were overseas. Investments overseas was mentioned as a warning sign in the updated guidance as something to watch out for. And the FCA had also begun voicing concerns over the increased use of SSASs in pension scams.

So, given what Zurich knew, I think it would have been fair and reasonable – and good practice – for it to have reviewed the proposed transfer in light of the updated Scorpion guidance. And the most reasonable way of going about that would have been to turn to the check list in the action pack to structure its due diligence into the transfer.

The check list provided a series of questions to help transferring schemes assess the potential threat by finding out more about the receiving scheme and how the consumer came to make the transfer request. Some items on the check list could have been addressed by checking online resources such as Companies House and HMRC. Others would have required contacting the consumer. The check list is divided into three parts (which I've numbered for ease of reading and not because I think the check list was designed to be followed in a particular order):

1. The nature/status of the receiving scheme

Sample questions: Is the receiving scheme newly registered with HMRC, is it sponsored by

a newly registered or dormant employer, an employer that doesn't employ the transferring member or is geographically distant from them, or is the receiving scheme connected to an unregulated investment company?

2. Description/promotion of the scheme

Sample questions: Do descriptions, promotional materials or adverts of the receiving scheme include the words 'loan', 'savings advance', 'cash incentive', 'bonus', 'loophole' or 'preference shares' or allude to overseas investments or unusual, creative or new investment techniques?

3. The scheme member

Sample questions: Has the transferring member been advised by an 'introducer', been advised by a non-regulated adviser or taken no advice? Has the member decided to transfer after receiving cold calls, unsolicited emails or text messages about their pension? Have they applied pressure to transfer as quickly as possible or been told they can access their pension before age 55?

Opposite each question, or group of questions, the check list identified actions that should help the transferring scheme establish the facts.

I don't think it would always have been necessary to follow the check list in its entirety. And I don't think an answer to any one single question on the check list would usually be conclusive in itself. A transferring scheme would therefore typically need to conduct investigations across several parts of the check list to establish whether a scam was a realistic threat. Given the warning signs of a potential pension scam, which the updated guidance sought to address, that should have been apparent to Zurich I think it should have addressed all three parts of the check list and contacted Mr K as part of its due diligence.

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

Information Zurich could have obtained quickly and easily from Companies House would've confirmed, in addition to the SSAS being newly registered, the sponsoring employer was also newly registered. From reasonable enquiries with Mr K it would have likely learned that he wasn't employed by K Ltd and that the SSAS and K Ltd were set up after a cold call and a pension review for the purpose to invest in TRG which promised him high returns. And the paperwork referred to a connection to an unregulated investment company – TRG. All of these were warning signs of a scam.

Lastly, as I've already explained, I think Mr K was contacted and ultimately advised by FRPS. And I think he'd have told Zurich that.

The check list recommends that in order to establish whether its member has been advised by a non-regulated adviser, the ceding firm should "*check whether advisers are approved by the FCA at www.fca.gov.uk/register*". In other words, they should consult the FCA's online register of authorised firms. Zurich has indicated it didn't take that step because Moneywise was mentioned in the paperwork. But Zurich didn't correspond with Moneywise. And again there was no mention of Moneywise in the paperwork beyond that initial LOA. So, I don't think Zurich could have reasonably concluded at the time that it was, based on the information available. And I think, if appropriate due diligence had been carried out and Zurich had learned of the extent of FRPS' involvement, it should have consulted the FCA register, which is not difficult, and it would quickly have discovered that Mr K's adviser was indeed unauthorised.

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 investment advice in the United Kingdom – indeed, the Scorpion guidance itself makes this point.

My view is that Zurich should have been concerned by FRPS's involvement because it pointed to a criminal breach of FSMA. On the balance of probabilities, I'm satisfied such a breach occurred here.

<u>What should Zurich have told Mr K – and would it have made a difference?</u>

Had it done more thorough due diligence, there would have been a number of warnings Zurich could have given to Mr K in relation to a possible scam threat as identified by the action pack. But the most egregious oversight was Zurich's failure to uncover the threat posed by a non-regulated adviser. Its failure to do so, and failure to warn Mr K accordingly, meant it didn't meet its obligations under PRIN and COBS 2.1.1R.

With those obligations in mind, it would have been appropriate for Zurich to have informed Mr K that the firm he had been advised by was unregulated and could put his pension at risk. Zurich 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 don't think this would have been a disproportionate response given the scale of the potential harm Mr K was facing. And I don't think any such warnings would reasonably have caused it to think it was running the risk of advising Mr K, that it was replicating the responsibilities of the receiving scheme or that it was putting in place unnecessary barriers to exit.

I've considered the possibility that Mr K would have transferred his pension even if Zurich had done everything they should have.

Zurich did share a copy of the Scorpion insert with Mr K in February 2014. And its covering letter highlighted some potential consequences of transferring to a pension liberation arrangement. But Mr K wasn't doing this. He wasn't trying to access his pension early nor was he offered any incentives. I don't think the majority of the warnings reasonably would have concerned him. Zurich's letter did recommend seeking advice from an appropriately qualified adviser and asked him to sign a declaration in order to continue. The declaration simply confirmed that he wanted to proceed

Zurich's further letter to Mr K in July 2014 talked about the potential to incur a significant tax charge if the transfer payment was considered to be 'unauthorised'. And it again suggested taking advice from a regulated business, if Mr K hadn't already, as well as providing information about how Mr K could find details of an independent adviser and how he could check the status of the business that had advised him. But while these messages recommended taking advice from a regulated business, none of them explained that advice to transfer received from an unregulated business was illegal or the possible consequences of accepting such advice.

I don't doubt that Mr K was influenced by the promise of better returns. And he believed the FRPS adviser was professional and says he had no reason to doubt him at the time. But Mr K wasn't an experienced investor. I think he trusted and was led by what the adviser, FRPS, had told him. But if he'd been given reason to think that FRPS was not acting in his best interests I think he would have listened to Zurich who was his pension provider and who he had trusted with his pension for many years.

Taking everything into account, I'm satisfied any messages along the lines I've set out would have changed Mr K's mind about the transfer. The messages would have followed contact with Mr K so would have seemed (and indeed would have been) specific to his individual circumstances and would have been given in the context of Zurich raising concerns about the risk of losing pension monies as a result of untrustworthy advice. This would have made Mr K aware that there were serious risks in using an unregulated adviser. I think the gravity of any messages along these lines would prompt most reasonable people to rethink their actions. And I'm not persuaded Mr K would have been any different. So, I consider that if Zurich had acted as it should, Mr K wouldn't have proceeded with the transfer out of his personal pension or suffered the investment losses that followed.

Fair compensation

I've taken into account that the courts are able to reduce a defendant's liability for negligence, where the claimant shares responsibility for the damage they've suffered. The Law Reform (Contributory Negligence) Act 1945 allows for the apportionment of liability in the case of contributory negligence. And in summary this says where a person suffers damage partly due to their own fault and partly due to the fault of another party, a claim in respect of that damage shall not be defeated because the person that suffered the damage was party at fault, but the damages recoverable shall be reduced by what the court thinks is an equitable share based on the share of responsibility / fault of the claimant.

I'm not deciding a legal claim, only a complaint. But I have given thought to whether Mr K should bear some responsibility for the losses he incurred. And I think he should here, due to his failure to act on what he should reasonably have known, contributing to the loss he suffered.

As I've explained, Zurich shared a copy of the Scorpion insert with Mr K. This said a warning sign to watch out for was being approached out of the blue over the phone – And Mr K has said that this happened to him. It also said that any financial adviser should be registered with the FCA and consumers should check for a business's background information online.

Zurich's covering letter also discussed potential consequences of transferring to a pension liberation arrangement – such as tax penalties, high charges, failed investments and a reduction in retirement income. And the letter went on to say that Zurich recommended Mr K take advice from an appropriately qualified UK regulated adviser with specialist knowledge of pension transfers.

The follow up letter Zurich sent to Mr K on 3 July 2014 again strongly recommended that he obtain regulated advice if he hadn't done so. And it provided links to a service whereby he could find a regulated adviser locally as well as a link to the FCA register to check the status of any business that had advised him.

It is true that this correspondence was all largely presented in relation to the risks of pension liberation – which wasn't something Mr K was doing. So, these warnings may not have resonated with him as strongly. But they were, nonetheless, warnings from a trusted source about how he could protect himself from an inappropriate transfer – including how to find a regulated adviser and how to check if an adviser was regulated.

Between the two letters from Zurich, Mr K received a letter from Broadwood. This also suggested obtaining regulated advice. And while it provided reassurance that the scheme would not facilitate pension liberation and that the investment was legitimate it also said that Broadwood was not FCA regulated, the investments were high risk, potentially illiquid, returns were not guaranteed and the investment suitable for adventurous investors.

Mr K has said he didn't have any investment experience, was told the investments were safe as they were in property and was quoted a figure of 9% returns per year. And Mr K has said he trusted what he was told.

I don't doubt that Mr K likely found the adviser convincing or that he may have believed he was getting advice from a trusted source. But the letter from Broadwood called into question some of the things Mr K said he was told and said he should again consider regulated advice. This came from a different source to the party that recommended the transfer.

So, Mr K had received several prompts to obtain regulated advice as well as how to check if the advice he received was from a regulated source. But it appears he didn't check this. None of the parties that were involved (FRPS, CGL, Broadwood) were regulated – and indeed Broadwood even confirmed its status – nor have I seen anything to suggest they claimed to be. So, I don't think the involvement of any of these businesses ought to have reassured Mr K that he was receiving regulated advice. So, given the information he'd been sent I think if acting reasonably, he ought to have checked if his adviser was regulated. And this would probably have led to the illegal advice being uncovered and the transfer being aborted.

Therefore, like our Investigator, when considering fair compensation here, I think it would be reasonable to attribute some responsibility for the loss Mr K has suffered to his own failure to act.

Essentially, I think both Zurich and Mr K should have done more during the process of the transfer to guard against the risk of a scam and that if either of them had done as they reasonably should, Mr K's losses would have been avoided. But Zurich was the professional party and dealing with members' pension transfer requests was an inherent part of operating, as it did, a regulated pensions business. So, it should have been more familiar with the risks than Mr K. In accordance with its duty under PRIN 6 and COBS 2.1.1R, Zurich should (as I have found above) have given specific warning about the likelihood Mr K had already been drawn into a scam. So, I think its failings were worse than those of Mr K. While this isn't an exact science, in the circumstances of this complaint, I intend to reduce Mr K's compensation by 30%. I think this is a fair way to account for Mr K's own contribution to the loss he's suffered.

Putting things right

Fair compensation

My aim is that Mr K should be put as closely as possible into the position he would probably now be in if Zurich had treated him fairly, taking into account that Mr K shares responsibility for his loss.

The SSAS only seems to have been used in order for Mr K to make an investment that I don't think he would have made from the proceeds of this pension transfer, but for Zurich's actions. So, I think that Mr K would have remained in his pension plan with Zurich and wouldn't have transferred to the SSAS.

To compensate Mr K fairly, Zurich should subtract the actual value of the SSAS from the notional value if the funds had remained with Zurich. If the notional value is greater than the actual value, there is a loss. Zurich should then pay 70% of that loss.

Actual value

This means the SSAS value at the date of my Final Decision. To arrive at this value, any

amount in the SSAS bank account is to be included, but any overdue administration charges yet to be applied to the SSAS should be deducted. Mr K may be asked to give Zurich his authority to enable it to obtain this information to assist in assessing his loss, in which case I expect him to provide it promptly.

My aim is to return Mr K to the position he would have been in but for the actions of Zurich. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. On the basis of the evidence I have, that is likely to be the case with the TRG investment. As I've explained, these are illiquid with little market for re-sale. And I don't think it's realistically possible for Zurich to only acquire a part of the investment from the SSAS as I'm only holding it responsible for 70% of the loss. Therefore as part of calculating compensation:

- Zurich should give the illiquid investment(s) a nil value as part of determining the actual value. In return Zurich may ask Mr K to provide an undertaking, to account to it for 70% of the net proceeds he may receive from those investments in future on withdrawing them from the SSAS. Zurich will need to meet any costs in drawing up the undertaking. If Zurich asks Mr K to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

- It's also fair that Mr K should not be disadvantaged while he is unable to close down the SSAS. So, to provide certainty to all parties, if these illiquid investment(s) remain in the scheme, I think it's fair that Zurich should pay an upfront sum to Mr K equivalent to 70% of five years' worth of future administration fees at the current tariff for the SSAS, to allow a reasonable period of time for the SSAS to be closed.

Notional value

This is the value of Mr K's funds had he remained invested with Zurich up to the date of calculation. Zurich should ensure that any pension commencement lump sum or gross income payments Mr K received from the SSAS are treated as notional withdrawals from Zurich on the date(s) they were paid, so that they cease to take part in the calculation of notional value from those point(s) onwards.

Payment of compensation

I don't think it's appropriate for further compensation to be paid into the SSAS given Mr K's dissatisfaction with the outcome of the investment it facilitated.

Zurich should reinstate Mr K's original pension plan as if its value on the date of calculation was equal to 70% of the amount of any loss established from the steps above (and it performs thereafter in line with the funds Mr K was invested in).

Zurich shouldn't reinstate Mr K's original plan if it would cause a breach of any HMRC pension protections or allowances – but my understanding is that it might be possible for it to reinstate a pension it formerly administered in order to rectify an administrative error that led to the transfer taking place. It is for Zurich to determine whether this is possible.

If Zurich is unable to reinstate Mr K's pension and it is open to new business, it should set up a **new** pension plan with a value equal to 70% of the amount of any loss on the date of calculation. The new plan should have features, costs and investment choices that are as close as possible to Mr K's original pension.

If Zurich considers that the amount it pays into a **new** plan is treated as a member contribution, its payment may be reduced to allow for any tax relief to which Mr K is entitled

based on his annual allowance and income tax position. However, Zurich's systems will need to be capable of adding any compensation which doesn't qualify for tax relief to the plan on a gross basis, so that Mr K doesn't incur an annual allowance charge. If Zurich cannot do this, then it shouldn't set up a new plan for Mr K.

If it's not possible to set up a new pension plan, Zurich should pay the amount of 70% of any loss direct to Mr K. But if this money had been in a pension, it would have provided a taxable income during retirement. Therefore, compensation paid in this way should be notionally reduced to allow for the marginal rate of income tax that would likely have been paid in future when Mr K is retired. (This is an adjustment to ensure that Mr K isn't overcompensated – it's not an actual payment of tax to HMRC.)

To make this reduction, it's reasonable to assume that Mr K is likely to be a basic rate taxpayer in retirement. So, if the loss represents further 'uncrystallised' funds from which Mr K was yet to take his 25% tax-free cash, then only the remaining 75% portion would be taxed at 20%. This results in an overall reduction of 15%, which should be applied to the compensation amount if it's paid direct to him in cash.

Alternatively, if the loss represents further 'crystallised' funds from which Mr K had already taken his 25% tax-free cash, the full 20% reduction should be applied to the compensation amount if it's paid direct to him in cash.

If payment of compensation is not made within 28 days of Zurich receiving Mr K's acceptance of the Final Decision, interest must be added to the compensation at the rate of 8% per year simple from the date of the Final Decision to the date of payment.

Income tax may be payable on any interest paid. If Zurich deducts income tax from the interest, it should tell Mr K how much has been taken off. Zurich should give Mr K a tax deduction certificate in respect of interest if Mr K asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

This interest is not required if Zurich is reinstating Mr K's plan for the amount of the loss – as the reinstated sum should, by definition, mirror the performance after the date of my Final Decision of the funds in which Mr K was invested. However, I expect any such reinstatement to be achieved promptly.

Details of the calculation must be provided to Mr K in a clear, simple format.

My final decision

For the reasons I've explained, I uphold this complaint and require Zurich Assurance Ltd to pay compensation to Mr K by carrying out the steps outlined in the 'putting things right' section of this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 13 January 2025.

Ben Stoker
Ombudsman