DRN-3188270

## The complaint

Mr R through a claims management company (CMC) has complained that ReAssure Life Limited (ReAssure) allowed him to transfer his personal pension to an overseas scheme when it shouldn't have done. He believes that ReAssure didn't carry out the required due diligence at the time and had it done so he would not have transferred.

## What happened

Mr R held a personal pension with Old Mutual Wealth. This was subsequently taken over by ReAssure.

In May 2016 Mr R was cold called by a firm called Capital Facts Limited (CFL) and was offered a free review of his pension. CFL was a firm not authorised by the FCA. He was subsequently recommended to transfer the pension he held with ReAssure to the Harbour Retirement Scheme (the scheme) which was a Qualifying Recognised Overseas Pension Scheme (QROPS). The CMC hasn't provided the name of the firm involved in recommending the transfer to Mr R but when Mr R spoke to our investigator he said the firm was First Review Pension Services (FRPS).

ReAssure didn't uphold Mr R's complaint so it was referred to this Service where it was assessed by one of our investigators. She was of the view the complaint should be upheld. ReAssure didn't provide TPR's scorpion leaflet /insert to Mr R making him aware of the risks of transferring his pension. She also felt ReAssure didn't carry out further detailed due diligence as required by TPR and other guidance at the time and so had failed to ensure the transfer was in Mr R's best interests.

ReAssure didn't agree with the assessment. It responded by affirming it had carried out the correct due diligence checks at the time the transfer request was made. It also stated ReAssure should not be responsible for the funds once they were reinvested.

As no agreement could be reached the complaint has been 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.

*What principles, rules and guidance apply to this case?*

As Mr R's policy was a personal pension, ReAssure was regulated by the Financial Conduct Authority (FCA, preceded by the FSA) in its operation. Both The Pensions Regulator (TPR) and FSA had issued a number of warnings on their websites during 2011 and 2012 about the dangers of pension liberation – where consumers might be cold-called by unregulated advisers and encouraged to release cash from their pensions ahead of their intended retirement age.

As a result, ReAssure would (or should) have been aware that there was a problem in the industry by February 2013, when TPR published new guidance (the 'Scorpion' campaign) including an Action Pack for ceding schemes to carry out due diligence on pension transfers.

Although this Scorpion guidance had been directed at the occupational schemes which TPR regulates, it was endorsed by the FSA at the time – and it was the only such guidance until March 2015 when a broader piece of guidance initiated by the whole industry (TPR and FCA regulated firms) was published: the Pension Scams Industry Group (PSIG) Code of Practice ('the Code'). TPR began referring to the Code in its Action Pack.

So, I consider ReAssure should already have been familiar with using the Scorpion guidance over the several years prior to Mr R's transfer. This guidance didn't change significantly, apart from rebranding in July 2014 to make clear that the concern was about 'scams' and not just liberation, and the main warning signs for both were largely the same. This meant that a ceding scheme that was confident that there wasn't a risk of liberation (and the associated tax charges), might not have been as sure that there was no risk of a scam.

The definition of a pension scam has been expanded in more recent years, but TPR broadly said in a press release at that time that this was the risk of consumers *'…being scammed into moving their retirement savings into unregulated high-risk or bogus investments that could result in them losing their entire pension pot.'* It said these were *'…often overseas and unregulated. Home visits from 'introducers', offers of 'free pension reviews', claims about 'legal loopholes' and unusual investments like overseas property, storage units or biofuels are all used to fool members into thinking they're being offered a legitimate pension transfer.'*

I'm not going to set out the March 2015 update to TPR's Action Pack or Version 1 of the Code (March 2015) in full detail here as I'm aware both parties should have copies of these. The Code stated that it didn't override existing regulatory guidance, but as it's a relevant indication of good industry practice at the relevant time, I'm going to take it into account alongside the Action Pack. I will summarise the key points of both below:

- The Code made clear 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.'* I've taken this into account.
- Both the Action Pack and the Code said that a 2-page leaflet (or 'insert') produced by the Pensions Advisory Service (TPAS) should be sent directly to the policyholder whenever a 'transfer pack' was requested, even by their representative. The March 2015 leaflet included a pictorial highlighting the risks of cold-calling, pension access before age 55, overseas transfer of funds, convincing marketing of returns over 8%pa, couriered paperwork and proposals for a single investment. I've also taken this into account.
- The Action Pack included a checklist for businesses to follow if a policyholder was asking for a transfer, involving questions of the policyholder and receiving scheme. All the questions had equal prominence in the checklist. As each transfer presents different risks, it's reasonable to say businesses had some discretion as to how much of the checklist to complete before being satisfied that the scam risk was sufficiently low to proceed.

- The Code contained an 'initial analysis' stage to better assist businesses in determining how far their enquiries should go. Two ways of 'fast tracking' a transfer in this initial stage were where the receiving scheme was a member of an accepted club or group, or had been 'whitelisted' after prior investigation.
- I'm not persuaded there are grounds here for a transfer to the Scheme to have been fast-tracked for either of those reasons. In particular the risk of a scam inherent in a QROPS depends largely on what investments the consumer is making, so further questioning about the wider circumstances would always have been needed.
- Beyond this, it was also possible under the Code for a transfer to have been fast-tracked if it passed some initial consumer questions. These addressed the risk of liberation as well as scams, but as there is no issue in this complaint of Mr R receiving an incentive or accessing their pension early, I've focused on the other scam questions. These were broadly the same in the checklist, so I'll summarise them as:
  - Did the consumer receive an unsolicited offer of a 'pension review' or investment opportunity by cold call, email or text?
  - Were they told they could obtain a higher tax-free cash sum by transferring? (This question is only present in the Code)
  - Were they promised a specific or guaranteed rate of return, particularly over 8%pa? (The checklist also highlights where the marketing material alludes to new or unusual investment techniques)
  - Did the marketing or discussions about the investment involve transferring funds overseas?
- The Action Pack used the same pictorial as the leaflet, adding two warning signs for the business to look out for. These signs weren't specifically in the Code's initial analysis questions, but I think whether they were present in the transfer should have become apparent as a result of asking the questions above in any event:
- Putting the transfer proceeds into a single investment: *'In most circumstances, financial advisers will suggest diversification of assets.'*
- Paperwork delivered to the consumer by courier that required an immediate signature. (This is also a question used at a later stage in the Code)
- If this questioning process flagged up concerns about Mr R's transfer, the Code clearly indicates that a transfer shouldn't have proceeded without full due diligence into the receiving scheme and what Mr R had been told about that scheme.
- This is an indication of where the remaining questions in the checklist might need to be asked, in proportion to the risk present in the transfer request. PSIG itself said the further questions it provided in the Code were examples, alternatives could be used and '*there is flexibility in the evidence you require'*. I'll set out in my findings below what further enquiries I think were required.
- If B considered there were material risks of a scam at the conclusion of its enquiries, the Action Pack expected it *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'*. And (for example) to direct them to TPAS *'…to discuss the potential consequences of the transfer, including tax repercussions…'*
- 'Booklet' here refers to a 7-page TPAS guide for consumers, which included the same pictorial as in the Action Pack (and the shorter factsheet); an example of an overseas property scam in a UK-based pension scheme; links to FCA online material about scams and checking if an adviser was regulated in the UK; and how to contact TPAS for guidance.
- If I'm persuaded that ReAssure should have communicated further with Mr R about the risk of a scam, I'm mindful that there are different ways of broadly meeting the same guidance – but I can look to the booklet as an indication of the type of message expected.

In considering what ReAssure should have done above and in my findings below, I've borne in mind that it was also bound to adhere to the ever-present Principles and Rules set out by the FSA/FCA. These include that it must take reasonable care to organise and control its affairs responsibly and effectively with adequate risk management systems; and must pay due regard to the interests of its customers and treat them fairly.

I've also taken into account that regarding QROPS, the Code said in 2015: '*Reported scams include 'cloned' QROPS, and promising extraordinary rates of return through unusual investment opportunities, typically offered via arrangements such as SIPPs and SSASs.'* It didn't set out detailed steps to follow for QROPS as a result: assuming the QROPS had not been 'cloned', the instruction was to follow the guidance similar to that for a SSAS.

The Action Pack also didn't specifically mention QROPS but said: *'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, I think it's fair to say that (genuine) QROPS weren't thought of as the most likely route for pension scam activity in 2015.

*Did ReAssure act in line with these rules and principles*

ReAssure has said it can find no evidence that it sent the scorpion insert so has conceded it wasn't sent. But under TPR guidance sending the insert was a requirement of both the scorpion guidance and the Code at the time Mr R requested the transfer of his pension. So there is a clear failing by ReAssure in this respect.

ReAssure did check the scheme was recognised by HMRC as a recognised overseas pension scheme and has provided the letters it sent to HMRC but when considering the guidance from the time issued by TPR this wasn't enough and this wasn't all ReAssure had to do in relation to transfer requests in 2016.

There is no evidence ReAssure followed any of TPR's further guidance at the time which it should have done.

The March 2015 scorpion action pack asked the transferring scheme to do the following:

*If a member is asking for a scheme transfer use the checklist (on the next page) to find out more about the receiving scheme and how the member can make the request.*

The checklist asks transferring schemes to find out about how the member came to hear about the receiving scheme , the registration of the receiving scheme, what investments were going to be made, whether the pension was going to be accessed before the age of 55, amongst other things.

The action pack also points out how transferring schemes can address some of the items on the checklist and for many of the items the suggestion is to contact the member. The scorpion guidance goes on to then say:

Next steps if you have concerns:

*Contact the member to establish whether they understand the type of scheme they'll be transferring to and send them the pension scams booklet available at www.pensions-scams.com.*

*Speak to the member at risk – over the phone, via email or letter. It could help establish answers to more of the questions in the checklist.*

I know ReAssure knew the scheme was on HMRC's list of recognised overseas schemes and so it would have had some comfort the scheme had not been identified as posing a threat of liberation or a scam, but the risk of a scam shouldn't have been discounted without ReAssure getting further information irrespective of how credible the receiving scheme might have seemed.

Also there is no guarantee the scheme wouldn't be removed from the list at any point. Also ReAssure would have known Mr R was moving his pension overseas despite still being a resident of the UK. This was unusual and so ReAssure should reasonably have suspected Mr R was being guided through the transfer process by unregulated entities rather than FCA regulated financial advisers. It would also have been a reasonable assumption that Mr R's actions were designed to facilitate investing overseas – a common vehicle for scam activity.

So ReAssure should still have had some concerns about what Mr R was intending to do. And had it contacted Mr R, as it should have done under TPR guidance, it would likely have also been concerned about M R being cold called by an unregulated firm.

So given this and with the FCA principals in mind I think ReAssure should reasonably have taken some of the next steps outlined in the scorpion guidance rather than just checking the status of the scheme with HMRC.

As well as following TPR scorpion guidance ReAssure should also have followed the PSIG code; as mentioned above this worked alongside TPR guidance for pension transfer requests.

Under the Code, certain transfers wouldn't have needed further due diligence – for instance those coming from an accepted "club" (such as a public Sector Transfer Club). But because those conditions don't apply in this complaint ReAssure would have had to conduct further due diligence into Mr R's transfer.

The QROPS section of the Code is relevant here. This included various steps for the transferring scheme to follow, including:

- *Checking HMRC's list of QROPS on the date of the transfer;*
- *Verifying the transfer is being paid to the scheme on the HMRC list and not a scheme with a near-identical name (a clone scheme);*
- *Establishing whether the QROPS was an occupational or personal pensions;*
- *Considering the rationale for moving funds offshore;*
- *Ensuring the transferring member has lodged a completed APSS263 form.*

As already mentioned the receiving scheme was on the HMRC recognised list at the time of the transfer and I am satisfied payment was made to the scheme. I have also seen information about the scheme – its terms and conditions and documents explaining how the scheme worked, the overseas transfer forms and the APSS263. I can't be sure these were obtained by ReAssure but they exist, and I think Mr R received them.

But as ReAssure didn't follow the guidance in the code I know it didn't consider the rationale for Mr R moving his funds abroad. Which in my view is an important failing.

Furthermore, the Code's "initial analysis" section suggests the transferring scheme contacts the member to answer a number of questions about their transfer and their reasons for requesting it:

- *Will you be receiving any cash payment, bonus, commission or loan from the receiving scheme or its administrators as a result of transferring your benefits.*
- *Did the receiving scheme/adviser or sales agent/representatives for the receiving scheme make the first contact (e.g. cold call).*
- *Have you been told you can access any part of your pension fund under the receiving scheme before the age of 55 other than on the grounds of ill health?*
- *Have you been told you will be able to draw a higher tax free cash sum as a result of transferring?*
- *Have you been told you will make a specific/guaranteed rate of return.*
- *Have you been informed or an overseas investment opportunity?*

A "yes" to any of these questions listed about would have been a potential warning sign. And clearly that applied here – Mr R was cold called and was transferring to an overseas fund.

These questions contained in the initial analysis section of the Code are the first step in analysing a transfer – it is not an optional extra that can be ignored depending upon the outcome of other due diligence. And whilst the Code leaves room for discretion it doesn't seem to me that the questions above could have been answered properly without contacting the member.

So contacting Mr R was always likely to be an important step for ReAssure to have taken at this point in time whatever comfort it feels it could have drawn from its other due diligence - namely only checking the scheme was a QROPS. And this is a relevant consideration in terms of the outcome of the complaint because the act of contacting the member and asking questions about their transfer can in itself prompt a member to change their mind – the Code is very clear about this possibility:

*"it is possible that during the due diligence process the member will withdraw their transfer request. This could be because the awareness information you have supplied and the questions you have asked have led the member to realise that the transfer is possibly connected with a pension scam and it is not in their best interests to proceed".*

In other words, ReAssure had to do more than just establish whether there was a risk of a scam and check the registration of the scheme. It had to engage further with any member to find out more behind the transfer and also it had be aware that its contact with the member could potentially help that member in his decision making.

Given its failure to contact Mr R and its failure to send the scorpion leaflet and follow the required TPR and PSIG guidance I am satisfied ReAssure has fallen short of all that was required of it at the time.

*Would this have made a difference to Mr R?*

As part of the investigation process we asked Mr R some questions about the transfer and the circumstances surrounding it. He has told us that:

- He was cold called out of the blue by CFL and up to that point he wasn't looking to do anything with his pension. He was offered a free pension review and was led to believe this was a service being offered to clients of ReAssure.
- He confirmed he was visited at home and had to sign the paperwork while the adviser waited for it, so he felt somewhat under pressure and wasn't given a lot of time to read the paperwork he signed. He wasn't told he could access his pension early or offered any type of incentive.

- He wasn't in any financial difficulty at the time and had no need to access his pension before his original planned date.
- He was told he would have a diversified portfolio and he would make significantly more returns than if he left with pension with the business.
- No mention was made of FRPS being regulated or not but because they were talking about his pension and advised him to transfer it he trusted that what they advised me him to do was best for him.
- Had they mentioned that they were not regulated he stated he would not have agreed to anything.
- No mention was made to him of the risks involved or anything about pension liberation or general pension scams.
- He didn't have doubts at the time and trusted the adviser as he's said he had no reason not to.

I have no reason to question these comments from Mr R and in fact I find them persuasive. Its also worth bearing in mind that the scheme made eight calls to ReAssure over a short period of time to get progress information on the transfer. I think this is excessive and should have been another trigger for ReAssure to undertake thorough due diligence. In my view had ReAssure done so Mr R would have been concerned enough about the types of question ReAssure would have been asking him and the information he would have been provided with to have changed his mind about transferring his pension. There seems to be no reason for him to transfer his pension or access it early to warrant the transfer. And while he was attracted by the potential to increase the value of his pension I think understanding the risks around transferring his pension would have outweighed this and he would have made a different decision about the transfer.

In summary ReAssure didn't carry out the correct due diligence expected of it under TPR scorpion guidance. It failed to send out the scorpion leaflet that was designed to alert pensions savers like Mr R to the possibility they could be involved in a pensions scam. ReAssure also failed to engage further with Mr R or follow the PSIG guidance which it also should have done at the time. And I consider had Mr R received the leaflet he would have sought further guidance and not gone through with the transfer. It's also very likely that had ReAssure obtained better understanding of Mr R's circumstances and the transfer it would have had concerns about the transfer and this would also have caused Mr R to not proceed with the transfer.

**Putting things right**

**Fair compensation**

My aim is that Mr R should be put as closely as possible into the position he would probably now be in if ReAssure had treated him fairly.

The Harbour Pension Scheme only seems to have been used in order for Mr R to make an investment that I don't think he would have made but for ReAssure's actions. So I think that Mr R would have remained in his pension plan with ReAssure and wouldn't have transferred to the Harbour Pension Scheme.

To compensate Mr R fairly, ReAssure must compare the actual value of the Harbour Pension Scheme with the notional value if it had remained with ReAssure. If the notional value is greater than the actual value, there is a loss.

***Actual value***

This means the actual amount payable from the Harbour Pension Scheme at the date of my final decision.

My aim is to return Mr R to the position he would have been in but for the actions of ReAssure. 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. That may be the case with some of the investments in the Harbour Pension Scheme. Therefore as part of calculating compensation:

- ReAssure should agree an amount with Harbour Pension Scheme as a commercial value for any illiquid investments, then pay the sum agreed to Harbour Pension Scheme plus any costs, and take ownership of those investments. The actual value used in the calculations should include anything ReAssure has paid to Harbour Pension Scheme for illiquid investments.

- Alternatively, if ReAssure is unable to buy those investments from Harbour Pension Scheme it must give them a nil value as part of determining the actual value. It's also fair that Mr R should not be disadvantaged while he is unable to close down the Harbour Pension Scheme and move to a potentially cheaper and more strongly regulated arrangement. So to provide certainty to all parties I think it's fair that ReAssure also covers five years' worth of future administration fees at the current tariff for the Harbour Pension Scheme as part of the compensation, to allow a reasonable period of time for the Harbour Pension Scheme to be closed.

Any outstanding administration charges yet to be applied to the Harbour Pension Scheme must also be deducted from the actual value.

***'Incentives'***

An upward adjustment may be made to the actual value to allow for any **indirect** cash benefits (including 'loans') Mr R was paid as a result of the transfer and/or any payments the Harbour Pension Scheme made to him before the age of 55 that it should not have been allowed to make (together, the 'incentives'). Mr R is expected to evidence to ReAssure the total amount of any such incentives paid as soon as possible, **otherwise he will not be able to benefit** from any reimbursement or indemnity regarding unauthorised payment charges caused specifically by these incentives (covered below).

Where it applies, this adjustment for incentives involves calculating what larger, gross amount would ordinarily need to have been withdrawn from the pension over the course of Mr R's retirement, to leave him a net amount equal to the total incentives. Here, it's reasonable to assume that Mr R is likely to be a basic rate taxpayer at the selected retirement age, so a 75% portion of his pension would be taxed at 20% assuming he is entitled to take the remaining 25% portion tax-free. As a result his net benefits would equal 85% of the gross benefits. So the total incentives (if any) should therefore be 'grossed-up' by dividing them by 0.85, then they should be added to the actual value at the date of my final decision.

***Notional value***

This is the value of Mr R's investment had it remained with ReAssure at the date of my final decision.

Any pension commencement lump sum or gross income payments Mr R received **directly** from the Harbour Pension Scheme which would have been permitted under the tax rules (and are therefore not being treated as 'incentives' above), should be treated as notional withdrawals from ReAssure 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***

There doesn't appear to be any reason why Mr R needed a pension arrangement that wasn't privately held, administered by an established insurance company and under FCA regulation. So I don't think it's appropriate for further compensation to be paid into the Harbour Pension Scheme.

ReAssure should reinstate Mr R's pension plan as if its value on the date of my final decision was equal to the amount of any loss (and it performs thereafter in line with the funds Mr R was invested in).

ReAssure shouldn't reinstate Mr R's plan if it would conflict with any existing protection or allowance – but my understanding is that it will 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. If ReAssure doesn't consider this is possible, it must explain why.

If ReAssure is unable to reinstate Mr R's pension and it is open to new business, it should set up a new plan for a value equal to the amount of any loss. The new plan should have features, costs and investment choices that are as close as possible to Mr R's original pension. Its payment into the new plan should allow for the effect of charges and tax relief (if applicable). ReAssure shouldn't set up a new plan if it considers that its payment will be treated as a member contribution in excess of Mr R's annual allowance, and ReAssure is unable to process the amount in excess of the annual allowance.

If it's not possible to set up a new plan either, ReAssure must pay the amount of any loss direct to Mr R. But if this money had been in a pension, it would have provided a taxable income. Therefore compensation paid in this way should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

To make this reduction, it's reasonable to assume that Mr R is likely to be a basic rate taxpayer at the selected retirement age, so a 75% portion of his pension would be taxed at 20% assuming he is entitled to take the remaining 25% portion tax-free. This results in an overall reduction of 15%, which should be applied to the compensation amount if it's paid direct to Mr R.

***Reimbursement, indemnity and undertakings***

In addition, ReAssure must reimburse Mr R for any unauthorised payment tax charges that have been levied against him personally by HMRC arising out of the funds transferred here. And it must also indemnify Mr R against any such charges arising in future as a result of unauthorised payments deemed to have been made before the date of my final decision.

The reimbursement or indemnity does not apply in respect of any incentives (as defined above) that Mr R does not promptly give details of (including their amounts) to ReAssure at the date of my final decision.

If illiquid investments are being left in the Harbour Pension Scheme, ReAssure may ask Mr R to provide an undertaking in return, to account to it for the net amount of any payment he may receive from those investments in future. ReAssure will need to meet any costs in drawing up the undertaking. If ReAssure asks Mr R to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

If payment of compensation is not made within 28 days of ReAssure receiving Mr R's acceptance of my final decision, interest must be added to the compensation at the rate of 8% per year simple from the date of my final decision to the date of payment.

This interest is not required if ReAssure is reinstating Mr R'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 R was invested.

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

**My final decision**

My final decision is that I uphold this complaint.

I direct ReAssure Life Limited to pay Mr R the redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 26 April 2022.

Ayshea Khan
**Ombudsman**