DRN-3719525

The complaint

Mr B has complained about a transfer of his Zurich Assurance Ltd personal pension to a small self-administered scheme ('SSAS') that happened in August 2015. Mr B's SSAS was subsequently used to invest in a fractional share of a hotel complex, through The Resort Group ('TRG'). The investment now appears to have little value and there is no market to sell the shares. Mr B says he has lost out financially as a result.

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

What happened

On 19 November 2014, Mr B signed a letter of authority allowing Capital Facts Ltd ('CFL', an unregulated introducer) to obtain details and transfer documents in relation to his pension. Mr B says this happened after a cold call he received, which was followed by a home visit from an 'agent' of either CFL or First Review Pension Services ('FRPS') – Mr B believes the agent coming to his home was from FRPS. On 24 November 2014, CFL wrote to Zurich, enclosing Mr B's letter of authority. It requested information on Mr B's pension and discharge forms to allow a transfer. Neither CFL nor FRPS were authorised to give financial advice.

Mr B held two personal pensions, one with Zurich and one with another provider. Mr B says he was attracted by the prospect of a better return on his personal pensions that he understood were "frozen" as he had stopped paying into them. He was promised very good results from the investment into TRG by the agent which he was told were safe and he would always get the returns back into his pension. He said the adviser that visited his home told him he wasn't regulated and couldn't therefore give financial advice, however Mr B was under the impression he did so anyway, and Mr B trusted him as he seemed professional.

In December 2014, a company was incorporated with Mr B as director. I'll refer to this company as WG Ltd. On 27 January 2015, Mr B signed documents to open a SSAS with Cantwell Grove Limited ('Cantwell Grove'). WG Ltd was recorded as the SSAS's principal employer. The SSAS documents also recorded that the SSAS was to be used to invest one part in a in General Investment Portfolio with a large mainstream provider and one part into commercial property with TRG.

Cantwell Grove wrote to Zurich on 25 February 2015, enclosing Mr B's signed authority to transfer his personal pension to the SSAS. The request included Key Scheme Details about the SSAS such as an HMRC registration number, sponsoring employer, and proposed investment providers. It also had a HMRC notification of registration of the SSAS attached, the SSAS trust deed, and a letter in which Mr B confirmed the transfer request was not connected to pension liberation and only made to "*take advantage of investment opportunities available under the Scheme*".

Mr B's Zurich pension was transferred out on 11 August 2015. The transfer value was around £45,500. He was 47 years old at the time of the transfer.

Mr B also transferred another personal pension from another provider with a transfer value of around £23,500. This was invested in TRG through the SSAS together with his Zurich pension. Mr B complained to the other provider about a lack of due diligence he said they carried out on the advisers and the investment. Once the complaint was with our Service, the provider agreed to settle his complaint due to the fact that at the time of the transfer Mr B was unemployed and therefore didn't have a statutory right to transfer his pension. I have considered the information available on that complaint and the other provider didn't give Mr B any warnings which would affect this complaint.

As I understand it, the investment in the fractional share of a hotel complex with TRG initially brought *some* returns, which were then re-invested in a portfolio with a mainstream investment provider within Mr B's SSAS. However, income stopped and the TRG investment is illiquid and has no realisable market value.

In September 2020, Mr B complained to Zurich. Briefly, his argument is that Zurich 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, the catalyst for the transfer was an unsolicited call, Mr B had been advised by an unregulated business, and the warning letters he received were generic and didn't mention any specific concerns Zurich should have had with Mr B's transfer.

Zurich didn't uphold the complaint. It said Mr B had a legal right to transfer and the scheme he was transferring into was registered. It was satisfied it had conducted an appropriate level of due diligence given the requirements of the time and that even if they had made further contact with him, this would not have changed his mind.

Our investigator upheld the complaint, but as Zurich disagreed with the outcome, she was unable to resolve the dispute informally, so the matter was passed to me to decide.

My provisional decision

In advance of this decision, I issued a provisional decision to the parties in which I said that I thought Mr B's complaint should be upheld. Mr B accepted the provisional decision, whilst Zurich did not accept it but had nothing further to add.

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.

I don't consider that I need to change the findings that I reached in my provisional decision, given that and Zurich didn't make further comments and Mr B accepted it. I have set these out below and adopt them as my findings in this decision.

In my provisional decision I said:

"<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 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 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 Serious Fraud Office, 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 that 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>

When the Scorpion guidance was launched in 2013, it included two standard documents that scheme administrators could use to warn their members about some of the potential dangers of transferring: a short 'insert' intended to be sent to members when requesting a transfer, and a longer booklet intended to be used for members looking for more information on the subject.

The March 2015 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, i.e. for the shorter insert (which had been refreshed in March 2015) to be sent when someone requested a transfer, and the longer version (which had also been refreshed) made available when members sought further information on the matter.

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 many 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 a 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.*

- *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 schemes 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 a member's interest.

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.

Zurich have argued that the PSIG Code only came into practice after Mr B had made his transfer request in February 2015, and that it would therefore not have been applicable to his transfer. The PSIG Code was published in March 2015; Mr B's transfer out from Zurich was completed in August 2015. Zurich said that the reason the transfer took some months were the relevant checks it had to carry out under the Scorpion guidance, so it says this in itself showed that it followed the correct steps. But I disagree that this was sufficient, given that by the time the transfer completed the PSIG Code and updated Scorpion guidance had been in force for several months. Zurich would have had ample time to review any ongoing transfer requests, such as Mr B's, in light of the new Code and take it into consideration. It's also worth noting that Zurich was one of the providers involved in the drafting of the Code, so should have reasonably be aware of its content.

Acting in line with the regulator's principles and COBS 2.1.1R, it was reasonable to take account of the PSIG Code and apply it where appropriate to ongoing transfer requests where checks were still ongoing. Zurich was in the process of checking the receiving scheme's HMRC registration in April 2015, and it was in communication with Mr B surrounding this, so I don't see why Zurich would not have been able to consider the guidance and recommended steps in the PSIG Code. I'm therefore satisfied that the PSIG Code as well as the updated Scorpion guidance were applicable to Mr B's transfer.

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

Our investigator spoke to Mr B and from Mr B's recollections, he said he'd been cold called by CFL and offered a free pension review. There was then a meeting at Mr B's home with someone Mr B referred to as "an agent" from FRPS. The agent told Mr B he wasn't regulated to give financial advice but encouraged Mr B to transfer and invest his pension fund in overseas hotel property. Mr B was led to believe that the recommendation would generate a good level of returns. The adviser suggested the investment was in demand, so TRG would always want to buy the property back from Mr B at an increased value. So Mr B thought it wouldn't be difficult to disinvest and sell his property share at any point in the future. He was told the investment was safe and secure as it was in property and that he could expect around 10% per annum from rental income.

Mr B initially told us that he was working as a chef at the time. However, it has since come to light that he was unemployed between 2014 and 2016. His representatives supplied us with evidence of this and that he was reliant on benefits. This has been shared with Zurich. I can see from older pension documentation that he had previously been employed as a chef, so given the passage of time, it's plausible that Mr B confused the years of employment and the year of the transfer in his later recollections.

I haven't seen any evidence Mr B held any other pensions or assets at the time, aside from his other personal pension which was also transferred to the SSAS. He told us that he relied on the advice he was given by someone he believed was a professional and knowledgeable agent. He was told that the suggested TRG investment was safe and a strategy which would mean he'd be better off in retirement, after he understood that his pensions were 'frozen' since he had stopped paying into them. So he proceeded with the proposal. He said the agent came back after the initial meeting to bring the paperwork and he signed everything during that second visit.

Mr B didn't know much about pensions and was told the investment would make a good amount of money. He knew his pension money was going into an overseas property. He hadn't been promised any incentives, loans, cashback, commission, advances or bonuses.

Mr B understood he would just get a percentage of the rental income – and he said he initially received some income, which was reinvested in a mainstream portfolio in his SSAS.

His representatives and Mr B have said that the TRG investment now can't be sold and given that TRG is in financial difficulty, it's likely to be of nil value. This is in line with our understanding of the TRG investment. Mr B confirmed the vast majority of his pension is still tied up in the TRG investment and only a very small portion is invested in the portfolio.

Mr B confirmed that he did receive a Scorpion leaflet in March 2015, but it appeared to him to be generic and not specific to his transfer request. He also told us that he initially thought this was designed to deter him from transferring away as Zurich "wanted to keep my money". He received another letter on or around 29 April 2015, informing him about the requirement for Zurich to check the receiving scheme's HMRC registration and this included again warnings and questions for him, and recommending advice from an independent financial adviser. However, he still thought both letters were generic and automatically produced. So he did not consider the warnings further. When he spoke to our investigator, he said a phone call from Zurich with specific questions about his transfer may have made a difference to his decision to carry on with the transfer request.

My impression is that Mr B told our investigator his honest recollection of events, even if it's not consistent in all respects with what was said when his complaint was made. I accept that Mr B was likely cold called about his pension. When his complaint was made to Zurich, the suggestion was that the unsolicited call was from CFL or FRPS. Neither firm was regulated by the FCA and both have since been dissolved. There is documentary evidence showing CFL's involvement at an early stage – CFL's letter dated 24 November 2014 enclosing Mr B's signed letter of authority. That would suggest it was CFL who had cold called him. But it might have been that someone from another firm, likely FRPS, called Mr B initially and then instructed CFL to get the information which was then passed back to FRPS to decide whether to take things further. So the letter of authority doesn't necessarily mean it was someone from CFL who visited Mr B.

There's contemporaneous documentary evidence to show that FRPS was involved, such as witness signatures from an FRPS 'consultant', as well as CFL. I think what was said during the meeting(s) was likely to have amounted to advice or a personal recommendation that Mr B transfer to a SSAS to invest in TRG. I say that because I can't see Mr B would have been prepared to enter into that sort of – rather complex – pension arrangement, or even known that it was available to him, unless he'd been told it would be a good idea and he'd be better off as a result. He confirmed to our investigator during the phone call that he only realised later in the process that he had been made a director of a company and he didn't understand the structure of this or the connected SSAS, he had just signed what was presented to him.

An adviser from another firm – Broadwood Assets Limited ('Broadwood') – was also involved in the process. Again, that firm wasn't regulated to give financial advice. The nature of its involvement was that of a trustee adviser: although Mr B was a (member) trustee of the SSAS, any advice he received in his capacity as a trustee isn't the same as advice he was given to transfer away from Zurich. The latter would have to be regulated advice – that is such as should only be given by a regulated adviser. Under section 36 of the Pensions Act 1995, a trustee of an occupational pension scheme (such as a SSAS) is required to take and consider 'appropriate advice' on whether the proposed investment(s) are satisfactory for the aims of the scheme. Advice under section 36 isn't regulated and as it was limited to that, Broadwood didn't need to be regulated. I've seen the letter from Broadwood to Mr B, stating that the TRG investment was 'appropriate' for the SSAS, but it clearly separates this advice from a personal recommendation to Mr B outside of his role as trustee and clarifies that he would need to seek independent financial advice for this. So I think the more significant *influence on Mr B and what led Mr B to transfer and invest in TRG was, as I've said, from the FRPS or CFL agent.*

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

The Scorpion insert

As set out above, at the time Mr B's request was made, I think personal pension providers like Zurich should, as a matter of course, have sent transferring members the Scorpion insert or given them substantially the same information.

Zurich said it sent one Scorpion leaflet in December 2014, in response to the quotation request from CFL. However, Mr B hasn't mentioned this in his recollections, and we haven't been provided with evidence of this, so it's unclear whether this was sent to Mr B directly or to CFL. But then on 3 March 2015, a letter was sent to Mr B's address which included another Scorpion leaflet as well as the following warnings:

> *"Unscrupulous firms are currently persuading people to transfer their pension fund into a new pension scheme so they can take their pension cash immediately. But under HM Revenue & Customs (HMRC) rules you cannot take any of your pension fund before age 55 (except in very specific cases which apply to very few people) or in a way that goes against pension regulations.*
>
> *To try and help protect our customers from these so-called pension liberation scams, we are taking extra precautions when dealing with any request to transfer a pension to another scheme. If we believe the transfer payment to the receiving scheme could be considered to be an unauthorised payment by HMRC or if it does not meet other statutory requirements, we will refuse to process the transfer.*
>
> *The Pension Regulator has issued the enclosed leaflet providing information on the warning signs you should look out for - please read it carefully.*
>
> *Pension liberation - the impact on you?*
>
> *If your pension fund is transferred to one of these arrangements:*
>
> - *You risk significant tax charges, penalties and interest from HMRC - this could well be more than half of your pension savings.*
> - *You are likely to pay very high charges, fees or commission payments, to the firm arranging the transfer.*
> - *You will have much less (or no) income when you retire.*
> - *Your fund may be invested in assets which are often high risk, located overseas and may not be subject to regulatory controls. If these investments fail, you may not have any means of obtaining compensation.*
>
> *You should still carry out your own checks before satisfying yourself that the proposed transfer is appropriate for you and your pension. For instance, you should inform yourself about the following implications as a minimum:*
>
> - *Have you received advice regarding the possible transfer of your pension from a UK regulated financial adviser specialising in pensions?*

- *Is your financial adviser and/or the scheme administrator/receiving scheme regulated by the FCA or another professional body? […]*

- *If you have not received regulated financial advice or dealt with a regulated business, what are your options if things go wrong? Did you know that you are not covered by the Financial Ombudsman Service (FOS) or the Financial Services Compensation Scheme (FSCS) if you have not dealt with a financial adviser or firm regulated by the FCA?*

- *What checks have you made regarding the proposed investments for your new scheme? Are you happy that you fully understand the risks involved? How quickly can you access these funds if you decide to claim your retirement benefits or transfer them elsewhere? Have you been given any guarantees and what is available to back these up?*

> *If you have not yet received advice regarding the possible transfer of your pension from a UK regulated financial adviser specialising in pensions, we strongly recommend that you obtain such advice. If you wish to discuss your pension with an independent financial adviser (IFA) or would like more information about the IFAs nearest to you, you can contact the IFA trade body, IFA Promotion Limited […].”*

This letter included a confirmation to be signed to continue the transfer, to be sent back to Zurich in a pre-paid envelope. Zurich said this was received back from Mr B two days after the letter had been sent, on 5 March 2015.

Another letter from Zurich to Mr B followed, dated 29 April 2015. This letter focussed on letting Mr B know that Zurich had a duty to check with HMRC that the receiving scheme, i.e. the SSAS, was registered. It described the process, the issue of unauthorised payments and tax charges, and that this was done to prevent ‘pension liberation’. It went on to say:

> *“As a result of increased pension liberation activity, the pensions industry is acting cautiously and making more checks before proceeding with (or declining) transfer requests. Inevitably, this slows down the transfer process, which is regrettable, but it is designed to provide greater protection to individuals so that their pension savings are available to provide them with pension income in later life. Unfortunately, many individuals have already been caught out as a result of pension liberation fraud and have either suffered substantial tax charges and/or have lost out financially through expensive scheme/scheme administrator charges and/or unregulated investments, or all of these.”*

It then repeated the points of “your own checks” as in the March 2015 letter (above) and again recommended seeking regulated advice from an independent financial adviser, before confirming that Zurich would now start the registration check with HMRC.

As mentioned, Mr B considered the letters and leaflet to be generic and automatically generated, and not relevant to his specific circumstances or transfer request. He confirmed he was not offered any cash payments or other incentives. So he was under the impression that Zurich only sent the standard letters anyone would get who made a transfer request.

Due diligence

In any event, as explained above, I consider the PSIG Code to have been a reasonable starting point for most ceding schemes and also applicable to Mr B’s transfer, even though the request may have been made just before the new Code had been published. By the time Zurich had sent the second letter on 29 April 2015, the Code would have been well known to *the industry, including Zurich which contributed to the work of the PSIG. I've therefore considered Mr B'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 Zurich's actions using the updated 2015 Scorpion guidance as a benchmark instead.*

The PSIG Code had an initial triage process, starting with determining whether the receiving scheme formed part of an 'accepted club', such as well-established and known occupational scheme groups or the Public Sector Transfer Club. It's clear that Mr B's SSAS, held with Cantwell Grove, did not form part of such a 'club'. So further due diligence was required.

This would have led Zurich to asking Mr B 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 two 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 to which the pension funds are transferred. The SSAS section of the Code (Section 6.4.3), which is most relevant here, 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. With that in mind, I think in this case Zurich should have addressed all four sections of the SSAS due diligence process and contacted Mr B to help with that.

Zurich did send some general warnings to Mr B which were important and good steps to take. And I have considered this in my decision. However, I think the updated Scorpion guidance and PSIG made it clear that just sending warnings without finding out more about the transfer from the customer wasn't enough, when initial warning signs were present.

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

Aside from the provenance of the receiving scheme and the employment link, which I will discuss further below, one factor requiring further investigations were the marketing methods. Mr B had always been clear that he was cold called by an agent and offered a free pension review. 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.

Mr B confirmed that he was told by the agent that they were "not a financial adviser", but they ended up recommending and facilitating the transfer and investment to him regardless. As I've set out above, I'm satisfied advice was provided, given the complexity of setting up a limited company, a SSAS, two pension transfers, and an overseas investment.

<u>What should Zurich have told Mr B – 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 B in relation to a possible scam threat as identified by the PSIG Code (and the Scorpion action pack). Zurich should also have been aware of the close parallels between Mr B'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.

However, Mr B confirmed that he knew the agent from FRPS or CFL wasn't a regulated adviser. The letters and leaflets Mr B received pointed out the importance of advisers being regulated, explained that otherwise members could lose regulatory protections, and showed how pension holders can check the status of their advisers. They also pointed out the risks of losing money in overseas investments and that such investment processes were often initiated by a cold call offering a free pension review.

So even if Mr B says that the letters appeared to be generic, the warnings were applicable to his transfer request in so far that he knew he was dealing with an unregulated adviser as well as an unregulated overseas investment, which started from an unsolicited approach. Given that he was comfortable going ahead with the recommendations from the adviser despite the warnings in the leaflet and letter, and despite knowing that the adviser wasn't regulated, I'm not satisfied that further correspondence, even if given specifically about his transfer, would have kept him from transferring his pension. He also thought the correspondence was designed to deter him from transferring away and Zurich "wanted to keep [his] money", so in my view it's unlikely that further communication and warnings would have changed his mind about this.

<u>Mr B's employment status and his rights to transfer</u>

Mr B's representatives have produced evidence that Mr B was unemployed at the time of the transfer and in receipt of benefits between 2014 and 2016. Zurich have since argued that Mr B was in fact employed, given that he held the office of director of the company which was established to facilitate the opening of the receiving SSAS scheme.

I appreciate that Mr B's employment status didn't form part of the transfer request forms or would have been evident from other transfer paperwork. However, investigations under the 'employment link' would have likely uncovered Mr B's situation. The PSIG code suggests, *amongst other things, validation of an employment link to the receiving scheme's principal employer by requesting payslips from the member. This first step would likely have led to the discovery that Mr B was in fact not receiving any income at the time. Further research under the point 'provenance of receiving scheme', such as asking the question "What is the date of incorporation of the principal employer for the receiving scheme?", as mentioned in the Code, would also have revealed that the company, WG Limited, had only recently been formed, in December 2014, with Mr B as sole director.*

Even though Mr B said in his initial recollections that he was employed as a chef at the time, I'm satisfied this was a confusion of timelines when he was asked about his circumstances five to six years later. He was open about the fact that he had stopped paying into his personal pensions and this was one of the factors that made the proposed investment and transfer attractive to him, as he was told that he could still get better returns on his pension funds.

As I've said above, I think it's unlikely that further warnings from Zurich would have changed Mr B's mind and prevented the transfer. However, under the PSIG Code, where a scam risk has been identified (or should have been identified) but the member decides to go ahead with the transfer regardless, a business has a duty to check whether the member has a statutory right to transfer.

The Pension Schemes Act 1993 requires a pension holder to be an "earner" to have a statutory right to transfer under the definitions of the act and related legislation. This was the case even before Hughes v The Royal London Mutual Insurance Society Ltd [2016] EWHC 319 (Ch) clarified in 2016 that this 'earning' didn't have to be related to the sponsoring employer of the receiving scheme. So even if Mr B was a director of the limited company set up for the opening of the SSAS, he didn't receive any income from this position – or from any other employment. This means he wasn't an 'earner' and therefore didn't have a statutory right to transfer.

Whilst Mr B didn't have a statutory right to transfer, he still had a contractual right to transfer under the scheme terms. However, it was the discretion of the scheme administrator whether to consent to a transfer under the contractual right. The PSIG Code says:

> *"If there is a discretionary transfer power, the information gathered during the due diligence process may be considered when deciding whether to agree to the transfer."*

Sufficient due diligence as set out above would have alerted Zurich to the fact that the SSAS, an occupational pension scheme, was only recently set up and only for the purpose of holding the unregulated overseas investment. And that by not receiving any income, Mr B would likely have limited financial resources and was more likely to become a victim of a scam or unregulated adviser, promising high returns without contributions. In addition, Zurich reasonably would have found out that Mr B had been introduced and advised by unregulated firms and was about to invest his pension transfer proceeds into an unregulated overseas investment scheme.

Providers have regulatory duties to act with due care and in the best interests of their members. It would have been clear that in this case, where Mr B didn't have a statutory right to transfer and numerous red flags indicating a scam risk were present in the transfer details, it would not have been in his best interest to consent to the transfer under the contractual rights.

So even though I'm not satisfied that further or more specific warnings would have prevented Mr B from transferring his pension, he didn't have a statutory right to transfer, which meant *the transfer would have been dependent on his contractual right to transfer which required consent from Zurich. Given the significant number of warning signs, I think Zurich should have reasonably withheld its consent to the transfer going ahead. If it had done this, Mr B couldn't have transferred his pension and therefore his losses could have been prevented.*

I appreciate that Zurich have said Mr B and Cantwell Grove may have raised a complaint to itself and The Pensions Ombudsman if it had refused to give its consent to the transfer. It is possible that Mr B, maybe with pressure or persuasion from the unregulated parties involved, would have raised a complaint. However, given the numerous warning signs, Zurich would have had reasonable reasons for blocking a transfer - and given that Mr B had no statutory right to transfer as he wasn't an earner and Zurich had discretion to give its consent in these circumstances, it's unlikely Zurich could have been forced to allow the transfer.

I therefore think Zurich should compensate Mr B as set out below.

<u>Fair compensation</u>

I have given thought to whether Mr B should also bear some responsibility for the losses he incurred. Although I'm deciding a complaint and not a legal claim, I take 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 court looks to see what risk the defendant's duty was supposed to guard against and whether the claimant's loss represents that particular risk coming to fruition.

The circumstances that gave rise to this complaint were:

- *The transfer followed unsolicited contact offering a free pension review.*
- *The receiving scheme was very recently set up – only weeks before the transfer was requested.*
- *The investment within the new scheme involved overseas investment properties.*
- *The Scorpion action pack highlighted these as scam risks and recommended checking that financial advice comes only from an authorised person by checking the FCA's register.*

Overall, the advice Mr B had received to transfer out of his personal pension was highly irregular, being given in breach of the general prohibition under FSMA and involving a high-risk, overseas property investment which was plainly inappropriate for Mr B, given his lack of investment experience and limited financial resources. This was precisely one of the situations the Scorpion material warned against. I'm therefore satisfied there is sufficient connection between the harm Mr B wants to be compensated for and the risk that Zurich had a duty to guard against.

Nonetheless, I also think – as I explain below – it's fair that Mr B should bear some responsibility for the loss he has incurred, taking into account that the Courts are able to reduce damages for negligence, where they think it just to do so because the claimant shares responsibility for the losses they've suffered.

More specifically, the Law Reform (Contributory Negligence) Act 1945 allows for the apportionment of liability in the case of contributory negligence. It says that where any person suffers damage as the result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

In this case, I think Mr B's failure to act on what he knew (or reasonably should have known) contributed to the loss he's suffered.

As I explained earlier in this decision, Zurich's letters in March and late April 2015 strongly recommended Mr B seek regulated advice if he wasn't already in receipt of this. This was a warning from a trusted source about how he could protect himself from an inappropriate transfer. The letter explained how to find a regulated adviser and how to check if an adviser was regulated. And as stated above, Mr B was aware that the agent who advised him wasn't regulated.

Before making the transfer request, Mr B received a letter from Broadwood, which also suggested he might want to take regulated financial advice, as an individual, rather than a SSAS trustee. The Broadwood letter would have been reassuring on some points: it said the proposed transfer wouldn't facilitate pension liberation and the TRG investment was legitimate and well-resourced. But it also clearly explained that:

- *Broadwood wasn't a regulated adviser;*
- *the proposed transfer involved risky investments which were highly illiquid, with no UK regulatory or compensatory protection and which were unsuitable for a cautious investor;*
- *if Mr B preferred advice on the suitability of the investment for him personally, then he should seek regulated financial advice.*

Mr B was without income and didn't have any capacity for loss and limited financial resources. At the time he received the Broadwood letter, I think he would have recognised himself as someone who was a 'cautious investor', given his situation. Therefore, the Broadwood letter should have been a strong warning to him that he should get regulated advice to ensure the investment was suitable for him before going ahead. He then received Zurich's letters which again urged him to seek regulated financial advice, as well as the Scorpion leaflet that pointed out situations very similar to his – being cold called and offered a free pension review, an overseas investment, high returns, and an unregulated adviser involved – but Mr B still went ahead with the transfer, despite his knowledge of the adviser not being authorised to give financial advice and Zurich's warning that Mr B couldn't access the Financial Ombudsman Service or compensation from the Financial Services Compensation Scheme if things went wrong with the adviser firm.

Therefore, when considering fair compensation in this case, I think it would be reasonable to attribute some responsibility for the loss Mr B has suffered to his own failure to act on the information and warnings he did receive.

Essentially, I think both Zurich and Mr B 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 B's losses would have been avoided. But Zurich was the professional party, operating as it did a regulated pensions business in which dealing with members' transfer requests was an inherent feature; so it should have been more familiar with the risks than Mr B. In accordance with its duty under PRIN 6 and COBS 2.1.1R, Zurich should (as I have found above) not have reasonably allowed the transfer to go ahead under a discretionary contractual right with the information they ought to have found out when doing their due diligence. So, I think its failings were more severe than those of Mr B. While this isn't an exact science, in the circumstances of this complaint, I intend to propose to reduce Mr B's compensation by 40%. I think this is a fair way to account for Mr B's own contribution to the loss he's suffered."

Putting things right

My aim is that Mr B 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 B shares responsibility for his loss.

The SSAS only seems to have been used in order for Mr B 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 B would have remained in his pension plan with Zurich and wouldn't have transferred to the SSAS.

To compensate Mr B 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 60% of that loss.

Actual value

This means the SSAS value at the date of calculation. 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 B 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.

As stated, the aim is to return Mr B 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. This is because the fractional shares can't be sold on the open market. 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 60% 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 B to provide an undertaking, to account to it for 60% 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 B to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

- It's also fair that Mr B 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 B equivalent to 60% 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 B'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 B 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 B's dissatisfaction with the outcome of the investment it facilitated.

Zurich should reinstate Mr B's original pension plan as if its value on the date of calculation was equal to 60% of the amount of any loss established from the steps above (and it performs thereafter in line with the funds Mr B was invested in).

Zurich shouldn't reinstate Mr B'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 B's pension and it is open to new business, it should set up a *new* pension plan with a value equal to 60% 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 B'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 B 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 B doesn't incur an annual allowance charge. If Zurich cannot do this, then it shouldn't set up a new plan for Mr B.

If it's not possible to set up a new pension plan, Zurich should pay the amount of 60% of any loss direct to Mr B. 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 B is retired. (This is an adjustment to ensure that Mr B isn't overcompensated – it's not an actual payment of tax to HMRC.)

To make this reduction, it's reasonable to assume that Mr B is likely to be a basic rate taxpayer in retirement. So, if the loss represents further 'uncrystallised' funds from which Mr B 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 B 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 B's acceptance of the final decision, interest should 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 B how much has been taken off. Zurich should give Mr B a tax deduction certificate in respect of interest if Mr B 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 B's plan for the amount of the loss – as the reinstated sum should, by definition, mirror the performance after the date of calculation of the funds in which Mr B was invested. However, I expect any such reinstatement to be achieved promptly.

Details of the calculation should be provided to Mr B in a clear, simple format.

My final decision

For the reasons given above, my decision is that I uphold Mr B's complaint, but I also recognise that Mr B contributed to his losses. I therefore direct Zurich Assurance Ltd to compensate Mr B in line with the approach set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 23 April 2025.

Lea Hurlin
Ombudsman