DRN-4407908

The complaint

Mr D is represented by a claims management company, which has made various arguments on his behalf. For simplicity, I'll refer to all submissions made on Mr D's behalf as being from Mr D.

Mr D has complained about a transfer from his Zurich Assurance Limited personal pension to a small self-administered scheme ("SSAS") in 2014.

The transfer enabled the pension funds to be invested, through membership of a company, in an overseas commercial property development. My understanding is Mr D's investment did initially provide some returns, but these were much lower than expected and ceased at the end of 2019. Any ongoing value is not realisable as there's no liquid market for the investment.

Mr D thinks his money is lost and says Zurich should have done more to protect him and to warn him about the potential dangers of transferring his pension.

What happened

Mr D had a group personal pension plan with Zurich. It was connected to his old employer, who'd been contributing to it up until his employment ended around March 2013. In June 2014, Mr D asked Zurich to transfer this pension to a newly established SSAS.

At the time, he was 51 and employed as a plant fitter. He had two other pensions: one he'd very recently opened with his new (and current) employer; and another personal pension held with another provider. Mr D says he'd never held any other investments.

A SSAS is a type of occupational pension, in which the members are also trustees and therefore take responsibility for operating the scheme. They are typically marketed at companies and partnerships seeking to create an occupational pension for a small group of directors and/or senior executives, so it was an unusual arrangement for someone in Mr D's circumstances. SSASs are not regulated in the same way as personal pensions, with far fewer protections. They can hold a wider range of investments and assets. As an occupational pension, a SSAS must be sponsored by an employer company. Normally (and logically) that would be a company employing the scheme members or providing them with an income, although this wasn't a requirement. The SSAS's assets must be held and invested by a trustee for the benefit of its members.

Mr D opened the SSAS in June 2014. He was the sole trustee and member. The sponsoring company for the SSAS didn't employ him or provide him any income. It was a dormant company established six months earlier, registered at Mr D's home address, and he was its sole director and shareholder. It never traded. The company seems to have existed only to allow the SSAS to be opened. This suggests Mr D was planning to open a SSAS from as early as December 2013.

Zurich completed the transfer in September 2014. It transferred £28,968 from Mr D's personal pension into the SSAS. Mr D then used £25,000 of this to invest in a hotel resort under construction in Cape Verde, owned and operated by The Resort Group. The investment was made by purchasing a fractional membership in a UK company limited by guarantee which had a promissory agreement with the developer to buy an apartment in the resort once construction was finished. I'll call this the "TRG investment". The TRG investment was unregulated and high risk. Mr D wouldn't have been allowed to hold this in his personal pension, but it was permitted in the SSAS.

As I shall explain in more detail below, several of the companies which helped Mr D set up the SSAS had links with The Resort Group. It would seem that they worked together with the aim of securing Mr D's investment in the TRG investment.

The TRG investment has proven to be illiquid and incapable of sale on the open market. Mr D thinks Zurich should have spotted warning signs that he might have been the victim of a scam and warned him before he went ahead.

<u>Mr D's recollections about what happened</u>

Mr D was in contact with several different firms. The details he's provided about who did what have changed over time and haven't always been consistent. I don't doubt Mr D's honesty: the events took place many years ago and he appears to be doing his best to piece things together from the little he does remember in light of information he has to hand. Broadly, what he does consistently remember is that:

- In 2013, he was cold called by someone who asked him about his pension arrangements and offered him a free pension review.
- This led to a visit in his home to talk about his pension arrangements.
- He was told it would be a good idea to transfer his Zurich pension into a SSAS so he could invest in a hotel development in Cape Verde. He was told this arrangement would outperform his existing Zurich pension.

In effect, he submits he received a personal recommendation to transfer his Zurich pension into a SSAS. Advice of that nature was (and remains) regulated by the Financial Services and Markets Act 2000 (FSMA). Only someone authorised to do so by the Financial Conduct Authority (FCA) is permitted to give regulated financial advice unless they have a specific exemption under FSMA.

<u>Who did what?</u>

Mr D is uncertain about whom he spoke to and when. But the available documentation relating to the transfer sheds some light on who was involved and what role they played:

- <u>Moneywise Financial Advisers Ltd.</u> This firm is now dissolved, but at the time it was authorised by the FCA to provide regulated financial advice about pensions. Mr D signed a form on 8 May 2013 giving Moneywise authority to obtain information about his pension. Moneywise requested the information and a pension transfer pack from Zurich on 17 May 2013. The letter from Moneywise shows it was operating from an address in Leicester (even though its head office and the registered correspondence address for its only director were in Scotland). Zurich replied to the Leicester address with details of Mr D's pension and a transfer form on 19 June 2013. On 8 January 2014, Zurich again sent details of Mr D's pension with a transfer form to Moneywise at the Leicester address. Zurich has no record of a second information request from Moneywise, so it's not clear what prompted it to write to Moneywise again. No further documentation I've seen refers to Moneywise and Mr D says he has no recollection of ever speaking with anyone from Moneywise.

- Consumer Money Matters Limited (CMM). This firm is now dissolved, but at the time it was an introducer firm, which sometimes (although not on this occasion) acted as an appointed representative for FCA regulated firms for mortgage and insurance services. It was not authorised to provide regulated financial advice. CMM's registered and operating address was the same Leicester address Moneywise had used seven months earlier. On 9 December 2013, Mr D signed a form giving CMM authority to obtain information about his pension. This form included an Enquiry Number and Consultant ID which matched those also used on the earlier Moneywise form. CMM requested pension information and a transfer pack from Zurich on 13 December 2013. Zurich replied to CMM on 14 January 2014, enclosing a pension transfer form and details of Mr D's pension.

  Use of the same Leicester address, enquiry number and consultant ID suggests Moneywise and CMM were connected. I'll consider the nature of that connection later in this decision.

- DLW Company Formation Services Ltd (DLW). DLW was an agent who, on 10 December 2013, set up the new limited company Mr D later used to sponsor his SSAS. DLW wasn't authorised to provide regulated financial advice. As noted below, DLW had connections to The Resort Group and Choices Wealth Limited.

- Choices Wealth Limited (CWL). This firm is now dissolved, but in 2014 it described its main activity as overseas property investment sales. It wasn't authorised to provide regulated financial advice. On 19 May 2014, a representative from CWL witnessed the identification documents used by Mr D to set up the SSAS. The same representative witnessed him sign further documents in connection with the SSAS on 17 June 2014. CWL was only incorporated on 9 April 2014, but one of its directors at the time had been a director of DLW since July 2013. This director had links to The Resort Group. At least one other director appointed later in 2014 had links with both DLW and The Resort Group. I therefore think CWL (along with DLW) probably had an interest in securing funds for The Resort Group and was helping Mr D – possibly encouraging him – to set up the SSAS for that reason.

  DLW's connection to CWL and The Resort Group is a further indication that the formation of Mr D's limited company in December 2013 was probably always intended to facilitate a SSAS, with the ultimate aim of allowing the TRG investment. It therefore appears that Mr D's initial decision to open a SSAS was made in anticipation of the TRG investment and came before CWL's incorporation, so before CWL could have become involved.

  Cantwell Grove Limited (CGL). CGL is a provider of unregulated SSAS administration services. Mr D's SSAS was arranged with CGL, and it was CGL who wrote to Zurich (on 19 June 2014) to request the transfer of Mr D's pension into the SSAS. It's notable that promotional material published by CGL (provided in this case by Mr D's representative) included a CV for its founder and sole director which states he was an existing shareholder and former non-executive director of The Resort Group. CGL wasn't authorised to provide regulated financial advice.

  Broadwood Assets. This company was appointed by CGL to provide Mr D with advice under section 36 of the Pensions Act 1995, a provision which requires a SSAS trustee to take and consider appropriate advice on whether a proposed investment is satisfactory for the aims of the scheme. Broadwood Assets provided this advice to Mr D in a letter dated 21 August 2014. The letter explained that the scope of its advice was limited to this and that it hadn't advised him on the establishment of his SSAS. It said the nature of the advice it did provide wasn't regulated under FSMA. Broadwood Assets wasn't authorised to provide regulated financial advice.

When CGL requested the pension transfer from Zurich, it included documentation that stated Mr D was taking appropriate advice under section 36 of the Pensions Act 1995 from a firm called Sequence Financial Management Ltd. CGL has since told us Sequence was the firm it had originally expected to provide Mr D with the required section 36 advice, which is why Sequence is named in the document sent to Zurich. But CGL says as things turned out Sequence wasn't available, and it was Broadwood Assets that actually provided the section 36 advice. There's no mention of Sequence in any of the other paperwork and Mr D doesn't recall ever dealing with that firm. So, I accept it was Broadwood Assets that was involved here, and Sequence played no part.

<u>The transfer request, and the warnings Mr D received about it</u>

CGL wrote to Zurich on 19 June 2014, requesting the transfer of Mr D's pension into the SSAS. This letter included information to show Zurich that Mr D was not trying to access his pension in an unauthorised way. Unauthorised access to pension funds (before the minimum retirement age of 55, for instance) is referred to in the industry as "pension liberation". It can have serious consequences, including punitive tax charges and exposing one's pension savings to scams. CGL provided Zurich with:

- a declaration by Mr D that CGL had explained pension liberation to him and the risks of transferring his pension;
- confirmation from Mr D that he hadn't been offered any cash incentive to transfer nor was he trying to access his retirement benefits before the age of 55;
- confirmation from CGL that it had warned Mr D about pension liberation and provided him with a copy of a leaflet (referred to as the "Scorpion leaflet") produced by The Pensions Regulator (TPR) which warned about pension liberation;
- confirmation from Mr D that he'd understood the warning about pension liberation.

CGL's letter to Zurich also included:

- a letter from HMRC confirming the SSAS was a registered scheme;
- the scheme trust deed; and
- a Q&A document stating that, as required under s36 of the Pensions Act 1996, the trustee (i.e. Mr D) was taking appropriate advice about whether the proposed investments were satisfactory for the scheme's aims, from an FCA authorised firm called Sequence Financial Management Ltd. (We now know this was wrong and, in fact, Mr D took this advice from Broadwood Assets instead.)

Zurich wrote to Mr D in response on 21 July 2014. It explained it had the paperwork from CGL but needed to check with HMRC that the scheme he wanted to transfer into was still registered. Specifically, it said:

> *"Before we can proceed with any transfer payment we need to be satisfied that HM Revenue and Customs (HMRC) would consider it to be an authorised payment in accordance with Section 169 of the Financial Act 2004. An unregulated payment would result in a considerable tax charge (known as an unregulated charge) for you and possibly for us.*
>
> *In order to combat pension liberation activity HMRC is increasingly taking firm action in applying tax charges wherever it concludes there has been an abuse of pension tax relief."*

The letter went on to explain that the pensions industry "*is acting cautiously and making more checks before proceeding with (or declining) transfer requests as a result of increased liberation activity".* It explained it would likely take a few months for HMRC to respond. And:

> *"Confirmation that we are able to transfer your pension to the scheme you have chosen should not be taken as any form of endorsement by us (or HMRC) of the receiving scheme or product. You should still carry out your own checks before satisfying yourself that the proposed transfer is appropriate for you and your pensions.*
>
> *If you have not yet been advised regarding your proposed transfer by a UK regulated financial adviser specialising in pensions, we strongly recommend that you now obtain such regulated advice.*
>
> *If you wish to discuss your pension with an Independent Financial Adviser (IFA) or would like information about the IFAs nearest to you, you can contact the IFA trade body, IFA Promotion Limited via their website: http://www.unbiased.co.uk/, by email: ifacontact@unbiased.co.uk or by telephone: 0330 303 0025.*
>
> *You can check if a financial adviser is regulated with the relevant authority, the Financial Conduct Authority (FCA) by checking the Financial Service Register which is hosted on the FCA's website (http://www.fca/org.uk) at http://www.fca.gov.uk/register/home.do."*

Shortly after this, on 21 August 2014, Mr D received the letter from Broadwood Assets providing him with advice under s36 of the Pensions Act 1995. This letter made it clear that Broadwood Assets was not a regulated financial adviser, and it wasn't advising him in his personal capacity but rather advising him in his role as trustee. It went on to say the TRG investment was a legitimate, credible and substantive arrangement that didn't facilitate pension liberation and was suitable to be held in a SSAS. But it also warned Mr D that the investment was risky and suitable only for more adventurous investors, pointing out that if he preferred advice on the suitability of the investment for him personally, he should seek regulated financial advice from an independent financial adviser.

Zurich completed the transfer on 17 September 2014.

<u>Zurich's response to the complaint</u>

Zurich says it followed the relevant guidance and carried out appropriate checks before transferring Mr D's pension. It pointed to the documentation Mr D had signed at the time to confirm he was aware of the risks of pension liberation. It believes that Mr D wouldn't have changed his mind about transferring even if Zurich had done more.

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 issued a provisional decision on 4 September 2023, which explained why I felt the complaint should be upheld. In response, Mr D said he had no further comment. Zurich disagreed with my findings and provided extensive reasons in a letter dated 16 October 2023, though it did not provide any new evidence I hadn't already considered.

I have now reconsidered all of the evidence and arguments from the outset to decide what's fair and reasonable in the circumstances of this complaint. In accordance with the requirements in DISP 3.6.4R of the Financial Conduct Authority's Handbook, I've taken into account relevant: law and regulations; regulatory rules; guidance and standards; codes of practice; and (where appropriate) what I consider to have been good industry practice at the relevant time. Having done so, I have reached the same conclusion as in my provisional decision, and for substantially the same reasons – which I set out below.

Both sides have provided a large amount of information in connection with this complaint. Please be assured that I've read and reconsidered the whole file – including all of the additional submissions made by Zurich on 16 October 2023 – but I'll concentrate my comments on what I think is most relevant. If I don't mention any specific point, it's not because I've failed to take it on board and think about it, but because I don't think I need to comment on it to reach my decision.

Where the evidence is incomplete or inconclusive (as some of it is here) I've reached my decision on the balance of probabilities – in other words, on what I think is more likely than not to have happened given the available evidence and wider circumstances.

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

Before I explain my reasoning, it will be useful to set out the environment Zurich was operating in at the time with regards to pension transfer requests, as well as any rules and guidance that were in place. Specifically, it's worth noting the following:

- 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 (in this case, a SSAS).

- On 10 June 2011 and 6 July 2011, the Financial Services Authority (FSA) warned consumers about the dangers of "pension unlocking". It referred to cold-calling and websites promoting transfers to schemes that invest money overseas to avoid paying UK tax and/or result in cash being drawn from the pension ahead of retirement, including as a loan. Particular concerns related to the tax implications of these transactions, the fees charged and potential investment losses from scam activity. The FSA said it was working closely with HMRC and The Pensions Regulator (TPR) to find out more information and encouraged affected consumers to contact FSA, HMRC or TPR helplines.

- TPR announced in December 2011 that it was working with HMRC and the FSA and had closed some schemes that were used for liberation.

- In February 2012, TPR published a warning, and factsheet, about pension liberation. The FSA supported this campaign. It was designed to raise public awareness about pension liberation, and remind scheme trustees of their duties to members, rather than introduce any specific new steps for transferring schemes to follow. The warnings highlighted in the campaign related to websites and cold callers that encouraged people to transfer in order to receive cash or access a loan.

- TPR launched its Scorpion campaign on 14 February 2013. The aim of the campaign was to raise awareness of pension liberation activity and to provide guidance to scheme administrators on dealing with transfer requests in order to help prevent liberation activity happening. The FSA endorsed the guidance. And it was updated several times after it was first launched. I cover the Scorpion campaign in more detail below.

- Whilst Zurich was processing Mr D's transfer, the FCA also started to voice concerns about the different types of pension arrangements that were being used to facilitate pensions scams. In an announcement entitled "Protect Your Pension Pot" published in August 2014 the FCA warned about transfers into new SIPPs and SSASs and about investing in unregulated and unusual investments such as overseas property, as potential scams.

- Personal pension providers are not regulated by TPR. They're regulated by the FCA. Prior to April 2013, they were regulated by the FCA's predecessor, the FSA. As such, they're subject to the Handbook and, under that, to the Principles for Businesses and to the Conduct Of Business Sourcebook (COBS). There have never been any specific FSA/FCA rules governing pension transfers, but the following have particular relevance to transfer requests:

    – *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;

    – *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.

<u>The Scorpion campaign</u>

Overview

As I have said above, the Scorpion campaign was launched in February 2013 and the guidance was updated regularly over the next few years. The guidance published in 2013 and the 24 July 2014 update are both relevant in this case because, from enquiry to completion, the transfer process with Zurich ran from 2013 until September 2014 (almost two months after the 2014 update).

The 2013 Scorpion campaign comprised the following:

- A Pensions Advisory Service insert (the 'Scorpion insert'). The insert warns readers about the dangers of agreeing to cash in a pension early and identifies the following warning signs: being approached out of the blue by phone or text; pushy advisers or ‘introducers’ who offer upfront cash incentives; companies offering loans, saving advances or cash back from a pension; and not being informed about the tax consequences of transferring. It concludes by recommending actions that can be taken to avoid becoming a victim of such activity. These included background searches online, pointing out that any financial advisers should be registered with the FCA. TPR said at the time it wanted to see the use of the Scorpion insert in transfer packs become best practice.

- A longer leaflet issued by The Pensions Advisory Service (TPAS) which gives more information, including example scenarios, about pension liberation. Guidance provided by TPR on its website at the time said this longer leaflet was intended to be sent to members who had queries about pension liberation fraud.

- An ‘action pack’ for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should “look out for” various warning signs of liberation. If any of the warning signs applied, the action pack provided a checklist that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request. Where transferring schemes still had concerns, they were encouraged to write to members to warn them of the potential tax consequences of their actions; to consider delaying the transfer; to seek legal advice; and to direct the member to TPAS, TPR or Action Fraud.

The 2014 update to the Scorpion campaign

This update reiterated much of what was stated in the 2013 version. There was again an insert which was to be sent to members requesting a transfer of their pension and an action pack which provided guidance to scheme providers on what to look out for. And there was a larger booklet which could be provided to members if they wanted more information about the matter.

The main change was that the 24 July 2014 update widened the focus from pension liberation specifically, to pension scams. The action pack for trustees and administrators was entitled “Pensions Scams” whereas the action pack from 2013 was entitled “Pension Liberation Fraud”. And, on the front page of the 2014 insert that was to be sent to members, it said “Pension scams. Don’t get stung”. The 2014 update also made references throughout to “scammers” and made comments in relation to a member losing their lifetime savings as a result of being scammed, as opposed to being subject to potential tax charges which could occur as a result of liberating a pension.

Other features of the 2014 guidance:

- It stated pensions scams in the UK were on the increase.

- Trustees, administrators and pension providers had to ensure that members received regular and clear information about the risk of pension scams and how to spot a pension scam.

- It asked for the Scorpion insert to be included in the member’s annual pension statement or in any other member communications.

- It highlighted some common features of pension scams such as phrases like “one off investment opportunities”, “free pension review”, “legal loopholes”, “cash bonus” and “government endorsement”.

- It stated that consumers being approached out of the blue over the phone, via text messages or in person door-to door was a common feature of a scam.

- Transfers of money or investments overseas, were also highlighted as something to watch out for and it explained this was because the money would be harder to recover.

- It said that if any of the warning signs applied, the action pack provided a checklist transferring schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request.

- If transferring schemes still had concerns, they were encouraged to contact the member to establish whether they understood the type of scheme they were planning on transferring to and to send them the pension scams booklet.

- It also encouraged transferring schemes to speak to the member at risk – over the phone, via email or letter – this could help the transferring scheme to establish answers to more of the questions on the checklist; or to direct the member to Action Fraud or TPAS if the transferring scheme thought it was a scam; or if the member insisted on proceeding the transferring scheme could contact Action Fraud itself.

The 2014 action pack also included two examples of real-life scams where the individuals concerned lost most or all of their pension savings. One of the examples closely matched the situation Mr D says he found himself in. It involved an individual under retirement age who had been approached out of the blue with an offer for a free pension review and who had been offered a “unique investment opportunity” for his pension savings specifically in a property development overseas.

<u>The status of the Scorpion guidance</u>

When it was launched in February 2013, the Scorpion guidance was described as a cross-government initiative by Action Fraud, The City of London Police, HMRC, TPAS, TPR, the SFO, and the FSA/FCA, all of which endorsed the action pack, allowing their names and logos to appear in the action pack and Scorpion insert.
So far as TPR itself was concerned, it issued the guidance under the powers at s.12 of the Pension Act 2004, which provides:

> 12 Provision of information, education and assistance
>
> (1) The [TPR] may provide such information, education and assistance as it considers appropriate to those involved in–
>
> > (a) the administration of work-based pension schemes, or
> >
> > (b) advising the trustees or managers in relation to such schemes as to their operation.

So, 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. Likewise, by and large, the contents of the action pack are framed in a way that is consistent with its stated purpose, namely as points to note or suggested actions a firm might take. For example, rather than telling firms they are expected to spot the warning signs of pension liberation fraud, the action pack lists “some of the things to look out for”; and, rather than say that the presence of a warning sign requires the firm to run though the checklist, it states: “If any of these features apply, then you can use the checklist …”

The language arguably strays into the imperative under the heading “Next steps if you have concerns”, stating “Contact the member to establish whether they understand the type of scheme they’ll be transferring to. Then “speak to the member at risk”. But, overall, the tenor of the document is essentially a set of prompts and suggestions, not requirements. And this remained the same for the updated version of the Scorpion guidance that followed in July 2014.

Also, it would seem inconsistent to view the Scorpion guidance as representing a binding rule or legal duty on personal pension providers regulated by the FSA/FCA when such a duty didn’t extend to those bodies that came under the regulator that drafted the guidance, the TPR. Furthermore, 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 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 all the above that the contents of the action pack were essentially informational and advisory in nature and that deviating from the action pack 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 statutory rights.

That said, the launch of the February 2013 Scorpion guidance was an important moment in so far as 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. And this remained the case with all its subsequent updates. The campaign and guidance were 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 guidance as a matter of good industry practice.

Taking all this into account, I think it’s fair and reasonable to conclude providers should have recognised the environment had changed, and more was now expected of transferring schemes. 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.

Therefore, whilst I don’t think personal pension providers had to follow all aspects of the Scorpion guidance in every transfer request, I think good industry practice meant they should have paid heed to the information it contained; 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. I look at what this means in practice in the next section.

What did personal pension providers like Zurich need to do?

TPR said it wanted to see the use of the Scorpion insert in transfer packs become best practice. Sending the insert was 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. I therefore think it reasonable for the Scorpion insert to have been sent by pension providers to transferring customers as a matter of course with transfer packs.

Under the 2014 Scorpion action pack, firms were asked to look out for the tell-tale signs of pension scams and undertake further due diligence and take appropriate action where it was apparent their client might be at risk. The action pack points to the scam warning signs transferring schemes should have been looking out for and provides a framework for any due diligence and follow-up actions. Therefore, as above, 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.

The 2014 version of the Scorpion action pack wasn't published until after Zurich had received Mr D's transfer request. Nonetheless, I think the guidance in this version is relevant in this case because when it was published, on 24 July 2014, Zurich was still making checks on Mr D's transfer request, and it didn't complete the transfer until 17 September 2014. Zurich had almost two months to factor the updated guidance into the checks it was making. So, in my view, it reasonably should have done so.

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 (or should have come) to a firm's attention would almost certainly breach the regulator's principles and COBS 2.1.1R.

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

Zurich has said it carried out the following "internal checks":

- Checked Mr D had fully completed the required transfer claim form and it was signed by him and dated.

- Checked details of the receiving scheme including the type of scheme, who the scheme administrator was and their regulatory status.

- Checked the receiving scheme arrangement was a registered pension and the transfer would be a "recognised transfer" under section 169 of the Finance Act. CGL provided a copy of the HMRC Notification of Registration confirming the date on which the receiving scheme had been registered. In any event, Zurich conducted its own check with HMRC to determine the SSAS remained registered and was not the subject of a de-registration notice and that HMRC was not aware the scheme was being used to facilitate pension liberation.

- Noted that CGL had provided Mr D with information relating to the topic of pension liberation. CGL provided Zurich with a letter signed by Mr D confirming that he was not seeking to access his pension early, that he hadn't been offered any cash or other incentive by any person and that he wanted to proceed with the transfer. In the same letter Mr D confirmed the reason he was requesting to transfer was to take advantage of investment opportunities available under the SSAS. Zurich noted CGL had provided Mr D with a copy of the TPAS "Predators Stalk Your Pensions" leaflet.

- Checked Mr D had a contractual right to transfer within the terms of his Zurich pension.

- Checked the Trust Deed and SSAS Rules provided by CGL to determine the receiving arrangement was operating legitimately as a pension scheme.

In my view this wasn't enough in all the circumstances of Mr D's transfer request, taking into account all the information available to Zurich. I've set out below why, and what more I think Zurich should have done to satisfy itself that Mr D wasn't liberating his pension or being scammed.

The Scorpion insert

Zurich didn't send a Scorpion insert. But I don't think that mattered in this case because I'm satisfied Mr D received a copy of the leaflet anyway. He signed a document confirming he'd read the leaflet. This was provided to Zurich in June 2014, which means Mr D would have received the 2013 version of the leaflet. If Zurich had sent a leaflet along with the transfer packs, it would also have been the 2013 version of the leaflet: Zurich sent several transfer packs in this case, the latest of which was in January 2014. Even if Zurich had been so cautious as to send a Scorpion leaflet to Mr D as late as June 2014 when it received his transfer request from CGL, the current version of the leaflet then was still the 2013 version. So, Mr D had the appropriate leaflet at the appropriate time.

I don't think Zurich needed to send another leaflet to Mr D when the July 2014 update was released, given where his transfer request had progressed to by then. But I do think Zurich should have taken the updated 2014 guidance into account when carrying out its own checks, given these were ongoing at the time and the transfer didn't complete until September.

Due diligence

Zurich did carry out some checks, as mentioned above. But there were still characteristics of Mr D's transfer that should have concerned Zurich and which it should have explored further.

On the 19 June 2014, CGL wrote to Zurich providing – among other information – a copy of the HMRC notification which stated Mr D's SSAS had been registered on 12 June 2014, and a Q&A document that stated the proposed investment was commercial property provided by The Resort Group, with a link to The Resort Group's website. So, Zurich knew Mr D wanted to transfer his pension into a recently registered scheme, and it knew (or reasonably should have known) the transfer involved overseas investment.

Only one of these scenarios – a newly registered receiving scheme – was mentioned as a potential warning sign in the original version of the Scorpion action pack, which was current at the time Zurich received CGL's letter of 19 June 2014. Zurich had checked with HMRC that Mr D's scheme wasn't subject to a de-registration notice, so it says it would be unreasonable to expect it to have carried out extra due diligence checks on Mr D's transfer based solely on this one point, when no other warning signs were apparent. Zurich also says it wouldn't be fair or reasonable to expect it to undertake extra due diligence simply because Mr D was transferring to a SSAS, pointing out that SSASs weren't specifically highlighted by TPR as a potential warning sign for scams until March 2015.

But Zurich has overlooked the fact that a second scenario present in Mr D's case – an overseas property investment – was highlighted as a potential warning sign in the updated 2014 version of the Scorpion action pack. The 2014 action pack was published just five weeks after Zurich received Mr D's transfer request, whilst Zurich's enquiries were still ongoing, and almost two months before Zurich completed the transfer. So, Zurich should have taken it into account.

I think Zurich should have known, therefore, in good time before Mr D's transfer completed in late September, that the 2014 Scorpion action pack warned about two scenarios present in Mr D's transfer request. Zurich should have recognised these were potential signs of a scam. Exercising reasonable due diligence in line with its obligations under PRIN 2 and PRIN 6, I'm satisfied Zurich should have followed up on these warning signs.

To be clear, I don't think Zurich needed to do extra due diligence in this particular case simply because the transfer was to a SSAS. The initial warning signs that should have prompted Zurich to enquire further were that Mr D wanted to transfer to a newly registered scheme to invest in an overseas property development. However, the fact TPR didn't warn specifically about SSASs until March 2015 doesn't mean Zurich should have been blind to the possibility of SSASs being used for scams. This was something the FCA was warning about at the time Zurich was processing Mr D's transfer request. (The FCA warned about the use of SSASs in scams, along with investing in unregulated and unusual investments such as overseas property, in its "Protecting Your Pension Pot" publication of August 2014, which it highlighted to firms in a regulatory round up on 1 September 2014.)

In these circumstances – following the publication on 24 July 2014 of the updated Scorpion guidance (if not before), and certainly before Zurich made the transfer nearly 2 months later (by which time FCA had also voiced concern about the role of SSASs and overseas/unusual investments) – I think Zurich should fairly and reasonably have looked into the proposed transfer and what lay behind Mr D's request. The most reasonable way of going about this would have been to turn to the checklist from the 2014 action pack to structure its due diligence in regard to Mr D's transfer.

The checklist provided a series of questions to help transferring schemes assess the potential threat of a scam by finding out more about the receiving scheme and how the consumer came to make the transfer request. Some items on the checklist could have been addressed by checking online resources such as Companies House and HMRC. Others would have required contacting the consumer.

The checklist is divided into three parts (which I've numbered for ease of reading and not because I think the checklist 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 employer or a dormant employer, is that employer geographically distant from the transferring member and 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' 'one-off investments', 'free pension reviews' or allude to overseas investments?

3. The scheme member

> Sample questions: Has the transferring member been contacted 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?

Opposite each question, or group of questions, the checklist listed actions that should help the transferring scheme establish the facts.

I don't think it would always have been necessary for transferring schemes to follow the checklist in its entirety. And I don't think an answer to any one single question on the checklist would usually be conclusive in itself. A transferring scheme would therefore typically need to conduct investigations across several parts of the checklist to establish whether liberation or other scams were realistic threats. Given the warning signs that should have been apparent to Zurich when dealing with Mr D's transfer request, and the relatively limited information it had about the transfer, I think in this case Zurich should reasonably have addressed all three parts of the checklist and contacted Mr D as part of its due diligence.

<u>What would Zurich reasonably have discovered?</u>

Mr D alleges he was cold called and – in essence – advised to transfer his pension to facilitate the TRG investment. That allegation is relevant to how Mr D would have explained the reasons and circumstances of his transfer request if Zurich had asked him about these. So, I need to examine its plausibility against the surrounding circumstances.

Mr D wasn't a sophisticated investor: he says he'd never held investments other than (what were quite straightforward) mainstream pensions, and he was a regular employee, working as a plant fitter. I accept his representations about this. There's nothing to suggest he had knowledge or experience of SSASs, nor of setting up his own company, nor of how to invest in an overseas commercial property development. These were complex and unusual arrangements for someone in his circumstances. I think it's unlikely he decided on his own to enter into them without advice or some form of recommendation.

Furthermore, the links between DLW, CWL, CGL and the Resort Group – as well as the link between Moneywise and CMM (whom I'm aware from other complaints received by the ombudsman service were both routinely involved in facilitating pension transfer arrangements that resulted in customers investing in The Resort Group) – suggest and add to the overall likelihood that Mr D was subject to an orchestrated process involving several different firms, which had the ultimate aim of securing funding for The Resort Group by persuading private individuals like him to transfer their pensions and invest the proceeds in it.

So, taking all the circumstances into account, on balance I find Mr D's recollection that he was cold called and advised to transfer his pension to be more likely than not. But who cold called him and who advised him? (And, therefore, what is Mr D likely to have said about this if Zurich had asked him at the time?) Mr D no longer remembers.

Moneywise had the earliest contact with Mr D, shortly after he'd left his employer. Mr D's employer had been a well-known company whose closure in March 2013 was reported in the press at the time. In my experience, high-profile company or pension scheme closures did sometimes attract cold calls from opportunists offering pension reviews to former staff/members. This might just be a coincidence in this case, of course, but the fact remains that Moneywise was on the scene long before the other parties we know of, and so I think it's more likely than not to have been a representative from Moneywise who initially cold called Mr D and offered him a free pension review. This must have been around May 2013, which is when Mr D signed forms for Moneywise to obtain his pension details from Zurich.

It's possible Moneywise advised Mr D to transfer his pension or took steps towards doing so. However, there's no indication Mr D took any action consequent to Moneywise's request for his pension information, so he doesn't appear to have relied on any advice he might have received from Moneywise. It wasn't until six months later – immediately after contact with CMM, when CMM started the process again by requesting his pension information afresh – that Mr D took the first concrete step towards transferring: he established a new limited company solely for the purpose (it would seem) of setting up a SSAS. On balance, it's more likely the initial contact with Moneywise didn't extend to providing advice about this arrangement and that the advice to take out the SSAS and overseas investment happened later, when CMM contacted Mr D. I think it's more likely than not CMM is the firm with whom Mr D remembers discussing his pension and who advised him, in such a way as persuaded him to act, that it would be a good idea to transfer it to a SSAS.

Moneywise and CMM were linked by the same Leicester address and the same consultant ID in this particular case. They also used the same enquiry number, although CMM started the process anew. I've considered the possibility their relationship involved Moneywise providing regulated financial advice before and/or after referring Mr D to CMM. But the long gap between Moneywise requesting Mr D's pension information and CMM requesting it – and the fact that CMM did so, rather than Moneywise again – doesn't suggest Moneywise remained involved. The consultant ID does suggest the same person had contacted Mr D, first in May on behalf of Moneywise and then again in December on behalf of CMM. Taking into account the use of a common address (which was CMM's registered address) I think it's likely the consultant was wearing two hats, working out of CMM's premises but generating business for both firms. This might explain why Mr D says he's never heard of Moneywise; it makes sense he'd remember the more recent and (probably) more substantial contact – when the person he'd dealt with was representing CMM.

Even though it seems likely they used the same consultant, on balance I think Mr D's dealings with Moneywise had come to an end by the time CMM became involved in December 2013. Before reaching this conclusion, I carefully considered the fact that Zurich sent information about Mr D's pension to Moneywise in January 2014. But I think this letter was a mistake. I don't think it indicates Moneywise was actually still involved at that point. The letter was sent in reply to a request for Mr D's pension details. Zurich doesn't have a copy of a request from Moneywise other than the one it received in May 2013, which it had already replied to in June 2013. Moneywise had used the same address as CMM. Presumably, therefore, Zurich had Moneywise in its system already matched to that address and to Mr D, as a result of the request Moneywise had made seven months prior. I think it more likely than not that Zurich's letter to Moneywise in January was actually prompted by CMM's information request of 13 December 2013. It would be an easy error for Zurich to have mismatched the request from CMM to the business name at the same address already in its system. The fact that Zurich just six days later re-sent the information, but this time addressed it to CMM from whom it had indeed received a request, is consistent with it correcting such an error. That seems more plausible to me than Zurich having received another information request from Moneywise but lost its record of this particular piece of correspondence, despite retaining records on Mr D's file for similar correspondence before and after it.

In all the circumstances, on balance, I don't think Moneywise was involved in giving the advice that led to Mr D's transfer request. I think it most likely CMM gave him that advice and persuaded him to make the transfer.

Earlier in my findings I concluded that, in this particular case, Zurich should have addressed all three parts of the Scorpion checklist and contacted Mr D as part of its due diligence. In my view, even the most basic enquiry by Zurich under part 3 of the checklist in 2014 would have revealed that Mr D's interest in transferring had been prompted by a cold call. That would have been a further warning sign, which should have prompted Zurich to enquire further. I think Mr D would have told Zurich – had it asked him, as I think it should have done – that he'd initially been cold called and then contacted again much more recently by someone who'd advised him to transfer his personal pension with the aim of making an overseas commercial property investment. I think he'd have named CMM as the business that advised him, because: at that point it would have been more than a year since he was in contact with Moneywise (a firm he doesn't remember), CMM had started the process again much more recently with a new information request, and CMM was the firm whom the evidence indicates actually prompted him to act.

The scorpion checklist recommends that in order to establish whether a member has been advised by a non-regulated adviser, the transferring firm should consult the FCA's online register of authorised firms. Zurich should have taken that step, which is not difficult. It would quickly have discovered that CMM was not regulated to provide financial advice and consequently Mr D had received unregulated advice to transfer out of his personal pension.

Zurich says it had no reason to be concerned about the involvement of CMM because: Zurich received no evidence Mr D was being advised by CMM; and in any event, Zurich's checks against CMM concluded it was an 'introducer appointed representative' and therefore had a remit to request information subject to Mr D's written authority. To be clear, I haven't assumed Zurich actually had evidence Mr D was being advised by CMM. Rather, I've concluded this is what Zurich would have discovered if it had followed the Scorpion checklist to find out more about how Mr D came to request the transfer. I've explained above why I think Zurich should have done this. Zurich is correct to say CMM had a remit to request Mr D's pension information. But the fact CMM was an introducer appointed representative for an FCA regulated firm did not mean it was authorised to give regulated financial advice about Mr D's pension – indeed, it meant the opposite: introducer appointed representatives are restricted in what they are allowed to do and cannot recommend transfers out of personal pensions or give advice about the suitability of such a transaction. If Zurich had checked the FCA online register at the time, it would quickly have discovered that CMM was not allowed to do so.

This is relevant because being advised by a firm which lacked authorisation or any relevant exemption 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 of this.

My view is that Zurich should have been concerned by the involvement of an unauthorised adviser because it pointed to a criminal breach of FSMA. On the balance of probabilities, I'm satisfied such a breach occurred here. CMM's status as an introducer appointed representative neither made it authorised nor exempted it from authorisation when it came to advising Mr D to transfer his personal pension, as Zurich should have concluded.

With its obligations under the regulator's Principles and COBS 2.1.1R in mind, it would have been appropriate for Zurich to have informed Mr D that the firm he'd been speaking to was unregulated and could put his pension at risk. Zurich should have told him that only authorised financial advisers are allowed to give advice on personal pension transfers, so he risked falling victim to illegal activity.

Zurich says it was entitled to rely on a statement from CGL, on 19 June 2014, that Mr D was receiving appropriate advice from an FCA regulated financial adviser firm called Sequence. I agree. However, that statement was quite specific about the type of advice Sequence was supposed to be providing. It said: "*As per the requirement under section 36 of the Pensions Act 1995, the trustee is taking and considering appropriate advice on whether the proposed investment(s) are satisfactory for the aims of the scheme. // The appropriate advice is being taken from Sequence Financial Management Limited…*" The "trustee" was Mr D. The "appropriate advice" referred to in the statement is clearly limited to advice given to Mr D in his capacity as trustee under section 36 of the Pensions Act 1995. This type of advice is quite different to personal financial advice, which Zurich should have known.

Zurich says any regulated adviser advising Mr D, in whatever capacity, would still have to comply with the suitability requirements within the prevailing FCA COBS rules in place at the time. But the suitability requirements in COBS didn't apply to advice about a property investment given to a trustee under section 36 of the Pensions Act 1995, which is the type of advice Zurich was told Sequence was providing to Mr D. The only limb of this transfer to which the COBS rules would have applied was regulated advice given to Mr D about transferring out of his Zurich pension. Zurich should have known that section 36 advice, given to Mr D as trustee of the SSAS, was not regulated financial advice about the suitability for Mr D of the proposed transfer out of his personal pension scheme in favour of the proposed new investment. CGL did not suggest Mr D was taking advice of that kind, but only "*advice on whether the proposed investment(s) are satisfactory for the aims of the scheme*".

Therefore, while I agree Zurich was entitled to rely on the statement about the involvement of Sequence, I don't think the statement should have reassured Zurich that Mr D was getting regulated financial advice, and certainly not the type of advice that Zurich – and the Scorpion guidance itself – recommended he should be getting. Further, it's apparent that Zurich in fact didn't interpret the statement in this way at the time because Zurich's letter to Mr D just over a month later, on 21 July 2014, proceeded on the assumption that he might not have obtained regulated financial advice.

Zurich asserts that its letter of 21 July 2014 nonetheless gave Mr D sufficient warnings of the potential risks and encouraged him to seek regulated financial advice. The full text of this letter has been set out earlier in this decision. In the letter, Zurich strongly recommended to Mr D that he seek regulated advice and told him how he could find an adviser and how to check whether his adviser was authorised. The recommendation was helpful, so far as it went, but it failed to tell him what Zurich should reasonably have already found out – which was that he already appeared to be involved with an unregulated adviser which was putting his pension at risk. As the professional in this transaction, Zurich had greater knowledge and experience about the risks of relying on unregulated advice. And it had a duty under PRIN 6 and COBS 2.1.1R to act in accordance with his best interests. So, once it had discovered (as I think it should have done) that Mr D was already in receipt of unauthorised advice, I don't think it was reasonable for Zurich to give him a general warning framed in non-specific terms, stating "*If you have not yet been advised regarding your proposed transfer by a UK regulated financial adviser specialising in pensions,…". .* That warning missed the key point, and one that Zurich should have looked into: the proposed transfer had been recommended to Mr D, apparently in breach of the criminal law, by an unauthorised firm.

Furthermore, it was around this time (in July 2014) that the Scorpion guidance was updated to refer more widely to the risks of scams. Yet Zurich doesn't appear to have applied this to its due diligence in Mr D's case, even though it had ample time to do so because his transfer didn't complete until September 2014.

<u>Causation</u>

Overall, I'm not satisfied Zurich fulfilled its obligations under PRIN and COBS, nor followed good practice in relation to Mr D's transfer. So, I don't think it acted fairly and reasonably. I think Zurich should have provided more specific information to Mr D about the risks of the transfer along the lines I've set out above. I've therefore gone on to consider whether this failing caused Mr D harm or loss.

I've considered the possibility Mr D would have gone ahead with the transfer even if Zurich had done all it should. He didn't act upon the letter Zurich sent to him in July 2014 which highlighted the issue of pension liberation, and which strongly recommended he seek regulated advice. Nor did he act upon the Scorpion insert, which contained much of the same information that Zurich had provided. Further, Zurich asserts Mr D was fully committed in his plan with the TRG investment and that it's unrealistic to suggest a further phone call or letter would have changed his mind.

However, when I take everything into consideration, I'm persuaded that Mr D would not have gone ahead with the transfer if Zurich had done everything it should.

The letter from Zurich in July 2014 didn't explain why Mr D should seek regulated advice nor – importantly – did it identify that the adviser involved in his transaction was unregulated. It didn't highlight to Mr D that one of the parties advising him was most likely breaking the law and exposing him to further risk. And Zurich never made these points to Mr D.

Had it done so, I don't think Mr D would have ignored this information. It was materially different information than what was contained in the warnings he actually did receive. Being in possession of all the facts and information, it's likely Mr D would have acted differently. As explained above, this information should have followed contact with Mr D asking him more about his transfer request, so would have seemed to him (and indeed would have been) specific to his individual circumstances. It would have been given to him in the context of Zurich raising concerns about the risk of him losing his pension monies as a result of untrustworthy advice. This would have made him aware he, specifically, had exposed his pension to serious risk by following the advice of an unregulated adviser.

Although Mr D had already taken various steps to facilitate the TRG investment, I'm not persuaded he was so committed that he couldn't or wouldn't have stopped the transfer. Whilst he had gone to the trouble of setting up a dormant company (albeit via an agent) and establishing a SSAS, there was no cost or barrier to him simply deciding not to take these forward and cancelling the transfer. I think his motivation for making the TRG investment came from the unsolicited advice. He was being led through the process. So, if he'd understood this advice was potentially untrustworthy, I think he would have changed his mind.

It's my view that Mr D wouldn't have transferred his pension and lost much of its value but for the failings on Zurich's part which I've described above.

I've therefore gone on to consider what is fair compensation in the circumstances here.

<u>Fair compensation</u>

I bear in mind that Mr D's complaint is similar to the type of claim that in legal proceedings would be treated as a claim for damages for negligent failure to give him the information or advice to which he was entitled. In that kind of case, the court asks itself whether there is a sufficient connection between the harm for which the claimant seeks damages as compensation and the subject matter of the defendant's duty of care. 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 D 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 risky, overseas property investment which was plainly inappropriate for Mr D, 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 D 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 D should bear some responsibility for the loss he has incurred. And, although I'm deciding only a complaint and not a legal claim, I take 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 D'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 letter of 21 July 2014 strongly recommended Mr D seek regulated advice if he wasn't already in receipt of this. This recommendation was made more in line with the principal risk Zurich was on the lookout for – which was that unregulated third parties might cold call Mr D in an attempt to liberate his pension – rather than a wider warning about scams. Mr D might have thought he had no reason to worry about pension liberation. But it was, nonetheless, 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.

Just one month later Mr D received a letter from Broadwood, which also suggested he might want to take regulated financial advice. 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 D preferred advice on the suitability of the investment for him personally then he should seek regulated financial advice.

Mr D says he was an inexperienced investor who wouldn't have wanted lots of risk. At the time he received the Broadwood letter, I think he would have recognised himself as someone who was a "cautious investor". 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. And he already knew – from Zurich's letter – how to check whether the unsolicited advice he'd already received from CMM was regulated. Yet Mr D didn't check. He could easily have done so. This would have been a reasonable step I'd expect someone in his position to take and would probably have led to the illegal advice being uncovered and the transfer being aborted.

None of the other parties assisting Mr D to set up the SSAS (DLW, CWL, CGL, Broadwood) were regulated and the evidence doesn't suggest they claimed to be. So, there's no reason to think their involvement would have reassured Mr D that he was getting regulated advice. The only party that was authorised to provide regulated financial advice, Moneywise, didn't advise Mr D and Mr D doesn't remember dealing with them. So Moneywise wouldn't have reassured him either.

Therefore, when considering fair compensation in this case, I think it would be reasonable to attribute some responsibility for the loss Mr D has suffered to his own failure to act.

In light of my finding that Mr D must accept some responsibility himself, Zurich has pointed to what it says is applicable law, in section 1C(2) of FSMA 2000 and a related judgment set out by Lord Justice Rix in *Zakl v Credit Suisse [2013] EWCA Civ 14*. The principle Zurich points to here is that properly informed consumers should take responsibility for their own mistakes. It is Zurich's view that because Mr D went ahead with his transfer "despite receiving the requisite warnings", he should take full responsibility for his own actions and Zurich should not be held responsible. In making this argument, Zurich appears to have misunderstood my conclusions. Crucially, I don't think Mr D received the requisite warnings for his particular circumstances. I think Zurich breached a duty it owed under PRIN and COBS (for the reasons I explained earlier in this decision) with the result that Mr D was not properly informed. Therefore I don't think the principle Zurich seeks to rely on in section 1C(2) of FSMA 2000 or *Zakl v Credit Suisse [2013] EWCA Civ 14* is relevant to my findings here.

Essentially, I think both Zurich and Mr D 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 D'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 D. 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 D had already been drawn into a scam. So, I think its failings were worse than those of Mr D. While this isn't an exact science, in the circumstances of this complaint, I propose to reduce Mr D's compensation by 30%. I think this is a fair way to account for Mr D's own contribution to the loss he's suffered.

Putting things right

The SSAS only seems to have been used in order for Mr D to make an investment that

I don't think he would have made but for Zurich's shortcomings. So, I think Mr D would have remained in his pension plan with Zurich and wouldn't have transferred to the SSAS.

To compensate Mr D fairly, Zurich should compare the actual value of Mr D's SSAS with the notional value if it had remained with Zurich. If the notional value is greater than the actual value, there is a loss.

Actual value

This means the actual amount payable from Mr D's SSAS at the date of my final decision. 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. I consider that is the case with the TRG investment within the SSAS. Therefore, as part of calculating compensation, Zurich should give the TRG investment a nil value as part of determining the actual value. It's also fair that Mr D should not be disadvantaged while it is unable to close down the SSAS and move to a potentially cheaper and more strongly regulated arrangement. So to provide certainty to all parties I think it's fair that Zurich also pays Mr D an upfront sum 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.

Any outstanding administration charges yet to be applied to the SSAS should also be deducted from the actual value.

Notional value

This is the value of Mr D's pension had it remained with Zurich at the date of my final decision.

Any pension commencement lump sum or gross income payments Mr D received **directly** from the SSAS which would have been permitted under the tax rules, should be 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

There doesn't appear to be any reason why Mr D 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 SSAS. However, in a case such as this where I've concluded there is contributory negligence, I also don't think it's appropriate for Zurich to reinstate Mr D's original pension plan, as it was not only Zurich's actions that led to it being lost.

If Zurich is open to new business, it should set up a new plan for a value equal to 70% of the amount of any loss. The new plan should have features, costs and investment choices that are as close as possible to Mr D's original pension. Its payment into the new plan should allow for the effect of charges and tax relief (if applicable). Zurich shouldn't set up a new plan if it conflicts with any existing lifetime allowance protection – or if it considers that its payment will be treated as a member contribution in excess of Mr D's annual allowance, and Zurich is unable to process the amount in excess of the annual allowance.

If it's not possible to set up a new plan, Zurich must pay the amount of any loss direct to Mr D. 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 D 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 D.

Zurich may ask Mr D to provide an undertaking in return, to account to it for 70% of the net amount of any payment he may receive from any illiquid investment in future. Zurich will need to meet any costs in drawing up the undertaking. If Zurich asks Mr D 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 Zurich receiving Mr D’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.

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

If either Mr D or Zurich dispute that the assumption for tax that Mr D will pay at retirement is reasonable, they must let us know as soon as possible so that the assumption can be clarified, and Mr D receives appropriate compensation. It won’t be possible for us to amend this assumption if a final decision is issued on the complaint.

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

My final decision

For the reasons given above, my final decision is that I uphold Mr D’s complaint. I direct Zurich Assurance Ltd to compensate Mr D in line with the approach outlined above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr D to accept or reject my decision before 11 January 2024.

Ayshea Khan
Ombudsman