DRN-4452685

The complaint

Miss M has complained about a transfer from her Scottish Widows Limited ("SWL") personal pension to a small self-administered scheme ("SSAS") in 2013. Miss M's SSAS was used to buy shares in a company. Those shares now appear to have little value.

Miss M says SWL failed in its responsibilities when dealing with her transfer request. She says that SWL should have done more to warn her of the potential dangers of transferring, and undertaken greater due diligence on the transfer, in line with the guidance required of transferring schemes at the time. Miss M says she wouldn't have transferred, and therefore wouldn't have put her pension savings at risk, if SWL had acted as it should have done.

What happened

On 1 February 2013, Miss M authorised Sun Money Ltd, an unregulated 'introducer' of investments, to approach SWL on her behalf to elicit information about her pension and to obtain transfer documents. On 18 February, she signed an application form to buy 30 shares in SCCL Ltd, a small unlisted company that had just been incorporated as a cosmetic dentistry venture. On 27 February, Sun Money wrote to SWL with a request for transfer documents and information.

On 21 April, Greenchurch Capital sent SWL paperwork to transfer Miss M's personal pension to a SSAS. Greenchurch Capital was acting as the SSAS's administrator. Included in the paperwork was Miss M's signed SWL transfer forms and a HMRC certificate which showed the SSAS had been registered on 8 April 2013.

A date-stamp shows SWL received Miss M's transfer documents on 23 April 2013. The next day, SWL wrote to Miss M to say it had received a transfer request. It also wrote to Greenchurch Capital and Miss M's home address to confirm the transfer had been processed. Miss M's transfer value was a little under £17,500. Miss M's SSAS was used to buy the 30 SCCL Ltd shares, which now appear to have little value. Miss M was 50 at the time of the transfer.

In 2018 Miss M was told by SCCL Ltd that the company's value was lower than hoped for and that it couldn't find a buyer for her shares. This followed enquiries from Miss M about redeeming her investment which she believed was a possibility after five years. In 2019, Miss M (with the help of a claims management company) complained to SWL. Briefly, her argument is that SWL failed to adequately warn her about the potential risks of transferring. In particular, she says SWL didn't follow guidance launched by The Pensions Regulator (TPR) on 14 February 2013. This is often referred to as the "Scorpion guidance" or "Scorpion campaign" because of the imagery it used. The guidance was launched in response to the increasing threat of pension liberation, the process by which pensions are accessed in an unauthorised way (before minimum retirement age, for instance) which can leave victims with little or no pension savings and liable to pay charges to HMRC.

SWL didn't think it had done anything wrong. It said that Miss M had a statutory right to transfer and that it had ensured the receiving scheme had been properly registered with HMRC. It said this was in line with industry practice at the time. SWL said it *didn't* follow the

Scorpion guidance because Miss M's transfer was too soon after the guidance was launched for it to have implemented any training and process changes. It said TPR had agreed it had until May 2013 to respond to the guidance (which was after Miss M's transfer completed).

Our investigator was unable to resolve the dispute informally, so the matter was passed to me to decide. I issued a provisional decision, in which I upheld the complaint. I said:

Although the event complained of happened more than six years before Miss M complained to SWL, I've no reason to conclude Miss M complained more than three years after she was aware (or ought reasonably to have been aware) of having cause for complaint. I'm therefore satisfied Miss M did complain in time and that this is a complaint I can consider.

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

Before I explain my reasoning, it will be useful to set out the environment SWL 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 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.*

- *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. I cover the Scorpion campaign in more detail below.*

- *Personal pension providers are not regulated by TPR. They're regulated by the Financial Conduct Authority (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 (PRIN) 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; 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.*

<u>The Scorpion campaign</u>

Overview

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 include talking to an adviser not associated with the transaction and recognising 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 check list that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request. Where 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 status of the Scorpion guidance

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 guidance, 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.

Thus, for the bodies regulated by TPR, the status of the guidance was that it provided them with information, education and/or assistance, as opposed to creating any new binding rule or legal duty.

Correspondingly, the communications about the launch of the guidance were predominantly expressed in terms that made its non-obligatory status clear. 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 check list, it states: "If any of these statements apply, then you can use the check list …"

The language arguably strays into the imperative under the heading "Next steps if you have concerns", stating "Contact the member to establish their understanding of, for example, the type of scheme they'll be transferring to." But this appears to be reversed later in a passage which states: "Trustees may wish to contact members direct where they have concerns about a proposed transfer." So, the tenor of the document is essentially a set of prompts and suggestions, not requirements.

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 the Financial Services and Markets Act (FSMA), which enabled the FSA to issue guidance provided it underwent a consultation process first. Nor did it constitute "confirmed industry guidance", as can be seen by consulting the list of all such FSA/FCA guidance on its website.

I take from 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 it provided, for the first time, guidance for personal pension providers dealing with transfer requests – guidance that prompted providers to take a more active role in assessing transfer requests. The 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 Scorpion 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 that 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 do think 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.

<u>What did personal pension providers like SWL need to do?</u>

TPR said it wanted to see the use of the Scorpion insert in transfer packs become best practice. Sending the insert to customers asking to transfer their pensions 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.

The contents of the Scorpion insert were directed towards consumers themselves and contained warnings about dishonest intermediaries who might be trying to lure them into pension liberation. It would have defeated the purpose of the insert if, instead of sending it to their customer, pension firms sent the insert to the customer's representative in the hope that that intermediary would then share the insert with their client. I therefore consider it fair and reasonable to say the insert had to be sent direct to the transferring member rather than, say, to an unregulated introducer.

Under the Scorpion action pack, firms were told to look out for the tell-tale signs of pension liberation and undertake further due diligence and take appropriate action where their client might be at risk. The action pack points to the liberation warning signs transferring schemes should have been looking out for and provides a framework for any due diligence and follow-up actions. Therefore, whilst using the action pack isn't an inflexible requirement, it does represent a reasonable benchmark for the level of care expected of a transferring scheme and identifies specific steps that would be appropriate for them to take, if the circumstances demanded.

It is also important to note that the obligations of regulated firms to customers who were transferring 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 liberation – 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 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.

Before I go on to consider whether SWL met its obligations, I set out my findings on how Miss M came to request the transfer.

Miss M's recollections

When our investigator spoke to Miss M, she initially indicated she had no control over the transfer. She said she had no idea it was happening until it was too late. She thought SWL gave her no choice about it and said she didn't know why she'd been sent a share certificate.

This is at odds with her complaint as articulated by her representative. In her complaint to SWL her representative said the following:

> *"[Miss M] received an unsolicited telephone call from a firm offering a free review of her pension arrangements with a view to increasing her returns. This was of interest to her and she agreed to speak with an unregulated introducer from Sun Money Limited. Miss M never met the adviser. The reviewer recommended that Miss M transfer her pension to a SSAS and invest as recommended. She was told that she would receive a 4% return in Year 1, 5% in Year 2, 6% in Year 3, 7% in Year 4 and 8% in Year 5 after which her investment would be returned to her…To [Miss M] it sounded like a realistic opportunity to achieve a significant increase on her pension savings.*

Furthermore, when Miss M referred her complaint to this Service she said:

> *"In 2013 I received a cold call offering me a free pension review and I then spoke to Sun Money limited. The adviser from Sun Money advised me to transfer my Scottish Widows pension to a SSAS with a view to increasing the returns. I had no experience of investments so relied on the advice given. I was unaware that the company were not FCA authorised and this information was not offered to me. I was informed that the scheme I was investing in was risk free so was not warned about the risks involved in this investment…If Scottish Widows had warned me about the risks, I would have taken advice from an authorised independent financial adviser and left my pension funds with them, I have suffered a significant loss by reason of the failure of at least one of my investments within the SSAS (SCCL Limited) as I was unaware that Sun Money Limited were an unauthorised firm and that the recommended investment was high risk."*

Miss M's recollections are inconsistent, which to some extent is understandable given the time that's passed since the events she's trying to remember; our investigator spoke to Miss M over eight years after the events in question. I therefore treat Miss M's recollections with caution. I've weighed them carefully with the wider circumstances to decide what's more likely than not to have happened.

I can see Miss M signed forms ahead of the transfer, including an application form to buy the shares, so I'm satisfied she knew about the transfer beforehand. There's also no evidence SWL misled her into thinking she had to transfer her pension and I can't see how it would have benefited SWL to do this. So I'm also satisfied SWL didn't mislead her about the transfer.

Therefore, and contrary to what Miss M initially told our investigator, it seems likely to me that Miss M knew she was transferring and was doing so of her own volition. But I accept as more likely than not her assertion that she was cold called by an unregulated introducer and advised to take the action she did. I say this because I haven't seen anything about Miss M and her circumstances that makes me think it's likely she would have decided on her own to embark on a complicated and esoteric arrangement: transferring out of her existing pension, setting up a SSAS and investing directly in a small, unlisted company. Miss M's assertion that she didn't know Sun Money was unauthorised also rings true because an *unsophisticated investor wouldn't usually know the importance of researching this (which was one of the issues the Scorpion guidance was trying to address).*

It's worth noting here that the investment opportunity, as Miss M says it was presented to her, did not involve accessing her pension early. Her representative says it was presented as lasting beyond age 55, without offers of loans or cash incentives. So, it would appear that Miss M's motivation in transferring was to achieve better growth for her pension, rather than to access it in an unauthorised manner.

I've next considered whether SWL took appropriate steps when dealing with Miss M's transfer request, in line with what I've set out above.

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

The Scorpion insert:

For the reasons given above, my view is that personal pension providers should, as a matter of course, have sent transferring members the Scorpion insert with their transfer packs. However, SWL says it didn't send the Scorpion insert to Miss M because her initial transfer enquiries came too soon after the guidance was launched for it to have responded. I find this to be reasonable in this case.

I say this because the guidance was published on 14 February 2013 without prior consultation, so SWL could only have started thinking about what changes it might need to make to its processes after 14 February 2013. Sun Money emailed SWL requesting a valuation and transfer forms on 27 February 2013. There's no record of SWL's response, but given Miss M signed the forms on 13 March 2013, it's likely SWL sent them to Sun Money by 8 March 2013 (allowing three working days for them to be received and then passed on to Miss M). That means SWL had, at most, about three weeks to respond to the Scorpion guidance before it sent Miss M her transfer documents. I think it's fair to say that even the relatively straightforward task of printing Scorpion inserts and ensuring their inclusion in transfer packs would have taken some time to implement. The fact SWL hadn't yet done so three weeks after the guidance was first published doesn't strike me as unreasonable in this instance.

Due diligence:

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

SWL says it didn't follow the Scorpion guidance in this case because TPR had given scheme administrators until May 2013 to implement any changes. SWL has provided no evidence to support this, so I've proceeded on the basis that no such dispensation was provided.

SWL received Miss M's transfer papers on 23 April 2013. This was over nine weeks after the launch of the Scorpion guidance, which should have given SWL time to understand the warning signs and next steps outlined in the action pack and implement changes to its processes. So I think the guidance in the action pack is relevant to Miss M's case.

Given the information SWL had at the time, there was one immediately apparent feature of Miss M's transfer that was a potential warning sign of liberation activity. This was that Miss M's SSAS had been registered very recently (around two weeks before she sent in her transfer request). As this was highlighted by TPR in the Scorpion action pack as a possible warning sign, SWL should have followed up on it to find out if other signs of liberation were *present – especially as it would have been aware (as her pension provider, but also from some of the paperwork sent in by Sun Money) that Miss M was under 55 at the time which made her a more likely candidate for pension liberation fraud. Given these warning signs, I think it would have been fair and reasonable – and good practice – for SWL to look into the proposed transfer and the most reasonable way of going about that would have been to turn to the check list in the action pack to structure its due diligence into Miss M's transfer.*

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

1. *The nature/status of the receiving scheme*

   Sample questions: Is the receiving scheme newly registered with HMRC, is it sponsored by a newly registered 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' or allude to overseas investments?

3. *The scheme member*

   Sample questions: Has the transferring member been advised by an 'introducer', been advised by a non-regulated adviser or taken no advice? Has the member decided to transfer after receiving cold calls, unsolicited emails or text messages about their pension?

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

I don't think it would always have been necessary to follow the check list in its entirety. And I don't think an answer to any one single question on the check list would usually be conclusive in itself. A transferring scheme would therefore typically need to conduct investigations across several parts of the check list to establish whether liberation was a realistic threat. Given the warning sign that should have been apparent to SWL when dealing with Miss M's transfer request, and the relatively limited information it had about the transfer, I think in this case SWL should have addressed all three parts of the check list and contacted Miss M as part of its due diligence.

Investigations under part 3 of the check list would have revealed Miss M's interest in transferring was prompted by a cold call. I think it's also fair to say Miss M would have told SWL – had it asked her as it should have done – that she was advised to transfer by Sun Money. She has said as much in her submissions to us. Miss M's recollections haven't always been consistent, of course, but her recollection about being advised is supported by the circumstances (as I have explained above) and I therefore find her to be persuasive on this particular point. And there's no evidence to show she was being advised by anyone other than Sun Money during the transfer.

The check list recommends that in order to establish whether its member has been advised by a non-regulated adviser, the ceding firm should "check whether advisers are registered with the FSA at www.fsa.gov.uk/fsaregister". In other words, they should consult the FSA's online register of authorised firms. SWL should have taken that step, which is not difficult, and it would quickly have discovered that Miss M's adviser was indeed unauthorised.

Being advised by an unauthorised firm to transfer benefits from a personal pension plan and reinvest the proceeds in particular shares would have been a breach of the general prohibition imposed by FSMA, which states no one can carry out regulated activities unless they're authorised or exempt. Anyone working in this field should have been aware that financial advisers need to be authorised to give regulated investment advice in the United Kingdom – indeed, the Scorpion insert itself makes this point.

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

I think SWL's failure to uncover this risk of illegal advice and then warn Miss M about it meant SWL didn't meet its obligations under Principles 2, 6 and 7 and COBS 2.1.1R. With those obligations in mind, it would have been appropriate for SWL to have informed Miss M that the firm she'd been advised by was unregulated and could put her pension at risk. SWL should have told her that only authorised financial advisers are allowed to give advice on personal pension transfers, so she risked falling victim to illegal activity.

<u>*The cause of Miss M's loss*</u>

I'm satisfied any messages along these lines would have changed Miss M's mind about the transfer. The messages would have followed conversations with Miss M so would have seemed to her (and indeed would have been) specific to her individual circumstances and would have been given to her in the context of SWL raising concerns about the risk of her losing her pension monies as a result of untrustworthy advice. This would have made her aware that there were serious risks with her using an unregulated adviser even if she was not liberating her pension. And her recollections (as outlined earlier) suggest she would have changed her mind if given some warning about dealing with an unauthorised business. So, I consider that if SWL had acted as it should, Miss M wouldn't have proceeded with the transfer out of her personal pension or suffered the investment losses she did.

But for SWL's failings Miss M wouldn't have transferred her pension and lost its value. Therefore, I've gone on to consider whether SWL should compensate Miss M for the loss she has suffered (see section 229(2)(a) of FSMA).

I bear in mind that Miss M'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 her the information or advice to which she 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.

So, it's important I bear in mind that the Scorpion guidance was directed towards protecting people from the risk of pension liberation and that doesn't appear to have happened in Miss M's case. Her loss was suffered because she accepted unsuitable investment advice from an introducer who wasn't authorised to act as a financial adviser at all, and it wasn't (as far as can be established taking into account what Miss M has said) a case of her seeking to cash in her pension early in an unauthorised way.

Nonetheless, the circumstances that gave rise to this complaint were very similar to those of a pension liberation scam: the transfer followed unsolicited contact from an unauthorised business and involved the setting up of a new pension scheme to house an investment and the involvement of recently established businesses. The Scorpion action pack and insert both recommend checking that financial advice comes only from an authorised person by checking the FSA/FCA register. And SWL's obligations under the Principles and COBS were of general application and went well beyond just protecting its customers from pension liberation. In the circumstances, even though this doesn't appear to be a case of pension liberation, I do consider it fair and reasonable for SWL to compensate Miss M entirely for her losses in line with the approach outlined below.

I have given thought to whether Miss M should herself bear some responsibility for the loss she has incurred. 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.

It's true that Miss M was contacted out of the blue to discuss her pension and that acting on unsolicited advice about a pension could be seen as a risky step to take. But my view is that Miss M doesn't bear responsibility for the losses she suffered, because I don't think the circumstances overall were sufficiently alarming to require her, reasonably, to act differently. As outlined previously, SWL didn't provide Miss M with the warnings it should have done; indeed, it didn't provide her with any warnings or give her any indication that there were steps she could take to protect herself. And I don't think Miss M, acting reasonably, would have got a sense from any other sources that there was a particular need to act with caution when dealing with unauthorised businesses. In the absence of any such warnings or information, my view is that Miss M's actions were in keeping with those a reasonable person would take. I therefore don't intend to reduce Miss M's compensation.

In my provisional decision, I also outlined what steps I thought SWL should take to put things right for Miss M.

Both parties responded to my provisional decision. Both parties agreed with my provisional findings.

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.

Having reviewed the case once again, and having taken on board the acceptance of my provisional findings by both parties, I see no reason to reach a different decision on Miss M's complaint. Therefore, for the reasons outlined in the previous section, I uphold the complaint. SWL must now put things right for Miss M in line with the approach I outlined in my provisional decision, which I repeat below.

Putting things right

My aim is that Miss M should be put as closely as possible into the position she would now be in if SWL had treated her fairly.

The SSAS only seems to have been used in order for Miss M to make an investment that I don't think she would have made but for SWL's actions. So I think that Miss M would have remained in her pension plan with SWL and wouldn't have transferred to the SSAS.

To compensate Miss M fairly, SWL should compare the actual value of Miss M's SSAS with the notional value if her pension had remained with SWL. If the notional value is greater than the actual value, there is a loss.

Actual value

This means the actual amount payable from Miss M's SSAS at the date of my final decision.

My aim is to return Miss M to the position she would have been in but for the actions of SWL. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. That may be the case here. Therefore, as part of calculating compensation:

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

- Alternatively, if SWL is unable to buy those investments from the SSAS it should give them a nil value as part of determining the actual value. It's also fair that Miss M should not be disadvantaged while she 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 SWL also covers five years' worth of future administration fees at the current tariff for the SSAS as part of the compensation, 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 Miss M's investment had it remained with SWL at the date of my final decision.

Any pension commencement lump sum or gross income payments Miss M received **directly** from the SSAS which would have been permitted under the tax rules, should be treated as notional withdrawals from SWL 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 Miss M 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.

SWL should reinstate Miss M's pension plan as if its value on the date of my final decision was equal to the amount of any loss (and it performs thereafter in line with the funds Miss M was invested in). SWL shouldn't reinstate Miss M's plan if it would conflict with any existing protection or allowance – but my understanding is that it will be possible for it to reinstate a pension it formerly administered in order to rectify an administrative error that led to the transfer taking place. If SWL doesn't consider this is possible, it must explain why.

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

If it's not possible to set up a new plan either, SWL should pay the amount of any loss direct to Miss M. 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 Miss M is likely to be a basic rate taxpayer at the selected retirement age, so a 75% portion of her pension would be taxed at 20% assuming she 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 Miss M.

If illiquid investments are being left in the SSAS, SWL may ask Miss M to provide an undertaking in return, to account to it for the net amount of any payment she may receive from those investments in future. SWL will need to meet any costs in drawing up the undertaking. If SWL asks Miss M 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 SWL receiving Miss M's acceptance of my final decision, interest should 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 SWL deducts income tax from the interest, it should tell Miss M how much has been taken off. SWL should give Miss M a tax deduction certificate in respect of interest if Miss M asks for one, so she can reclaim the tax on interest from HMRC if appropriate. This interest is not required if SWL is reinstating Miss M's plan for the amount of the loss – as the reinstated sum should, by definition, mirror the performance after the date of my final decision of the funds in which Miss M was invested.

Details of the calculation should be provided to Miss M in a clear, simple format.

My final decision

I uphold Miss M's complaint. Scottish Widows Limited must now put things right for Miss M in line with the approach outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss M to accept or reject my decision before 11 December 2023.
Christian Wood
Ombudsman