DRN-4794280

The complaint

Mr E has complained about a transfer of his personal pension with The National Farmers' Union Mutual Insurance Society Limited (NFU) to a small self-administered scheme (SSAS) in 2014. Mr E's SSAS was subsequently used to invest in Dolphin Capital and an overseas property development. Mr E says both investments have failed and he's lost out financially as a result.

Mr E says NFU failed in its responsibilities when dealing with the transfer request. He says it should've done more to warn him of the potential dangers of transferring and undertaken greater due diligence on the transfer, in line with the guidance he says was required of transferring schemes at the time. Mr E says he wouldn't have transferred, and therefore wouldn't have put his pension savings at risk, if NFU had acted as it should've done.

What happened

I issued a provisional decision on 22 April 2024. I've set out here what I said about what had happened and my provisional findings – why I was upholding the complaint.

'*Mr E had two personal pension policies with NFU. In 2014 he was in contact with a firm called Stevenson Pride who'd offered a review of his pension planning. Mr E says he was told he could transfer his pension to a SSAS and invest in a wider range of investments with returns exceeding those on his NFU pension.*

On 21 March 2014 a company was incorporated with Mr E as a director. I'll refer to this company as E Limited. On the same date Mr E signed documents to open a SSAS with Rowanmoor Group plc (Rowanmoor). Company E was recorded as the SSAS's principal employer. The SSAS documents also recorded that the SSAS was to be used to invest in Akbuk Unity Bay (a Ramada resort development in Turkey) and Dolphin Capital (a German based property development company).

A transfer request was made to NFU on 8 May 2014 via the Origo system. On 14 May 2014 NFU made a transfer payment of £68,436.84 to Rowanmoor. On 13 June 2014 £60,175 was invested in Akbuk Unity Bay. On 3 July 2014 a further transfer payment of £37,750.40 in respect of another personal pension held with a different provider – Aviva Life & Pensions UK Limited (Aviva) – was received by Rowanmoor. Mr E has also complained about that transfer. On 29 August 2014 £39,000 was invested in Dolphin Capital loan notes.

Mr E later became concerned about his investments. In early 2018 he received a letter about the Akbuk investment saying the resort hadn't been fully developed. He got in contact with Rowanmoor in early 2019 but he says they weren't helpful in resolving his queries. So he got in touch with a pensions solicitor who undertook investigations primarily in 2019. Mr E says it was established that his signature had been forged and around £60,000 had been invested in Akbuk without his knowledge. He contacted Rowanmoor again who suggested he seek financial advice and provided him with statements. The solicitor said it would be difficult to pursue a court claim against his adviser, due to them declaring bankrupt, and recommended he contact a claims management company (CMC) to potentially pursue a complaint against the ceding scheme. Mr E engaged a CMC (his current representative) in 2020.

That led to Mr E's complaint to NFU in October 2020. Briefly his argument was that NFU ought to have spotted, and told him about, a number of warning signs in relation to the transfer, including (but not limited to) the following: the SSAS was newly registered, there wasn't a genuine employment link to the sponsoring employer; the catalyst for the transfer was an unsolicited call and Mr E had been advised by an unregulated business.

NFU didn't uphold the complaint. It said that in 2014 it accepted transfer requests via Origo Options, an electronic transfer system, without requiring further information from either the customer or the receiving scheme, as due diligence had already been completed by Origo themselves. The requirements for being accepted onto the Origo platform are extensive and, at that time, NFU would've had no reason to doubt the validity of the receiving company or specific scheme and therefore there was no need to duplicate that work.

Our investigator was unable to resolve the dispute informally, so the matter was passed to me to decide.

I understand that the Dolphin investment has failed. Preliminary bankruptcy proceedings were commenced in Germany in 2020. Investors are very unlikely to get any of their money back. Development of the Akbuk Resort was beset by problems and there is now no market for Mr E's investment – a fractional share in a hotel suite.

What I've provisionally 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.

As I've mentioned above, Mr E has also complained about a transfer from another provider at about the same time. That complaint has been dealt with under separate reference but I've considered both complaints, and all the information that's been provided on each, together.

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

Personal pension providers are regulated by the Financial Conduct Authority (FCA). Prior to that they were regulated by the FCA's predecessor, the Financial Services Authority (FSA). As such NFU was subject to the FSA/FCA Handbook, and under that to the Principles for Businesses (PRIN) and to the Conduct of Business Sourcebook (COBS). There have never been any specific FSA/FCA rules governing pension transfer requests, but the following have particular relevance here:

Principle 2 – A firm must conduct its business with due skill, care and diligence;
Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly;
Principle 7 – A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading; and
COBS 2.1.1R (the client's best interests rule), which states that a firm must act honestly, fairly and professionally in accordance with the best interests of its client.

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

The Scorpion guidance was launched by The Pensions Regulator (TPR). It was described as a cross-government initiative by Action Fraud, The City of London Police, HMRC, the Pensions Advisory Service (TPAS), TPR, the Serious Fraud Office (SFO) and the FSA/FCA, all of which endorsed the guidance, allowing their names and logos to appear in Scorpion materials. The guidance comprised the following:

- *An insert to be included in transfer packs (the 'Scorpion insert'). The insert warns readers about the dangers of agreeing to cash in a pension early and identifies a number of warning signs to look out for.*
- *A longer insert issued by TPAS which gives more information, including example scenarios, about pension liberation. Guidance provided by TPR on its website at the time said this longer insert 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.*

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

The FSA's endorsement of the Scorpion guidance was relatively informal: it didn't take the form of Handbook Guidance, because it was not issued under s.139A of the Financial Services and Markets Act (FSMA), which enabled the FSA to issue guidance provided it underwent a consultation process first. Nor did it constitute "confirmed industry guidance", as can be seen by consulting the list of all such FSA/FCA guidance on its website.

I take from the above that the content of the Scorpion guidance was essentially informational and advisory in nature and that deviating from it doesn't necessarily mean a firm has broken the Principles or COBS rules. Firms were able to take a proportionate approach to transfer requests, balancing consumer protection with the need to also execute a transfer promptly and in line with a member's statutory rights.

That said, the launch of the 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 those requests. The guidance was launched in response to widespread abuses that were causing pension scheme members to suffer significant losses. And the guidance's specific purpose was to inform and help ceding firms when they dealt with transfer requests in order to prevent these abuses and save their customers from falling victim to them.

In those circumstances, I consider firms which received pension transfer requests needed to *pay regard to the contents of the Scorpion guidance as a matter of good industry practice. It means February 2013 marks an inflection point in terms of what was expected of personal pension providers dealing with transfer requests as a matter of fulfilling their duties under the regulator's Principles and COBS 2.1.1R.*

What did personal pension providers need to do?

For the reasons given above, I don't think personal pension providers necessarily had to follow all aspects of the Scorpion guidance in every transfer request. However, I do think they should have paid heed to the information it contained. 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. With that in mind, I take the view that personal pension providers dealing with transfer requests needed to heed the following:

> *1. As a first step, a ceding scheme needed to check whether the receiving scheme was validly registered.*
> *2. When TPR launched the Scorpion guidance in February 2013, its press release said the Scorpion insert should be provided in the information sent to members requesting a transfer. It said on its website that it wanted the inclusion of the Scorpion insert in transfer packs to "become best practice". The Scorpion insert provided an important safeguard for transferring members, allowing them to consider for themselves the liberation threat they were facing. Sending it to customers asking to transfer their pensions was also a simple and inexpensive step for pension firms to take and one that wouldn't have got in the way of efficiently dealing with transfer requests. So, all things considered, I think the Scorpion insert should have been sent as a matter of good industry practice with transfer packs and direct to the transferring member when the request for the transfer pack had come from a different party – an unregulated introducer, say.*
> *3. I also think it would be fair and reasonable for personal pension providers – operating with the regulator's Principles and COBS 2.1.1R in mind – to ensure the warnings contained in the Scorpion insert were provided in some form to a member before a transfer even if the transfer process didn't involve the sending of transfer packs.*
> *4. The Scorpion guidance asked firms to look out for the tell-tale signs of pension liberation 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 warning signs transferring schemes should have been looking out for and provides a framework for any due diligence and follow-up actions. Therefore, whilst using the action pack wasn't an inflexible requirement, it did represent a reasonable benchmark for the level of care expected of transferring schemes and identified specific steps that would be appropriate for them to take, if the circumstances demanded.*
> *5. The considerations of regulated firms didn't start and end with the Scorpion guidance. If a personal pension provider had good reason to think the transferring member was being scammed – even if the suspected scam didn't involve anything specifically referred to in the Scorpion guidance – then its general duties to its customer as an authorised financial services provider would come into play and it would have needed to act. Ignoring clear signs of a scam, if they came to a firm's attention, or should have done so, would almost certainly breach the regulator's Principles and COBS 2.1.1R.*

The circumstances surrounding the transfer and Mr E's recollections

Mr E has told us that in 2014 he was considering amalgamating his pensions. He initially *considered moving them to NFU or Aviva and he made enquiries about that. But he was also thinking about moving them to a different provider altogether. He looked on the internet and was then called by someone who offered him a free review and referred him to Stevenson Pride. That firm wasn't authorised or regulated by the FCA.*

Mr E was interested in transferring to a SIPP (self invested personal pension) as his brother-in-law had done. But Mr E says the adviser told him a SSAS would be much better. Mr E had several meetings with the adviser and was given information about investing in Dolphin and Akbuk. He says he was told the returns would exceed those on his existing pensions: Akbuk would generate 10% pa and Dolphin 13.8% pa for the five year duration of the investment. Mr E had no experience of investments and trusted what he'd been told and which seemed a realistic opportunity to significantly increase his retirement provision.

Mr E says the adviser didn't warn him of the risks of the proposed investments or properly explain their structure. He was given the clear understanding that the investments were safe and largely risk free. The adviser didn't make it clear he wasn't FCA authorised. Mr E's impression from the meetings was that everything was regulated although he accepts there was nothing on the paperwork which indicated that. Mr E says the adviser was 'pushy' and that it was a limited time opportunity and Mr E needed to move fast to not miss out.

Mr E was interested in transferring his personal pension. I think that was in the hope he'd get better returns and so boost his retirement provision. I haven't seen anything to suggest he was motivated by the prospect of receiving an unauthorised payment from his pension fund. I accept what he says about how the transfer came about and Stevenson Pride's involvement. I can't see that Mr E would've transferred unless he'd been advised to do so. I think it's likely that Stevenson Pride advised him to transfer out of the NFU personal pension.

There's been some suggestion that the Akbuk investment was made without Mr E himself having signed the relevant documentation. I'm not sure exactly what might've gone on. But, from what Mr E has said, he knew the plan was that his SSAS would invest in Akbuk (and Dolphin). Indeed the returns promised featured in his decision to go ahead with the transfer. In the circumstances, it isn't immediately clear to me why Mr E would be unhappy that the Akbuk investment had been made. I'm not persuaded by what Mr E has said about the investment having been made without his knowledge.

<u>What did NFU 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 or given them substantially the same information. Here NFU didn't send Mr E the Scorpion insert – NFU has explained that where, as here, the transfer request was made via Origo, it wasn't NFU's practice to send a copy of the insert. Nor did NFU provide Mr E with substantially the same information. Instead NFU processed the transfer without ensuring that Mr E had been given any warnings.

NFU had a duty of care to Mr E to treat him fairly. NFU would've been well aware of the guidance and the pension industry's attempts to combat pension liberation scams at the time. NFU still had a duty to ensure their member was given appropriate warnings. The warnings contained in the insert should've been given somehow, and regardless of the involvement of the Origo platform. NFU could've given the warnings in the Scorpio insert in the run up to the transfer during which it looks like Mr E was in contact with NFU with a view to transferring. Alternatively, it could've been done as part of NFU's due diligence process. Either way would've been more in keeping with the substance of the Scorpion guidance *rather than sending nothing, just because of the method chosen to request the transfer.*

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 undertaken further due diligence and take appropriate action if it was apparent their customer might be at risk.

The Scorpion guidance at that time referred to six warning signs and said, if any one was present, then transferring firms needed to run through the checklist later in the guidance to find out more about the transfer. In this case the first warning sign the guidance refers to was present – that Mr E's SSAS was only recently registered. That wouldn't have been clear from Origo transfer request. Looking at the printout of the transfer request we've seen, it confirmed the SSAS was registered. But it didn't say when that was. But, in checking the SSAS was correctly registered – which NFU should've done, NFU would've identified that the SSAS was only recently registered.

Given this warning sign, I think it would have been fair and reasonable – and good practice – for NFU to have looked into the proposed transfer in more detail. The most reasonable way of going about that would've been to turn to the check list in the action pack to structure its due diligence into the transfer.

The check list provided a series of questions to help transferring schemes assess the potential threat by finding out more about the receiving scheme and how the consumer came to make the transfer request. Some items on the check list could have been addressed by checking online resources such as Companies House and HMRC. Others would have required contacting the consumer. The check list is divided into three parts (which I've numbered for ease of reading and not because I think the 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 or dormant employer, an employer that doesn't employ the transferring member or is geographically distant from them, or is the receiving scheme connected to an unregulated investment company?*
>
> *2. Description/promotion of the scheme*
> *Sample questions: Do descriptions, promotional materials or adverts of the receiving scheme include the words 'loan', 'savings advance', 'cash incentive', 'bonus', 'loophole' or 'preference shares' or allude to overseas investments or unusual, creative or new investment techniques?*
>
> *3. The scheme member*
> *Sample questions: Has the transferring member been advised by an 'introducer', been advised by a non-regulated adviser or taken no advice? Has the member decided to transfer after receiving cold calls, unsolicited emails or text messages about their pension? Have they applied pressure to transfer as quickly as possible or been told they can access their pension before age 55?*

Opposite each question, or group of questions, the checklist 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 an answer to any one single question on the check list which might have been construed as indicating there might be a problem wouldn't 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've been apparent to NFU and the limited information NFU had about the transfer, I think NFU should've conducted enquires across all three parts of the checklist, including contacting Mr E.

NFU has argued that Origo would've already completed due diligence checks on the receiving scheme's administrators so negating the need for it to do its own due diligence. However, NFU hasn't provided any details on what exactly Origo did in this respect. And I think that points to the problem here, which is that NFU relied on due diligence conducted by a third party even though it doesn't appear to have really known what that due diligence involved. Given the importance of what the due diligence in question was aimed at preventing – pension liberation, the end result of which can often be the loss of entire pension funds – and the clear steps that were expected of ceding schemes to prevent this happening, not to mention the duties of ceding schemes under PRIN and COBS 2.1.1R, I don't think NFU's approach was good enough here.

I note that, at the time of the transfer, Rowanmoor was a long established SSAS provider and had some repute in the industry. Rowanmoor Trustees Limited also had legal and fiduciary duties as a professional trustee. So there's an argument that NFU could've taken comfort from this. I disagree. The Scorpion guidance gave ceding schemes an important role to play in protecting customers wanting to transfer a pension. It would defeat the purpose of the Scorpion guidance for a ceding scheme to have delegated that role to a different business – especially one that had a vested interest in the transfer proceeding. An important aspect in this is the fact that there is little regulatory oversight of single member SSASs – they don't have to be registered with TPR. In the absence of that oversight, NFU was assuming, in effect, that Rowanmoor would want to maintain its standing in the industry and the trustee subsidiary would comply with its legal and fiduciary duties. In the context of guarding against pension scams – and an environment where providers and trustees clearly didn't always act as they should have done – I don't consider this to have been a prudent assumption.

The fact that a different part of the Rowanmoor Group was regulated by the FCA doesn't change my thinking on this. The key point is that Rowanmoor Trustees Limited wasn't FCA-regulated so I see no reason why it would have operated with FCA regulations and Principles in mind – or why its actions would have come under FCA scrutiny. As such, I'm not persuaded NFU could, reasonably, have derived sufficient comfort about the Rowanmoor SSAS as a destination for Mr E's transfer.

<u>What would NFU likely have found out?</u>

I've thought about what would've come to light if NFU had looked into the transfer. In looking into the nature/status of the receiving scheme, NFU would've found out that not only was the SSAS recently registered so was the sponsoring employer – the checklist suggests checking with Companies House. And I think Mr E would've told NFU that the company wasn't trading and, although he was the sole director, he wasn't employed by the company as such. I understand that at the time Mr E was working for a car insurance firm.

Enquiries under the second part of the checklist would've revealed, although Mr E hadn't been offered any cash incentive or bonus or loan, that the proposed investments were both overseas and were unusual or what might be termed non mainstream.

And, with reference to the third section, if NFU had asked Mr E about how the transfer had come about and how he'd become aware of the receiving scheme, I don't see any reason *why Mr E wouldn't have said that Stevenson Pride was involved and was driving the transfer and the investments. The checklist says that the ceding scheme should check whether any advisers are FCA registered and the web address for the FCA's online Register is given. It would've been very easy for NFU to have searched Stevenson Pride and found out that firm, although it had been an appointed representative of another firm, was no longer regulated or authorised by the FCA.*

I think NFU should've pointed that out to Mr E. And at the same time told him about the general prohibition in s.19 of FSMA (Financial Services and Markets Act 2000) which says that a person cannot carry out regulated activities in the UK unless they are authorised or exempt. Regulated activities include giving certain pension and investment advice. A person acting in contravention of s.19 will be guilty of a criminal offence. On balance, I think such a breach occurred here.

<u>Would the outcome have been any different?</u>

I've considered very carefully if the outcome would've been any different if NFU had warned Mr E about the transfer.

First, as I've said, NFU should've provided Mr E with the Scorpion insert (or given substantively the same warnings in a different way). We shared the Scorpion insert (the version at the time) with Mr E and asked him what he'd have thought if he'd got it. I bear in mind that it's some years after the event and it's impossible to say now with certainty what Mr E might have done differently. I don't regard what Mr E has said and which, to some degree, is with the benefit of hindsight and knowing now that the transfer resulted in the loss of his pension fund, as conclusive. I also bear in mind that the main thrust of the insert was 'pension liberation fraud', 'cashing' in a pension early and the offer of loans or cash incentives, none of which featured in Mr E's case.

But Mr E has said he thought the insert would've made him act more cautiously and that in particular two elements of the 'What to watch out for' section would've rung alarm bells – being approached out of the blue over the telephone and the fact that the adviser was pushy and said that it was a limited time opportunity and that Mr E needed to move fast to not miss out. And the 'Five steps to avoid becoming a victim' section referred to checking the adviser was registered with the FCA, particularly as the adviser was keen to move quickly. Mr E said he thought, if he'd seen the insert, it would've potentially changed his decision to transfer and so the disastrous outcome would've been avoided.

Mr E was contemplating transferring his pension – he'd started looking into that and so his situation wasn't quite the same as someone who receives a call, completely out of the blue, offering a review of their pension. And it seems his brother-in-law had transferred to a SIPP, although I don't have full details about that. So Mr E might've been more predisposed to transferring.

But his initial inclination seems to have been to consolidate his pensions with one of his existing providers. He was then presented with investment opportunities which appeared would deliver outstanding returns and significantly boost his retirement savings. I haven't seen anything to suggest Mr E was an experienced investor who'd have understood that higher returns generally meant higher risk. And, according to Mr E, the adviser said the investments were safe. I think Mr E was dependent on advice and would've accepted what the adviser said. I don't think Mr E would've appreciated that the investments were unusual, higher risk and illiquid.

I also note what Mr E has said about not realising the adviser wasn't authorised. If Mr E had seen the Scorpion insert I think it would've likely prompted him to check Stevenson Pride's *status by accessing the FCA Register. That firm had, until 2011, been an appointed representative of FCA registered firm. But by 2014 the firm was no longer an appointed representative nor was it registered in its own right. So it was unable to undertake regulated activities. I don't know exactly what the FCA's website said at the time. But the website today includes a very clear warning not to do business with a firm that's no longer an appointed representative.*

I think Mr E would've been concerned if he'd found out that the adviser wasn't authorised and that likely would've been enough for him to decide not to proceed. He understood he was getting regulated financial advice from an authorised adviser – someone who was fully trained, who'd passed financial examinations and was bound by the FCA's rules. His pension provision was important to him and the amounts he'd be investing were substantial. At the very least, I think he'd have wanted to check things out by taking advice from someone who was authorised as the insert recommended. I can't see, if he'd taken regulated advice, he'd have been advised to go ahead.

But, and even if the Scorpion insert wouldn't, on its own, have been enough to make Mr E check out Stevenson Pride, I've said NFU should've contacted Mr E anyway. And, amongst other things, told him, after checking the FCA Register, that Stevenson Pride wasn't regulated. In those circumstances Mr E would've definitely known about Stevenson Pride's unregulated status. And that Stevenson Pride shouldn't have been advising him in connection with his pension and investments and, if they had done so, that was in breach of the general prohibition in s.19 of FSMA and a criminal offence and so a very serious matter.

I think any concerns expressed by NFU – Mr E's existing, trusted and reputable pension provider – would've carried weight. I think NFU should've warned Mr E about Stevenson Pride. Even if he wouldn't have acted differently if he'd seen the Scorpion insert, I think he'd have taken seriously any indication from NFU that Stevenson Pride wasn't acting in his best interest. That would've made Mr E pause and consider things further. On balance, if NFU had acted as it should've done, I don't think Mr E would've gone ahead with the transfer and the investments. At the very least it would've prompted him to seek regulated financial advice. As I've said above, if he'd have done that, I can't see he'd have been advised to proceed.

<u>The cause of Mr E's loss</u>

I bear in mind that this 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 someone the information or advice to which they were 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, and as I've noted above, the Scorpion guidance was directed towards protecting people from the risk of pension liberation and that doesn't appear to have happened here. The loss was suffered because Mr E accepted unsuitable 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 Mr E has said) a case of seeking to cash in a pension 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 contact from an unauthorised business and involved the setting up of a new pension scheme to house the investments. 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 NFU'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'm satisfied there is sufficient connection between the harm Mr E wants to be compensated for and the risk that NFU had a duty to guard against. So I do consider it fair and reasonable for NFU to compensate Mr E for his losses.*

In summary, my view is that NFU should've done more to protect its member, Mr E. NFU should've undertaken its own due diligence in connection with the transfer and not relied on whatever due diligence had been undertaken by Origo and/or Rowanmoor (the latter having a vested interest in the transfer proceeding). If NFU had undertaken its own enquiries, given the warning sign I've identified above, NFU would've found out that there were other issues and, in particular, the involvement of an unregulated adviser. If NFU had shared with Mr E its concerns as to why his pension fund might be at risk I think that would've made Mr E think again and decide against proceeding with the transfer and investments. NFU could've prevented Mr E's losses so I think it's fair and reasonable for NFU to compensate Mr E for those losses.'

I went on to set out what NFU needed to do to redress Mr E.

Mr E didn't have any further comments. NFU didn't accept my provisional decision and instructed solicitors to respond. They said their focus was on whether it was credible for me to find that, had NFU conducted itself as I'd suggested, Mr E would've acted differently and avoided the losses he has suffered. I've summarised the points made below, using more or less the same headings.

<u>The nature of Mr E's assertions</u>

I'd referred in my provisional decision to what had been said on Mr E's behalf as if he'd made those comments himself. Mr E was represented by lawyers who framed their responses to suit their client's case. It was of concern that we didn't appear to be in receipt of direct evidence from Mr E. Sight of all the communications between us and Mr E/his representative was requested.

<u>The Akbuk Bay investment</u>

NFU was at a disadvantage, not having seen what had actually been said by Mr E or on his behalf but he seemed to be saying the Akbuk Bay investment was made without his knowledge. It followed that his complaint against NFU about that investment must fail, because his loss was caused by someone making the investment in his name but against his wishes, which would've presumably happened irrespective of the communications, due diligence or other steps NFU might've taken. I'd said I wasn't persuaded by what Mr E had said. But, if I thought he was telling an untruth about an important point, why would I believe him on other points, when his assertions are surprising and lack credibility?

<u>The status of the Adviser</u>

It seems Mr E didn't think about whether the adviser was authorised or not. He didn't ask the adviser who seems not to have asserted he was or wasn't connected with a regulated firm. I'd said Mr E's impression from the meetings was that everything was regulated although he accepted there was nothing on the paperwork to indicate that. So the question arose as to the basis on which Mr E had formed that impression. He'd said the adviser was pushy which was something that might cause concern yet it seems not to have worried Mr E at the time. Although I might conclude he likely wouldn't have transferred unless advised to do so, there was no evidence to suggest he was influenced by the adviser not being authorised. Mr E believed someone had fraudulently signed an investment in his name. Despite that he was content to proceed with it. It wasn't credible to suggest that being told the adviser wasn't authorised would've deterred Mr E from continuing with the investment.

What would've caused Mr E to act more cautiously?

Mr E's evidence was that two points on the '*What to watch out for*' section of the Scorpion insert would've rung alarm bells – being approached out of the blue and that the adviser was pushy, saying it was a limited time opportunity and Mr E needed to move fast to not miss out. But it was difficult to see, if NFU had communicated those points, that would've caused Mr E to change his mind because he knew about those matters at the outset. And it was maybe unlikely he'd been approached out of the blue. He'd been looking on the internet and he'd probably left his contact details on a website which resulted in him being contacted.

The role of Mr E's brother-in-law

The role of Mr E's brother-in-law should be considered in more detail. The evidence is sketchy but it seems Mr E wanted to transfer because that was what his brother-in-law had done. If Mr E had received warnings of the type I'd said should've been sent, the likelihood is that he'd have discussed the situation with his brother-in-law – his experience in taking out a SIPP is assumed to have been positive, otherwise it's difficult to see why Mr E wished to follow his example. Whether the brother-in-law had received advice and who from before he took out his SIPP was an essential line of enquiry.

The impact receiving information would've had on Mr E

Transferring schemes are often criticised for the measures they take to ensure their members are adequately protecting their own interests when considering a transfer. Delaying transferring funds while making enquiries or undertaking due diligence can result in losses through the member failing to purchase the investment at the desired time. NFU has examples of having been criticised for its attempts to follow guidance about the measures it should take to ensure that transfers don't expose its members to inordinate risk. Often the member and their advisers regard NFU's conduct as meddlesome and motivated by NFU wanting funds to remain with it. NFU seeks to manage the risks by providing factual information which doesn't overstate concerns. Had NFU communicated with Mr E directly, as it's suggested NFU should've done, it would've been made clear that the concerns it was raising were specifically in connection with the Scorpion guidance – and which, as I'd recognised, were aimed at tackling pension liberation and not about investments which are too risky for the member or about genuine investments advised on by someone who may not be authorised to give such advice.

Had NFU provided warnings in their proper context, about the risks of criminality, it's highly likely Mr E would've been assured that the investments were genuine. He only seems to have become concerned about Akbuk Bay in 2018, four years after he'd made the investment, on hearing that the resort hadn't been fully developed. And the Dolphin Capital investment seems to have only failed in 2020, some six years after Mr E's investment. On reading any communications from NFU, Mr E would've likely noted NFU's concerns, identified that the proposed investments were genuine and not fraudulent and then, with some justification, treated the Scorpion guidance as not relevant to his situation.

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.

Before I respond to the comments made on NFU's behalf, I'd point out that we shared our casefile with NFU's solicitors. We also asked about Mr E's discussions with his brother-in-law. Mr E said it wasn't an in depth conversation, more a passing comment. He'd referred to looking to amalgamate his pensions and his brother-in-law had said he had a SIPP. There was no detailed discussion, just that a SIPP was another type of pension platform and that the brother-in-law's financial adviser had said they were better for investments and flexibility. Mr E's impression was that the SIPP was already well established. There was no discussion about why it had been set up, if Mr E's brother-in-law was happy with it or if Mr E might be better off if he transferred to a SIPP. Nor, when Mr E was told he should have a SASS and not a SIPP, was that discussed.

NFU's solicitors had said their response should be treated as provisional pending sight of the communications requested which, as I've said, we shared. As we did with what was said about Mr E's brother-in-law's involvement. We haven't had any further comments.

I've paid particular attention to the comments made on behalf of NFU on my provisional decision. I agree that the key issue is whether, if NFU had done what I'd said it should've done, Mr E would've acted differently and avoided the losses he has suffered. Having carefully considered the points made on behalf of NFU, I'm not persuaded to depart from the views I expressed in my provisional decision. Essentially I think, if NFU had acted differently and as I consider it should've done, Mr E would've acted differently – he wouldn't have gone ahead.

As to Mr E's evidence, I've taken into account, in the same way as I would in any other case where a consumer is represented, what's been said on his behalf. We've also spoken to Mr E and the call recordings have been shared with NFU's representative. I'm aware as to who has said what and not distinguishing between comments made by Mr E and his representative was simply to make reading my provisional decision easier. Mr E's recollections aren't complete. I think that's understandable, given the time that's elapsed and which might also mean that some inconsistences are perhaps to be expected. And, in considering what Mr E might've done had things been dealt with differently, there won't be any direct evidence. I don't agree that I'm acting as his advocate or that my findings are made so I can uphold the complaint. Rather I've made findings, including as to what Mr E is likely to have done, on the balance of probabilities – that is what I consider is likely to have happened – based on such evidence as there is, some of which is conflicting and/or incomplete, and the wider circumstances.

As I noted in my provisional decision, Mr E had suggested the Akbuk Bay investment was made without his knowledge. The basis for Mr E thinking that was his belief that his signature had been forged. I don't know if that related to a single signature or if it was more widespread. But any forgery only came to light some years later. At the time, Mr E would've signed multiple documents in connection with the setting up of the SSAS, the transfer and making the investment in Akbuk Bay. It's possible that a later close examination of everything he signed could reveal some discrepancies. But I couldn't see the investment had been made without his knowledge. The transfer to the SSAS was driven by the fact that Mr E wanted to invest differently. It's clear he knew the SSAS would be invested in Akbuk Bay and Dolphin Capital – that's consistent with what he and his representative have told us and the SSAS application form records those were the intended investments. Mr E would've also received documents and statements subsequently from which he'd have seen that the Akbuk Bay investment had been made. I take the point about Mr E's credibility. But I don't think, even if my view is that Mr E is mistaken on one point, that must mean his evidence is wholly unreliable in all respects.

As to the unregulated status of the adviser, I think Mr E simply assumed that the adviser would've been regulated. I don't think it's unreasonable for a consumer to assume (in so far as they would consider it at all) that someone giving financial advice has the necessary qualifications and any necessary authority or registration to provide such advice. After all, there would seem little need for the Scorpion guidance if people always gave this area more thorough consideration. As such, I don't think anything can be read into Mr E proceeding with the transfer despite Stevenson Pride's unauthorised status other than Mr E was evidently unaware of this and the potential repercussions that could follow – shortfalls that NFU could've and should've, addressed.

Similar considerations apply to NFU's arguments about Mr E proceeding despite the adviser being pushy and the pressure put on him to not miss an investment opportunity. Yes, Mr E would have been aware of that at the time. But he wouldn't have been aware that this was unusual behaviour for an 'adviser' or behaviour that indicated his pension savings were being put in jeopardy.

Mr E did tell us that, if he'd seen the Scorpion insert, it would've rung some alarm bells with him, because he'd been approached out of the blue and the adviser had been pushy. I accept that the former may not have been exactly what happened – Mr E has told us he'd been thinking about amalgamating his pensions and it's possible he left his details on a website, or his browsing may have triggered the contact. But he does recall the adviser being pushy which is something the insert highlights as a possible warning sign. Mr E didn't see the insert because NFU didn't send it to him (which I think NFU should've done – or warnings along similar lines) but NFU's argument is that failure wouldn't have made any difference anyway as the insert wouldn't have prompted Mr E to act.

But, even if that's right, I don't think much turns on the Scorpion insert. I said, in my provisional decision, even if the Scorpion insert wouldn't have been enough to make Mr E check out Stevenson Pride, NFU should've contacted him anyway. And, if NFU had asked Mr E about how the transfer request had come about, he'd have told NFU that Stevenson Pride was involved. If NFU had checked it would've seen that firm wasn't authorised by the FCA. That should've prompted NFU to warn Mr E and point out to him that Stevenson Pride couldn't lawfully give regulated advice. I still think, for the reasons I gave in my provisional decision, that would've made Mr E think again about the transfer and I don't think he'd have gone ahead. And, as I've mentioned above, we've looked in more detail into the part played by Mr E's brother-in-law. I'm satisfied that his involvement was peripheral. So it isn't the case that Mr E would've insisted on proceeding because of his brother-in-law's experience or influence.

I don't disagree that sometimes, where a customer wants to transfer, steps taken by providers such as NFU may not be well received and may be perceived as stalling tactics or attempts to retain the customer and their funds. I said in my provisional decision that firms needed to take a proportional approach to transfer requests, balancing consumer protection with the need to execute a transfer promptly and in line with a member's statutory rights. I also agree that the Scorpion guidance at that time was aimed at pension liberation and scams rather than investments which may be too risky for the particular consumer.

NFU's point seems to be that, had NFU warned Mr E, he'd have been assured the investments were genuine. I agree, if Mr E had reverted to those advising him (Stevenson Pride), they'd have reassured him about the investments. But, if NFU had told Mr E that Stevenson Pride shouldn't have been advising him about transferring his existing pension so he could invest in Akbuk Bay and Dolphin Capital, I think that would've made him start to think about if what they were telling him he should do would really work out best for him. So it isn't the actual status of the investments that's the issue and whether they could properly be described as genuine or not. Rather it's knowing that the advising firm wasn't authorised and that they were acting unlawfully in giving advice. And it's that which, in my view, would've made a difference. I think that would give rise to serious questions as to whether someone who was prepared to act unlawfully was really likely to be acting in Mr E's best interests. I think he'd have lost trust and faith in those he'd been dealing with. Mr E may only have become concerned later about the investments. But I can't see he'd have gone ahead with the transfer and investments if he'd had any doubts at the time.

All in all I maintain the views set out in my provisional decision. I've set those out in full above and they form part of this decision. In summary, NFU could've and should've done more to protect its member, Mr E. Had NFU undertaken its own due diligence in connection with the transfer NFU would've found out about the involvement of an unregulated adviser. If NFU had shared with Mr E its concerns as to why that might mean his pension fund could be at risk, I think Mr E would've thought again and decided against proceeding with the transfer and investments. NFU could've prevented Mr E's losses so I think it's fair and reasonable for NFU to compensate Mr E for those losses.

For the reasons I've given I'm upholding the complaint. NFU should redress Mr E as I've set out below and which follows what I said in my provisional decision.

Putting things right – fair compensation

My aim is that Mr E should be put as closely as possible into the position he'd probably now be in if NFU had treated him fairly.

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

To compensate Mr E fairly, NFU must subtract the proportion of the actual value of the SSAS which originates from the transfer of the NFU pension, from the notional value if the funds had remained with NFU. If the notional value is greater than the actual value, there is a loss.

Actual value

This means the proportion of the SSAS value originating from Mr E's NFU transfer (the "**relevant proportion**") at the date of my Final Decision. To arrive at this value, any amount in the SSAS bank account is to be included, but any overdue administration charges yet to be applied to the SSAS should be deducted. Mr E may be asked to give NFU his authority to enable it to obtain this information to assist in assessing his loss, in which case I expect him to provide it promptly.

My aim is to return Mr E to the position he would have been in but for the actions of NFU. 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. Bearing in mind what I said in my provisional decision, this is likely to be the case for both the Dolphin and Akbuk investments. And I don't think it's realistically possible for NFU to only acquire a part of the investment from the SSAS as I'm only holding it responsible for the loss originating from a transfer in of the NFU funds. Therefore as part of calculating compensation:

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

- It’s also fair that Mr E should not be disadvantaged while he is unable to close down the SSAS. So to provide certainty to all parties, if these illiquid investments remain in the scheme, I think it’s fair that NFU must pay an upfront sum to Mr E equivalent to the relevant proportion of five years’ worth of future administration fees at the current tariff for the SSAS, to allow a reasonable period of time for the SSAS to be closed.

Notional value

This is the value of Mr E’s funds had he remained invested with NFU up to the date of my Final Decision.

NFU should ensure that the relevant proportion of any pension commencement lump sum or gross income payments Mr E received from the SSAS are treated as notional withdrawals from NFU on the date(s) they were paid, so that they cease to take part in the calculation of notional value from those point(s) onwards.

Payment of compensation

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

NFU should reinstate Mr E’s original pension plan as if its value on the date of my Final Decision was equal to the amount of any loss established from the steps above (and it performs thereafter in line with the funds Mr E was invested in).

NFU shouldn’t reinstate Mr E’s original plan if it would cause a breach of any HMRC pension protections or allowances – 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. It is for NFU to determine whether this is possible, but if NFU doesn’t consider this is possible, it should explain why.

If NFU is unable to reinstate Mr E’s pension and it is open to new business, it should set up a **new** pension plan with a value equal to the amount of any loss on the date of my Final Decision. The **new** plan should have features, costs and investment choices that are as close as possible to Mr E’s original pension.

If NFU considers that the amount it pays into a **new** plan is treated as a member contribution, its payment may be reduced to allow for any tax relief to which Mr E is entitled based on his annual allowance and income tax position. However, NFU’s systems will need to be capable of adding any compensation which doesn’t qualify for tax relief to the plan on a gross basis, so that Mr E doesn’t incur an annual allowance charge. If NFU cannot do this, then it shouldn’t set up a new plan for Mr E.

If it’s not possible to set up a new pension plan, NFU must pay the amount of any loss direct to Mr E. But if this money had been in a pension, it would have provided a taxable income. Therefore compensation paid in this way should be notionally reduced to allow for any income tax that would otherwise have been paid. (This is an adjustment to ensure that Mr E isn’t overcompensated – it’s not an actual payment of tax to HMRC.)

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

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

If payment of compensation is not made within 28 days of NFU receiving Mr E’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 NFU deducts income tax from the interest, it should tell Mr E how much has been taken off. NFU should give Mr E a tax deduction certificate in respect of interest if Mr E asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

This interest is not required if NFU is reinstating Mr E’s plan for the amount of the loss – as the reinstated sum should, by definition, mirror the performance after the date of my Final Decision of the funds in which Mr E was invested.

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

My final decision

I uphold the complaint. The National Farmers’ Union Mutual Insurance Society Limited must redress Mr E as I’ve set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr E to accept or reject my decision before 28 August 2024.

Lesley Stead
Ombudsman