DRN-4964870

Financial Ombudsman Service

The complaint

Mr E has complained, with the help of a professional third party, about the transfer of his Zurich Assurance Ltd personal pension to a small self-administered scheme ('SSAS') in June 2016. Mr E's SSAS was subsequently used to invest in Dolphin Capital loan notes. The investment now appears to have little value. Mr E says he has lost out financially as a result.

Mr E also transferred pension benefits to the SSAS from another provider, which I'll call 'Firm S', at around the same time. A separate complaint has been lodged about that transfer. While this decision will only look at the transfer from Zurich, some of the circumstances of the transfer from Firm S are relevant to this complaint. And so, I'll refer to them where necessary.

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

What happened

Mr E says he was cold called by Genie Financial Services ('GFS') in 2016. GFS was previously registered with the Financial Conduct Authority ('FCA') as an appointed representative of another business. But this registration had ended in January 2014. Mr E says GFS put him in touch with another business, John Charles Property Investments Limited ('JCPI'). JCPI was not authorised or regulated by the FCA.

In March 2016, a company was incorporated with Mr E as director. I'll refer to this company as E Ltd

On 10 May 2016, Whitehall Group (UK) Limited ('WGL') emailed Mr E. It said it was following up on his recent discussions with JCPI and understood he was interested in establishing a SSAS and investing with Dolphin Trust (Dolphin Capital). WGL said *"I understand that you are not receiving financial advice from a Financial Conduct Authority approved adviser concerning the SSAS, please note that we do not offer advice as to the suitability of this product or in respect of the underlying investments and assets which are held within it."* It said it strongly recommended he obtain regulated advice and provided a link to a service that could provide details of independent financial advisers local to Mr E. It added *"Where a SSAS is established without advice from a financial adviser, I must stress that we operate the pension scheme on the basis that you are a direct client who is fully aware of the nature of the pension scheme and the costs associated with it. There is therefore no Financial Services Compensation Scheme protection in respect of any decisions regarding the establishment of the SSAS and any payments or pension transfers made to it or any non-FCA regulated investments to be made by it."*

WGL went on to say it had enclosed information about its SSAS services, it set out some information about fees and explained that administration of the SSAS was carried out by

WGL, with its trustee company Whitehall Trustees Limited (‘WTL’) acting as professional trustees. It set out the documents that were required for a SSAS to be established.

WTL was not and hadn’t at any stage been FCA regulated. WGL was shown on the FCA register as previously being authorised as an Introducer Appointed Representative of another business. But its registration had ceased in February 2013.

On 17 May 2016, JCPI wrote to WGL on behalf of Mr E enclosing application paperwork to establish the SSAS.

WGL wrote to Mr E on 19 May 2016 thanking him for his application to set up a SSAS and confirming this had been done and it was applying to HMRC for registration. The letter went on to again say *“We understand you have not received advice from a financial adviser who is authorised and regulated by the Financial Conduct Authority regarding the establishment of the SSAS and any payments or pension transfers made to it or any investments to be made by it. There is therefore no Financial Services Compensation Scheme protection in respect of any of these decisions. If this does not match your understanding please let me know as soon as possible.”* And WGL then again explained *“Please note that we do not offer advice as to the suitability of this product or in respect of the underlying investments and assets which are held within it. If you are in any doubt about the suitability of any aspect of this product, we strongly recommend that you obtain independent financial advice.”* With it again providing the link to where Mr E could find details of local independent financial advisers.

A SSAS was then established with E Ltd as the principal company and WTL as the trustee.

I can see that WGL wrote to both Zurich and Firm S on 20 May 2016. It said it acted as co-trustee and administrator of the SSAS, it enclosed its transfer discharge instruction, signed by Mr E, and asked that payment of the transfer value now be made.

Zurich responded to WGL on 26 May 2016, providing its standard transfer pack. It was noted in its covering letters that its policy was not to complete forms belonging to other businesses.

WGL returned the completed Zurich forms on 13 June 2016.

WGL wrote to Firm S on 15 June 2016, providing evidence that the SSAS had been registered with HMRC.

On 21 June 2016, Zurich wrote to WTL and Mr E, confirming it had transferred £33,223.77, representing the value of Mr E’s pension benefits held with it, to the SSAS. Firm S confirmed it had transferred the pension benefits Mr E held with it, totalling just under £12,000 to the SSAS on 23 June 2016. Mr E was 52 at the time.

In July 2016, £42,000 was invested in Dolphin Capital loan notes. Dolphin (now called German Property Group) was a German business which offered high yielding Loan Note investments. Its underlying business was described as the renovation of derelict properties to provide residential accommodation. The loan note offer from 2016 explained that this was a two year loan note, paying 10% interest per annum. In June 2018, Mr E signed a letter confirming he authorised WGL to pay the reinvestment fee charged by JCPI. And Dolphin Capital confirmed that £49,123.00, being the amount previously invested plus interests, had been re-invested in a five-year loan note, maturing in 2023, again paying a fixed 10% interest per annum.

Dolphin is now in insolvency proceedings in Germany having collapsed in 2020 owing significant amounts to investors. I can see that WGL sent Mr E several letters throughout

2020 explaining the updates it had received from Dolphin and that it had entered insolvency proceedings. There has been a total loss on all non-matured Loan Notes following it entering insolvency.

In January 2022, Mr E complained to Zurich with the help of his professional representative. Initially they said Zurich had failed to check that Mr E had received appropriate regulated advice, which was a requirement when transferring pension benefits greater than £30,000 from a defined benefit pension scheme. But he'd been advised to transfer by an unregulated business, JCPI.

Zurich said that Mr E's personal pension was not a defined benefit scheme. So, it did not agree with the complaint made.

Mr E's representative acknowledged on review that the pension was not a defined benefit scheme. But it said Mr E still felt Zurich hadn't acted as it should've done. Briefly, Mr E thought Zurich ought to have spotted, and told him about, a number of warning signs in relation to the transfer, including (but not limited to) the following: the SSAS and sponsoring employer were newly registered, Mr E had been cold called by an unregulated introducer and had been advised to transfer by an unregulated business.

Zurich didn't uphold the complaint. It said Mr E had exercised his right to transfer and had signed the application to do so. It noted that WGL and WTL remained active companies providing administration and trustee services. So, it didn't think it had done anything wrong.

The complaint was referred to the Financial Ombudsman Service. It was considered by one of our Investigators, but they were unable to resolve the dispute informally. As a result, the matter was passed to me to decide.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

While doing so I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time.

I'd note that Zurich's representative, which responded to our Investigator's opinion on its behalf, has said there is a lack of documentary evidence in relation to some of Mr E's arguments. But Mr E's testimony, supplied via his representative, is evidence which I've considered. And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

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

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

- Principle 2 – A firm must conduct its business with due skill, care and diligence;

- Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly;

- Principle 7 – A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading; and

- COBS 2.1.1R (the client's best interests rule), which states that a firm must act honestly, fairly and professionally in accordance with the best interests of its client.

In February 2013, The Pensions Regulator ('TPR') issued its Scorpion guidance – so called because of the imagery used in the campaign – to help tackle the increasing problem of pension liberation, the process by which unauthorised payments are made from a pension (such as accessing a pension below minimum retirement age). In brief, the guidance provided a due diligence framework for ceding schemes dealing with pension transfer requests and some consumer-facing warning materials designed to allow members decide for themselves the risks they were running when considering a transfer.

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

The FSA's endorsement of the Scorpion guidance was relatively informal: it didn't take the form of Handbook Guidance, because it was not issued under s.139A of the Financial Services and Markets Act ('FSMA'), which enabled the FSA to issue guidance provided it underwent a consultation process first. Nor did it constitute "confirmed industry guidance", as can be seen by consulting the list of all such FSA/FCA guidance on its website. So the content of the Scorpion guidance was essentially informational and advisory in nature. Deviating from it doesn't therefore mean a firm has necessarily broken the Principles or COBS rules. Firms were able to take a proportionate approach to transfer requests, balancing consumer protection with the need to also execute a transfer promptly and in line with a member's right to transfer.

That said, the launch of the Scorpion guidance in 2013 was an important moment in so far 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.

The Scorpion guidance was updated in July 2014. It widened the focus from pension liberation specifically, to pension scams more generally – which included situations where someone transferred in order to benefit from "too good to be true" investment opportunities such as overseas property developments. An example of this was given in one of the action pack's case studies.

In a similar vein, in April 2014 the FCA had also started to voice concerns about the different types of pension arrangements that were being used to facilitate pensions scams. In an announcement to consumers entitled "Protect Your Pension Pot" the increase in the use of SIPPs and SSASs in pensions scams was highlighted, as was an increase in the use of unregulated and/or illiquid investments. The FCA further published its own factsheet for consumers in late August 2014. It highlighted the announcement to insurers and advisers in a regulatory round-up published on its website in September 2014.

There was a further update to the Scorpion guidance in March 2015. This guidance referenced the potential dangers posed by "pension freedoms" (which was about to give people greater flexibility in relation to taking pension benefits) and explained that pension scams were evolving. In particular, it highlighted that single member occupational schemes were being used by scammers.

At the same time, a broader piece of guidance was initiated by an industry working group covering both TPR and FCA regulated firms: the Pension Scams Industry Group (PSIG) Code of Good Practice. The intention of the PSIG Code was to help firms achieve the aims of the Scorpion campaign in a streamlined way which balanced the need to process transfers promptly with the need to identify those customers at material risk of scams.

The Scorpion guidance for businesses was updated again in March 2016. This said business should direct members to the government's Pension Wise website and reiterated the recommendation for businesses to use TPR's checklist and carry out due diligence on all transfer requests. And it said business should communicate any suspicions to consumers, record these and direct consumers to TPAS.

The Scorpion guidance

The March 2015 update to the Scorpion guidance asked schemes to ensure they provided their members with "regular, clear" information on how to spot a scam. It recommended giving members that information in annual pension statements and whenever they requested a transfer pack. It said to include the pensions scam "leaflet" in member communications. The March 2016 update to the Scorpion guidance set out how business could protect members from falling victim to scams. And the first step listed was to read and share TPR's scams booklet for consumers. Directing members to TPR's information was also repeated separately.

In the absence of more explicit direction, I take the view that the member-facing Scorpion warning materials were to be used in much the same way as previously, which is for the shorter insert (which had been refreshed in March 2015) to be sent when someone requested a transfer pack and the longer version (which had also been refreshed) made available when members sought further information on the subject.

When a transfer request was made, transferring schemes were also asked to use a three-part checklist to find out more about a receiving scheme and why their member was looking to transfer.

The PSIG Code of Good Practice

The PSIG Code was voluntary. But, in its own words, it set a standard for dealing with transfer requests from UK registered pension schemes. It was "welcomed" by the FCA and the Association of British Insurers (amongst others). And several FCA regulated pension providers were part of the PSIG and co-authored the Code. So much of the observations I've made about the status of the Scorpion guidance would, by extension, apply to the PSIG Code. In other words, personal pension providers didn't necessarily have to follow it in its entirety in every transfer request and failure to do so wouldn't necessarily be a breach of the regulator's Principles or COBS. Nevertheless, the Code sets an additional benchmark of good industry practice in addition to the Scorpion guidance.

In brief, the PSIG Code asked schemes to send the Scorpion "materials" in transfer packs and statements, and make them available on websites where applicable. The PSIG Code goes on to say those materials should be sent to scheme members directly, rather than just to their advisers.

Like the Scorpion guidance, the PSIG Code also outlined a due diligence process for ceding schemes to follow. However, whilst there is considerable overlap between the Scorpion guidance and the PSIG Code, there are several differences worth highlighting here, such as:

- The PSIG Code includes an observation that: "*A strong first signal of [a scam] would be a letter of authority requesting a company not authorised by FCA to obtain the required pension information; e.g. a transfer value, etc*." This is a departure from the Scorpion guidance which was silent on whether anything could be read into the entity seeking information on a person's pension.

- The Code makes explicit reference to the need for scheme administrators to keep up to date with the latest pension scams and to use that knowledge to inform due diligence processes. Attention is drawn to FCA alerts in this area. (I noted the contents of some of those alerts earlier in my decision.)

- Under the PSIG Code, an 'initial analysis' stage allows transferring schemes to fast-track a transfer request without the need for further detailed due diligence, providing certain conditions are met. No such triage process exists in the Scorpion guidance.

- The PSIG Code splits its later due diligence process by receiving scheme type: larger occupational pension schemes, SIPPs, SSASs and QROPS. The Scorpion guidance doesn't distinguish between receiving scheme in this way – there's just the one due diligence checklist which is largely (apart from a few questions) the same whatever the destination scheme.

TPR began referring to the Code as soon as it was published, in the March 2015 version of the Scorpion action pack. Likewise, the PSIG Code referenced the Scorpion guidance and indicated staff dealing with scheme members needed to be aware of the Scorpion materials.

Therefore, in order to act in the consumer's best interest and to play an active part in trying to protect customers from scams, I think it's fair and reasonable to expect ceding schemes to have paid due regard to both the Scorpion guidance and the PSIG Code when processing transfer requests. Where one differed from the other, they needed to consider carefully how to assess a transfer request taking into account the interests of the transferring member. Typically, I'd consider the Code to have been a reasonable starting point for most ceding schemes because it provided more detailed guidance on how to go about further due diligence, including steps to potentially fast-track some transfers which – where appropriate – would be in the interest of both parties.

The considerations of regulated firms didn't start and end with the Scorpion guidance and the PSIG Code. If a personal pension provider had good reason to think the transferring member was being scammed – even if the suspected scam didn't involve anything specifically referred to in either the Scorpion guidance or the Code – then its general duties to its customer as an authorised financial services provider would come into play and it would have needed to act. Ignoring clear signs of a scam, if they came to a firm's attention, or should have done so, would almost certainly breach the regulator's principles and COBS 2.1.1R.

The circumstances surrounding the transfer: what does the evidence suggest happened?

Mr E says he was cold called by GFS and introduced to JCPI. He says JCPI recommended that he set up the SSAS and invest with Dolphin as he'd receive better returns than his existing scheme offered. He says he wasn't offered incentives to transfer or told he could access his pension early. Mr E said he hadn't considered transferring previously and, while he did have some doubts, information online about the companies led him to believe they were professional. He says at no point were the potential risks of the transfer discussed. And he says he didn't receive any warnings from Zurich, including the Scorpion leaflet, and believes if he had been provided this information he would've sought input from the services it listed (such as TPAS) and wouldn't have transferred.

I haven't seen anything to indicate Mr E was an experienced investor. Nor have I seen anything about his circumstances or what he's said that leads me to think he'd likely have embarked on such a complicated arrangement on his own – setting up a new company, opening a SSAS, transferring his existing pension and investing overseas. So, I think he was likely introduced to this idea by someone. Mr E has said he hadn't thought about moving his pension previously, and I haven't seen anything to dispute this. And as a result, I have no reason to doubt what Mr E has said – that he was cold called.

Zurich's representative says there is no documentary evidence of GFS' involvement – the business that Mr E says called him and introduced him to JCPI. So, they therefore question whether GFS was involved. While there might be no documents bearing GFS' name, in my experience this isn't unusual where introducers, particularly unregulated ones, have been involved in pension transfers. And, as I've explained, Mr E's testimony is evidence. And I don't see what Zurich's representative thinks Mr E stands to gain from mentioning GFS if they were not involved. GFS were not FCA regulated at the time. But neither were JCPI or WGL / WLT. So, no matter which business contacted Mr E, none were authorised to advise him to transfer his pension. And again therefore, I don't have any reason to doubt Mr E that he was cold called by GFS and that this business acted as an introducer.

Mr E has said that he was told he'd receive better returns by investing in Dolphin than his Zurich pension would pay. And this was what persuaded him to transfer. All the Dolphin documents I've seen talk about guaranteed returns of 10%. I think it's reasonable to believe that these were emphasised prominently to Mr E as a reason that transferring was a good idea. And I think the emphasis of returns under the new arrangement being better than those the Zurich pension would provide seems to have represented comparing the prospective benefits of the two schemes and suggesting the new scheme was more beneficial – which I think represented advice. Zurich's representative has said that no copies of written advice has been provided. But that doesn't mean that Mr E was not verbally advised to transfer. On balance, I think he likely was and that, more importantly, if he'd been asked at the time whether he'd been advised, he'd have said yes.

WGL / WLT's email and letter acknowledging the SSAS application explained that it did not offer advice on the suitability of the transfer. And its involvement began when the application for the SSAS was submitted, which indicated an investment in Dolphin had already been decided on. So, I'm satisfied WGL / WLT didn't advise Mr E.

I've seen evidence of JCPI's involvement in the transfer. It submitted the application to open the SSAS to WGL and Mr E completed a letter of authority as part of that application, authorising WGL to provide any information required to JCPI. WGL's acknowledgments of that application said that Mr E had discussed setting up the SSAS and investing with Dolphin with JCPI. And the authorisation Mr E signed to reinvest in Dolphin after the expiry of the initial two-year loan also named JCPI and agreed to the payment of its fee. So, I'm satisfied on balance that Mr E did speak to JCPI as part of the application to transfer and that it remained involved throughout, given it still had some involvement a couple of years later when the reinvestment took place.

Zurich's representative has said they believe it is implausible that JCPI advised Mr E to transfer as it is still trading, which would likely not be the case if it was perpetrating scams. But I don't agree that JCPI still trading, means that it didn't advise Mr E to transfer and invest in Dolphin (a business operating, albeit overseas, in the same industry that Companies House records suggests JCPI was involved in – 'development of building projects'). And on balance I think JCPI did likely recommend that Mr E transfer and that, if asked, he'd have said that he understood it had advised him.

But I also think it is likely that Mr E was aware that JCPI was not FCA regulated. The email and letter that WGL sent to Mr E acknowledging his application for a SSAS said that it understood he hadn't received FCA regulated advice, and to let it know if he understood differently. I can't see that Mr E disagreed with this statement. So, I think this indicates he was aware that the advice he'd taken wasn't FCA regulated. I'll discuss this further below.

I also think Mr E is correct that he has likely incurred losses to his pension savings. As I've said, Dolphin is in insolvency proceedings and all non-matured loan notes at the point it collapsed in 2020 (which included Mr E's reinvested loan) have suffered a total loss. So, Mr E's investment is likely to have no value.

<u>What did Zurich 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.

I haven't seen any evidence that Zurich corresponded directly with Mr E or sent him the Scorpion leaflet.

Zurich says its process was to include the up-to-date Scorpion leaflet when sending transfer packs. And so, it says the Scorpion insert would have been included in the information it sent to WGL on 26 May 2016.

Notwithstanding that the pack makes no reference to the Scorpion insert or to Mr E being directed to read it, which weakens its argument as to whether it was sent, WGL was an unregulated third party that stood to benefit from the transfer. The purpose of issuing the Scorpion materials was so that consumers could see, for themselves, the risks involved with such transfers. So, I don't think Zurich relying on a party, who might have a vested interest in not sharing the information, providing the relevant information to Mr E was pragmatic. And the PSIG Code made the following point under section 6.1 (Transfer packs), "*If a transfer pack is not being sent to a member directly, pension scam awareness material should still be sent to the member's home address*". I think that this is a reasonable action to expect of Zurich even if the Code (which Zurich helped to draft) hadn't been so specific on this point. To do otherwise places an unreasonable trust in third parties to share the information with members.

As a result, I don't think I can reasonably say that this information was shared with Mr E by Zurich and so it failed to make him aware of the scam risks that were considered good industry practice at the time.

I also haven't seen anything to show that Firm S provided Mr E the Scorpion information when dealing with his transfer request. Mr E's representatives made a data subject access request to Firm S as part of lodging a complaint with it. And they have provided us a copy of the information they received in response. This didn't contain any letters to Mr E at the time of the transfer request. Rather, like Zurich, Firm S seems to have only corresponded with WGL. And none of the letters it sent to WGL referred to the Scorpion insert being included.

Due diligence:

As explained above, I consider the PSIG Code to have been a reasonable starting point for most ceding schemes. I've therefore considered Mr E's transfer in that light. But I don't think it would make a difference to the outcome of the complaint if I had considered Zurich's actions using the Scorpion guidance as a benchmark instead.

Based on what it has said in response to the complaint Zurich seems to have relied on WGL / WLT administering the SSAS, allowing the application to be fast tracked under the initial analysis section of the PSIG code. And it has indicated this is because WGL and WLT was an "*established and respected SSAS provider*". But I don't agree that this ought to have provided sufficient comfort for Zurich to undertake no further due diligence.

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 SSASs like this; they don't have to be registered with TPR and neither entity was FCA regulated. In the absence of that oversight, Zurich was assuming, in effect, that WGL / WLT would want to maintain its standing in the industry and the trustee subsidiary would comply with its legal and fiduciary duties. And as neither were FCA regulated, I see no reason why they would have operated with FCA regulations and principles in mind. So, 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 these to have been prudent assumptions by Zurich.

The PSIG Code allowed for firms to fast-track transfer requests from an accepted club or group. I've considered whether Zurich's view of WGL / WLT's involvement may have been equivalent to considering this transfer request as coming from a recognised 'club' or group, which was one of the initial filter questions for transfers at low scam risk under the PSIG Code. But the example PSIG gave of a recognised club or group was an association of pension schemes: the Public Sector Transfer Club. This was mostly large schemes in the public sector who would be making transfers between each other on a regular basis. It would be relatively unusual to be making a transfer to a scheme which had recently joined that club, and understandably some comfort could be drawn from that. I don't think the same would apply to a recently established SSAS, even if the scheme administrators were known.

Zurich hasn't provided evidence of any wider due diligence it carried out in respect of WGL / WLT that would lead me to think it could reasonably have "white listed" them, bearing in mind section 6.11 of the PSIG Code which required businesses to have in place robust processes to manage such lists. And the transfer was to E Ltd's SSAS, which was the recently established SSAS of a newly incorporated company which Zurich could have had no previous knowledge about to allow it to fast-track the due diligence process.

So, for those reasons I don't agree that the "accepted club" or "white list" parts of the "Initial analysis" section of the PSIG Code are applicable here. So, the initial triage process should have instead led to Zurich asking Mr E further questions about the transfer as per Section 6.2.2 ("Initial analysis – member questions"). I won't repeat the list of suggested questions in full. Suffice to say, at least three of them would have been answered "yes":

- Did receiving scheme/adviser or sales agents/representatives for the receiving scheme make the first contact (e.g. a cold call)?

- Have you been promised a specific/guaranteed rate of return?

- Have you been informed of an overseas investment opportunity?

Under the Code, further investigation should follow a “yes” to any question. The nature of that investigation depends on the type of scheme being transferred to. The SSAS section of the Code (Section 6.4.3) points to the following as being potential areas of concern:

a) Employment link: a lack of an employment link to any member of the SSAS.

b) Geographical link: a sponsoring employer that is geographically distant from the member.

c) Marketing methods: a SSAS being marketed through a cold call or an unsolicited approach.

d) Provenance of receiving scheme: a SSAS registered within the previous six months or a recently registered sponsoring employer or administrator operating from ‘virtual’ offices, or using PO Boxes for correspondence purposes.

Underneath each area of concern, the Code set out a series of example questions to help scheme administrators assess the potential risk facing a transferring member.

Not every question would need to be addressed under the Code. Indeed, the Code makes the point that it is for scheme administrators to choose the most relevant questions to ask (including asking questions *not* on the list if appropriate). But the Code makes the point that a transferring scheme would typically need to conduct investigations into a “wide range” of issues to establish whether a scam was a realistic threat. With that in mind, and given the relatively limited information it had about the transfer, I think in this case Zurich should have addressed all four sections of the SSAS due diligence process and contacted Mr E to help with that.

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

In addition to the warning signs Zurich should have become aware of, which I discussed above, it would also have known that the E Ltd SSAS had only recently been established and registered with HMRC. With a straightforward check of the information on Companies House, Zurich would’ve learned in addition that E Ltd had only recently been established. And I think with some simple questions directed to Mr E it would also have learned that, although a director of E Ltd, Mr E doesn’t appear to have been employed by it.

I also think, on balance, Mr E would have told Mr E that JCPI had recommended that he transfer and invest in Dolphin Capital. Again, I don’t have any reason to doubt that he had been cold called and I don’t think he’d have sought to enter into this rather complicated arrangement without having been advised to do so. He’s been consistent in his argument that JCPI advised him and as I’ve already explained, JCPI was clearly involved in the transfer process.

Being *advised* by an unauthorised firm to transfer benefits from a personal pension plan would have been a breach of the general prohibition imposed by FSMA, which states no one can carry out regulated activities unless they’re authorised or exempt. Anyone working in this field should have been aware that financial advisers need to be authorised to give regulated advice in the UK. The PSIG Code (and the Scorpion guidance) make much the same point. Indeed, the PSIG Code says firms should report individuals appearing to give regulated advice that aren't authorised to do so. My view is that, on learning about it, Zurich should have been concerned by JCPI's involvement because it pointed to a criminal breach of FSMA. And on the balance of probabilities, I'm satisfied such a breach occurred here.

I do note that WGL's correspondence with Mr E when it received the SSAS application said it understood he hadn't received FCA regulated advice. And it said he'd be treated as a direct client and wouldn't benefit from FSCS protections. Mr E doesn't appear to have disputed this statement – that he hadn't received regulated advice. And I've thought about whether this means Mr E, at the time, didn't think he'd been advised. But I note the correspondence didn't say WGL understood he hadn't received advice or a recommendation at all – just that this wasn't from a regulated business.

I haven't seen anything that suggests in correspondence with Mr E that JCPI purported to be an FCA regulated business. And so, on balance I think this information indicates Mr E was aware that JCPI was not regulated, but not that it hadn't recommended that he transfer. So, I'm still of the opinion he'd have identified JCPI as having advised him if asked. And I haven't seen anything that leads me to think Mr E, as an inexperienced investor, *fully* understood the significance of JCPI not being FCA regulated. He didn't receive any warnings about this from Zurich or Firm S, from what I've seen. And, although WGL had said it recommended he seek regulated advice and that without it he wouldn't benefit from FSCS protection, there wasn't any accompanying commentary or explanation which explained that a business providing unregulated advice was potentially acting illegally.

<u>What should Zurich have told Mr E – and would it have made a difference?</u>

Had it done more thorough due diligence, there would have been a number of warnings Zurich could have given to Mr E in relation to a possible scam threat as identified by the PSIG Code (and the Scorpion action pack). Zurich should also have been aware of the close parallels between Mr E's transfer and the warnings the FCA gave to consumers in 2014 (and subsequently passed on to firms) about transferring to SSASs in order to invest in unusual investments. But the most egregious oversight was Zurich's failure to uncover the threat posed by a non-regulated adviser. Its failure to do so, and failure to warn Mr E accordingly, meant it didn't meet its obligations under PRIN and COBS 2.1.1R.

Again, I'm satisfied the evidence suggests that Mr E was aware that JCPI was not regulated. But with Zurich's obligations in mind, I think it would have been appropriate for it to have informed Mr E that using an unregulated adviser could put his pension at risk. Zurich should have said only authorised financial advisers are *allowed* to give advice on personal pension transfers, something I can't see that was drawn to Mr E's attention by any of the parties involved, so he risked falling victim to illegal activity.

I don't think this would have been a disproportionate response given the scale of the potential harm Mr E was facing and Zurich's responsibilities under PRIN and COBS 2.1.1R. And I don't think any such warnings would reasonably have caused Zurich to think it was running the risk of advising Mr E, that it was replicating the responsibilities of the receiving scheme or that it was putting in place unnecessary barriers to exit.

WGL's correspondence with Mr E had explained that, without regulated advice, he would potentially lose FSCS protection. Which doesn't appear to have dissuaded him from proceeding. But there was no indication that JCPI was potentially acting illegally or that I think would have led him to question the motivations for the advice. Whereas if Zurich had explained that he was potentially falling victim to illegal activity, I'm satisfied any messages along these lines would have changed Mr E's mind about the transfer. The messages would have followed conversations with Mr E so would have seemed to him (and indeed would have been) specific to his individual circumstances and would have been given in the context of Zurich raising concerns about the risk of losing pension monies as a result of untrustworthy advice. Again, I think Mr E is likely to have been aware that JCPI was unregulated. But the messages from Zurich would have made Mr E aware that there were serious risks in using an unregulated adviser – which he doesn't appear to have been informed of previously. I think the gravity of any messages along these lines would prompt most reasonable people to rethink their actions. And I think it would have led Mr E to question whether JCPI was acting in his interests. So, I consider that if Zurich had acted as it should, Mr E wouldn't have proceeded with the transfer out of his personal pension.

Zurich's representative argued that it shouldn't be held responsible for losses stemming from the reinvestment of Mr E's pension into a second loan note with Dolphin. But if the transfer to the SSAS hadn't taken place, none of the investments in Dolphin would have occurred and Mr E would not have been acting on advice from JCPI. So, I don't agree that this loss does not stem from the transfer. And so, I uphold Mr E's complaint.

Putting things right

Fair compensation

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

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

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

Actual value

This means the proportion of the SSAS value originating from Mr E's Zurich 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 Zurich his authority to enable it to obtain this information to assist in assessing his loss, in which case I expect him to provide it promptly.

My aim is to return Mr E to the position he would have been in but for the actions of Zurich. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. On the basis of the evidence I have, that is likely to be the case with the Dolphin Capital investment, given the company having entered insolvency proceedings. And I don't think it's realistically possible for Zurich to only acquire a part of the investment from the SSAS as I'm only holding it responsible for the loss originating from a transfer in of the Zurich funds. Therefore as part of calculating compensation:

- Zurich must give the illiquid investment(s) a nil value as part of determining the actual value. In return Zurich 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. Zurich will need to meet any costs in drawing up the undertaking. If Zurich 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 investment(s) remain in the scheme, I think it's fair that Zurich 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 Zurich up to the date of my Final Decision.

Zurich 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 Zurich on the date(s) they were paid, so that they cease to take part in the calculation of notional value from those point(s) onwards.

Payment of compensation

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

Zurich 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).

Zurich 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 might be possible for it to reinstate a pension it formerly administered in order to rectify an administrative error that led to the transfer taking place. It is for Zurich to determine whether this is possible.

If Zurich is unable to reinstate Mr 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 Zurich considers that the amount it pays into a **new** plan is treated as a member contribution, its payment may be reduced to allow for any tax relief to which Mr E is entitled based on his annual allowance and income tax position. However, Zurich's systems will need to be capable of adding any compensation which doesn't qualify for tax relief to the plan on a gross basis, so that Mr E doesn't incur an annual allowance charge. If Zurich 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, Zurich 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 during retirement. Therefore compensation paid in this way should be notionally reduced to allow for the marginal rate of income tax that would likely have been paid in future when Mr E is retired. (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 Zurich receiving Mr E’s acceptance of the Final Decision, interest must be added to the compensation at the rate of 8% per year simple from the date of the Final Decision to the date of payment.

Income tax may be payable on any interest paid. If Zurich deducts income tax from the interest, it should tell Mr E how much has been taken off. Zurich 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 Zurich 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. However, I expect any such reinstatement to be achieved promptly.

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

My final decision

For the reasons given above, I uphold this complaint. Zurich Assurance Ltd must now put things right in line with the approach 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 18 April 2025.

Ben Stoker
Ombudsman