DRN-5108407

The complaint

Mr R has complained about a transfer of his Scottish Equitable Plc trading as AEGON personal pension to a small self-administered scheme (SSAS[1]) in April 2015. Mr R's SSAS was subsequently used to invest in overseas commercial property developments. The investments now appear to have little value. Mr R says he has lost out financially as a result.

Mr R says Scottish Equitable failed in its responsibilities when dealing with the transfer request. He says 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 R says he wouldn't have transferred, and therefore wouldn't have put his pension savings at risk, if Scottish Equitable had acted as it should have done.

What happened

Mr R held two personal pension plans: one with Scottish Equitable and another with a company I'll call provider B.

Mr R says that a company called Roseland Mill Limited cold called him offering a free pension review. Its representative then visited him and recommended he invest in Dolphin Capital loan notes and in the Unity Bay resort. The loan notes were a form of investment in companies developing properties in Germany. The investments were intended to pay back the capital invested plus fixed rate returns of 10% a year over a set period of time. Unity Bay was a hotel development offered by the Akbuk Resort Group in Turkey.

Mr R told us the investments seemed safe and appeared a realistic opportunity to achieve a significant increase on his pension savings.

In February 2015, a company was incorporated with Mr R as director. I'll refer to this company as K. On 23 February 2015 Mr R signed documents to open a SSAS with Rowanmoor Group PLC (Rowanmoor) as SSAS provider and Rowanmoor Trustees Limited were to be its independent trustee. Company K was recorded as the SSAS's principal employer. The SSAS documents also recorded that the SSAS was to be used to invest £36,208 in Unity Bay and £37,500 in Dolphin Loan notes.

On 30 March 2015, Scottish Equitable received a request to transfer Mr R's pension funds to his SSAS via the Origo system.[2] On 13 April 2015 Scottish Equitable transferred £70,311 to Company K's SSAS. Mr R was 48 years old at the time of the transfer.

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[1] A SSAS is a type of occupational pension in which the members are also trustees and therefore take responsibility for operating the scheme. It's an arrangement typically intended to meet the needs of people who run their own companies. SSASs are not regulated by the financial services regulator, the Financial Conduct Authority (FCA). They can hold a wider range of investments and assets than many personal pensions. As an occupational pension, a SSAS must be sponsored by an employer company.

[2] Origo is an electronic platform which allows the transfer of pensions and investments which can make transfers more efficient and reduce transfer times.

Soon after provider B transferred the pension funds Mr R held with it of £10,994.66 into company K's SSAS.

SSAS funds were then used to invest in Dolphin and Unity Bay as described above. The remainder was held in cash within the SSAS.

As I understand it, both the Unity Bay development and Dolphin did initially pay returns. However, it appears the Unity Bay returns stopped in 2016. The Dolphin investment continued paying returns until 2019. However, since then both of the investments have failed. Mr R is unlikely to receive any further significant return on his SSAS investments. In October 2020, Mr R complained to Scottish Equitable. Briefly, his argument is that it 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
- he had been advised by an unregulated business.

Scottish Equitable didn't uphold the complaint. It said Mr R had a legal right to transfer and that none of the information it had about the transfer at the time gave it cause for concern. It was satisfied it had conducted an appropriate level of due diligence given the requirements of the time.

Mr R brought his complaint to the Financial Ombudsman Service. One of our Investigators looked into it. He didn't think the complaint should be upheld. While he thought that Scottish Equitable could have done more he felt that Mr R would have gone ahead with the transfer even if it had done so.

Mr R didn't agree. As our investigator was unable to resolve the dispute informally, the matter was passed to me to decide.

Provisional decision

On 9 October 2024 I issued a provisional decision setting out why I intended to uphold the complaint and what Scottish Equitable needed to do to put things right. I invited the parties to comment on my provisional findings. For ease of reference I've reproduced the relevant extracts below.

'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.

When 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. 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.

In bringing this complaint and in responding to it Mr R – via his representatives – and Scottish Equitable have made a number of points. However, in this decision I don't intend to address each and every point raised. Instead, I will focus on what I see as being the key issues at the heart of Mr R's complaint and the reasons for my provisional decision. The relevant rules and guidance

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 Scottish Equitable was subject to the FSA/FCA Handbook, and under that to the Principles for Businesses (PRIN) and to the Conduct of Business Sourcebook (COBS). There have never been any specific FSA/FCA rules governing how personal pension providers deal with pension transfer requests, but the following have particular relevance here:

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

In February 2013, The Pensions Regulator (TPR) issued its Scorpion guidance to help tackle the increasing problem of pension liberation, the process by which unauthorised payments are made from a pension (such as accessing it below minimum retirement age). In brief, the guidance provided a due diligence framework for ceding schemes, like Scottish Equitable, dealing with pension transfer requests and some consumer-facing warning materials designed to allow members to 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 its 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 a turning 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 Self-Invested Personal Pensions (SIPPs) and SSASs in pensions scams was highlighted, as was an increase in the use of unregulated and/or illiquid investments. The FCA further published its own factsheet for consumers in late August 2014. It highlighted the announcement to insurers and advisers in a regulatory round-up published on its website in September 2014.

There was a further update to the Scorpion guidance in March 2015, which is relevant for this complaint. This guidance referenced the potential dangers posed by "pension freedoms" (which was about to give people greater flexibility in relation to taking pension benefits) and explained that pension scams were evolving. In particular, it highlighted that single member occupational schemes were being used by scammers. At the same time, a broader piece of guidance was initiated by an industry working group covering both TPR and FCA regulated firms: the Pension Scams Industry Group (PSIG) Code of Good Practice. The intention of the PSIG Code was to help firms achieve the aims of the Scorpion campaign in a streamlined way which balanced the need to process transfers promptly with the need to identify those customers at material risk of scams.

<u>The March 2015 Scorpion guidance</u>

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.

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 that pension providers should send those materials to scheme members directly, rather than just to their advisers.

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

• The PSIG Code includes an observation that: "A strong first signal of [a scam] would be a letter of authority requesting a company not authorised by FCA to obtain the required pension information; e.g. a transfer value, etc." This is a departure from the Scorpion guidance (including the 2015 guidance) which was silent on whether anything could be read into the entity seeking information on a person's pension.

- *The Code makes explicit reference to the need for scheme administrators to keep up to date with the latest pension scams and to use that knowledge to inform due diligence processes. Attention is drawn to FCA alerts in this area. (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 2015 Scorpion guidance – following the three-part due diligence checklist was expected whenever a transfer was requested.*

- *The PSIG Code splits its later due diligence process by receiving scheme type: larger occupational pension schemes, SIPPs, SSASs and Qualifying Registered Overseas Pension Schemes (QROPS). The 2015 Scorpion guidance doesn't distinguish between receiving schemes in this way – there's just the one due diligence checklist which is largely (apart from a few questions) the same whatever the destination scheme.*

The Code was intended to take effect immediately from 16 March 2015.

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

Therefore, in order to act in the consumer's best interest and to play an active part in trying to protect customers from scams, I think it's fair and reasonable to expect ceding schemes to have paid due regard to both the Scorpion guidance and the PSIG Code when processing *transfer requests. Where one differed from the other, they needed to consider carefully how to assess a transfer request taking into account the interests of the transferring member.*

Typically, I'd consider the Code to have been a reasonable starting point for most ceding schemes because it provided more detailed guidance on how to go about further due diligence, including steps to potentially fast-track some transfers which – where appropriate – would be in a member's interest.

The considerations for 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?

As I've said above Mr R said he was cold called by a firm offering a free pension review. In conversation with our Investigator Mr R wasn't certain of the firms name and referred to it as "Rose something".

Mr R said the representative told him that by transferring his funds would outperform his current arrangements. The representative didn't offer any cash up front or other inducements. Mr R said he understood that the investments were in construction projects. He was shown investment literature which he said looked like a holiday brochure. He felt the investments were safe and had no doubts about entering into them.

On balance of probabilities, I accept Mr R's evidence about how the investments came about.

In our Investigator's complaint assessment, he noticed that an independent financial adviser (IFA) had verified Mr R's identity on his SSAS application form. At the time the IFA was employed by an FCA authorised firm called Multicorp Rose (which has since been dissolved). The inclusion of the word "Rose" within the authorised firm's name gave our Investigator pause for thought. He wondered if Mr R's recollection that the advising representative worked for "Rose something" indicated that the IFA, in his work for Multicorp Rose, had done more than just verify Mr R's identity and had been involved in the advice process to invest in the SSAS. But I don't find that probable.

I'll explain that the SSAS application form asks for a "regulated UK or EU intermediary" to certify the applicants identity. The form asked for the name of the regulating body and reference number for the person certifying identity. Roseland Mill and its representative are named on the SSAS application as being the "trustee adviser". That is the firm/individual giving advice to the SSAS trustee – in this case Mr R – on investment matters. Neither Roseland Mill nor its representative were regulated. So they should not have been able to verify Mr R's identity on the SSAS application. And, to complete the form properly would require someone else who was appropriately authorised to verify the identity.

I've noted that the IFA who verified Mr R's identity was also a director of Roseland Mill. So, it seems more likely than not that, to save time and the cost of using another appropriately regulated firm in order to verify an identity, the IFA would simply use his FCA registration number in order to do that on Roseland Mill's behalf. But that is an entirely different act to *giving regulated advice. And the IFA's name doesn't appear on any of the other documents relevant to the transfer. In particular the Origo transfer says that no adviser was involved, and, if an authorised advising firm had been involved, I would have expected to see it named on the Origo documents. But that wasn't the case. So I'm satisfied that the IFA's role was limited to verifying Mr R's identity. And, as a director of Roseland Mill, he had a vested interest in being able to do that.*

Further, there's no evidence that Mr R had previously been looking to transfer his pensions. And he's been consistent that a representative from the cold calling firm visited him at home and gave him the advice to make the overseas investments. As I've said above Roseland Mill is named on the SSAS application as the trustee adviser. Also Roseland Mill's representative witnessed Mr R's signature on the Dolphin Capital Loan notes application. That took place some weeks after Scottish Equitable had transferred the funds to Mr R's SSAS, which demonstrates that Roseland Mill was involved throughout the process.

In order to achieve that Mr R needed to set up his own company and establish a SSAS. Doing that, i.e. setting up his own limited company, establishing a SSAS, transferring his existing pension and investing in overseas property development companies – were complex and unusual arrangements for someone such as Mr R. He wasn't a sophisticated investor. I can't see he'd have done all that, or even known that sort of arrangement was available to him, unless he'd been told it would be a good idea and he'd end up better off.

So I'm satisfied the above action was recommended to him. Advice to transfer out of his personal pension with Scottish Equitable would be regulated advice which should only have been given by an FCA authorised adviser. But I'm persuaded that, on balance, it was Roseland Mill's representative, who was not regulated, who took Mr R through the required steps to make the overseas investments.

It appears that the Akbuk investment ran into problems in 2016. The investment had a complicated structure involving a number of different firms. It seems that the firm administering the investments became insolvent around 2019 and further returns from the investment are extremely unlikely.

Similarly, I understand that Dolphin ceased trading and became insolvent sometime in 2019. So the SSAS investments have little, if any, value.

<u>*What did Scottish Equitable 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.

Scottish Equitable said that, as the transfer came from the Origo system and involved Rowanmoor it did not need to issue the Scorpion insert[3]. But for the reasons given below I reject that assertion. I think Scottish Equitable's failure to send the Scorpion insert, or to give Mr R any warnings about scam risks was an oversight.

Due diligence:

As explained above, I consider a reasonable starting point for most ceding schemes would be to look at the guidance in the PSIG Code. I've therefore considered Mr R's transfer in that

[3] I can confirm that provider B also did not send Mr R the Scorpion materials.

light. But I don't think it would make a difference to the outcome of the complaint if I had considered Scottish Equitable's actions using the Scorpion guidance as a benchmark instead.

I've firstly looked at what due diligence Scottish Equitable carried out in this case to consider whether it was sufficient.

Scottish Equitable has argued that Origo would already have completed due diligence checks on the receiving scheme's administrators removing the need for it to do its own due diligence. But, Scottish Equitable 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 Scottish Equitable relied on due diligence conducted by a third party even though it doesn't appear to have really known what that due diligence involved.

I've taken into account what the due diligence in question was aimed at preventing – pension scams, 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. Given also the duties of personal pension providers under PRIN and COBS 2.1.1R, I don't think Scottish Equitable's approach was good enough here.

Further, 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. There's an argument, therefore, that Scottish Equitable could have 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 here is the fact that there is little regulatory oversight of SSASs like this; they don't have to be registered with TPR. In the absence of that oversight, Scottish Equitable 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 Rowanmoor's business was regulated by the FCA doesn't change my thinking on this. The key point is that Rowanmoor Group Plc and Rowanmoor Trustees Limited (both of which were involved in the operation of the SSAS) weren't FCA regulated. So I see no reason why they would have operated with FCA regulations and Principles in mind – or why their actions would have come under FCA scrutiny. As such, I'm not persuaded Scottish Equitable could, reasonably, have derived sufficient comfort about the Rowanmoor SSAS as a destination for Mr R's transfer.

Further, the transfer itself was not to Rowanmoor, it was to company K's SSAS, which was recently registered and previously unknown to Scottish Equitable. It follows that I don't think Scottish Equitable should have considered the receiving scheme/administrator as being free of scam risk. So it should have followed the initial triage process as set out in the PSIG Code. Doing so should have led to Scottish Equitable asking Mr R further questions about the transfer as per Section 6.2.2 of the Code ("Initial analysis – member questions"). I won't repeat the list of suggested questions in full. Suffice to say, three of them would have most likely been answered "yes":

- *Did the 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 one 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 Scottish Equitable had about the transfer, I think in this case it should have addressed all four sections of the SSAS due diligence process and contacted Mr R to help with that.

<u>What should Scottish Equitable have found out?</u>

With a few simple enquiries Scottish Equitable should have found out that the SSAS was not only recently established but was also connected to a company which was recently registered; it wasn't trading; Mr R wasn't actually employed by it in a meaningful sense and neither Mr R nor company K would be paying contributions into the SSAS. All of these were given as warning signs in the Scorpion action pack.

Further, Scottish Equitable would have discovered that the investment opportunity had arisen following a cold call offering a pension review. Mr R was being offered both specific and guaranteed returns, in an overseas investment in an unregulated investment vehicle. Again, all of these things were signs the updated Scorpion guidance said could be a cause for concern. Scottish Equitable should also have established that the advice to transfer out of his personal pension had come from an unregulated firm in Roseland Mill.

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, so that includes Scottish Equitable, 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 Scottish Equitable should therefore have been concerned by Roseland Mill's involvement because it pointed to a criminal breach of FSMA. On the balance of probabilities, I'm satisfied such a breach occurred here.

<u>What should Scottish Equitable have told Mr R – and would it have made a difference?</u>

Had it done more thorough due diligence, there would have been a number of warnings Scottish Equitable could have given to Mr R in relation to a possible scam threat as identified by the PSIG Code (and the Scorpion action pack). Scottish Equitable should also have been aware of the close parallels between Mr R'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 stark oversight was Scottish Equitable's failure to uncover the threat posed by a non-regulated adviser. Its failure to do so, and failure to warn Mr R accordingly, meant it didn't meet its obligations under PRIN and COBS 2.1.1R.

With those obligations in mind, it would have been appropriate for Scottish Equitable to have informed Mr R that the firm which had advised him was unregulated and could put his pension at risk. Scottish Equitable should have said only authorised financial advisers are allowed to give advice on personal pension transfers, so he risked falling victim to illegal activity and losing regulatory protections.

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

I'm satisfied any messages along these lines would have changed Mr R's mind about the transfer. The messages would have followed conversations or correspondence with Mr R so would have seemed to him (and indeed would have been) specific to his individual circumstances. The messages would have been given in the context of Scottish Equitable raising concerns about the risk of losing pension monies as a result of untrustworthy advice. This would have made Mr R aware that there were serious risks in following the recommendations of an unregulated adviser.

I think the gravity of any messages along the above lines would prompt most reasonable people to rethink their actions. Regardless of how safe Mr R might originally have thought the investments were I've seen no persuasive reason why he would have reacted any differently to most people in the knowledge that they might be putting their pension savings at risk. So, I consider that if Scottish Equitable had acted as it should, Mr R wouldn't have proceeded with the transfer out of his personal pension or suffered the investment losses that followed. I therefore uphold Mr R's complaint.'

I then went on to set out how Scottish Equitable could reasonably provide appropriate redress for Mr R. I've reproduced that award under the heading 'putting things right' below. Importantly, my provisional redress award included Scottish Equitable compensating Mr R for five years' worth of SSAS fees.

Developments

After considering my provisional decision Scottish Equitable made an offer to settle the complaint. It said that, on receipt of the appropriate information and undertaking from Mr R, it would make a payment of compensation direct to him using the method set out in my provisional decision.

We put Scottish Equitable's offer to Mr R. He replied via his representatives who noted that Scottish Equitable had not made reference to the payment of five years' worth of SSAS fees and was reluctant to accept the offer without it.

As the matter has not been resolved between the parties I've decided to issue a final decision which, if Mr R accepts it within the timescale set out, will be binding.

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.

As neither party has objected to my rationale for deciding the merits of Mr R's complaint, I see no reason to revisit that rationale here or to amend it.

I'm grateful to Scottish Equitable for it's offer to settle the matter which is generally reasonable but omits an important consideration. For the avoidance of doubt, in order to fully, fairly and reasonably put things right, as well as compensating Mr R for his pension losses arising from the transfer, Scottish Equitable will also need to compensate him for five years' worth of SSAS fees. It should do so as I originally set out in my provisional decision and which I have repeated below.

Putting things right

Fair compensation

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

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

To compensate Mr R fairly, Scottish Equitable must subtract the proportion of the actual value of the SSAS which originates from the transfer of the Scottish Equitable pension, from the notional value if the funds had remained with Scottish Equitable. 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 R's Scottish Equitable 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 R may be asked to give Scottish Equitable 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 R to the position he would have been in but for the actions of Scottish Equitable. 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 and Unity Bay investments. This is because they have no realisable onward market and the companies behind them are no longer trading. And I don't think it's realistically possible for Scottish Equitable 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 Scottish Equitable funds. Therefore as part of calculating compensation:

- Scottish Equitable must give the illiquid investments a nil value as part of determining the actual value. In return Scottish Equitable may ask Mr R 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. Scottish Equitable will need to meet any costs in drawing up the undertaking. If Scottish Equitable asks Mr R to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

- It's also fair that Mr R 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 Scottish Equitable must pay an upfront sum to Mr R 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 R's funds had he remained invested with Scottish Equitable up to the date of my Final Decision.

Scottish Equitable should ensure that the relevant proportion of any pension commencement lump sum or gross income payments Mr R received from the SSAS are treated as notional withdrawals from Scottish Equitable 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 R's dissatisfaction with the outcome of the investment it facilitated.

Scottish Equitable should reinstate Mr R'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 R was invested in).

Scottish Equitable shouldn't reinstate Mr R'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 Scottish Equitable to determine whether this is possible.

If Scottish Equitable is unable to reinstate Mr R'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 R's original pension.

If Scottish Equitable 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 R is entitled based on his annual allowance and income tax position. However, Scottish Equitable'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 R doesn't incur an annual allowance charge. If Scottish Equitable cannot do this, then it shouldn't set up a new plan for Mr R.

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

To make this reduction, it's reasonable to assume that Mr R is likely to be a basic rate taxpayer in retirement. So, if the loss represents further 'uncrystallised' funds from which Mr R 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 R 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 Scottish Equitable receiving Mr R'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 Scottish Equitable deducts income tax from the interest, it should tell Mr R how much has been taken off. Scottish Equitable should give Mr R a tax deduction certificate in respect of interest if Mr R asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

This interest is not required if Scottish Equitable is reinstating Mr R'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 R was invested. However, I expect any such reinstatement to be achieved promptly.

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

My final decision

For the reasons given above I uphold this complaint. I require Scottish Equitable Plc trading as AEGON to take the steps set out under the heading 'putting things right' above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr R to accept or reject my decision before 25 November 2024.

Joe Scott
Ombudsman