DRN-5200074

The complaint

Ms L has complained about the actions of Scottish Widows Limited ("SWL") when it transferred her personal pension to a Qualifying Recognised Overseas Pension Scheme ("QROPS") in 2014. The QROPS subsequently invested in an asset that is unlikely to realise any value meaning Ms L has suffered a significant financial loss.

Ms L says SWL failed in its responsibilities when dealing with her transfer request. She says that SWL should have done more to warn her of the potential dangers of transferring, and undertaken greater due diligence on the transfer, in line with the guidance she says was required of transferring schemes at the time. Ms L says she wouldn't have transferred, and wouldn't have suffered financial losses, if SWL had acted as it should have done.

What happened

On 9 June 2014, Harbour Pensions Limited wrote to SWL requesting it transfer Ms L's pension to the Harbour Retirement Scheme ("the Harbour Scheme"), a QROPS based in Malta. Included in the transfer request were various forms completed by Ms L and the receiving scheme's administrators – Harbour Pensions Limited – along with a letter from HMRC, dated 9 April 2013, which said it had accepted the Harbour Scheme as a QROPS.

Ms L had previously been cold called by a firm called Portia which offered her a free pension review. Ms L was then referred to Servatus Ltd, an EEA regulated firm based in Dublin, which wrote to her with its recommendations.

On 7 August, Harbour Pensions Limited wrote to SWL enclosing transfer documents that hadn't previously been sent to SWL.

On 22 August, SWL wrote to the Harbour Scheme advising that a payment in respect of Ms L's transfer value had been paid. The transfer value was approximately £6,000. SWL also wrote to Ms L confirming the transfer value had been paid. An incorrect reference number meant the payment didn't go through at that point. This was corrected by SWL and the payment was made the following month.

By this point, Ms L had transferred nearly £90,000 from a defined benefit occupational scheme to the Harbour Scheme. Servatus also advised Ms L on that pension. A large proportion of Ms L's combined transfer value was used to invest in a Dolphin Capital Loan Note. Dolphin Capital (now known as the German Property Group) is a German property venture which has gone into liquidation.

Ms L was, and remains, resident in the UK. She was 52 at the time of the transfer.

In August 2021, Ms L (with the help of a claims management company) complained to SWL. Briefly, her argument is that SWL ought to have spotted, and told her about, a number of warning signs in relation to the transfer, including (but not limited to) the following: the catalyst for the transfer was an unsolicited call; advice had come from someone not regulated by the Financial Conduct Authority ("FCA"); a QROPS was a complex arrangement and not necessary for her situation, especially as she wasn't intending to move abroad; she was transferring in order to invest in high risk, unregulated, assets; and the returns she had been promised were unrealistically high.

SWL didn't think it had done anything wrong. It said, in brief, that it had conducted adequate due diligence into the receiving scheme's status and hadn't found any reason to prevent Ms L exercising her right to transfer.

Ms L referred her complaint to us. Our investigator didn't uphold her complaint. Ms L asked for an ombudsman to make a decision.

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.

The relevant rules and guidance

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

- The Pensions Schemes Act 1993 gives a member of a personal pension scheme the right to transfer the cash equivalent value of their accrued benefits to another personal or occupational pension scheme if certain conditions are satisfied. The member may also have a right to transfer under the terms of their pension. This 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. This came to be known as "pension liberation".

- The Pensions Regulator ("TPR") launched the "Scorpion" campaign on 14 February 2013. The aim of the campaign was to raise awareness of pension liberation activity and to provide guidance to scheme administrators on dealing with transfer requests in order to help prevent liberation activity happening. The Financial Services Authority ("FSA") and the FCA, which had succeeded the FSA, endorsed the guidance. The guidance was subsequently updated, including in July 2014. I cover the Scorpion campaign in more detail below.

- In late April 2014 the FCA 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.

- SWL was subject to the 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:

  - 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.

- Also relevant here is that an overseas pension scheme is defined in HMRC regulations as being one which is subject to specified regulatory and taxation restrictions in the country of establishment. To become a QROPS it must also be:

  - Recognised, meaning in short that it meets specified tests applied by HMRC, including on minimum retirement age and the application of tax relief.

  - Qualifying, meaning it must notify HMRC that it is a recognised overseas pension scheme; provide appropriate evidence of this; undertake to adhere to HMRC's requirements; and not be otherwise excluded by HMRC from being a QROPS.

Overseas schemes that have notified HMRC that they qualify to be a QROPS are included in a published list on HMRC's website.

<u>The Scorpion guidance</u>

The Scorpion campaign was launched on 14 February 2013, and was initially focused just on pension liberation – namely, the access to pension funds in an unauthorised manner (such as before normal minimum pension age). The guidance was updated on 24 July 2014. It widened the focus from pension liberation specifically, to pension scams – which it said were on the increase.

The materials in the July 2014 Scorpion campaign comprised:

- An insert to be included in transfer packs (the 'Scorpion insert'). The insert warns readers about the dangers of pension scams and identifies a number of warning signs to look out for.

- A longer booklet issued by TPAS which gives more information, including example scenarios, about pension scams. Guidance provided by TPR said this longer leaflet was intended to be used in ongoing communications with members so that they could become aware of the scam risks they were facing.

- An 'action pack' for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should "watch out for" various warning signs of a scam. 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 a transferring scheme still had concerns, they were encouraged (amongst other things) to contact the member to establish whether they understood the type of scheme they were transferring to and – where a member insisted on transferring – directing the member to Action Fraud or TPAS.

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 contents 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 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.

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

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. In deciding how to apply the guidance, they needed to consider the guidance as a whole, including the various warning signs to which it drew attention, the case studies that highlighted different types of scam, and the checklist and various suggested actions ceding schemes might take. 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:

1. As a first step, a ceding scheme needed to check whether the receiving scheme was validly registered.

2. The Scorpion insert provided an important safeguard for transferring members, allowing them to consider *for themselves* the scam 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.

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 scams and undertake further due diligence and take appropriate action where it was apparent their client might be at risk. The guidance 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.

These were additional requirements over and above what a ceding scheme would always have needed to do when processing a QROPS transfer. Those requirements included checking whether the QROPS was on HMRC's published list, and ensuring the necessary HMRC forms were completed.

<u>The circumstances surrounding the transfer: what does the evidence suggest happened?</u>

Ms L says the transfer process was instigated by a cold call from someone offering her a free pension review, which she agreed to. She says she was then referred to Servatus, an EEA authorised firm based in Dublin. Ms L has said the initial cold call came from one of two firms which she has named, one of which was "Portia Financial". I can see Servatus sent Ms L a "Pension Review Report" and the covering letter to that report made reference to "Portia". So it seems likely that it was Portia that cold called Ms L.

I note that before then, in February 2014, Ms L signed a letter of authority giving a different firm permission to gather information on her SWL pension and to request transfer documents. This was sent to SWL in March 2014. Ms L hasn't mentioned this other firm, and its role doesn't appear to have been crucial to what happened.

Despite providing the covering letter to her Servatus Pension Review Report, Ms L hasn't been able to locate the report itself. Nevertheless, I'm satisfied Servatus advised Ms L and provided her with a recommendation about her retirement planning. The covering letter and title of the report suggest as much. And Ms L agreed to pay Servatus for advice – the Harbour Scheme application form (which Ms L signed) included a section headed "professional adviser & fees", in which an initial fee of 0.5%, to be taken from the Harbour Scheme, has been entered along with the adviser's details.

Ms L's complaint to SWL also fills in some of the blanks. She says the transfer and subsequent investment were on the advice of Servatus and she recalls meeting her adviser at home on at least one occasion. She says she was told her existing pension arrangements were not performing well and her fund would be "3 or 4 times" higher at retirement if she transferred and invested in German property.

At the time of the transfer, Ms L was 52 years old. She lived in the UK and didn't intend to live overseas. Based on her Harbour Scheme application form, she had one other pension –

the defined benefit occupational scheme which she also transferred around the same time. Ms L says she had no other long-term savings other than some bank shares. In the absence of the Pension Review Report (which recorded this type of information in other cases that I'm aware of), there isn't contemporaneous evidence to corroborate what she has said in this respect. But I see no reason to disbelieve her on this point.

Ms L says she was a low-risk investor and points to a fact-find from 2005 to evidence this. However, the Harbour Scheme application form recorded Ms L's attitude to risk and the options for "lower risk" and "low risk" *weren't* selected. Instead, "*Med/Enhanced risk*" was selected, which was the second highest (of five) categories. It was described as follows:

"There is a chance of more aggressive growth of your investments over the longer term but with an increased possibility of your investment value declining."

I recognise that the rating appears to have been chosen by Ms L and wasn't the result of any in-depth questioning or analysis. But the same would apply to what Ms L is now saying about her attitude to risk at the time of the transfer. So there is a discrepancy between what Ms L is now saying and what she said (or agreed to) at the time of the transfer about her attitude to risk. I will return to this later, although my decision doesn't turn on this. Otherwise, Ms L recollections are broadly in line with the documentary evidence, incomplete though it is without the Servatus Pension Review Report. In short, Ms L was cold called by Portia and then passed on to Servatus. Servatus advised Ms L to transfer her SWL pension to the Harbour Scheme in order to invest in a Dolphin Loan note. The rationale behind the transfer was to improve returns on her pension rather than receive an unauthorised payment from it.

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

Due diligence:

SWL checked that HMRC had accepted the Harbour Scheme as a QROPS. I note too that the Harbour Scheme was on HMRC's published list and had been since 2013 (and continued to be so long after Ms L's transfer). These steps ensured that the transfer payment both qualified as an authorised payment for tax purposes and also satisfied Ms L's statutory right, and potentially other legal rights, to transfer.

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

Given the information SWL had at the time, one feature of Ms L's transfer would have been a potential warning sign of a scam under the July 2014 Scorpion guidance – there was a transfer of money overseas. SWL should therefore have followed up on that to find out if other signs of a scam were present. I think it would have been fair and reasonable – and good practice – for SWL to have turned to the check list in the action pack to do this.

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 HMRC. Others would have required contacting the consumer. The check list is divided into three parts (which I've numbered for ease of reading and not because I think the check list was designed to be followed in a particular order):

1. The nature/status of the receiving scheme

   Sample questions: Is the receiving scheme newly registered with HMRC, is it sponsored by a newly registered 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 check list identified actions that should help the transferring scheme establish the facts.

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

There were a number of parallels between Ms L's transfer and the warning signs identified by the check list, including the unsolicited contact that prompted Ms L's initial interest in transferring and the investment that lay behind her decision to transfer which was overseas and could, reasonably, be described as being "unusual" or "creative". Ms L was also transferring to a QROPS even though she was resident in the UK and didn't appear to be contemplating a move overseas. Whilst the action pack didn't specifically address such a scenario, it's reasonable to say this should have appeared unusual to SWL.

However, in aggregate, I'm satisfied SWL wouldn't have thought Ms L was likely falling victim to a scam. I say this because investigations into who had advised her would have revealed the presence of Servatus, which was an advisory firm regulated by the Central Bank of Ireland. Importantly, Servatus was also shown on the FCA's register as authorised in the UK with passporting rights. This means that for UK purposes throughout the period of this transfer Servatus was an authorised person under s.31(1)(b) of the Financial Services and Markets Act (FSMA) 2000 and Schedule 3 to that Act.

The presence of Servatus as an authorised person advising Ms L would have indicated to SWL that the transfer was unlikely to be a scam and that Ms L would enjoy some regulatory protections in the event it turned out to be one. This wouldn't have been via the UK's complaints and investor protection institutions, the Financial Ombudsman Service or the Financial Services Compensation Scheme. But The Republic of Ireland also has a complaints system, financial services and pensions ombudsman and a statutory investor compensation scheme, which EU countries are required to have under the EU's Investor Compensation Directive.

Furthermore, as a firm that was regulated (albeit by a home-state regulator in another EU jurisdiction) the regulatory protections included the fact that Servatus would have been held to a high standard, mandated throughout the EU, by its own regulator. And as an authorised firm, Servatus would have had to follow the applicable European regulatory standards and conduct its practice in accordance with those standards. Its operations would have been under some oversight by its regulator to ensure it was acting in the best interest of its client. It therefore would have had to meet certain required standards in all of its dealings and be subject to regulation and to investor recourse under the Irish system. So in light of this it isn't unreasonable that, had it checked up on its regulatory standing, SWL could have been reassured that Servatus was regulated to EU standards that were accepted for the purpose of authorisation under UK law.

As outlined previously, firms needed 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 rights. I'm satisfied that the fact that Ms L was being advised by a properly authorised adviser would reasonably have given SWL comfort the transfer was unlikely to be a scam. With that in mind, there wouldn't have been a need, and it wouldn't have been proportionate, for SWL to have given Ms L any specific warnings beyond the warnings contained in the Scorpion insert (which I discuss below).

In coming to that conclusion, I have considered whether the act of contacting Ms L and asking questions about her transfer – which SWL should have done – would have prompted her to change her mind about the transfer. Those questions would, for instance, have reminded Ms L of the fact that a significant financial decision had been set in train by a cold call and that she was moving her pension outside of her country of residence – both of which may have seemed less judicious on questioning and therefore potential prompts, in themselves, for further thought. But, like SWL, I'm satisfied Ms L would, ultimately, have taken comfort from the fact that she had been advised by a regulated adviser.

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.

There were two obvious opportunities when SWL should have sent Ms L the Scorpion insert: following the initial request for transfer papers in March 2014 and when Harbour Pensions Limited wrote to SWL in June 2014 requesting a transfer to the Harbour Scheme.

I've seen nothing to indicate SWL sent Ms L the Scorpion insert on either occasion. However, the version of the Scorpion insert that was in use at that time was the February 2013 version, which focussed on the threat posed by offers to access pensions before the age of 55. Therefore, even though some of the warning signs highlighted in the insert would have had parallels with Ms L's situation, as she wasn't intending to access her pension early I don't think the insert would have caused her alarm. In that respect, SWL's failure to send the insert was immaterial – it wouldn't have prompted her to question what she was doing or made a difference to her decision to transfer.

However, Ms L has argued that SWL should have sent the July 2014 version of the Scorpion insert which went further than just warning about liberation. She refers to our investigator's assessment which says SWL's procedure was to only send the Scorpion insert when it had concerns about a transfer. As the investigator said there were a number of warning signs with the transfer (such as the cold call and overseas investments), it must follow – in Ms L's view – that SWL ought to have sent the Scorpion insert at the point it should have identified those warning signs, which was in August 2014 when it was doing its due diligence checks.

I disagree with Ms L's logic. For the reasons given above, SWL wouldn't ultimately have had concerns about Ms L's transfer so there wouldn't have been a need to send her any sort of warning following its due diligence and it would be disproportionate to have expected it to have done so. My view therefore remains that it's the February 2013 Scorpion insert that should have been sent to Ms L.

Nevertheless, for the sake of completeness, I don't think the July 2014 version of the Scorpion insert would have made a difference to Ms L's thinking anyway. That version of the insert highlighted the following warning signs for someone to be on the lookout for:

- claims that a pension pot can be accessed before age 55;

- being approached out of the blue over the phone, via text message or in person door-to-door;

- being enticed by upfront cash; and

- being offered a free 'pension review' or being lured by 'one off' investment opportunities.

It went on to say that if someone thought they were being targeted by scammers, they should not be rushed or pressured into a decision and that they should call TPR before signing anything – or Action Fraud if an offer had already been accepted.

Some of the warnings and actions listed didn't apply to Ms L. But some did: she was approached unsolicited, and she was offered a pension review. Without the advice report written by Servatus it's unclear whether the Dolphin investment was presented as a one-off opportunity but the overall tenor of the insert was to be cautious about "too good to be true" claims about various investments. So this also had parallels with Ms L's situation. And this version of the Scorpion insert warned about scams in general rather than the narrower warning about pension liberation. So that too may have put Ms L more on guard than she otherwise would have been had she received just the February 2013 version of the insert.

However, on balance, I don't think messages along the lines of the above would have been enough for Ms L to change her mind. It strikes me as doubtful that she would have just aborted the transfer without further research. And if she had conducted further research I think Ms L, like SWL, would have taken comfort from the fact that a regulated adviser had advised her. So, I think it's unlikely the contents of the July 2014 Scorpion insert would have changed Ms L's mind about transferring.

I've considered whether being asked due diligence questions by SWL (which would have preceded the sending of the insert in Ms L's view) would likely have primed her to have been more receptive to the messages contained in that insert and prompted her to "join the dots" about the risks she was taking. In other words, I've considered the likely *cumulative* impact of everything SWL should have done and not just the impact a due diligence process, and the Scorpion insert, would have had in isolation. But I return to what I said before which is that Ms L was being advised by a regulated adviser so I'm satisfied she would, ultimately, have taken comfort from that.

I've also considered everything Ms L has said about her character at the time which, to summarise, was cautious and prudent and why that, along with her relatively limited long-term savings, meant she wouldn't have proceeded with the transfer had she been warned about doing so.

As I mentioned previously, there's a disconnect here between what Ms L is now saying about her attitude to risk and what she said (or agreed to) at the time, which was that she *wasn't* a low-risk investor. So I don't think her argument that she was so cautious that she would have responded to any warnings given to her by SWL are as persuasive as she thinks. But even putting that to one side, I don't think Ms L would have had any misgivings as a result of the insert because she would have been under the impression (or would have found out) that she had been advised by a regulated firm. I think this would have neutralised the fact that the insert had referenced cold calls, free pension reviews and one-off investment opportunities – even if she had been a low-risk investor.

Ultimately, SWL would have been entitled to take comfort from the presence of a regulated adviser. It wouldn't have been its job here to have questioned the advice that adviser gave. Likewise, Ms L wouldn't have had reason to think her adviser was untrustworthy. It therefore follows that I don't uphold Ms L's complaint.

My final decision

For the reasons given above, my final decision is to not uphold Ms L's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms L to accept or reject my decision before 10 February 2025.

Christian Wood
Ombudsman