DRN-5262223

The complaint

Mr H has complained about a transfer of his Zurich Assurance Ltd personal pension to a small self-administered scheme (SSAS) in April 2014. Mr H's SSAS was subsequently used to invest in Dolphin Capital. The investment now appears to have little value. Mr H says he has lost out financially as a result.

Mr H says Zurich failed in its responsibilities when dealing with the transfer request. Amongst other things he says that it:

- Should have ensured any third parties it dealt with were appropriately regulated.
- Should have done more to warn him of the potential dangers of transferring.
- Should have undertaken greater due diligence on the transfer, in line with the guidance he believes was required of transferring schemes at the time.

Mr H says that if Zurich had acted as it should have done, he wouldn't have transferred. So, he wouldn't have put his pension savings at risk.

What happened

Mr H held a personal pension plan with Zurich and two other pension providers which I'll refer to as providers C and ST. On 3 July 2013, Mr H signed two letters of authority allowing Return on Capital Group Limited ('RoC'), and The Pensions Specialist (PS) to obtain details, in relation to his pension.

At that time PS was an authorised representative of a Financial Conduct Authority (FCA) regulated firm. PS sent a request for information about Mr H's pension to Zurich on 25 July 2013. Zurich sent the required information shortly after. There's no evidence of any further involvement from PS following this.

In August 2013 Zurich wrote to Mr H. It said he was three-years away from his chosen retirement age at the time he took out the plan. Zurich suggested Mr H should consider what he wanted to get out of his plan. It recommended he speak with a regulated financial adviser.

On 26 September 2013, RoC wrote to Zurich, enclosing Mr H's letter of authority, an information request and also a request for transfer documents. That letter of authority said RoC was not FCA regulated and it was not giving financial advice. Zurich sent RoC the requested information on 3 October 2013. Zurich says it didn't hear from RoC again.

Mr H says he became interested in a pension transfer after an unsolicited approach from RoC. His recollection is it told him that by transferring he could secure a greater return on his pension investments, while also paying less in fees.

In November 2013 Mr H was appointed as director of a well-established company, I'll call company S. I understand he still holds that position and actively works for the company.

In February 2014 Mr H signed documents to set up a SSAS with company S as its sponsoring employer. A firm called Rowanmoor Group PLC was the SSAS administrator and Rowanmoor Trustees Limited its independent trustee. The SSAS application form advised Mr H to seek regulated advice before transferring a pension.

On 3 March 2014, Rowanmoor Group PLC wrote to Zurich. It enclosed a letter of authority from Mr H and a certificate to show HMRC had appropriately registered company S' SSAS. Rowanmoor asked Zurich to supply the relevant information to allow Mr H to transfer his Zurich pension funds to the SSAS. Zurich sent Rowanmoor the required information five days later. It enclosed a copy of the 'Scorpion' leaflet (referred to as this because of the imagery it contains).

On the same day, 3 March 2014, Rowanmoor wrote to RoC. It enclosed some documents for RoC to pass onto Mr H. Those included a letter giving some information and warnings about the proposed Dolphin investment. Rowanmoor told RoC that Mr H would need to sign a declaration to say he'd read the letter and whether or not he would be taking further advice.

On 26 March 2014 Rowanmoor sent Zurich a request to transfer Mr H's pension to the SSAS. Zurich sent Rowanmoor a cheque for the value of his pension fund, £58,460.71 on 8 April 2014. He was 53 years old at the time of the transfer. Around the same time one of Mr H's other pension providers, provider C, transferred £30,895 from Mr H's personal pension held with it to the SSAS.

In October 2016 the other of Mr H's pension providers, provider ST, transferred Mr H's pension fund – of £10,459 – held with it, to his SSAS.

I understand that Mr H invested his pension in two funds RoC recommended: Dolphin Trust, which was a German property company, and Store First[1] which involved rental of storage units. Mr H received some returns on his investments into his SASS. However, I'm aware that Dolphin Capital went into administration and is no longer trading. Similarly Store First was wound up by the High Court and Mr H's investment in it appears to no longer be generating revenue and there is no recognised secondary market for it.

In June 2020, Mr H complained to Zurich as summarised above. Zurich didn't uphold Mr H's complaint. Briefly it said that it had included The Pension Regulator's (TPR) Scorpion leaflet, when it replied to RoC's and Rowanmoor's request for information in October 2013. It said it didn't hear from RoC again.

Then in March 2014 Rowanmoor had sent it Mr H's authorisation to transfer his Zurich pension funds to a SSAS, which was appropriately registered with HMRC. Zurich said the SSAS application form had advised Mr H to seek financial advice before making a transfer or in the event that he didn't understand any point within it. It said that when it sent Rowanmoor its transfer pack it had again included the Scorpion leaflet. It later acted on Mr H's instruction to make the transfer. It added that Mr H had a statutory right to make such a transfer.

Zurich also said that it's not a financial adviser and it was Mr H's responsibility to seek financial advice. It said it wasn't responsible for Mr H's choice of investments following the transfer.

Mr H brought his complaint to us. One of our Investigators looked into it. He didn't uphold Mr H's complaint. In a nutshell he said that while he thought Zurich could have taken other

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[1] Store First was part of a larger group offering storage pods or parking spaces to sell as investment opportunities. The larger collection of businesses were together known as Group First.

actions to improve its service, he believed Mr H would have gone ahead with the transfer in any event.

Mr H didn't accept our Investigator's complaint assessment. As the investigator was unable to resolve the dispute informally, the matter was passed to me to decide.

My provisional decision on the merits of Mr H's complaint

I issued a provisional decision explaining why I intended to uphold the complaint. For ease I've copied the relevant extract 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.

As I've said above, Mr H also transferred funds from his personal pension previously held with C. He complained directly to C separately. I have occasionally, where appropriate, referred to C's involvement for context only. But as it is a separate entity to Zurich and responsible for its own complaint handling, I do not intend to comment further on C's actions within this decision.

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

Personal pension providers are regulated by the Financial Conduct Authority (FCA). Prior to that they were regulated by the FCA's predecessor, the Financial Services Authority (FSA). As such 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 pension transfer requests, but the following have particular relevance here:

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

The Pensions Schemes Act 1993 gives a member of a personal pension scheme the right to transfer the cash equivalent value of their accrued benefits to another personal or occupational pension scheme if certain conditions are satisfied (and they may also have a right to transfer under the terms of the contract). This right came to be exploited, with people encouraged to transfer to fraudulent schemes in the expectation of receiving payments from their pension that they weren't entitled to – for instance, because they were below minimum retirement age. At various points, regulators issued bulletins warning of the dangers of taking such action. But it was only from 14 February 2013 that transferring schemes had formal guidance to follow that was aimed at tackling pension liberation[2] – the Scorpion guidance.

[2] Liberation is a type of scam where pensions are accessed in an unauthorised way (before minimum

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

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

- *A longer leaflet issued by TPAS which gives more information, including example scenarios, about pension liberation. Guidance provided by TPR on its website at the time said this longer leaflet was intended to be sent to members who had queries about pension liberation fraud.*

- *An 'action pack' for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should "look out for" various warning signs of liberation. If any of the warning signs applied, the action pack provided a checklist that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request. Where transferring schemes still had concerns, they were encouraged to write to members to warn them of the potential tax consequences of their actions; to consider delaying the transfer; to seek legal advice; and to direct the member to TPAS, TPR or Action Fraud.*

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

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

I take from the above that the 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 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.

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retirement age, for instance). This can leave victims paying punitive tax charges to HMRC and having to deal with the consequences of having their pension invested in an inappropriate way.

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.

<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. And where the recommendations in the guidance applied, absent a good reason to the contrary, it would normally have been reasonable, and in my view good industry practice, for pension providers at least to follow the substance of those recommendations. With that in mind, I take the view that personal pension providers dealing with transfer requests needed to heed the following:

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

2. *When TPR launched the Scorpion guidance in February 2013, its press release said the Scorpion insert should be provided in the information sent to members requesting a transfer. It said on its website that it wanted the inclusion of the Scorpion insert in transfer packs to "become best practice". The Scorpion insert provided an important safeguard for transferring members, allowing them to consider for themselves the liberation threat they were facing. Sending it to customers asking to transfer their pensions was also a simple and inexpensive step for pension firms to take and one that wouldn't have got in the way of efficiently dealing with transfer requests. So, all things considered, I think the Scorpion insert should have been sent as a matter of good industry practice with transfer packs and direct to the transferring member when the request for the transfer pack had come from a different party – an unregulated introducer, say.*

3. *I also think it would be fair and reasonable for personal pension providers – operating with the regulator's Principles and COBS 2.1.1R in mind – to ensure the warnings contained in the Scorpion insert were provided in some form to a member before a transfer even if the transfer process didn't involve the sending of transfer packs.*

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

5. *The considerations of regulated firms didn't start and end with the Scorpion guidance. If a personal pension provider had good reason to think the transferring member was being scammed – even if the suspected scam didn't involve anything specifically referred to in the Scorpion guidance – then its general duties to its customer as an authorised financial services provider would come into play and it would have needed to act. Ignoring clear signs of a scam, if they came to a firm's*

attention, or should have done so, would almost certainly breach the regulator's principles and COBS 2.1.1R.

The circumstances surrounding the transfer and Mr H's recollections

As I've said above Mr H told us he became interested in a transfer after an unsolicited approach from RoC. It told him that by transferring he could secure a far more significant return than his current pensions while also paying less in fees for the administration of his pensions and investments. It didn't offer cash upfront or any other form of inducement and he didn't feel pressured. He said the adviser visited him several times at home, and on one occasion was accompanied by his boss. He found the adviser convincing and friendly. Mr H thought everything was legitimate.

What did Zurich do and was it enough?

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.

In this instance Zurich confirmed that it did not send the Scorpion leaflet directly to Mr H[3]*. Instead Zurich sent it to RoC and Rowanmoor. But I don't think it was reasonable for Zurich to rely on a third party to pass on information that could prevent its customers from being scammed out of their pensions. For example, RoC had a vested interest in Mr H not seeing a copy of the leaflet that's because, had he done so, he likely would have realised that some other warnings from the leaflet applied to his situation. That is he'd been cold called by an adviser. The letter of authority Mr H had signed some months earlier said that RoC wasn't regulated and wasn't providing advice. But, it's apparent from Mr H's evidence that RoC was providing advice even though it was not authorised to do so. So, it wasn't in RoC's interests to bring these facts to Mr H's attention. It follows that sending the Scorpion leaflet to RoC was unlikely to be of any value to Mr H.*

Also Zurich sent the leaflet to Rowanmoor. But, while Rowanmoor was a legitimate business of some repute in the pensions industry at the time it had a vested interest in the transfer going ahead. That is, it stood to earn fees both for its work as administrator and, for its subsidiary company, trustee of the SSAS. Also, by only sending the leaflet to third parties, Zurich had no way of knowing whether or not its customers had received the information and warnings that were important to them. So, I don't think Zurich's process at that time was in line with its obligations under COBS 2.1.1R.

Due diligence:

In light of the Scorpion guidance, I think firms like Zurich ought to have been on the look-out for the tell-tale signs of pension liberation and needed to undertake further due diligence and take appropriate action if it was apparent their customer might be at risk. Zurich didn't undertake any further due diligence.

The Scorpion guidance at that time referred to six warning signs and said if any one was present then transferring firms needed to run through the checklist later in the guidance to find out more about the transfer. In this case the first warning sign the guidance refers to was

[3] I can confirm that C did not send Mr H the Scorpion leaflet or give other warnings regarding pension liberation or scams.

present. That is that Mr H’s SSAS was recently registered. So that should have caused Zurich to follow up on this to find out if other signs of liberation or scams were present.

Given this warning sign, I think it would have been fair and reasonable – and good practice – for Zurich to look into the proposed transfer in more detail. And I think the most reasonable way of going about that would have been to turn to the checklist in the action pack to structure its due diligence into the transfer.

The checklist 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 checklist could have been addressed by checking online resources such as Companies House and HMRC. Others would have required contacting Mr H. The checklist is divided into three parts (which I’ve numbered for ease of reading and not because I think the checklist was designed to be followed in a particular order):

1. The nature/status of the receiving scheme

Sample questions: Is the receiving scheme newly registered with HMRC, is it sponsored by a newly registered or dormant employer, an employer that doesn’t employ the transferring member or is geographically distant from them, or is the receiving scheme connected to an unregulated investment company?

2. Description/promotion of the scheme

Sample questions: Do descriptions, promotional materials or adverts of the receiving scheme include the words ‘loan’, ‘savings advance’, ‘cash incentive’, ‘bonus’, ‘loophole’ or ‘preference shares’ or allude to overseas investments or unusual, creative or new investment techniques?

3. The scheme member

Sample questions: Has the transferring member been advised by an ‘introducer’, been advised by a non-regulated adviser or taken no advice? Has the member decided to transfer after receiving cold calls, unsolicited emails or text messages about their pension? Have they applied pressure to transfer as quickly as possible or been told they can access their pension before age 55?

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

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

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

I don't think that investigation under part 1 of the checklist would have revealed too much. Mr H had relatively recently been appointed as a director of S. So, the SSAS could have *seemed a legitimate vehicle for him to want to contribute to his pension through. But, I think the other two parts of the checklist would have been more revealing.*

Investigations into part two would have, most likely, identified that Mr H wasn't offered any form of cash incentive to transfer nor told he could access his pension funds early. But RoC was advising him to invest in property abroad together with an unregulated investment scheme concerned with storage pods. All of these investments include some features that might be implicated in pension liberation (overseas, unregulated and/or unusual or creative techniques).

Following part 3 of the checklist Zurich would likely have learned that Mr H's transfer journey began when RoC cold-called him and advised him to transfer. And while it wasn't offering cash or another incentive, it was giving him pensions advice.

The checklist recommends that in order to establish whether its member has been advised by a non-regulated adviser, the transferring firm should "check whether advisers are registered". In other words, they should consult the regulator's online register of authorised firms. Zurich should have taken that step, which is not difficult, and it would quickly have discovered that RoC wasn't authorised to provide advice. In fact, in this case RoC said itself on the letter of authority Mr H signed in July 2013 that it wasn't regulated. So Zurich should have found establishing this fact rather easy to do.

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 Zurich, should have been aware that financial advisers need to be authorised to give regulated investment advice in the United Kingdom – indeed, the Scorpion insert itself makes this point.

My view is that Zurich should have been concerned by the involvement of RoC in the advice process 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 Zurich have told Mr H – and would it have made a difference?</u>

I think if Zurich had identified the issues above, which, for completeness are: an unregulated adviser made an unsolicited approach to Mr H and then gave him illegal advice; and he was intending to invest in the types of scheme often used to liberate pension funds; then Zurich should have warned Mr H about the risks of transferring his pension. But it didn't provide any warnings. And I think its failures here mean it didn't meet its obligations under Principles 2, 6 and 7 and COBS 2.1.1R. With those obligations in mind, it would also have been appropriate for Zurich to have informed Mr H that the firm advising him, RoC, was unregulated and could put his pension at risk. Zurich should have told Mr H that only authorised financial advisers are allowed to give advice on personal pension transfers. And as RoC wasn't regulated he risked falling victim to illegal activity and losing regulatory protections.

I note Mr H had previously told our Investigator that if he'd seen the Scorpion leaflet he would have asked RoC why it wasn't regulated and was relying on Rowanmoor, which was regulated. Our Investigator said that, in those circumstances, it's likely RoC could have found a plausible argument to defend its unregulated status. But, as I've said above, Zurich didn't send the leaflet. And, even if it had, I don't think that would have gone far enough. Given that there were warning signs I think Zurich should have run through the checklist and had a conversation with Mr H. That discussion would have alerted him to the fact he was dealing with people who, as friendly and legitimate as they might seem, were almost certainly engaging in criminal activity in the very act of advising him.

Also Zurich's messages would have followed conversations with Mr H so would have seemed to him (and indeed would have been) specific to his individual circumstances. Further, the information imparted would have been given in the context of Zurich raising concerns about the risk of him losing pension monies as a result of untrustworthy advice. This would have made Mr H aware that there were serious risks in using an unregulated adviser, particularly one to make investments of a type which were unusual and unlikely to be regulated, even if he was not liberating his pension. I think the gravity of any messages along these lines would prompt most reasonable people to either change their mind or, at the very least, to seek further guidance from TPAS (as suggested in the action pack) or advice from a properly regulated adviser before proceeding. And I think it's more likely than not that this guidance or advice would have made Mr H acutely aware that the investments he was considering were extremely high risk, unwise and likely outside of his attitude to risk.

I've seen no persuasive reason why Mr H would have acted differently to the majority of people in those circumstances. So, I consider that if Zurich had acted as it should, Mr H wouldn't have proceeded with the transfer out of his personal pension or suffered the investment losses that followed.

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

I bear in mind that this complaint is similar to the type of claim that in legal proceedings would be treated as a claim for damages for negligent failure to give someone the information or advice to which they were entitled. In that kind of case, the court asks itself whether there is a sufficient connection between the harm for which the claimant seeks damages as compensation and the subject matter of the defendant's duty of care. The court looks to see what risk the defendant's duty was supposed to guard against and whether the claimant's loss represents that particular risk coming to fruition.

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

Nonetheless, the circumstances that gave rise to this complaint were very similar to those of a pension liberation scam: the transfer followed unsolicited contact from an unauthorised firm and involved the setting up of a new pension scheme to house an overseas investment and another with unusual investment techniques. The Scorpion action pack and insert both recommend checking that financial advice comes only from an authorised person by checking the FSA/FCA register. And Zurich's obligations under the Principles and COBS were of general application and went well beyond just protecting its customers from pension liberation. In the circumstances, even though this doesn't appear to be a case of pension liberation, I'm satisfied there is sufficient connection between the harm Mr H wants to be compensated for and the risk that Zurich had a duty to guard against. So I do consider it fair and reasonable for Zurich to compensate Mr H for his losses.

<u>Other arguments</u>

Zurich's said that it's not a financial adviser and it wasn't responsible for the investments Mr H chose following the transfer. I accept those things are accurate. I'm not suggesting that Zurich should have given Mr H financial advice. But, for the reasons given above, I think it had a duty under the Principles and COBS 2.1.1R to discover how the transfer request had come about and then give him the appropriate warnings. But it didn't do so.

Zurich's also suggested that Mr H might wish to redirect his complaint to Rowanmoor Group PLC, which is a regulated entity. I understand 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 Zurich could have taken comfort from this. I disagree. The Scorpion guidance gave transferring 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 transferring scheme to have delegated that role to a different business – especially, as I've said above, one that had a vested interest in the transfer proceeding.

An important aspect in this is the fact that there is little regulatory oversight of single-member SSASs; they don't have to be registered with TPR. In the absence of that oversight, Zurich 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. So, I don't think it would be fair to lay the blame for Zurich's omissions at Rowanmoor's door.

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

<u>Summary</u>

For the reasons given above I think Zurich should have taken more robust action when presented with the facts.

Had Zurich reacted appropriately to the warning signs as set out in my findings above, it would have followed the Scorpion guidance and began further enquiries. I think those would have uncovered that Mr H was in danger of putting his pension funds at risk by going ahead with the transfer.

But Zurich didn't begin those investigations, it simply proceeded with the transfer without ever contacting Mr H. And, as a result of Zurich's omissions I think that led to the losses Mr H suffered. It follows that I think it's fair and reasonable for Zurich to take the action set out below to put things right.

Developments

Zurich, via its representatives, provided an initial detailed response to my provisional decision. As well as disagreeing with my reasoning for upholding the complaint, Zurich said that we didn't have jurisdiction to consider it. It said that Mr H hadn't brought his complaint within the time limits set out to do so and it didn't consent for us to consider the matter.

After receiving Zurich's response I requested further information from Mr H. I also spoke with him myself.

After carefully considering all the evidence I decided that Mr H had not brought his complaint out of time. I issued a provisional jurisdiction finding and then a final jurisdiction decision setting out my reasons for arriving at that conclusion. At Zurich's request I also shared further file evidence with it.

Zurich, again via its representatives, then submitted further detailed comments concerning the merits of Mr H's complaint. It asked me to consider its recent comments alongside those it had previously submitted.

We have dealt with some of Zurich's comments which are not specific to Mr H's complaint outside of this complaint determination process. And as those issues are generic, I don't intend to reproduce that correspondence here.

Further, as I've said above Zurich has made many detailed points since I issued my provisional decision. I don't intend to summarise all of those here. However, in brief Zurich still does not accept that it failed to do sufficient due diligence or was in breach of COBS or PRIN. Or if it should have done more that its acts or omissions were the cause or the sole cause of Mr H's losses. It said I hadn't correctly factored in the actions or liabilities of others or Mr H's own contributory negligence.

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. 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.

As I've said above Zurich has made many detailed points. I've carefully considered everything it's said. However, our rules don't require me to address or respond to each and every point raised. We're an alternative to the court not a substitute for it. As such my role is to decide how a complaint should be resolved with minimal formality. And I aim to present my conclusions in as clear and as concise a manner as I can. In doing so I focus on the key issues and the reasons that are crucial to my decision making. So, if there's something I haven't mentioned, whether in my provisional decision or in this final determination, it isn't because I've ignored it, I haven't. It's because I'm satisfied I don't need to comment on it to be able to reach what I think is the fair and reasonable outcome.

<u>Did Zurich do enough in the circumstances?</u>

Zurich said that I didn't go far enough to explain why it was required to do further due diligence. It said I only pointed to the recently registered SSAS as being a warning factor and that this alone did not – at that time – raise concerns. But I disagree.

As I said in my provisional decision the Scorpion guidance was clear that a recently registered SSAS was a warning sign for ceding schemes like Zurich to be on the look out for. The guidance said that identifying a single warning sign would not necessarily indicate a dangerous pension arrangement. But it also said that if any warning signs were present then the business concerned could use the checklist to find out if there were other causes for concern.

I appreciate that using the checklist was not a mandatory requirement for ceding schemes like Zurich. But it was the guidance that the FCA was endorsing at the time, and it gave a reasonable structure for ceding schemes to follow in order to identify and prevent pension liberation type activities. So as I said in my provisional decision, I think it was fair and reasonable, where a warning sign was present, for ceding schemes to use the Scorpion checklist to inform their due diligence requirements.

In this case, while the recent registration of the SSAS should have been apparent to Zurich, it didn't identify any further warning signs. In fact it said that none of the other warning signs were present. But the fact that Zurich did not identify any other warning features was because it did not do any further due diligence whatsoever. So, as it did no due diligence it had no way of knowing whether in fact those risk factors were present. And, as I describe below there were other signs that should have raised concerns, which Zurich should have established if it had done what it should have done.

The purpose of the due diligence was to establish facts which might prevent the loss of an entire pension pot. As I've already said, if Zurich had done the appropriate due diligence then it could have identified and warned Mr H about the dangers of accepting advice from an unregulated adviser who was in all likelihood behaving unlawfully in the very act of giving that advice.

For the avoidance of doubt had Zurich done the appropriate due diligence it would most likely have discovered that:

- Mr H received an unsolicited approach via a cold call.
- The proposed investments were connected to unregulated investment companies.
- Some of the investments Involved were overseas.
- They Incorporated unusual, creative or new investment techniques in investing in storage pods.
- Mr H had been advised by an unregulated adviser.

All of those are factors the Scorpion guidance told ceding schemes to be on the look out for. But Zurich did not establish those facts because despite a clear warning sign being present, it chose not to do the due diligence it should have done. And for the reasons already given I think it failed to meet its obligations under PRIN and COBS.

Zurich has also argued that I have applied a higher standard of expectation on it than to what was typical industry practice at the time. It's said that is borne out by other Financial Ombudsman Service decisions which demonstrate that other ceding schemes acted in a similar manner to Zurich. But whether or not other ceding schemes made similar mistakes or failed to do appropriate due diligence would not excuse Zurich from its responsibilities. And there have been numerous examples over the years where what was a very common practice was found to be unfair and unreasonable practice, for example the mis-sale of payment protection insurance (PPI). The fact that numerous businesses followed the same sharp practice did not make that practice fair and reasonable.

It is the case that some pension providers took a more protective attitude towards their customers than others. And some providers modified their approaches over time as experience grew. However, when dealing with Mr H's transfer request, Zurich apparently adopted an extremely casual attitude to its obligations to act in Mr H's best interests. I think I've made my reasons for that decision clear. But it is certainly not the case that I am holding Zurich to a higher standard than other providers. And the Financial Ombudsman Service has upheld many similar complaints from a number of different pension providers in similar circumstances.

The Pensions Ombudsman's findings regarding ceding schemes

Zurich has cited some decisions of the Pensions Ombudsman and said that my findings are at odds with those decisions. As such it said that my provisional decision was "irrational" and "unsustainable".

It appears that Zurich has failed to understand the differences between the two Ombudsman schemes. And while I will have regard to Pensions Ombudsman decisions when arriving at my own determinations, I am not bound by them.

In any event, for the reasons I explain below, I do not agree that my provisional decision is so far removed from the Pensions Ombudsman's findings Zurich has referred to, as to make it irrational or unsustainable. But, for completeness, I'll explain that it's entirely possible for the Pensions Ombudsman and the Financial Ombudsman Service, operating correctly under the relevant rules of their individual schemes, to reach different conclusions on the same facts.

The Pensions Ombudsman principally makes his determination based on whether or not there has been maladministration and rules on disputes of fact. In general his remit is to makes the same decision a court would make. In contrast I make determinations based on whether or not a business has treated a consumer fairly and reasonably in all the circumstances of the complaint. And, as I've said above, while I will consider the position at law, I'm not bound by it. So, while the approaches of the two Ombudsmen schemes are similar they are not the same. That means that we may arrive at different conclusions based on the same facts. That position is generally well understood and any difference in approach or decision doesn't make one scheme's decision or the others irrational or unsustainable.

In particular Zurich referred to a Pensions Ombudsman decision[4] not to uphold a complaint against a ceding scheme in circumstances which Zurich believes are similar to Mr H's. However, I do not find that the facts of the two cases are so similar that the Pensions Ombudsman's decision need concern me. In the cited case the Pensions Ombudsman found that the complainant concerned, Mr Y, received authorised advice from two FCA regulated firms. That is not the case for Mr H. As I said in my provisional decision and as I expand upon below, Mr H did not receive FCA authorised advice from any firm or individual.

Zurich also said the Pensions Ombudsman found that – similar to Mr H – Mr Y had not received the Scorpion leaflet. But that is simply wrong. In fact the Pensions Ombudsman found that while the pension provider complained about had not given Mr Y the Scorpion information he had received it from two other sources: the SSAS provider and another pension provider. And indeed the Pensions Ombudsman noted that Mr Y had signed a declaration to say he'd read and understood it. It follows that, even if I were bound by the Pensions Ombudsman's decisions, I wouldn't find this one to be of a reasonable parallel with Mr H's that I needed to draw conclusions from it.

Zurich added that in the above case the Pensions Ombudsman found that:

"In any event, despite the checks carried out by [the ceding scheme], it had a statutory and contractual duty to transfer Mr Y's funds. It was required to act upon this duty when it received Mr Y's transfer forms, unless there were any indications of why the transfer should not go ahead, such as those indicating pension liberation fraud. In Mr Y's case, there was little to no indication at that time that [an overseas investment] was a pensions liberation vehicle"

[4] Reference CAS-46108-G9D1

In other words the Pensions Ombudsman found that the ceding scheme had to act upon its contractual and statutory duty to effect the transfer. But the Pensions Ombudsman didn't find that a ceding scheme could not or should not carry out appropriate due diligence first.

Zurich said the Pensions Ombudsman had made similar points in other decisions about the importance of a scheme member's statutory right to transfer. It said that this was in "stark contrast" with my provisional findings where it said "it appears to be asserted" that Zurich could have "resisted the transfer and carried out further due diligence" because of the presence of an unregulated adviser.

For the avoidance of doubt, my provisional finding was that Zurich **should have** delayed effecting the transfer until after it had carried out the appropriate due diligence.

But my findings are not at odds with those of the Pensions Ombudsman. I explained in my provisional decision that scheme members will have a statutory right to transfer. However, a ceding scheme has six months in which to carry out that statutory right. And ceding schemes are expected to use that time to do appropriate due diligence.

By way of example the consumer referred to in the Pensions Ombudsman case above, Mr Y, had a second complaint against another pension provider. In the Pensions Ombudsman's determination of that case he found that the provider **was** required to make further checks because it was aware of the recent registration of the SSAS[5]. In other words the Pensions Ombudsman in that case came to the same conclusions I did in my provisional decision. That is, as the SSAS was recently registered the ceding scheme concerned was required to do further checks before acting upon the member's statutory rights to transfer. That is entirely in keeping with what I said Zurich should have done.

Zurich has referred to other Pensions Ombudsman decisions but some of its references are somewhat curious. For example in three cases the complaint was that the ceding scheme **had** refused a transfer. And while the Pensions Ombudsman did refer to a statutory right to transfer, his finding in all three cases was that the scheme member did **not** have a statutory right to transfer. However he also commented that[6]:

"*But there is no direct link between a transfer being for pension liberation purposes and (a) its not being a recognised transfer or (b) there being no statutory right to the transfer…But providers, trustees, managers and administrators will want to keep in mind that strictly they can only refuse to make the transfer beyond the end of the statutory period if there is no statutory right to it."*

So the Pensions Ombudsman found that a pension being for the purposes of liberation did not remove a statutory right to transfer. But he also found that pension providers could not refuse that right beyond the statutory limit of six months. Notably, he didn't conclude that a ceding scheme had to act on the statutory right immediately and without doing further due diligence.

The Pensions Ombudsman made similar comments in another case Zurich cited (PO-3105[7]). That was again a complaint about a pension provider's refusal to make a transfer. In that case the Pensions Ombudsman said[8]:

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[5] CAS-46114-K5R2 – paragraph 30
[6] PO-3809 Paragraph 117
[7] Zurich quoted reference PO-3015 but the decision in that case was from a differently named complainant to the one Zurich gave and the decision would appear to have no bearing on this case. I think this was simply a typo when giving the reference number.
[8] Paragraph 89

"[The pension provider complained about] *suggest that it is wrong to focus solely on whether or not an individual has a statutory right to a transfer. They say that if they were to take a passive approach and allow transfers to schemes that meet the legislative requirements without carrying out further diligence they would be exposing customers to fraudulent pension liberation and/or adverse tax consequences.* ***They are right*** [emphasis added] – *and I have not adopted such a narrow focus, nor do I suggest they should have.*"

And[9]

"*That a regulator, or other source of intelligence, indicates that a transfer may be for pension liberation purposes (perhaps because the receiving scheme and/or those connected with it have a history) may be good reason for delaying the transfer and asking relevant questions during the statutory period allowed for the transfer.*"

In other words the Pensions Ombudsman found that a scheme member's statutory right to transfer does not override a provider's obligation to do appropriate due diligence.

Zurich also cited another Pensions Ombudsman case which contains similar wording to the previous two (PO-1837[10]). Zurich said that in all three cases the Pensions Ombudsman found that:

"*even in the face of severe warning, if the client had established a valid right to transfer their pension, the pension provider could not have resisted payment for risk of breaching its statutory obligations*"

However, the above quote does not appear in any of the three decisions cited. Instead, it appears under the heading of "comment" on the Pensions Ombudsman's website discussing the three cases[11]. And the nature of the comments is that they are essentially hypothetical in nature, rather than specific to any of the three cases. And as the comments don't appear in a determination I doubt they would be binding on the Pensions Ombudsman himself, let alone the Financial Ombudsman Service. However, even if the comments were binding on my considerations I would not find them to be in "stark contrast" with my findings in the provisional decision.

As I've said above the Pensions Ombudsman has found in other cases that it is appropriate for ceding schemes to delay transferring while they do the appropriate due diligence. And if following that appropriate due diligence and having given "severe warnings" the consumer insists on transferring then the provider may not "resist" making payment. But as far as I'm aware the Pensions Ombudsman has made no finding that a pension provider should not do any due diligence where that is appropriate. And my provisional decision findings, which I maintain, are simply that Zurich should have done appropriate due diligence. Had it been the case that, having done so, Mr H insisted on transferring then I agree with the Pensions Ombudsman's conclusion that Zurich could not have continued to 'resist' that. But that wasn't the case. Zurich did no due diligence and didn't give any warnings. And I find nothing of concern in the Pensions Ombudsman decisions Zurich has cited.

<u>The involvement of other parties</u>

Zurich has argued that the involvement and actions of other bodies removed the need for it to do further due diligence. It's also argued that those other bodies or individuals had a part to play in terms of causation for the losses Mr H has suffered. Zurich itself recognised that a

[9] Paragraph 104
[10] Zurich actually quoted reference PO-1873 but I can't find a Pensions Ombudsman's decision with that reference and trust this was merely another typo.
[11] https://www.pensions-ombudsman.org.uk/news-item/pension-liberation-update-0

number of its comments were repetitive. So I've tried to focus on what I see as being its key concerns, which I've given careful consideration to below.

The Pensions Specialist (PS)

Zurich has argued that the involvement of PS called some of my findings, particularly about who gave Mr H advice to transfer and the issue of which party or parties caused his losses, into question.

I addressed a number of Zurich's arguments in my provisional and final jurisdiction decisions. So it is particularly disappointing that it continues to raise the same arguments without producing any further material evidence or rationale in support of it. When doing so Zurich has studiously overlooked the important point that PS was no longer an authorised representative of an FCA regulated firm by the time Zurich received the transfer request. However, for completeness I will reiterate my previous findings on the matter.

There's no doubt that Mr H signed a letter of authority enabling PS to gather information about his pensions in July 2013. But that letter is headed with an all caps statement that it was a:

"*LETTER AUTHORISING THE RELEASE OF INFORMATION ONLY*"

And while it did give PS authority to act on Mr H's behalf it repeated that:

"*This letter authorises the release of information only. It is not a change of servicing agent*."

So Mr H didn't appoint PS as his "financial adviser", he simply authorised it to gather information about his pension. PS then requested that information from Zurich in late July 2013. Zurich replied to that request on 29 July 2013. Zurich didn't ever hear from PS again and there's no other evidence of PS continuing to be involved with the matter.

Also, not only is there no evidence that Mr H ever appointed PS to be his financial adviser but it appears that Zurich had another authorised firm registered as Mr H's designated financial adviser, which I refer to as adviser A, and which Zurich believed was still representing Mr H.

I say the above because – on completion of the transfer – Zurich copied its letter confirming it had done so to adviser A. So it seems likely it still had that firm recorded as Mr H's advisers and not PS. I note that Zurich has not disputed this point in response to my provisional jurisdiction decision where I first raised it. Nor has it provided any evidence that it **had** recorded PS as Mr H's financial adviser on its system in place of or alongside adviser A.

Similarly, there's no evidence Zurich copied to PS its letter confirming it had made the transfer as it did for adviser A. And if Zurich genuinely believed that PS was acting as Mr H's regulated financial adviser in the transfer I would have expected it to copy its letter concluding the matter to PS. But it didn't ever contact PS again after its July 2013 letter providing information. All of which indicates that Zurich had adviser A recorded as Mr H's financial advisers and not PS. So there's no contemporaneous evidence it considered or took comfort from the involvement of PS at the time of the transfer.

Further, as I've said above and as I pointed out in my jurisdiction decision, PS ceased to be the appointed representative of its FCA authorised principal from December 2013. So from that point onwards it ceased to hold any FCA authorisation. That means it could not, from that point, carry out any regulated activity on behalf of its clients.

Zurich didn't receive the transfer request until March 2014. That was around eight months after it had replied to PS' information request and four months since PS had ceased to act for an authorised firm. It follows that, by the time Zurich was considering the transfer request PS was not authorised to act as an adviser on behalf of Mr H.

In summary:

- Zurich had only one contact with PS in July 2013. Zurich responded to that and it didn't ever have contact from PS again.

- PS' letter said Mr H had authorised it to gather information only and was not a change in servicing agent.

- PS ceased to be an authorised representative of an FCA regulated firm in December 2013 and Zurich didn't receive the transfer request until March 2014.

- Zurich had another regulated firm, adviser A, noted on its system as Mr H's adviser.

Taking the above into consideration it's very difficult to understand why Zurich continues to argue that the involvement of PS in any way affected its consideration of the transfer or contributed to Mr H's losses.

I'll add that I asked Mr H what he remembered about PS' involvement. He told me that he had no recollection whatsoever of even signing the letter of authority or of any involvement from PS.

In conversation with me he assumed that RoC's adviser had asked him to sign the PS letter of authority at the same time as he signed one for RoC. But he doesn't remember doing so nor does he recall any other interaction with PS whatsoever.

I'm mindful that we're over ten years on from the events concerned. So Mr H's memory of those events will inevitably have faded. But that doesn't mean that I should completely dismiss his recollection – or in the case of PS his lack of it – in its entirety. For example he was able to describe RoC's adviser to me. So he clearly has some memory of the events.

And his account has been consistent throughout. I don't find that surprising as I think most people would have some memories of making a potentially life changing decision like transferring pension funds and investing in non-standard investment vehicles.

Also, Mr H's recall is supported by the verifiable evidence – as I've said above I've seen no other evidence at all of PS having any further involvement in the matter after July 2013. So, while I will treat Mr H's oral evidence to me with some caution, I do attach appropriate weight to it.

And having considered all of the above, I find that PS did not advise Mr H, Zurich did not record PS on its systems as his financial adviser, and its involvement gave it no reasonable rationale for Zurich failing to do appropriate due diligence.

Similarly, it would be unreasonable to conclude that, if Zurich had asked Mr H who was advising him he would have answered that it was PS, when he's been consistent that the advising firm was RoC and its two named representatives. Additionally, there is no reasonable basis for Zurich's liability to be reduced because of reference to PS in the matter.

Return on Capital (RoC)

Zurich said that my conclusion that RoC had given Mr H regulated advice and had acted unlawfully in the process was "remarkable". It said my finding relied entirely on hindsight and unsupported assumptions. It said that was contrary to RoC's written submission in the LOA Mr H signed in July 2013 which said that RoC was not providing financial advice.

I agree there is no explicit written evidence from RoC showing that it gave Mr H advice to invest in Dolphin or Store First. However, there is no evidence of any other person or firm giving Mr H written advice or a recommendation to transfer his pension and invest as he did. And in order to do that Mr H needed to establish a SSAS and, while there was a legitimate existing company, S, to act as the SSAS' sponsoring employer, it seems unlikely he would have set up the SSAS unless someone had advised him to do so.

Mr H wasn't a sophisticated investor. And he'd only relatively recently become the director of company S. I can't see he'd have set the SSAS up, 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. And Mr H has been consistent that the transfer came about after receiving a cold call from RoC. It's adviser visited him and made a recommendation to set up the SSAS, transfer his current pensions and invest in Dolphin and Store First.

Further, aside from Mr H's recollection, it's notable that:

- RoC is named on the SSAS application form from February 2014 as its *trustee adviser*.
- RoC is given as the "agent" on the Store First 'Store pod reservation form" of 5 March 2014.
- RoC's representative witnessed Mr H's application for the Dolphin loan notes on 11 March 2014.
- The SSAS made a payment of £250 to RoC in May 2014 which is recorded as being "IFA[12] fees".

And all of the above actions happened after PS had ceased to be FCA authorised. In addition, RoC continued to advise Mr H after the transfer had concluded as there is evidence of its involvement for a number of years afterwards. That includes Mr H and RoC signing an agreement to allow Rowanmoor to deduct fees for the "financial advisor" from the SSAS funds. So it's not the case that my conclusion that RoC provided unlawful advice is based almost exclusively on Mr H's recollection and hindsight. Instead it is supported by the contemporaneous evidence of RoC being engaged in an advisory capacity both prior to the SSAS being set up and afterwards.

I'm aware that RoC's LOA from July 2013 said that RoC was not giving financial advice. Mr H told me that he had no recollection of that, and given the time that has passed I don't find that surprising. However, I also don't find it surprising that Mr H didn't identify the apparent contradiction between RoC's statement, that it wasn't giving financial advice, and its actions some months later when it plainly did give financial advice. Again I need to think of the two actions in context.

[12] IFA is generally understood to be an abbreviation of "independent financial adviser".

Mr H signed the LOA in order to allow RoC to send that to his pension providers with a view to it gathering information about his pensions. So unless Mr H had concerns about RoC seeing his pension details he had no reason to specifically recall the details of the LOA. It wasn't intended for him or addressed to him. It was intended to be sent to pension providers. He simply had to sign it. And there's no evidence RoC gave him a copy of that letter.

Further I'm aware that some pension providers had begun refusing to provide pension information to unregulated firms without first contacting the consumer concerned. And that act in itself could alert the consumer to the fact that the firm concerned was not regulated. So, whilst I can't be certain, I think it's possible that, in order to try and avoid further complications caused by pension providers informing their customers that a firm was unregulated, RoC told pension providers at the outset that it wasn't giving pension advice. In that context RoC's statement that it wasn't giving advice was for the pension providers consumption and not Mr H's. In other words its purpose was most likely to be aimed at deflecting any attention from pension providers like Zurich away from it rather than giving an instruction to the consumer about the constraints of its involvement. So it's unlikely to have been a matter that Mr H would have identified as being a contradiction at the point when RoC did give Mr H advice many months later.

It follows that I remain satisfied that if Zurich had made enquiries of Mr H, at the time of the transfer, and asked him how the transfer came about, he would have told it that action was recommended to him. And he clearly would have named RoC's adviser and firm as the person and entity who had given that advice. Zurich could have then determined for itself that an unregulated firm was providing authorised advice in clear contravention of FSMA. There is nothing 'remarkable' about that determination. And it would seem to me that the most likely reason that Zurich wasn't in a position to arrive at the same conclusion itself was because it failed to do the appropriate due diligence.

Zurich has also argued that if it had given Mr H appropriate warnings about RoC's unregulated status, it's likely RoC would have given him a plausible explanation for that and relied on Rowanmoor's reputation to explain its involvement. In that scenario Mr H would ultimately be in the same position.

I've thought carefully about this. I note Mr H told our Investigator that if Zurich had pointed out RoC's unregulated status he said that, in the first instance, he would have taken this up with RoC's adviser himself. But this was Mr H's answer when put on the spot by our Investigator about what he'd do in that situation. So Mr H's answer was his first thought on the matter.

When I spoke with him, Mr H's answer was different and he said it would have caused him to take stock of the situation and question his own actions. I appreciate Mr H gave that answer with the benefit of hindsight; however, I think most people when told that their adviser was acting unlawfully and could be putting their pension funds at risk, would think very carefully about whether their trust was misplaced. And, if Zurich had presented Mr H with the Scorpion material in the first place, he could have at the least approached TPAS or Action Fraud for advice, or alternatively sought the advice of an impartial regulated adviser. Those are more logical steps for someone to take once given the time to consider their actions in the circumstances described. So I remain of the view that if Zurich had given the appropriate advice then Mr H would have taken a different course of action.

I'll add that Zurich took issue with my comment in the provisional decision that in failing to warn Mr H that in following RoC's advice he would lose regulatory protections. It said that Mr H did not lose regulatory protections as he would retain the right to complain about Rowanmoor to the Pensions Ombudsman. However, the source of Mr H's inappropriate advice was RoC not Rowanmoor. He couldn't complain about RoC to the

Pensions Ombudsman. So it's not in doubt that he lost regulatory protection in terms of complaining about unsuitable pension transfer and investment advice. The fact that Mr H could have complained about an entirely separate entity and on a different complaint point would a not have made Rowanmoor responsible for RoC's advice.

Further, I understand that the Pensions Ombudsman has upheld complaints against Rowanmoor Trustees Limited's failure to effectively carry out its regulatory and fiduciary duties in similar circumstances to Mr H's. But I also understand that it is a dormant company, with little or no assets of its own. So it would most likely be incapable of settling claims made against it. In those circumstances there would have been little for Mr H to gain by complaining to the Pensions Ombudsman about Rowanmoor as that wouldn't resolve his complaint about Zurich's failure to carry out its own duties.

Rowanmoor

Zurich has continued to argue that the involvement of Rowanmoor, whose directors were also directors of an FCA regulated business, could give it comfort meaning further due diligence was unnecessary. I explained in my provisional decision why I don't think that was the case and nothing Zurich has said since then persuades me otherwise.

I'll repeat that the FCA does not regulate SSAS trustees or administrators and it has no powers to intervene in or manage their actions. The fact that Rowanmoor's directors were also directors of another business which was FCA regulated does not change my thinking on this. The directors chose to run their SSAS related business from two entirely separate entities to their FCA regulated business. And they no doubt set up the different businesses with different structures and an awareness of the difference in regulatory regimes. So, they would have known that by doing so they would not fall under FCA scrutiny *for doing that work*.

Zurich has pointed to the FCA's guidance concerning individuals' fitness and propriety to undertake regulated activities. Zurich's argued that if it came to the FCA's attention that the Rowanmoor directors were acting in a manner inconsistent with that guidance this could cause the FCA to take action against them. That might be the case, but the fact that an individual could attract the FCA's attention should their actions in a non FCA regulated role, warrant that attention, does not mean that those individuals will always act with FCA principles in mind while carrying out other work. That's particularly so when the FCA has no regulatory interest in or locus on the action being taken. And I don't see why Rowanmoor's directors, nor its staff who actually did the work, would have any regard to FCA principles when those simply did not come into play in the work they were doing. So I don't think it was reasonable for Zurich to come to that conclusion either.

Further Zurich's said the evidence from Rowanmoor's file is that Rowanmoor conducted its SSAS business in the manner expected a professional administrator and trustee. I need to be clear that as a SSAS is an occupational pension scheme, the action of its trustees or administrator do not fall within the Financial Ombudsman Service's jurisdiction. So I don't have the powers to make a finding on how the SSAS trustees conducted themselves, or to determined if they did or did not do everything that they should have done. However, there's evidence that Rowanmoor might not have taken all the actions it perhaps should have done.

I say the above as Zurich's evidence is that it sent the Scorpion insert to Rowanmoor when it responded to Rowanmoor's information request. But there's no evidence from Rowanmoor's file that it passed that important information on to Mr H. And while that might not have been a regulatory breach it doesn't indicate that it was acting in his best interests.

Also, section 36 of the Pensions Act 1995 requires trustees, whether professional or otherwise, to obtain and consider proper advice on the question of whether planned SSAS investments are satisfactory for the SSAS. But as far as I can tell, the Rowanmoor trustees didn’t obtain appropriate advice on the Dolphin investments for Mr H’s SSAS. Alternatively, if it had already received and considered that advice, it didn't pass the original advice on to Mr H. Instead it sent Mr H a risk warning letter (which I've expanded upon below) and recommended he seek his own advice. But I can't see that Rowanmoor followed up on this and insisted on seeing that advice. In fact Mr H signed a slip to say that he didn't intend to take legal advice and Rowanmoor was apparently satisfied with this.

So, while I don't have the power to rule upon whether or not Rowanmoor dealt with Mr H fairly and reasonably of fulfilled its duties as a SSAS trustee, I'm not convinced that Rowanmoor did conduct itself in an appropriate manner. And given that Zurich did no due diligence about what Rowanmoor was or was not doing, it had little basis on which to conclude that it could take comfort from Rowanmoor’s involvement.

But even if I were to agree with Zurich that it could take assurance from Rowanmoor’s presence, the fact remains that Zurich had a role to play in ensuring it did its own appropriate due diligence. Whatever Rowanmoor’s own legal and fiduciary duties were, those did not absolve Zurich of its own responsibilities and obligations as placed on it by PRIN and COBS.

Carrying out its own duties to the required standard was aimed at preventing the potential loss of pension funds. But it seems Zurich chose not to carry out its duties because it believed it could take assurance that other businesses would do their duty even though Zurich wasn't doing its own. I don't think that was a fair and reasonable approach.

Regardless of Rowanmoor’s directors’ links to other FCA regulated businesses, nothing about Rowanmoor’s standing absolved Zurich of its duties under PRIN and COBS or acting in line with the Scorpion guidance. The guidance put ceding schemes front and centre of scam and liberation prevention. So the standing – or perceived standing – of the administrator or trustee of the receiving scheme does not absolve a ceding scheme of its responsibility to act in line with PRIN and COBS or to follow good industry practice and consider available guidance. The Rowanmoor entities involved with Mr H’s SSAS were not FCA regulated for that work. So it seems to me that if Zurich chose not to carry out its own duties fully because it believed it could take reassurance from Rowanmoor’s standing, then that reassurance was entirely misplaced.

Rowanmoor’s Dolphin warning letters

Zurich has pointed to letters which Rowanmoor sent to Mr H on each occasion before he invested with Dolphin. Those letters, amongst other things, contained warnings that investments of that nature carried a high risk, there was no secondary market for them, they were not transferable, that investors would have no need for liquidity and would need to be able to withstand a total loss of the investment. The letters went on to say the investments were not FCA regulated and recommended that, as with all complex investments, that consumers like Mr H should take appropriate legal or professional advice before investing.

The letter asked for Mr H’s signature and declaration that – deleting where appropriate – he:

- Had read the letter.

- Understood there were risks involved in the proposed transaction and that Rowanmoor would not carry any liability for it.

- Would/would not be appointing a legal adviser.
- Would/would not be taking out life assurance.

Zurich has argued that Rowanmoor's letter gave stark warnings but Mr H went ahead with the investments anyway. So, it believes there's no evidence that if Zurich had given him the same warnings Mr H would have acted on that information.

I understand Zurich's point and I agree that the letters contain warnings that could cause a consumer to sit up and take notice. But I think we need to consider the context on which those warnings were given to Mr H.

Rowanmoor first sent Mr H its warning on 3 March 2014, before Zurich had received the transfer request. At that time Mr H has told us that he had not had sight of the Scorpion materials – which Zurich had not sent directly to him. And he was unaware of the significance of taking advice from an unregulated adviser or of the consequences of losing regulatory protections.

It's also notable that Rowanmoor sent the letter along with other documents to RoC and not directly to Mr H. Rowanmoor told RoC that Mr H would need to sign the declaration I've referred to above. Mr H signed that declaration on 11 March 2014. On the same day he signed an application for the Dolphin loan notes – which RoC's representative witnessed. So it's apparent that RoC met Mr H in person and asked him to sign to say he'd read the Rowanmoor letter on the same day he signed to apply for loan notes themselves. And Mr H has previously told us he signed what RoC asked him to. So it seems likely he signed the letter without fully considering its implications. And while that might have been an error on his behalf, I don't think that means he'd been negligent.

Mr H has told us about how convincing he found RoC's representative. And RoC was recorded on the SSAS application as being the trustee adviser. That is Mr H was paying RoC a fee from the SSAS funds in order to advise him on the scheme. And no one had warned Mr H of accepting advice from an unregulated adviser – Rowanmoor clearly accepted RoC as the adviser, as it was happy to pay a fee from the SSAS it was a trustee of to RoC for its services.

I've previously concluded that it was RoC which advised Mr H to invest in Dolphin and Store First. I haven't seen any written advice from RoC, and Mr H told me he doesn't recall receiving any, but it's not in doubt that RoC was advocating Dolphin and Store First. And, as I said above, Rowanmoor sent its warning letter direct to RoC and asked it to give this to Mr H and obtain his signature to say he'd read it.

Mr H told me over the phone that RoC's representative simply turned up with the papers and Mr H "signed in the right place". So it doesn't appear that the matter was discussed in any detail. But even if it was I have little doubt that RoC would have presented a plausible argument for why Rowanmoor gave those risk warnings and why those need not overly concern Mr H at the point that RoC gave the letter to him. In those circumstances even if Mr H had given the letter further consideration it seems unlikely it would have changed his mind about investing.

Further, some of the information within Rowanmoor's letter was not new to Mr H. So I doubt whether the warnings would have landed with Mr H at all. For example the loan notes themselves were clear that they were not transferable and that they would not mature for five years. So Mr H wouldn't have expected those investments to be liquid. He would have been expecting to tie the money up for five years at which point he could redeem them. I'm also aware that the loan notes themselves came with multiple paged legal contracts that appear to be binding and which promise guaranteed returns. And, those would have painted a picture of offering legal protection against failures.

I'm aware that Rowanmoor's letter said that "as with all complex investments" it recommended Mr H take "legal and other professional advice in the matter". But I doubt that many consumers like Mr H would be surprised to be advised to take legal advice when agreeing to a legal document. And Rowanmoor's letter wasn't clear about where he should go to get professional advice that was different to the advice RoC was already providing.

However, I think it's likely that the Rowanmoor letters could have carried more weight if Zurich had told Mr H about the risks of accepting advice from an unregulated adviser. I appreciate that Rowanmoor had sent its Dolphin warning letter before Zurich received the transfer request. And by that time Mr H was already some way down the road to investing. But, had Zurich done everything it should have done, including sending the Scorpion warning and then doing appropriate due diligence and advising Mr H of the risks, the situation was more likely to have been different.

As I said in my provisional decision I think for most reasonable people, learning that their adviser could be acting in an unlawful manner in the very act of advising them, would cause them to re-examine their situation, the adviser's recommendations and their relationship. I think that's the case even where the consumer had established a rapport with their adviser and put their trust in them. And it's likely that, in those circumstances, the consumer involved while re-examining their situation would look again at the warnings they'd received and reconsider whether their adviser was trustworthy.

In that context, I think Rowanmoor's warning letter – when considered through the lens of understanding that the firm or individual who recommended the investment is probably acting unlawfully – could have carried far more weight. But in this case, Mr H had no reason to be concerned about the action of his adviser. And while the Rowanmoor letter did point out some risks associated with the transfer, almost all investment opportunities carry some risk and so consumers generally expect to see some warnings. So I don't agree with Zurich that Mr H's decision to proceed with the transfer despite having been given some warnings is evidence that he would have gone ahead even if Zurich had done all it should have done.

I note again that the Rowanmoor letter did say that Mr H should take appropriate advice. But assuming Mr H had picked up on this point, his understanding was that he had already taken appropriate advice – from RoC. And that advice was the Dolphin investments were suitable for him. Rowanmoor had accepted RoC as the SSAS's trustee adviser and no-one had warned him of the dangers of taking advice from an unregulated adviser. So, from his perspective, it's likely he would have believed that he'd done what he needed to do and accepted professional advice of someone he trusted. He had no reason at that time not to trust the adviser.

It follows that Mr H was unaware of the risks associated with an unregulated adviser. So, I don't find the fact that Mr H went ahead with the investments after receiving the Rowanmoor warning letters is compelling that he would have gone ahead with the investments if Zurich had done everything it should have done and warned him of the risks of accepting the recommendation of an unregulated adviser.

The Hetherington Partnership

The Hetherington Partnership was a law firm instructed by Mr H but recommended by Store First. It was responsible for advising Mr H on matters relating to the legal title for his store pod purchase.

Zurich said that the Hetherington Partnership recommended that Mr H seek the advice of an independent financial adviser. And Zurich described the letter as providing “grave warnings”. But I don't think that’s a reasonable interpretation of the content or tone of the Hetherington Partnership’s communications with Mr H. The letter Zurich referred to is clear that Mr H should take advice from a surveyor as to the value of the pods, as Mr H would be committed to buying those once the contracts were exchanged. It also advised Mr H that the Hetherington Partnership wasn’t able to advise him on a number of matters, including taxation, before also recommending he seek the advice of an IFA. However, Mr H was already taking financial advice from RoC. And the Hetherington Partnership’s letters didn't instruct Mr H to only take advice from an FCA regulated IFA nor warn of the implications of taking advice from an unauthorised adviser. So Mr H most likely already believed he had taken and was taking the financial advice the Hetherington Partnership was recommending.

The Hetherington Partnership also produced a ‘report’ which advised Mr H that the lease contained a two year break clause. And that a buy back option, where Mr H would be able to sell the store pods back to Store First after five years, was at Store First’s discretion. But the letter did very little to warn Mr H of the implications for him and his investments if those things happened.

I also think it's worth noting that the Hetherington Partnership’s partners were the subject of prosecutions before Solicitors Disciplinary Tribunals (SDTs), which saw both partners struck off the solicitors’ register. The SDT’s decision were later upheld at appeal by the High Court.

The SDT examined the advice the Hetherington Partnership had given to their clients concerning dealings with Group First companies. The SDT and the High Court[13] found that the Hetherington Partnership had deliberately not given full advice in order that Group First transactions would proceed. Mr H’s case was not one the SDT or court specifically considered. But I think the SDT and High Court’s decisions demonstrate that, rather than giving “grave warnings” the Hetherington Partnership’s approach to Group First clients was to deliberately only provide basic information. The court found that their motivation for doing so was in order to maintain their income stream from Group First, and their risk warning letters were unlikely to dissuade clients like Mr H from withdrawing from their purchases.

Also, while the Hetherington Partnership’s letter did make a recommendation that Mr H should take advice from an IFA, it didn't explain who that IFA should be regulated by, nor did it contain other warnings likely to deter Mr H from making the Store First investment. So I don't find the involvement of the Hetherington Partnership or its letters to Mr H supports Zurich’s stance.

Provider C

Zurich has noted that provider C also processed a transfer request around the same time as it did. That is the case. But I think it’s worth pointing out that, while I have seen the relevant papers in respect of that transfer, Mr R has not submitted a complaint to the Financial Ombudsman Service about provider C’s actions. So I have not made any finding about the manner in which it treated Mr H.

That said, I have noted that provider C did not give Mr H the Scorpion warning materials nor inform him that RoC was unregulated. So Mr H didn't receive that information from provider C either. Had it done the appropriate due diligence, so that Mr H had received the necessary warnings before Zurich completed its transfer, then the outcome of Mr H’s complaint against Zurich would most likely be different. But that wasn't the case. And, as far

[13] Margaret Bridget Hetherington & Anor. v Solicitors Regulation Authority Limited [2022] EWHC 2722 (Admin)

as I can tell Zurich was unaware of the involvement of provider C and could not have considered its actions when deciding what due diligence it was required to do.

But, in any event I have factored in the involvement of other providers when awarding redress. And I am only holding Zurich responsible for the relevant proportion of Mr H's losses which refer to the sum transferred from his Zurich policy.

Provider ST

In 2016 Mr H also transferred the funds from a third pension from provider ST into his SSAS. However, there was no record of any involvement or reference to Mr H's pension with ST anywhere on Zurich's, provider C's or Rowanmoor's files at the time of Mr H's initial transfer in 2014. As such provider ST had no part to play in influencing or preventing the transfers in 2014. However, as with provider C, Zurich need only compensate Mr H for the relevant proportion of the SSAS funds lost relevant to its transfer.

<u>*The cause of Mr H's losses – other considerations*</u>

As I have already said above, Zurich has argued that other parties had given Mr H appropriate warnings and the gravity of those warning should have dissuaded Mr H from transferring. However, for the reason already given I'm not persuaded by that argument and I don't intend to revisit those findings here. However, I will repeat that I consider that if Zurich had acted as it should and warned Mr H about the risks of following the advice of an unregulated adviser, he would not have proceeded with the transfer of his Zurich pension or suffered the investment losses he did. I'll reiterate that the warnings provided by Rowanmoor or the Hetherington Partnership did not highlight those risks, nor were they required to. So it's not the case that other parties gave Mr H the warnings that Zurich should have done.

In support of its arguments that it is not responsible for Mr H's losses Zurich has referred to the findings of a Court of Appeal case[14]. That action was taken by an investor against a business which advised him on his investments which went on to suffer significant losses. In that case the court found the defendant business to have committed a breach of the regulatory rules. But the court did not rule that the defendant should be responsible for the entirety of the losses the claimant suffered. And Zurich's interpretation was that the court found that it was for the claimant to prove that they would have acted differently but for the defendant's breach.

I'll take the opportunity to remind the parties that while I will take the position at law into consideration, in coming to my determination I am not bound by the law nor by any precedent set in court. Instead I reach my decision based on what I consider to be fair and reasonable in all the circumstances of the complaint.

However, even if I were bound by the precedent of the court I wouldn't have found Zurich's arguments here compelling. I don't intend to produce an in-depth analysis of the action concerned or the court's findings here. Save that is to say that there are few parallels between the facts before the Court of Appeal and the complaint before me.

In the court case cited the claimant was a multimillionaire and extremely experienced to the point of being an expert in the investment area concerned. It was also common ground that the defendant business had given the claimant specific advice and explained the risks involved to the claimant. However, the judge found that it was for the claimant to show that he had relied on the defendant's advice when making the investments, which the claimant was unable to do. There is no such equivalent position in Mr H's complaint. Zurich gave him

[14] Zaki v Credit Suisse [2013] EWCA Civ 14 at [49].

no advice whatsoever. So, given the lack of parallels between the facts of the cases I don't think it would be reasonable to say the principles from the court case cited should apply when determining Mr H's complaint.

In my view the appropriate question is whether or not Mr H would have suffered the losses that he did if Zurich had done everything it should have done. I've already concluded that Mr H would not have done so. That is, I'm satisfied he wouldn't have gone ahead with the transfer.

But I also have to decide whether it's fair and reasonable to instruct Zurich to compensate Mr H for the relevant proportion of those losses[15]. In doing so, I've considered whether Mr H should bear some responsibility for the loss he has incurred because of his own actions.

I thought about this when arriving at my provisional decision, where I commented that I take into account that the courts are able to reduce a defendant's liability for negligence where the claimant shares responsibility for the damage they've suffered.

More specifically, the Law Reform (Contributory Negligence) Act 1945 allows for the apportionment of liability in the case of contributory negligence. It says that where any person suffers damage as the result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage; but the damages recoverable shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

I've taken this into consideration not because the 1945 Act directly applies to complaints to the Financial Ombudsman Service – it doesn't it only applies to legal claims. And clearly I'm not deciding a legal claim, only a complaint. But I've considered this because I think this complaint raises similar issues to a legal claim in negligence.

My view is that Mr H doesn't bear responsibility for the losses he suffered. He transferred his Zurich pension because he listened to someone who was promising significantly higher returns than he was achieving. Crucially, Zurich – nor anyone else – gave Mr H the warnings it should have done at the time of the transfer about the dangers of following the advice of an unregulated party that was most likely acting unlawfully.

In fact Zurich provided no risk warnings directly to Mr H at all. Nor did it directly give him any indication of what further steps he could take to protect himself. Further, I don't think Mr H, acting reasonably, would have got a sense from any other sources that there was a need to act with additional caution when transferring his pension. My view is that he wouldn't reasonably have known that his actions were exposing him to undue risk. I'm satisfied his actions were in keeping with those a reasonable person would take in his circumstances. So I don't intend to reduce Mr H's compensation.

Zurich has also said I should consider the involvement of the other parties and to apportion liability accordingly. Zurich said its liability should be nil. But I disagree. I've already explained above why I don't intend to hold Mr H contributorily negligent for the losses he suffered. And I've also already said that I intend to only hold Zurich liable for the relative proportion of losses suffered from the funds Mr H transferred from his Zurich policy.

Further under the DISP rules (or in law) there is no requirement for Mr H to have complained to *all* the potential parties that might have caused his loss. And for the reasons given I'm satisfied that but for Zurich's actions Mr H would not have transferred his Zurich pension and

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[15] 229(2)(a) of FSMA

suffered the losses he expects to under the SSAS and the investments held within it. In these circumstances I'm satisfied that I can fairly make the award I have below against Zurich.

However, it's plain that Zurich thinks that other parties are also responsible for Mr H's losses. If it believes it can recover some of its compensation outlay from the other parties involved then I think it would be entitled to do so. To facilitate that I think it would be fair for it to ask Mr H to grant it the right to complain against Rowanmoor (or whichever body has taken on Rowanmoor's liabilities), the investment providers or advisers, should it wish to do so. Zurich would need to bear the costs of drafting any such undertakings. If Zurich asks Mr H to assign this right to it, payment of the compensation awarded may be dependent upon provision of that undertaking. But Zurich may only pursue any action to recover compensation from third parties after it has first compensated Mr H in full.

Putting things right

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

The SSAS only seems to have been used in order for Mr H 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 H would have remained in his pension plan with Zurich and wouldn't have transferred to the SSAS.

To compensate Mr H 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 H'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 H 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 H 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 and Store First investments. This is because there is no recognisable secondary market for them. 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 H 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 H to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

- It's also fair that Mr H 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 H 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 H'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 H 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 H's dissatisfaction with the outcome of the investment it facilitated.

Zurich should reinstate Mr H'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 H was invested in).

Zurich shouldn't reinstate Mr H'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 H'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 H'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 H 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 H doesn't incur an annual allowance charge. If Zurich cannot do this, then it shouldn't set up a new plan for Mr H.

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

To make this reduction, it's reasonable to assume that Mr H is likely to be a basic rate taxpayer in retirement. So, if the loss represents further 'uncrystallised' funds from which Mr H 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 H 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 H'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 H how much has been taken off. Zurich should give Mr H a tax deduction certificate in respect of interest if Mr H 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 H'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 H was invested. However, I expect any such reinstatement to be achieved promptly.

Zurich must provide details of the calculation to Mr H 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 H to accept or reject my decision before 13 February 2025.

Joe Scott
Ombudsman