DRN-5282732

The complaint

Mr M has complained, with the help of a professional representative, about a transfer of his Zurich Assurance Ltd (Zurich) personal pension to a small self-administered scheme (SSAS) in September 2014. Mr M's SSAS was subsequently used to invest in an overseas property investment with The Resort Group (TRG). The investment now appears to have little or no value. Mr M says he has lost out financially as a result.

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

What happened

I issued my provisional decision of 2 January 2025 in which I said that I intended to uphold Mr M's complaint and award compensation. This set out the background and circumstances leading up to this complaint as well as my reasons for reaching my conclusion. I've included the relevant extracts from my provisional decision below as it forms part of this final decision.

<u>Copy of my provisional decision</u>

What happened

Around October 2013, Mr M says he was cold called by a business offering him a free pension review. Because he was interested in what was offered, Mr M says he contacted Zurich to request details of his pension. Zurich replied to Mr M with the requested information on 7 October 2013.

Mr M says he then agreed to meet with an adviser from First Review Pension Services (FRPS) at his home. Mr M, who was 43 at the time, says they recommended he transfer his pension to a SSAS and invest in an overseas commercial property investment with TRG. Mr M says he had no experience of investments and trusted the information he was given.

He says it sounded like a realistic opportunity to achieve a significant increase on his pension savings, so he agreed to go ahead. FRPS was not an FCA authorised firm.

On 24 October 2013, a company was incorporated with Mr M as director. I'll refer to this company as D Limited. A SSAS was then established and registered with HMRC on 29 November 2013. D Ltd was recorded as the SSAS's principal employer and Cantwell Grove Limited (CGL) was recorded as the administrator. CGL was not subject to FCA regulation.

On 23 December 2013, CGL wrote to Zurich enclosing documents to allow Mr M's pension to be transferred to the SSAS. The letter said that CGL was aware of concerns around 'pension liberation', it supported the efforts of the pension industry, and that its business model, as a pensions administrator, had been vetted by HMRC. It also said CGL supported the 'Scorpion' campaign of The Pension Regulator (TPR) and that the 'Scorpion' information leaflet, which warned about the risks of pension liberation, had been shared with Mr M.

CGL enclosed the completed application for the transfer, copies of the scheme trust deed and rules, the HMRC registration confirmation and a scheme details Q&A document, which it said gave answers to some general questions, including which investments were under consideration.

I haven't seen a copy of the Q&A document referred to in this case. But we know from other complaints involving CGL that this document was standardised and followed the same layout. So, I think it's likely this said that the investments under consideration were a commercial property investment provided by TRG and a discretionary fund management service (other documentation on file indicates part of Mr M's pension funds were also invested this way.) The document would also have likely named the firm responsible for giving Mr M advice (as the trustee of the SSAS) about whether the investments were satisfactory for the aims of the scheme.

I don't know which firm this document would've named as being responsible for this advice, but I can see from a partial copy of a letter Mr M signed on 11 September 2014 (after the transfer) that the trustee advice was provided by a business called Broadwood Assets Ltd (BAL.) This said it was providing him with advice, in his capacity as trustee of the SSAS, on the potential suitability of the TRG investment. It wasn't advising on whether the TRG investment was suitable for the particular needs and objectives of the members or beneficiaries of the SSAS. Again, from my experience of the format of this letter, the missing pages would've outlined that it had not advised on the establishment of the SSAS and it was not providing advice that would be deemed regulated. BAL was not regulated or authorised by the FCA.

Also enclosed with the transfer request paperwork was a letter signed by Mr M. This letter said he was aware there had been a rise in cases of pension liberation fraud and he was aware of the issues relating to this. The letter said Mr M wanted to confirm he was requesting a transfer to take advantage of investment opportunities, none of which were connected with pension liberation. And it said he was not looking to access his pension before age 55 – the trust deed of the SSAS would not permit this – and he had not been offered a cash or other incentive to transfer.

On 17 February 2014, Zurich sent Mr M a letter acknowledging receipt of the transfer request. The letter highlighted the issue of pension liberation and said that unscrupulous firms were persuading people to transfer their pension so they could access cash immediately. It explained that to help protect its customers, it was taking extra precautions with any pension transfer request to another scheme.

It said if it believed the transfer payment to the receiving scheme could be considered to be an unauthorised payment by HMRC, or if it didn't meet other statutory requirements, it would refuse to process the transfer.
It enclosed a copy of the Scorpion leaflet which it said Mr M should read carefully.

The letter explained the consequences of moving to a scheme which was involved in pension liberation and it said if Mr M hadn't already done so, it recommended he seek advice from a qualified regulated adviser. It said that if Mr M wanted to continue with the transfer he needed to complete and return an attached form following which it might contact

HMRC to confirm the registration status of the scheme as part of its 'enhanced due diligence.' It warned this could take up to three months.

On 18 March 2014, Zurich received another transfer request from CGL prompting it to send Mr M another letter on 26 March 2014, which was essentially a duplicate of its earlier February letter.

On 3 April 2014, Zurich received Mr M's signed form to confirm he wanted to go ahead with the transfer. The form asked Mr M whether he'd been told he could access his pension before age 55 and if he'd been told he could take more than 25% as a lump sum. Mr M answered 'No' to both.

On 28 April 2014, Zurich wrote to Mr M again. It explained that it was going to contact HMRC to satisfy itself that D Limited SSAS was still registered and that the transfer wouldn't be deemed an authorised payment. It said that while this would slow the process down, it said it was necessary to protect people's pensions in light of increased pension liberation activity so that their savings were available to provide them with a pension income later in life. It said that unfortunately many people had already been caught out as a result of pension liberation fraud. It said once it was satisfied the scheme was registered and there wasn't a significant risk that it had been set up or was being used to facilitate pension liberation, it would be able to action the transfer.

The letter went on to say that Mr M should still carry out his own checks before concluding the transfer was appropriate for him and his pension. And it repeated what it had said before that if Mr M hadn't already sought regulated financial advice, it strongly recommended that he do so. It explained how Mr M could go about finding an adviser pointing him to www.unbiased.co.uk and how to check the adviser was regulated and had the relevant authority by checking the Financial Conduct Authority (FCA) register.

On 24 July 2014, HMRC confirmed the registration status of the scheme. Zurich says it then proceeded with its internal checks and the transfer was made on 8 September 2014 for an amount of just over £45,200.

According to the SSAS bank account statements, an investment of around £35,800 was then made with TRG.

I understand that while the TRG investment provided Mr M with returns up to around 2018, it has now failed and as such has no value.

On 12 November 2020, Mr M complained to Zurich. Briefly, he said it ought to have spotted, and told him about, a number of warning signs in relation to the transfer. These included but were not limited to: the involvement of unregulated businesses, Mr M having been cold called, CGL not being regulated, the intended investment being non-standard and unregulated the SSAS being newly registered with no genuine employment link to the sponsoring employer. Mr M said if Zurich had properly informed him of these warning signs, he wouldn't have transferred.

Zurich didn't uphold the complaint. In summary it said it had a duty to conduct the transfer with reasonable care and skill, which it did. It said it told Mr M that he should seek independent regulated financial advice on more than one occasion, and it confirmed how he could do so. It said it provided Mr M with a Scorpion leaflet on two separate occasions, so it was satisfied it had conducted an appropriate level of due diligence given the requirements of the time. It said Mr M had a legal right to transfer and he exercised that right by choosing to go ahead.

Mr M referred his complaint to the Financial Ombudsman Service. Our Investigator was unable to resolve the dispute informally, so the matter was passed to me to decide.

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.

I've taken into account relevant: law and regulations; regulatory rules; guidance and standards; codes of practice; and (where appropriate) what I consider to have been good industry practice at the relevant time. Where the evidence is incomplete or inconclusive I've reached my decision on the balance of probabilities – in other words, on what I think is more likely than not to have happened given the available evidence and wider circumstances.

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

Personal pension providers are regulated by 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 guidance to follow that was aimed at tackling pension liberation – the "Scorpion" guidance.

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 was updated on 24 July 2014. It widened the focus from pension liberation specifically, to pension scams – which it said were on the increase. While this update came after Mr M's transfer request was first submitted, the guidance published in 2013 and the 24 July 2014 update are both relevant in this case because, from enquiry to completion, the transfer process with Zurich ran from December 2013 until September 2014 (some six weeks after the 2014 update.) I cover the Scorpion campaign in more detail below.

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

<u>The Scorpion guidance</u>

The materials in the Scorpion campaign comprised:

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

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

- An ‘action pack’ for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should “watch out for” various warning signs of a scam. If any of the warning signs applied, the action pack provided a check list that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request. Where a transferring scheme still had concerns, they were encouraged (amongst other things) to contact the member to establish whether they understood the type of scheme they were transferring to and – where a member insisted on transferring – directing the member to Action Fraud or TPAS.

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

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

I take from the above that the contents of the Scorpion guidance was essentially informational and advisory in nature and that deviating from it doesn’t necessarily mean a firm has broken the Principles or COBS rules.

Firms were able to take a proportionate approach to transfer requests, balancing consumer protection with the need to also execute a transfer promptly and in line with a member’s rights.

That said, the launch of the Scorpion guidance was an important moment in so far it provided, for the first time, guidance for personal pension providers dealing with transfer requests – guidance that prompted providers to take a more active role in assessing transfer requests. The guidance was launched in response to widespread abuses that were causing pension scheme members to suffer significant losses. And the guidance's specific purpose was to inform and help ceding firms when they dealt with transfer requests in order to prevent these abuses and save their customers from falling victim to them.

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

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

For the reasons given above, I don't think personal pension providers necessarily had to follow all aspects of the Scorpion guidance in every transfer request. However, I do think they should have paid heed to the information it contained. In deciding how to apply the guidance, they needed to consider the guidance as a whole, including the various warning signs to which it drew attention, the case studies that highlighted different types of scam, and the checklist and various suggested actions ceding schemes might take. And where the recommendations in the guidance applied, absent a good reason to the contrary, it would normally have been reasonable, and in my view good industry practice, for pension providers at least to follow the substance of those recommendations:

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

2. The Scorpion insert provided an important safeguard for transferring members, allowing them to consider *for themselves* the scam threat they were facing. Sending it to customers asking to transfer their pensions was also a simple and inexpensive step for pension firms to take and one that wouldn't have got in the way of efficiently dealing with transfer requests. So, all things considered, I think the Scorpion insert should have been sent as a matter of good industry practice with transfer packs and direct to the transferring member when the request for the transfer pack had come from a different party.

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

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

5. The considerations of regulated firms didn't start and end with the Scorpion guidance. If a personal pension provider had good reason to think the transferring member was being scammed – even if the suspected scam didn't involve anything

specifically referred to in the Scorpion guidance – then its general duties to its customer as an authorised financial services provider would come into play and it would have needed to act. Ignoring clear signs of a scam, if they came to a firm's attention, or should have done so, would almost certainly breach the regulator's principles and COBS 2.1.1R.

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

In October 2013, Mr M says he was cold called by a business offering him a free review of his pension arrangements. He says he then contacted Zurich to request details of his pension because he was interested in what was being offered. Zurich provided Mr M with the requested information on 7 October 2013.

Mr M says he then agreed to meet with an adviser from FRPS at his home. Mr M says they recommended he transfer his pension to a SSAS and invest in an overseas commercial property investment with TRG, which was described to him in very positive terms. He says he had no experience of investments and trusted the information he was given. He says he understood that the returns were safe because the investment was in property and that it would produce guaranteed rental income producing greater returns than he was getting on his Zurich funds. Mr M says it sounded like a realistic opportunity to achieve a significant increase on his pension savings and to make them more manageable, so he agreed to go ahead. Mr M says all of the paperwork was completed with the FRPS adviser.

I've seen nothing to dispute what Mr M says, so I accept his representations both about what happened and his circumstances at the time. There's nothing to suggest Mr M had knowledge or experience of SSASs, nor of setting up his own company, nor of how to invest in an overseas commercial property development. In my view these were complex and unusual arrangements for someone in his circumstances. I think it's unlikely he decided on his own to enter into them without advice or some form of recommendation.

And I think that advice came from FRPS. I think the evidence supports that it was FRPS who Mr M met with. I can see that it was an FRPS representative who witnessed Mr M's identification documents and certified the copies with a company stamp and signature. To have witnessed Mr M's identification documents requires physical presence. Mr M has said he only met and dealt with FRPS and there is no other evidence to suggest the involvement of another business at this stage of the process. So, I think this supports Mr M's version of events. I also think it's likely it was FRPS who cold called Mr M – my experience in looking at other similar complaints involving this business suggests this was its modus operandi.

I also think that, given what Mr M has said was discussed about the benefits of moving his pension to a SSAS and that the representative appears to have been promoting the advantages of the SSAS and the investment over the ceding scheme, this supports Mr M being recommended or advised to transfer. Crucially, FRPS was unregulated.

For the sake of completeness, and in line with the letter Mr M signed as part of the application to transfer, I haven't seen anything to suggest that Mr M was offered or received a payment or other incentive to transfer or that he received funds from the pension.

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

The Scorpion insert:

For the reasons given above, my view is that personal pension providers should, as a matter of course, have sent transferring members the Scorpion insert or given them substantially the same information.

Notwithstanding that it appears from the covering letter CGL included in the transfer request paperwork that it had already provided Mr M with a copy of the Scorpion leaflet, Zurich sent Mr M a copy of the Scorpion leaflet on two separate occasions. They were enclosed in the letters it sent him in February and March 2014, which I referred to earlier on. The letters were correctly addressed to Mr M, so I think it's likely he received them. The relevant version at the time was the 2013 version. Both of the letters Zurich sent to Mr M contained the printed graphic and the title of the current leaflet 'Predators stalk your pension' at the top – so I'm satisfied Mr M had the appropriate leaflet at the appropriate time.

I don't think Zurich needed to send another leaflet to Mr M when the July 2014 update was released, given where his transfer request had progressed to by then. But I do think Zurich should have taken the updated 2014 guidance into account when carrying out its own internal checks, given these were ongoing at the time and the transfer didn't complete until September. I'll discuss this in more detail below.

Due diligence

In light of the Scorpion guidance, I think firms ought to have been on the look-out for the tell-tale signs of pension liberation, and pension scams more broadly from July 2014, and needed to undertake further due diligence and take appropriate action if it was apparent their customer might be at risk.

It's apparent on this case that Zurich did carry out some checks and provided Mr M with some warnings about the risks involved with pension liberation scams as well as highlighting to him the importance of getting regulated financial advice. As I've already referred to, it sent him two letters following receipt of the transfer request and provided him with the relevant Scorpion insert. And when Mr M returned his signed form confirming that he had not been told he could access his pension monies early and that he wanted to proceed with the transfer, Zurich checked with HMRC that Mr M's scheme was still registered and that it wasn't likely to have been set up to facilitate pension liberation. Zurich received a response from HMRC on 24 July 2014.

It was around the time Zurich received a reply from HMRC that the Scorpion guidance was updated to refer more widely to the risks of pension scams. Zurich's checks were still ongoing at this point – it has referred to carrying out 'relevant internal checks' before transferring Mr M's pension on 8 September 2014. Zurich hasn't said what these checks entailed, but it doesn't appear to have applied the July 2014 updated guidance to its due diligence in Mr M's case. While I'm mindful of the implementation date of the updated guidance and the stage Mr M's transfer request was at, given Zurich has said it checks were still ongoing and it didn't complete the transfer until 8 September 2014, I think it had ample time to implement the updated guidance. In the circumstances I think it was fair and reasonable for it to do so. So, I don't think Zurich did enough here.

At the time Zurich received Mr M's transfer request in December 2013, it was provided with a copy of the HMRC notification which said Mr M's SSAS was registered on 29 November 2013.

And as I also concluded earlier on, the Q&A document CGL enclosed with the transfer paperwork would have stated the proposed investment was commercial property provided by TRG (I believe it would have included a link to TRG's website.) So, Zurich knew Mr M wanted to transfer his pension into a recently registered scheme, and it knew (or reasonably should have known) the transfer involved overseas investment.

Only one of these scenarios – a newly registered receiving scheme – was mentioned as a potential warning sign in the original version of the Scorpion action pack, which was current at the time Zurich received CGL's transfer request. This might be what prompted Zurich to contact HMRC as part of its checks. But in the updated 2014 version of the Scorpion action pack, an overseas property investment was highlighted as a potential warning sign. And this scenario was present in Mr M's case.

So, at the point in July 2014 when Zurich's checks were still ongoing, I think it should have known that there were two scenarios present in Mr M's case that the 2014 Scorpion action pack said were potential signs of a scam. I think Zurich should have recognised this. Furthermore, in its "Protecting Your Pension Pot" publication of August 2014, the FCA warned about the use of SSASs in scams, along with investing in unregulated and unusual investments such as overseas property. This was highlighted to firms in a regulatory round up on 1 September 2014.

So, taking all of the above into account and in the particular circumstances of this case, in exercising reasonable due diligence in line with its obligations under PRIN 2 and PRIN 6, I'm satisfied Zurich should have fairly and reasonably followed up on these warning signs and looked into Mr M's proposed transfer further in line with the updated guidance. And the most reasonable way of going about this would have been to turn to the checklist from the 2014 action pack to structure its due diligence in to Mr M's transfer.

The check list provided a series of questions to help transferring schemes assess the potential threat by finding out more about the receiving scheme and how the consumer came to make the transfer request. Some items on the check list could have been addressed by checking online resources such as Companies House and HMRC. Others would have required contacting the consumer. The check list is divided into three parts (which I've numbered for ease of reading and not because I think the check list was designed to be followed in a particular order):

1. The nature/status of the receiving scheme

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

2. Description/promotion of the scheme

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

3. The scheme member

   Sample questions: Has the transferring member been advised by an 'introducer', been advised by a non-regulated adviser or taken no advice?

   Has the member decided to transfer after receiving cold calls, unsolicited emails or text messages about their pension? Have they applied pressure to transfer as quickly as possible or been told they can access their pension before age 55?

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

I don't think it would always have been necessary to follow the check list in its entirety. And I don't think an answer to any one single question on the check list would usually be conclusive in itself. A transferring scheme would therefore typically need to conduct investigations across several parts of the check list to establish whether a scam was a realistic threat. Given the warning signs that should have been apparent when dealing with Mr M'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 check list and contacted Mr M as part of its due diligence.

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

In addition to what it already knew, or ought reasonably to have known, that Mr M's SSAS had been recently registered and he was intending to invest in overseas commercial property, its enquires under part 3 of the check list would have revealed that not only had Mr M been cold called, but he appeared to be taking advice from FRPS. This is the business I think Mr M would've named – if Zurich had asked him – based on my conclusion earlier on.

The check list recommends that in order to establish whether its member has been advised by a non-regulated adviser, the ceding firm should "*check whether advisers are approved by the FCA at www.fca.gov.uk/register*." In other words, they should consult the FCA's online register of authorised firms. Zurich should have taken that step, which is not difficult, and it would quickly have discovered that Mr M's adviser was indeed unauthorised.

Being *advised* by an unauthorised firm to transfer benefits from a personal pension plan would have been a breach of the general prohibition imposed by FSMA, which states no one can carry out regulated activities unless they're authorised or exempt. Anyone working in this field should have been aware that financial advisers need to be authorised to give regulated investment advice in the United Kingdom – indeed, the Scorpion guidance itself makes this point.

My view is that FRPS' involvement should have concerned Zurich because it pointed to a criminal breach of FSMA. On the balance of probabilities, I'm satisfied such a breach occurred here.

I'd add here that while CGL's statement included in the transfer paperwork might have pointed to a regulated firm providing Mr M with advice, that advice was quite specific. It was only being given to Mr M as the trustee of the SSAS – it was not regulated financial advice about the suitability for Mr M of the proposed transfer out of his personal pension scheme in favour of the proposed new investment. So, Zurich should not have taken comfort from their involvement and that Mr M was getting regulated advice. In any event, it appears Zurich didn't because its letters to him in early 2014 assumed that he hadn't taken such advice.

<u>What should Zurich have told Mr M?</u>

Had it done more thorough due diligence, there would have been a number of warnings Zurich could have given to Mr M in relation to a possible scam threat as identified by the action pack.

As I said above, I think Zurich should also have been aware of the close parallels between Mr M's transfer and the warnings the FCA gave to consumers in August 2014 about transferring to SSASs and which was brought to the attention of pension providers the following month. But the gravest oversight was Zurich's failure to uncover the threat posed by a non-regulated adviser. Its failure to do so, and failure to warn Mr M accordingly, meant it didn't meet its obligations under PRIN and COBS 2.1.1R.

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

I'm mindful that as I set out earlier in this decision, Zurich's three letters it sent to Mr M in February, March and April 2014 recommended (strongly in the April letter) he seek regulated advice and it told him in the April letter how he could find an adviser and how to check whether his adviser was authorised. I accept the recommendation was helpful, but it didn't go as far as telling him that he appeared to be involved with an unregulated adviser which was putting his pension at risk. As the professional in this transaction, Zurich had greater knowledge and experience about the risks of relying on unregulated advice. And it had a duty under PRIN 6 and COBS 2.1.1R to act in accordance with his best interests.

So, once Zurich had discovered (as I think it should have done) that Mr M was already in receipt of unauthorised advice, I don't think it was reasonable for Zurich to have relied on the earlier general warning framed in non-specific terms. That warning missed the key point, and one that Zurich should have looked into: the proposed transfer had been recommended to Mr M, apparently in breach of the criminal law, by an unauthorised firm.

And as I will explain below, it is the specific nature and extent of the warning that I think Zurich ought to have given Mr M which makes the difference here.

<u>Would it have made a difference?</u>

Taking everything into account, I think Mr M would likely have acted differently and not gone ahead with the transfer had Zurich done everything it ought reasonably to have done.

On the one hand I accept it's possible that Mr M would've gone ahead with the transfer even if Zurich had done all it should. For example, he didn't act upon the letters Zurich sent to him in the early part of 2014 which highlighted the issue of pension liberation, and which strongly recommended he seek regulated advice. And he didn't act upon the Scorpion insert, which contained much of the same information that Zurich had provided.

But on the other hand the letters from Zurich didn't explain why Mr M should seek regulated advice. And crucially in my view, they didn't identify that the adviser involved in his transaction was unregulated. It didn't highlight to Mr M that the party advising him was most likely breaking the law and exposing him to significant risk. Zurich's communication with Mr M didn't go this far.

And I think this is the fundamental difference here. Had Zurich done so, I'm satisfied any messages along these lines would have changed Mr M's mind about the transfer. The messages would have been materially different. It would've followed contact with Mr M asking him more about his transfer, so would have seemed to him (and indeed would have been) specific to his individual circumstances. It would have been given in the context of Zurich raising concerns about the risk of losing pension monies as a result of untrustworthy advice.

This would have made Mr M aware that there were serious risks in using an unregulated adviser. I think the gravity of any messages along these lines would prompt most reasonable people to rethink their actions. I've seen no persuasive reason why Mr M would have been any different. I think they would have rung alarm bells with him – I don't think he would've ignored these warnings. Mr M might have abandoned things at this point, but I think it's likely he would've sought regulated advice or free guidance from TPAS as set out in the Scorpion leaflet.

So, I consider that if Zurich acted as it should, Mr M wouldn't have proceeded with the transfer out of his personal pension or suffered the investment losses that followed.

I therefore intend to uphold Mr M's complaint.

Fair compensation

I have given thought to whether Mr M should bear some responsibility for the losses he incurred. 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.

I'm not deciding a legal claim, only a complaint. But having carefully considered the matter, I think it's fair that Mr M should bear some responsibility for the loss he's incurred. This is because I think Mr M's failure to act on what he knew (or reasonably should have known) contributed to the loss he's suffered.

As I've explained, Zurich shared a copy of the Scorpion insert with Mr M on two separate occasions. This said that a warning sign to watch out for was being approached out of the blue over the phone. And this what Mr M has said happened to him. The covering letters from Zurich, accompanying the Scorpion inserts, also highlighted potential consequences of transferring. These included risking significant tax charges, penalties and interest, being "invested in assets which are often high risk, located overseas and may not be subject to regulatory controls" and potentially having "much less (or no) income when you retire." The letters also recommended Mr M seek advice from an appropriately qualified regulated adviser.

Zurich then wrote to Mr M again repeating much of what it said before. It also said that Mr M should carry out his own checks before concluding the transfer was appropriate for him and his pension, and it strongly recommended he seek regulated advice if he hadn't already done so. The letter explained how Mr M could find an adviser as well as how to check if an adviser was regulated – in my view a relatively simple thing to do.

Now I accept that the Scorpion leaflet and information Zurich provided, including the recommendation to seek advice was made more in line with the principal risk Zurich was on the lookout for at the time, namely pension liberation. So, it's possible that as this wasn't what Mr M was planning to do by transferring, the warning might not have worried him. But it was, nonetheless, a warning from a trusted source about how he could protect himself from an inappropriate transfer. I think the information Mr M received ought to have made him think about whether he should rely on what he'd been told.

But Mr M didn't act on the information and the repeated recommendation over the course of several months to seek independent advice. And I think he should have. I consider Mr M had ample time to seek out and get that advice given how long the transfer process took to complete. I think this would have been a reasonable step for someone in his position to take and would probably have led to the illegal advice being uncovered and the transfer being aborted.

So, when considering fair compensation here, I think it would be fair to attribute some responsibility for the loss Mr M has suffered to his own failure to act.

Overall, I think both Zurich and Mr M should have done more during the process of the transfer to guard against the risk of a scam and that if either of them had done as they reasonably should, Mr M's losses would have been avoided. But Zurich was the professional party and dealing with members' pension transfer requests was an inherent part of operating, as it did, a regulated pensions business. So, it should have been more familiar with the risks than Mr M. In accordance with its duty under PRIN 6 and COBS 2.1.1R, Zurich should (as I have found above) have given a specific warning about the likelihood Mr M had already been drawn into a scam. So, I think its failings were worse than those of Mr M. While this isn't an exact science, in the circumstances of this complaint, I propose to reduce Mr M's compensation by 30%. I think this is a fair way to account for Mr M's own contribution to the loss he's suffered.

End of provisional decision

Responses to my provisional decision

Mr M said he accepted my provisional decision.

Zurich said it disagreed. In summary it said it believes it provided Mr M with sufficient warnings and it isn't persuaded that he would've acted differently and not gone ahead if he had been given further warnings. It said:

- It highlighted the different conclusion I had reached from the investigator two years ago based on the same evidence.
- The ombudsman has accepted that Mr M was solely relying on the advice of FRPS, but it has no evidence on its records that FRPS was involved – its files show Mr M signed a letter of authority in April 2013 with a regulated firm.
- It disagrees that Mr M wouldn't have transferred had it told Mr M FRPS was unregulated. Mr M didn't heed any of the other warnings it gave – instead, he confirmed his intention to transfer by raising a complaint about the delay in transfer with the TPO. Whilst the Ombudsman may conclude that Mr M was being told to raise this action by CGL, he nevertheless signed the TPO complaint form.
- Mr M's own actions led to the situation he now finds himself in – he wanted to take advantage of alternative investments and it is only now they have failed that he is complaining.
- It wanted to highlight that the TPO and the Financial Ombudsman Service are reaching opposite conclusions on complaints about transfers in almost identical circumstances and it provided an extract from a recent TPO determination in what it said were similar circumstances to this complaint, where they concluded the transfer was not a scam but a failed investment. It said the stark difference in outcome was extremely concerning for both consumers and firms.

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.

Having done so and carefully considered what Zurich has said in response to my provisional decision, I've not been persuaded to change my mind. I've decided to reach the same conclusions and for the same reasons as set out my provisional decision.

I will now address the key points of Zurich's response.

As our external resources explain, and Zurich is aware, I've reviewed the complaint afresh after our Investigator was unable to resolve the matter informally. And the decision represents my opinion, independent of our Investigator's view, of what is fair and reasonable in the circumstances. My opinion, and decision, has involved taking 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 I'm satisfied I've reached a fair and reasonable outcome and given adequate reasoning to explain why I have reached that outcome.

To be clear, I haven't assumed Zurich actually had evidence Mr M was being advised by FRPS. Rather, I've concluded this is what Zurich would have discovered if it had followed the Scorpion checklist to find out more about how Mr M came to request the transfer. And I've already explained why I think Zurich should have done this.

I understand Zurich believes it provided Mr M with sufficient warnings. And while I've acknowledged the general warnings it gave Mr M, and I've taken into account that Mr M ignored those warnings in determining what fair compensation should be, for the reasons I set out in my provisional decision, it remains my view that Zurich's due diligence it carried out on Mr M's transfer and the warnings it gave him didn't go far enough in the circumstances. And if things had happened as they should have, I still think Mr M would've acted differently and not gone ahead with the transfer.

As I said in my provisional decision, Zurich's three letters it sent to Mr M in February, March and April 2014 recommended he seek regulated advice. And the April letter said how he could find an adviser and how to check whether they were authorised. But these didn't explain why Mr M should seek regulated advice. And crucially they didn't identify that the adviser involved in his transaction was unregulated. It didn't highlight to Mr M that the business or individual advising him was most likely breaking the law and exposing his pension funds to further risk. Zurich never made these points to Mr M.

Had Zurich done so, I don't think Mr M would've ignored this information. It was materially different information than what was contained in the warnings he actually received. It would've been a more specific, and in my view, a stark warning specific to his individual circumstances. And it would've been given to him in the context of Zurich raising concerns about the risk of him losing his pension monies as a result of untrustworthy advice from an unregulated adviser. I don't think Mr M would've ignored this warning. Being in possession of all the facts and information, and being told this by Zurich who I think he would've trusted as his existing pension provider, I think he would have changed his mind.

While Mr M might have wanted to take advantage of alternative investments, I think it's apparent here that he was influenced by the advice he received – I think his motivation came from that advice. And that advice was from the unregulated FRPS. He was being led through the process. Mr M was not an experienced investor who I think was determined to transfer his pension and invest this way regardless. So, if Zurich had given Mr M reason to think that FRPS was not acting in his best interests by giving him the additional warning about being advised by an unregulated adviser, I think he would have changed his mind and not gone ahead.

As Zurich has itself acknowledged, I think Mr M's action in raising a complaint to TPO about the transfer was likely driven by CGL and not by Mr M himself. I'm not persuaded him raising this complaint is compelling evidence of his intention to transfer regardless.

I note Zurich said it didn't expect me to take into account its point about the apparent different conclusions the TPO and the Financial Ombudsman Service are reaching on complaints about transfers in almost identical circumstances – it simply wanted to draw it to my attention. But for completeness, as I've already said, I've reached my decision on what I consider is fair and reasonable in the particular and individual circumstances of this complaint. I'm not bound by the decisions of TPO. And I'd add that, in my view, no two complaints are exactly the same despite what it might look like on the face of it. The specific and individual circumstances are different. And for that reason, this may well result in different outcomes based on what look like similar circumstances.

So, for the reasons above, I consider that if Zurich had acted as it should have, Mr M would not have proceeded with the transfer out of his personal pension or suffered the investment losses that followed. I therefore uphold this complaint.

Putting things right – fair compensation

My aim is that Mr M should be put as closely as possible into the position he would probably now be in if Zurich had treated him fairly, taking into account that Mr M shares responsibility for his loss.

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

To compensate Mr M fairly, Zurich must subtract the actual value of the D Ltd SSAS 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. Zurich must then pay 70% of that loss.

Actual value

This means the D Ltd SSAS value at the date of my Final Decision. To arrive at this value, any amount in the D Ltd SSAS bank account is to be included, but any overdue administration charges yet to be applied to the D Ltd SSAS should be deducted. Mr M 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 M 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 following investment(s): TRG. This is because the investment has failed and it currently has no value. And I don't think it's realistically possible for Zurich to only acquire a part of the investment from the D Ltd SSAS as I'm only holding it responsible for 70% of the loss. 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 M to provide an undertaking, to account to it for 70% of the net proceeds he may receive from those investments in future on withdrawing them from the D Ltd SSAS. Zurich will need to meet any costs in drawing up the undertaking.

  If Zurich asks Mr M to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

- It's also fair that Mr M should not be disadvantaged while he is unable to close down the D Ltd 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 M equivalent to 70% of five years' worth of future administration fees at the current tariff for the D Ltd SSAS, to allow a reasonable period of time for the D Ltd SSAS to be closed.

Notional value

This is the value of Mr M's funds had he remained invested with Zurich up to the date of my Final Decision.

Zurich should ensure that any pension commencement lump sum or gross income payments Mr M received from the D Ltd 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 D Ltd SSAS given Mr M's dissatisfaction with the outcome of the investment it facilitated.

Zurich should reinstate Mr M's original pension plan as if its value on the date of my Final Decision was equal to 70% of the amount of any loss established from the steps above (and it performs thereafter in line with the funds Mr M was invested in).

Zurich shouldn't reinstate Mr M'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 M's pension and it is open to new business, it should set up a **new** pension plan with a value equal to 70% of 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 M'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 M 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 M doesn't incur an annual allowance charge. If Zurich cannot do this, then it shouldn't set up a new plan for Mr M.

If it's not possible to set up a new pension plan, Zurich must pay the amount of 70% of any loss direct to Mr M. 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 M is retired. (This is an adjustment to ensure that Mr M isn't overcompensated – it's not an actual payment of tax to HMRC.)

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

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

My final decision

For the reasons above, I’ve decided to uphold this complaint and I instruct Zurich Assurance Ltd to put things right in line with the approach set out above. I make no other award.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr M to accept or reject my decision before 28 February 2025.

Paul Featherstone
Ombudsman