DRN-5326890

The complaint

Mr W has complained about a transfer of his Zurich Assurance Ltd personal pension to a small self-administered scheme ("SSAS") in June 2015. Mr W's SSAS was subsequently used to invest in The Resort Group ("TRG"), an investment in hotel property in Cape Verde, and in a Dolphin Trust loan note, a German property development company. The investments now appear to have little value. Mr W says he has lost out financially as a result.

Mr W 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 W 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

Around March 2015 Mr W signed a letter of authority to allow Capital Facts to obtain pension information. Capital Facts sent that letter of authority to Zurich requesting Mr W's plan information and transfer forms. Zurich sent Capital Facts a transfer claim form for a qualified recognised overseas pension scheme ("QROPS") on 24 March 2015. Capital Facts wasn't authorised by the Financial Conduct Authority (FCA).

Mr W says he was attracted by the prospect of improved investment returns on the investments that Capital Facts were suggesting he invest in.

The transfer to a QROPS was not applied for, however. Instead, on 10 April 2015, a company was incorporated with Mr W as director. I'll refer to this company as Firm A. On 29 April 2015, Mr W signed documents to open a SSAS with Rowanmoor Group. Firm A was recorded as the SSAS's principal employer. The SSAS documents also recorded that the SSAS was to be used to invest in a hotel development in Cape Verde via TRG.

On 7 May 2015 Rowanmoor wrote to Zurich requesting transfer information for Mr W's pension. And on 14 May 2015 Zurich sent Rowanmoor plan information and a transfer claim form for Mr W's pension.

On 26 May 2015 Mr W's transfer papers were sent to Zurich. These were sent in by Rowanmoor. Included in the transfer papers were: Zurich's completed transfer claim form (signed by Mr W on 29 April 2015); extracts from the SSAS application signed by Mr W.

Mr W's pension was transferred on 1 June 2015. His transfer value was around £56,000. He was 54 years old at the time of the transfer.

An investment in TRG was made on 5 June for £34,200. The investment purchased a fractional ownership of hotel rooms in Cape Verde. This investment failed to deliver the advertised returns and has no secondary market meaning it's illiquid. On 18 December 2015 £10,000 was transferred from the SSAS to purchase a 5-year loan note with Dolphin Trust. The Dolphin investment has also failed to make the promised returns or to return the loan capital.

In August 2020, Mr W complained to Zurich. Briefly, his argument is that Zurich ought to have spotted, and told him about, a number of warning signs in relation to the transfer, including (but not limited to) the following: the SSAS was newly registered, there wasn't a genuine employment link to the sponsoring employer, the transfer followed high pressure sales techniques, the catalyst for the transfer was an unsolicited call and he had been advised by an unregulated business.

Zurich didn't uphold the complaint. It said Mr W had a legal right to transfer and that none of the information it had about the transfer at the time gave it cause for concern. It said that it sent a copy of the Scorpion insert with the transfer information that it sent to Rowanmoor. It considered that Rowanmoor was FCA registered so should have been aware of the scam risks and should have advised Mr W accordingly. It was satisfied it had conducted an appropriate level of due diligence given the requirements of the time.

Our investigator was unable to resolve the dispute informally, so the matter was passed to me to decide.

I issued a provisional decision in January 2025 explaining why I thought that Mr W's complaint should be upheld and what I thought Zurich should do to put things right.

What I said in my provisional decision

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

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

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

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

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

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

That said, the launch of the Scorpion guidance in 2013 was an important moment in so far it provided, for the first time, guidance for personal pension providers dealing with transfer requests – guidance that prompted providers to take a more active role in assessing those requests. The guidance was launched in response to widespread abuses that were causing pension scheme members to suffer significant losses. And the guidance's specific purpose was to inform and help ceding firms when they dealt with transfer requests in order to prevent these abuses and save their customers from falling victim to them.

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

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

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

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

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

The March 2015 update to the Scorpion guidance asked schemes to ensure they provided their members with "regular, clear" information on how to spot a scam. It recommended giving members that information in annual pension statements and whenever they requested *a transfer pack. It said to include the pensions scam "leaflet" in member communications.*

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

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

<u>*The PSIG Code of Good Practice*</u>

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

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

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

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

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

- *Under the PSIG Code, an 'initial analysis' stage allows transferring schemes to fast-track a transfer request without the need for further detailed due diligence, providing certain conditions are met. No such triage process exists in the 2015 Scorpion guidance – following the three-part due diligence checklist was expected whenever a transfer was requested.*

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

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

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

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

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

Mr W has explained that he received an unsolicited approach from Capital Facts and was visited by a representative from that firm. He said that Capital Facts carried out a pension review for him. And it recommended that he use his pension to invest in an overseas hotel investment with The Resort Group. It also recommended setting up a SSAS and transferring his existing Zurich personal pension to the SSAS to make that investment. Mr W explains that the agent of Capital Facts was professional and persuasive and he was attracted by the sound of the returns in the recommended investment.

Mr W does not have any correspondence or written recommendation from Capital Facts. But there is evidence that Mr W signed a letter of authority for Capital Facts to obtain information about his pension, and that Zurich received that in March 2015. Zurich have not provided the letter it received from Capital Facts. But the reply that it sent indicates that the initial enquiry was made about a transfer to a QROPS, which was not the transfer that Mr W ended up making.

The subsequent timeline however persuades me that Mr W was still acting under the guidance of Capital Facts. I say that because Firm A was established within weeks of it receiving Zurich's valuation of the pension. And the application for the Firm A SSAS was submitted shortly after that. It didn't leave much time for a separate third party to contact and meet Mr W as well. Overall, the letter of authority from Capital Facts corroborates Mr W's account. Which is that he considered that he was acting on Capital Fact's recommendation. And I would also highlight here the point I made earlier about the PSIG Code identifying that firms receiving just this sort of approach from an unregulated party was a warning sign.

Zurich have pointed to the involvement of another party that was detailed in the SSAS application that it was sent by Rowanmoor. It listed a different firm – Firm S – as the 'trustee adviser'. This was the adviser who will provide advice on the scheme to the member trustee. This is a distinct role that is not necessarily provided by the same party that advises on the transfer of a personal pension to the SSAS. It is advice provided to the trustee, as a requirement of the Pensions Act 1995. I think that it's more likely that Firm S was involved in *that capacity and not in advising Mr W on transferring his personal pension.*

Even if I am wrong, and Firm S instead provided advice to Mr W, Firm S was not in fact regulated to provide advice. Zurich has indicated that the named contact for Firm S – a person I will refer to as Mr X – was authorised by the FCA in his capacity for a regulated firm. But companies house shows Mr X to be a director of a number of different firms. The fact that he held a position with a regulated firm doesn't mean that the role he performed for Firm S (a separate limited company) would also be regulated activity. I am therefore not persuaded by Zurich's argument that Mr W was receiving regulated financial advice from Firm S.

Nonetheless, what is arguably more relevant is what Zurich would, more likely than not, have found out had it made enquiries of Mr W. Which I think would have been that Mr W considered that he was acting on the advice of Capital Facts.

<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.

Mr W has said that he didn't receive a Scorpion insert or any other correspondence with the same message. And Zurich haven't provided me with evidence to suggest that it sent it to him.

I am aware that it says that it would have been included in the transfer requests that it sent to Capital Facts and then to Rowanmoor. But the letters don't refer to the inclusion of the Scorpion insert. Zurich have provided us with a copy of the longer booklet. But I am not persuaded that it was sent to Mr W. It is a copy of the publication from February 2013. So isn't the relevant publication for the dates that either request was received.

Overall, I am not persuaded that Zurich sent either the 2014 Scorpion insert to Capital Facts or the later, March 2015 version, to Rowanmoor. But what is most relevant is that I've seen no evidence that Zurich made any direct contact with Mr W following the requested information. And the PSIG Code made the following point under section 6.1 (Transfer packs):

> *"If a transfer pack is not being sent to a member directly, pension scam awareness material should still be sent to the member's home address".*

I think that this is a reasonable action to expect of Zurich even if the Code wasn't so specific on this point. To do otherwise places an unreasonable trust in third parties to share the information with members.

For these reasons I think that Zurich failed to make Mr W aware of the scam risks that were considered good industry practice at the time. This treated him unfairly.

The Scorpion insert of March 2015 would have alerted Mr W to the following warning signs:

- *Being cold called and offered a free pension review*
- *Convincing marketing materials that promised returns over 8%*
- *Pension access before age 55*
- *Overseas transfer of funds*

- *A proposal to put money in a single investment*

A number of these warning signs would likely have been relevant to the position Mr W was in. He says that he had been cold called and was recommended overseas investments that promised returns over 8%. His testimony is that he was advised initially on the TRG investment and that he was only made aware of Dolphin Trust after the transfer. Which given the dates of the investments appears likely. And the marketing materials for TRG at the time promised these returns. So, even though he wasn't seeking to access his pension before age 55, the remainder of the warnings were likely to strike a chord with him.

The Scorpion insert listed a number of things to do if you spot a scam. Which included calling The Pensions Advisory Service or reporting it to Action Fraud. I appreciate that Zurich have made the point that we can't know whether Mr W would have taken any action or not. But I've seen no evidence that he was so intent on transferring that he would have ignored the message in the Scorpion insert. So I think that, in this case, receiving it was likely to have had an impact and set Mr W on a path that would likely have prevented his transferring and suffering the loss that he did.

Due diligence:

Sending the Scorpion insert, or a similar warning, to Mr W was only a part of what industry guidance suggested Zurich ought to have done. Zurich was also expected to perform due diligence to determine whether or not to process the transfer. As explained above, I consider the PSIG Code to have been a reasonable starting point for most ceding schemes. I've therefore considered Mr W's transfer in that light. But I don't think it would make a difference to the outcome of the complaint if I had considered Zurich's actions using the Scorpion guidance as a benchmark instead.

I've looked at what due diligence Zurich carried out in this case to consider whether it was sufficient. But there is little evidence of any due diligence resembling what was recommended in the Scorpion campaign or PSIG Code. Zurich, presumably, confirmed that the Firm A SSAS was properly registered with HMRC. And other than that it appeared to have been satisfied to proceed on the basis that the Firm A SSAS was administered by Rowanmoor Group. A part of which was regulated by the FCA for the provision of personal pensions. Although not the part that administered the SSAS.

I note that at the time of the transfer Rowanmoor was a long established SSAS provider and had some repute in the industry. Rowanmoor Trustees Limited also had legal and fiduciary duties as a professional trustee. There's an argument, therefore, that Zurich could have taken comfort from this. I disagree. The Scorpion guidance gave ceding schemes an important role to play in protecting customers wanting to transfer a pension. It would defeat the purpose of the Scorpion guidance for a ceding scheme to have delegated that role to a different business – especially one that had a vested interest in the transfer proceeding. An important aspect in this is the fact that there is little regulatory oversight of SSASs like this; they don't have to be registered with TPR. In the absence of that oversight, 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.

The fact that a different part of Rowanmoor's business was regulated by the FCA doesn't change my thinking on this. The key point is that Rowanmoor Group Plc and Rowanmoor Trustees Limited (both of which were involved in the operation of the SSAS) weren't FCA-regulated so I see no reason why they would have operated with FCA regulations and

Principles in mind – or why their actions would have come under FCA scrutiny. As such, I'm not persuaded Zurich could, reasonably, have derived sufficient comfort about the Rowanmoor SSAS as a destination for Mr W's transfer.

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

For the reasons given above, the "accepted club" part of the "Initial analysis" section of the PSIG Code isn't applicable here. Neither could Zurich have considered the receiving scheme/administrator as being free of scam risk. So the initial triage process should have instead led to Zurich asking Mr W further questions about the transfer as per Section 6.2.2 ("Initial analysis – member questions"). I won't repeat the list of suggested questions in full. Suffice to say, at least three of them would have been answered "yes":

- *Did receiving scheme/adviser or sales agents/representatives for the receiving scheme make the first contact (e.g. a cold call)?*
- *Have you been promised a specific/guaranteed rate of return?*
- *Have you been informed of an overseas investment opportunity?*

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

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

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

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

d) *Provenance of receiving scheme: a SSAS registered within the previous six months or a recently registered sponsoring employer.*

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

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

What should Zurich have found out?

Had Zurich conducted due diligence along the guidance in the PSIG Code, in addition to the warnings highlighted by the initial analysis, it would likely have established the following additional warning signs about Mr W's transfer:

- *Mr W had no genuine employment link to Firm A;*
- *Mr W had received face to face advice from Capital Facts, a firm not regulated by the FCA.*

Being advised by an unauthorised firm to transfer benefits from a personal pension plan would have been a breach of the general prohibition imposed by FSMA, which states no one can carry out regulated activities unless they're authorised or exempt. Anyone working in this field should have been aware that financial advisers need to be authorised to give regulated advice in the UK. The PSIG Code (and the Scorpion guidance) make much the same point. Indeed, the PSIG Code says firms should report individuals appearing to give regulated advice that aren't authorised to do so.

My view is that Zurich should therefore have been concerned by Capital Fact's involvement because it pointed to a criminal breach of FSMA. On the balance of probabilities, I'm satisfied such a breach occurred here. And that Zurich would have found this out by simply asking Mr W questions like those set out in the Code and Scorpion guidance.

What should Zurich have told Mr W – and would it have made a difference?

Had it done more thorough due diligence, there would have been a number of warnings Zurich could have given to Mr W in relation to a possible scam threat as identified by the PSIG Code (and the Scorpion action pack). Zurich should also have been aware of the close parallels between Mr W's transfer and the warnings the FCA gave to consumers in 2014 (and subsequently passed on to firms) about transferring to SSASs in order to invest in unusual investments. But the most egregious oversight was Zurich's failure to uncover the threat posed by a non-regulated adviser. Its failure to do so, and failure to warn Mr W 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 W that Capital Facts 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 don't think this would have been a disproportionate response given the scale of the potential harm Mr W was facing and Zurich's responsibilities under PRIN and COBS 2.1.1R. And I don't think any such warnings would reasonably have caused Zurich to think it was running the risk of advising Mr W, that it was replicating the responsibilities of the receiving scheme or that it was putting in place unnecessary barriers to exit.

I'm satisfied any messages along these lines would have changed Mr W's mind about the transfer. The messages would have followed conversations with Mr W so would have seemed to him (and indeed would have been) specific to his individual circumstances and would have been given in the context of Zurich raising concerns about the risk of losing pension monies as a result of untrustworthy advice. This would have made Mr W 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 W would have been any different.

In reaching this conclusion I have considered the fact that, in other similar cases we have *seen Rowanmoor trustees send the member trustees warning letters about the type of asset class being invested in. Mr W has not been able to provide any such evidence in his case and it is not within the contents of the information received from the SSAS as part of Mr W's subject access request. So I have considered the type of warning letter that Rowanmoor were sending member trustees prior to investments in Dolphin Trust.*

These letters all appeared to contain the same wording. They warned consumers that the investment in a loan note carried a high risk and had no secondary market. It explained, amongst other things, that investors should have no need for liquidity over the term of the loan. The letter confirmed Rowanmoor's view that the investment was eligible to be held in the SSAS it made it clear that it wasn't a recommendation. And recommended obtaining legal and other professional advice. I haven't seen that Mr W received this letter, but given the other cases we have seen, it is likely that he would have. It required signed authorisation to proceed. I think it unlikely that Rowanmoor would not have required the same in Mr W's case.

I don't think that it's fair to interpret any failure of Mr W to react to this type of warning from Rowanmoor as being indicative that he would proceed with the transfer despite any other warnings. That's because I think Mr W was at that stage because he trusted the advice that he'd been given that had gotten him to that point. He had, more likely than not, been advised on the suitability of the Dolphin Trust investment. And it was against that backdrop that he would have received Rowanmoor's letter. He had no reason to doubt that any recommendation he had was not in his best interests. The content of the Rowanmoor letters that I have seen were not likely to undermine that.

But for Zurich's failings Mr W would not have ended up in the position of relying on advice in breach of FSMA. As I explained above, Zurich's failure to send Mr W the Scorpion insert (or similar message) denied him the information that may have led him to question the advice process he'd been subject of. But worse than that, Zurich's failure to make any of the enquiries that the PSIG Code proposed, meant that it failed to give Mr W clear warnings that would, in my opinion, have undermined the trust he had in the advice he'd been given. So, I consider that if Zurich had acted as it should, Mr W wouldn't have proceeded with the transfer out of his personal pension or suffered the investment losses that followed. I therefore uphold Mr W's complaint."

I then set out how I thought Zurich should put things right.

Responses to my provisional decision

Mr W accepted my provisional decision.

Zurich responded to disagree with my finding. It provided no new evidence or arguments that I had not already considered before issuing my provisional decision. Zurich offered no argument regarding my findings on the due diligence that I'd provisionally decided that it ought to have done. And it offered no argument about what it would likely have found out or about how it should reasonably have warned Mr W about that. Its argument is that any warnings that it should have given Mr W would not have changed his mind because he didn't heed the warnings that he would most likely have received from Rowanmoor. It also continues to argue that Mr W was not the victim of a scam but of a failed investment.

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.

In the absence of any new evidence or arguments my final decision remains the same as I explained in my provisional decision and set out above. To be clear, I have considered Zurich's response, but think that I already took these arguments into consideration in my provisional decision. In it I determined that Mr W would, more likely than not, have received the standard warning letter that I have seen Rowanmoor send customers in a number of cases like this involving these specific investments. And I note that Mr W hasn't objected to this finding. Having considered it previously, I still don't agree with Zurich's view on the relevance of those warnings for the same reasons as I set out in my provisional decision.

<u>In summary</u>

I uphold Mr W's complaint for the reasons in my provisional decision and summarised again here:

- At the time of this transfer there had been developing industry guidance in place for some time. I set this out in my provisional decision above. Importantly PSIG had published its Code for ceding schemes as well as TPR having published and updated its Scorpion campaign. Whilst not mandatory it provided a good starting point to allow Zurich to comply with its obligations to Mr W under PRIN and COBS that I referred to. I consider it was good practice for Zurich to have followed this industry best practice or a similarly rigorous due diligence process of its own to help protect its customers from scams.

- Zurich failed to send Mr W the Scorpion warning insert or a similar message prior to the transfer. I consider that this was a simple measure that the PSIG code and Scorpion campaign emphasised. It included key warnings that were very similar to Mr W's circumstances. This denied Mr W the information to be able to take action to avoid becoming a victim of the type of transfer that PSIG was warning about.

- Zurich fail to demonstrate that it carried out any due diligence before the transfer. It meant that it did nothing to explore the transfer circumstances. I think this was a serious failing in the way that it approached Mr W's transfer.

- Because Zurich did no due diligence, I think it's reasonable to consider what it would likely have found if it had done the due diligence set out in PSIG's code. I considered this in my provisional decision, and no one has challenged my opinion on that. So, for the same reasons that I detailed in my provisional decision I think that Zurich would have identified warning signs. And that they would have led it to have determined that there was a material risk of a scam in Mr W's transfer. And it would likely have uncovered the involvement of an unregulated adviser, in breach of the general prohibition of FSMA.

- I am of the opinion that Zurich would have had to react to the information that pointed to a scam. It should have informed Mr W about the illegal activity around the advice he was taking. And the PSIG code additionally set out what Zurich could have done to alert Mr W to the risks. Those things were specifically intended to inform consumers and dissuade them from likely harm. They included things like refusing to make the transfer, or setting out the risks and requiring the customer to sign a declaration to go ahead in spite of the concerns.

- I still think that reasonable actions by Zurich, in line with the industry best practice I have referred to, would have made a difference. I don't think that it's fair to interpret any failure of Mr W to react to the type of warning that Rowanmoor would likely have sent him as being indicative that he would proceed with the transfer despite any other warnings. That's because I think Mr W was at that stage because he trusted the advice that he'd been given that had gotten him to that point. He had, more likely than not, been advised on the suitability of the Dolphin Trust and TRG investments. And it was against that backdrop that he would have received Rowanmoor's letters. He had no reason to doubt that any recommendation he'd already received was not in his best interests. Or was provided in breach of FSMA. The content of the Rowanmoor letters that I have seen, and detail in my provisional decision, were not likely to undermine that. So, I don't think that Mr W's failure to go against the advice he had on receipt of Rowanmoor's warning means that he would have transferred his Zurich pension irrespective of any warnings that Zurich gave.

Putting things right

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

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

To compensate Mr W fairly, Zurich should subtract the actual value of the Firm A 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.

Actual value

This means the Firm A SSAS value at the date of calculation. To arrive at this value, any amount in the Firm A SSAS bank account is to be included, but any overdue administration charges yet to be applied to the Firm A SSAS should be deducted. Mr W 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 W 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 investments: TRG and Dolphin Trust. This is because these investments have potentially failed entirely and have no secondary market. Therefore as part of calculating compensation:

- Zurich should seek to agree an amount with the Firm A SSAS as a commercial value for the illiquid investments above, then pay the sum agreed to the Firm A SSAS plus any costs, and take ownership of those investments. The actual value used in the calculations should include anything Zurich has paid to the Firm A SSAS for illiquid investments.

- Alternatively, if it is unable to buy them from the Firm A SSAS, Zurich should give the illiquid investments a nil value as part of determining the actual value. In return Zurich may ask Mr W to provide an undertaking, to account to it for the net proceeds he may receive from those investments in future on withdrawing them from the Firm A SSAS. Zurich will need to meet any costs in drawing up the undertaking. If Zurich asks Mr W to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

- It's also fair that Mr W should not be disadvantaged while he is unable to close down the Firm A SSAS. So to provide certainty to all parties, if these illiquid investments remain in the scheme, I think it's fair that Zurich should pay an upfront sum to Mr W equivalent to five years' worth of future administration fees at the current tariff for the Firm A SSAS, to allow a reasonable period of time for the Firm A SSAS to be closed.

Notional value

This is the value of Mr W's funds had he remained invested with Zurich up to the date of calculation.

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

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

Zurich shouldn't reinstate Mr W'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 W'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 calculation. The new plan should have features, costs and investment choices that are as close as possible to Mr W'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 W 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 W doesn't incur an annual allowance charge. If Zurich cannot do this, then it shouldn't set up a new plan for Mr W.

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

To make this reduction, it's reasonable to assume that Mr W is likely to be a basic rate taxpayer in retirement. So, if the loss represents further 'uncrystallised' funds from which Mr W 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 W 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 this Provisional Decision is accepted by both parties and we notify the parties that I've decided not to issue a Final Decision, the date we notify the parties of this will become the date of calculation referenced above. However, if payment of compensation is not then made within 28 days of that date of calculation, interest should be added to the compensation at the rate of 8% per year simple from the date of calculation until it is paid. If a Final Decision has to be issued, the date of calculation will become the date of the Final Decision itself, and interest will be calculated differently, as set out below.

If payment of compensation is not made within 28 days of Zurich receiving Mr W's acceptance of the Final Decision, interest should 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 W how much has been taken off. Zurich should give Mr W a tax deduction certificate in respect of interest if Mr W 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 W's plan for the amount of the loss – as the reinstated sum should, by definition, mirror the performance after the date of calculation of the funds in which Mr W was invested. However, I expect any such reinstatement to be achieved promptly.

Details of the calculation should be provided to Mr W in a clear, simple format.

My final decision

For the above reasons I uphold Mr W's complaint and direct Zurich Assurance Ltd to put things right in the way I set out under the heading 'Putting things right' above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 14 March 2025.

Gary Lane
Ombudsman