Financial Ombudsman Service

The complaint

Mr S has complained, with the help of a professional third party, about the transfer of his Zurich Assurance Ltd ('Zurich') personal pension to a small self-administered scheme ('SSAS') in 2014. Mr S's SSAS was subsequently used to invest in an overseas property development with The Resort Group ('TRG'). The investment now appears to have little value. Mr S says he has lost out financially as a result.

Mr S 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 S 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

On 14 August 2014, Mr S signed a letter of authority ('LOA') giving Zurich permission to share details and transfer documents in relation to his pension with Moneywise Financial Advisors Limited ('Moneywise'). Moneywise was regulated by the Financial Conduct Authority ('FCA'). This LOA was sent to Zurich by Moneywise via fax.

Zurich sent plan information and transfer forms to both Mr S and Moneywise.

In September 2014, a company was incorporated with Mr S as director. I'll refer to this company as C Ltd. A SSAS was then set up. C Ltd was the SSAS's principal employer and Cantwell Grove Limited ('CGL') was the administrator. HMRC confirmed in writing to CGL that the SSAS had been registered with it on 13 October 2014.

On 22 October 2014, CGL wrote to Zurich enclosing completed paperwork and requested the transfer of Mr S's pension benefits to the SSAS. The covering letter said 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'), had spoken to Mr S and confirmed no cash incentive or other inducements had been offered and access to pension benefits before age 55 was not being sought. And it said that the 'Scorpion' information leaflet had been shared with Mr S.

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

The Q&A document said that the investments under consideration were a commercial property investment provided by TRG and a discretionary fund management ('DFM') service. The document said that appropriate advice, under section 36 of the Pensions Act 1995, was being taken by the trustees of the SSAS from Sequence Financial Management Limited (SFML'). SFML was registered and authorised by the FCA. And the DFM provider was also noted as being FCA registered.

The confirmation letter which CGL referenced was signed by Mr S. 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 S wanted to confirm he was requesting a transfer to take advantage of investment opportunities, none of which were connected with pension liberation. And it stated he was not seeking to access his pension before age 55 and had not been offered a cash or other incentive to transfer.

Zurich wrote to Mr S on 4 November 2014. It acknowledged the request to transfer and said Zurich needed to take time to gather information to satisfy itself that the transfer would be considered and authorised payment. It said Mr S might be aware that extra checks were being done throughout the pension industry before processing transfers because of the risk in pension liberation. And for this reason, the transfer process could be slower. Zurich said it would have a response for Mr S shortly but in the meantime his pension funds would remain invested.

Zurich then wrote to Mr S again on 12 November 2014. Zurich again repeated why further checks were being done and said that many individuals had already been caught out as a result of pension liberation fraud and have either suffered substantive tax charges or lost out financially through expensive scheme charges and / or unregulated investments. Zurich explained it had contacted HMRC to check that the receiving scheme was still registered and, if this was confirmed, it could complete the transfer as requested. Zurich said though that it being able to complete the transfer was not an endorsement by it or HMRC of the receiving scheme or product. And Zurich said Mr S should still carry out his own checks. It said Mr S should inform himself about whether he'd received UK regulated financial advice, which he could check by consulting the FCA register – and Zurich provided a link where he could do that. It also said if he had not received regulated advice, he should be aware, if something went wrong, he wouldn't be covered by the Financial Ombudsman Service or Financial Services Compensation Scheme ('FSCS'). Zurich said Mr S should think about whether he understood the proposed investments, risks and how he could access his pension. And it said if he hadn't already done so, Zurich *"strongly recommended"* Mr S obtain regulated advice and provided details of a service that could provide information about advisers local to Mr S.

Zurich confirmed to CGL and Mr S on 23 December 2014 that it had actioned the transfer, with the letter to CGL enclosing a cheque for £39,769.70 representing the total value of Mr S's pension benefits. Mr S was 53 years old at the time.

On 5 January 2015 Broadwood Assets Limited ('Broadwood') wrote to Mr S. The letter said it understood he was considering appropriate investments for his newly established SSAS for which he'd be sole trustee and member. And it understood he was considering an investment into an overseas commercial property in Cape Verde through TRG. The letter said Mr S, as trustee, was required to take advice under section 36 of the Pensions Act 1995 and had appointed Broadwood to provide that advice. It went on to say the advice was only given to Mr S in his capacity as the trustee of the SSAS. And Broadwood said the advice was only on the potential suitability of the TRG investment *"both as a specific example of an overseas commercial property investment, and more generally as an investment to be held within a SSAS"*. Broadwood said it had not advised on the establishment of the SSAS, was not providing advice that would be deemed regulated – as Broadwood was not regulated or authorised by the FCA – and wasn't advising on whether the TRG investment was *"suitable for the particular needs and objectives of the members of beneficiaries of the SSAS"*. The letter concluded that the TRG investment was suitable for Mr S's SSAS *"albeit when considered in the light of sensible diversification"* while also saying it was suitable for more adventurous investors.

I’ve seen evidence £25,150 of Mr S’s pension funds were then invested with TRG. The remainder, after the payment of fees appears to have remained in cash, with Mr S subsequently taking approximately £9,400 from the pension in March 2017 as tax free cash.

Statements for the SSAS bank account indicate that the TRG investment was providing credits to the pension bank account (returns) every few months until October 2019. I understand that those credits have since ceased and there is little market for re-sale of the investment.

In December 2022, Mr S complained to Zurich. He said he’d been cold called in the summer of 2014. He believed it was Moneywise that did so. He says though he was then introduced to a business called First Review Pension Services (‘FRPS’). And FRPS met with him at his home and recommended that he transfer, even though FRPS was not authorised or regulated by the FCA. Mr S says Zurich ought to have spotted, and told him about, a number of warning signs in relation to the transfer. These included the SSAS and sponsoring employer were newly registered, the employer wasn’t an active company and Mr S didn’t have an employment connection to it, he’d been cold called, Mr S had been advised by an unregulated business and the proposed investment was overseas and in an unregulated, high-risk area.

Zurich didn’t uphold the complaint. It said it had received an LOA from an FCA regulated business and so, even if Moneywise didn’t advise Mr S, he had access to regulated advice. It also said the information it had indicated another FCA regulated business was going to provide him with investment advice, and a third was involved with some of the proposed investments. It acknowledged that it hadn’t sent Mr S TPR’s Scorpion information but said he'd received this from CGL. And its letters to him had made him aware of some of the risks of transferring and suggested seeking regulated advice. So, it thought it had taken appropriate steps at the time of the transfer.

The complaint was referred to the Financial Ombudsman Service. When providing its file, Zurich said it consented to us considering the complaint. One of our Investigator’s reviewed the complaint and recommended it should be upheld. Zurich disagreed.

A solicitor responding on behalf of Zurich said that they believed we did not have jurisdiction to consider the matter. They also said, that notwithstanding, they disagreed with our Investigator’s opinion. As we were unable to resolve the dispute informally, the matter was passed to me to decide.

I issued a provisional decision earlier this month. I explained that I was satisfied we did have jurisdiction to consider Mr S’s complaint, as Zurich had consented to us doing so and this could not be withdrawn. I then explained that having considered the merits of the complaint, I thought it should be upheld.

There were no further comments made in respect of whether we have jurisdiction to consider the merits of the complaint. I’ve taken from this that Zurich accepts what I’ve said on this matter. So, I won’t make any further comment on the matter of jurisdiction and have instead focused on the merits of Mr S’s complaint. Below are extracts from my provisional findings, explaining why I intended to uphold the complaint, which form part of my final decision.

I’ve taken into account relevant law and regulations, regulator’s rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances. I’d also say that while I’ve considered everything on file and that the parties have said, in *light of our role as an impartial alternative dispute resolution service, I haven't addressed everything that's been said. Rather I've addressed what I see as being the key matters at the heart of Mr S's complaint and the reasons for my 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 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. 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 as it provided, for the first time, guidance for personal pension providers dealing with transfer requests – guidance that prompted providers to take a more active role in assessing 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>

Mr S says he was cold called and offered a free pension review. His representative has said that the initial contact appears to have been from Moneywise – as this is the company for whom Mr S signed an LOA. Mr S says he agreed to a review as he thought it would be useful to see what other options there were for his pension. He says he had no further contact with Moneywise and was instead introduced to FRPS. Mr S recalls the name of the FRPS adviser who he says visited his home and gave a presentation about the TRG investment. He says he was told that this would provide returns of 6-9% per year which would be far in excess of his existing pension and so FRPS advised him to transfer. Mr S says he agreed to go ahead based on the improved benefits he was told he'd receive. He *says FRPS then arranged all of the relevant paperwork and didn't warn him about any potential risks of transferring. Mr S agreed he received the letters from Zurich, which didn't include the Scorpion leaflet. He says he thought the message in these letters was that Zurich was carrying out checks with HMRC and that it would continue with the transfer if it received a positive response, so didn't require anything further of him.*

I don't have any reason to doubt what Mr S has said about having been cold called and offered a pension review. I've not seen anything to suggest Mr S had any great experience of pensions and investments. Nor have I seen anything about his circumstances that leads me to think he'd likely have embarked on this rather complicated arrangement on his own – setting up a new company, opening a SSAS, transferring his existing pension and investing overseas. So, I think it was the discussions that followed the initial contact which led to the transfer.

I also think, based on what he says was discussed, that he was advised to transfer. The emphasis of returns under the new arrangement being better than those the Zurich pension would provide seems to have represented comparing the prospective benefits of the two schemes and suggesting the new scheme was more beneficial. I think this advice was the catalyst for the transfer. And Mr S has said he wasn't offered any other incentives to transfer. So, I think it was the prospect of better returns that persuaded him to transfer.

I've thought about which business I believe advised Mr S.

The 'Q&A' document which CGL sent to Zurich referred to SFML, an FCA regulated business, providing advice. But it was clear this was section 36 advice to the scheme trustees. So, SFML's role was clearly defined. Zurich should have known that section 36 advice, given to Mr S as trustee of the SSAS, was not regulated financial advice about the suitability for him of the proposed transfer out of his personal pension scheme in favour of the proposed new investment. And the documents from CGL did not suggest he was taking advice of that kind from SFML, but only "advice on whether the proposed investment(s) are satisfactory for the aims of the scheme". And it appears SFML did not actually do this anyway. Broadwood, which was not FCA regulated, provided Mr S with written section 36 advice after the transfer had taken place.

The 'Q&A' document also mentioned an FCA regulated DFM. But this was only in the capacity as a potential product provider, with no suggestion it would provide advice on the pension transfer.

The LOA that Mr S signed named Moneywise, another FCA regulated business, as the party to which information should be provided. And Zurich appears to have only received correspondence from Moneywise and CGL. But I have also seen evidence that supports what Mr S has said that FRPS was involved in this transfer.

As part of setting up the SSAS, an application was made for a bank account. This application was signed by Mr S. The signature and application needed to be witnessed. The document is stamped as having been witnessed by FRPS. In addition, I've seen a copy of Mr S's identification documents that were witnessed as part of the transfer application. And I've been provided a copy of the trust deed in respect of the SSAS. Both of these were again witnessed by FRPS, and specifically the adviser who Mr S named as the person that visited his home and advised him to transfer.

Taking all of this into account, I'm satisfied that FRPS was involved in the transfer and that a face-to-face meeting with Mr S is likely to have taken place.

It's clear that Zurich sent transfer forms to Moneywise's registered address. But I don't think *that means Moneywise gave Mr S regulated advice. The Financial Ombudsman Service has seen dozens of complaints about pension transfers where both Moneywise and FRPS appear in the documents. Predominantly in those cases though, it appears to have been FRPS that has advised consumers to transfer.*

FRPS appears to have been established with the purpose of securing investment into TRG. The two businesses shared a director in common and in nearly every case I've seen involving FRPS the recommendation to transfer has included some investment in TRG – as happened here. I agree it would seem unusual for a regulated business to introduce a consumer to an unregulated one, when advice on a pension transfer needed to be from a regulated business. But in nearly all of the complaints I've seen, Moneywise appears to have been involved in name only, often at the start of the process – likely with the intention of adding some legitimacy to the transfer, given its status as a regulated adviser. And I note that here there isn't any evidence of regulated advice being provided to Mr S by Moneywise, such as a written recommendation. Nor have I seen anything to indicate Moneywise was paid a fee for advice – and it's unlikely a regulated financial adviser would provide advice for free.

Where evidence is incomplete, I have to make my decision on the balance of probabilities. And based on the available information and what we know more generally about transfers like Mr S's, on balance I think it is likely that the advice he received to transfer came from FRPS, an unregulated business, rather than Moneywise. And crucially, I think Mr S would've identified FRPS as the business that had advised him, if asked.

I also think Mr S is correct when he says that the TRG investment likely now has little value. As I've noted, I understand returns from the investment to his pension likely ceased in late 2019 – which is consistent with what we've seen in a large number of other complaints involving investment in TRG. We've also seen several complaints where consumers have been told it is their responsibility to attempt to sell the investment – but they have been unable to do so, and there is no recognised secondary market for re-sale of the investment. So, I believe the investment is now likely to be largely illiquid.

<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.

Zurich has acknowledged in its response to the complaint that it did not send Mr S a copy of the Scorpion leaflet. But it has said that CGL told it that it had shared the Scorpion insert with Mr S.

CGL was an unregulated third party that stood to benefit from the transfer. The purpose of issuing the Scorpion materials was so that consumers could see, for themselves, the risks involved with such transfers. So, I don't think Zurich relying on a party, who might have a vested interest in not sharing the information, saying it had shared the relevant information with Mr S was pragmatic.

Mr S did though sign a letter saying that he understood there had been a rise in pension liberation and that wasn't a reason for his application to transfer. It was reasonable in my view for Zurich to assume he agreed with the content of that letter before he signed it. This indicates that he had at least been given broadly the same information that the February 2013 Scorpion guidance contained, about pension liberation. And CGL's letter to Zurich said *it had shared the Scorpion information leaflet 'Predators Stalk Your Pension (the title of the 2013 version) with Mr S. On balance, I think it is likely that CGL did share the 2013 Scorpion information with Mr S.*

But by the time the pension information was requested from Zurich in August 2014, the focus of the Scorpion guidance had changed to scams more generally. And I haven't seen anything that suggests the updated Scorpion warnings were shared with Mr S by CGL. So, I don't think I can reasonably say that the up-to-date Scorpion information was shared with Mr S, in line with good industry practice at the time.

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 a pension scam and needed to undertake further due diligence and take appropriate action if it was apparent their customer might be at risk.

I understand Zurich checked that the receiving scheme was registered with HMRC as part of its due diligence – it wrote to Mr S saying that it would need to do so before it could proceed. But that appears to have been the extent of the due diligence it caried out.

Given the information Zurich had at the time, two features of Mr S's transfer would have been potential warning signs of a scam: the receiving SSAS was only recently registered and the proposed investment with TRG, highlighted in the Q&A document CGL provided to Zurich, involved investing money overseas, making it harder to recover.

Zurich has indicated it took comfort in Moneywise and SFML, two FCA regulated businesses, being involved. But I don't agree that it could've taken sufficient comfort from this to justify not carrying out any further due diligence. As I said previously, the mention of SFML indicated its capacity would be limited to providing section 36 advice to Mr S as a trustee, not regulated advice about the suitability of the transfer for him as an individual. So, the information Zurich had about SFML's involvement wasn't, in my view, enough for it to be reassured. And while Mr S had completed an LOA for Moneywise, there was no evidence that it had done anything beyond requesting information. None of the documents CGL sent Zurich as part of the transfer request gave any indication or confirmation that Moneywise had acted as Mr S's adviser. And no written advice has been produced at any stage. So, Zurich couldn't have safely concluded that Mr S had received regulated advice.

Because of this and the warning signs of a scam, as described by the Scorpion guidance, which were apparent, I think it would have been fair and reasonable – and good practice – for Zurich to have followed up to find out if other signs of a scam were present. I think the most reasonable way for Zurich to have looked into the proposed transfer would have been to turn to the check list in the action pack to structure its due diligence.

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 S'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 S as part of its due diligence.

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

Information Zurich could have obtained quickly and easily from Companies House would've confirmed, in addition to the SSAS being newly registered, the sponsoring employer was also newly registered. From reasonable enquiries with Mr S it would have likely learned that he wasn't employed by C Ltd and that the SSAS and C Ltd were set up after a cold call and a pension review for the purpose to invest in TRG which promised him high returns. And the paperwork referred to a connection to an unregulated investment company – TRG. All of these were warning signs of a scam.

Lastly, as I've already explained, I think Mr S was ultimately advised by FRPS. And I think he'd have told Zurich that.

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. I'd have expected Zurich to have taken that step when it became aware that Mr S had been advised, which is not difficult, and it would quickly have discovered that his 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 Zurich should have been concerned by FRPS's involvement because it pointed to a criminal breach of FSMA. On the balance of probabilities, I'm satisfied such a breach occurred here.

<u>What should Zurich have told Mr S – and would it have made a difference?</u>

Had it done more thorough due diligence, there would have been a number of warnings Zurich could have given to Mr S in relation to a possible scam threat as identified by the action pack. Zurich should also have been aware of the close parallels between Mr S's transfer and the warnings the FCA gave to consumers in August 2014 about transferring to SSASs (which was brought to the attention of pension providers the following month). 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 S 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 S that the FRPS, 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.

I appreciate that Zurich's letter to Mr S on 12 November 2014 included a recommendation that Mr S seek regulated advice if he hadn't done so. But the letter didn't make any reference to unregulated businesses not being legally allowed to provide advice. The letter did talk about people having already lost money due to pension liberation fraud, high costs incurred from new providers and / or unregulated investments. But none of the warnings explained that advice to transfer received from an unregulated business was potentially illegal. So, I don't think this letter went far enough to warn Mr S of the significant consequences he potentially faced as a result of FRPS' advice.

I don't think Zurich warning Mr S of this would have been a disproportionate response given the scale of the potential harm he was facing. And I don't think any such warnings would reasonably have caused Zurich to think it was running the risk of advising Mr S, 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 S's mind about the transfer. The messages would have followed conversations with Mr S 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 S aware that there were serious risks in using an unregulated adviser – something which the two letters Zurich sent to Mr S didn't highlight. I think the gravity of any messages along these lines would prompt most reasonable people to rethink their actions. And I've seen no persuasive reason why Mr S would have been any different.

<u>Fair compensation</u>

I've taken 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. The Law Reform (Contributory Negligence) Act 1945 allows for the apportionment of liability in the case of contributory negligence. And in summary this says where a person suffers damage partly due to their own fault and partly due to the fault of another party, a claim in respect of that damage shall not be defeated because the person that suffered the damage *was partly at fault, but the damages recoverable shall be reduced by what the court thinks is an equitable share based on the share of responsibility / fault of the claimant.*

I'm not deciding a legal claim, only a complaint. But I have given thought to whether Mr S should bear some responsibility for the losses he incurred. And I think he should here, due to his failure to act on what he should reasonably have known, contributing to the loss he suffered.

As I've noted, Zurich did send two letters to Mr S while the transfer was ongoing. The bulk of the messaging was around it contacting HMRC to further confirm the status of the receiving scheme and the reasons for this being the rise in pension liberation. There wasn't a reference to the Scorpion guidance, or this being widened to cover the need to be vigilant for scams more generally. And there was also no mention of the FCA's warnings about the increased use of SSAS's in scams.

At the same time though the second letter Zurich sent to Mr S did say that he should check his own understanding of certain things around the transfer. And Mr S has said he had no investment experience, which in my view ought to have made him think about this suggestion.

One of the things Zurich said was that many people had already lost out financially, with one of the reasons being unregulated investments. Mr S said FRPS didn't discuss any risks associated with the investment with him. But he received the letter from Broadwood before investing, which he signed a copy of. And this said that the proposed investment with TRG was not regulated – so had parallels to what the letter was highlighting as situations where consumers had already incurred detriment. It also explained that the proposed transfer involved risky investments which were highly illiquid, with no UK regulatory or compensatory protection and which were unsuitable for a cautious investor. I think this ought to have been concerning for Mr S.

Zurich also said Mr S should inform himself about whether he'd received regulated advice. It noted that if Mr S hadn't taken regulated advice, he was likely to not be covered by our Service and the FSCS. A link was provided to the FCA register in order to check if Mr S's adviser was regulated. And Zurich said if he hadn't taken regulated advice, it strongly recommended that Mr S do so and provided a link to a service that could help him find advisers local to him. Mr S doesn't appear though to have acted on these suggestions. And I think he should have. This would have been a reasonable step I'd expect someone in his position to take. And given I'm satisfied that he likely believed FRPS was the party that had advised him, and Moneywise were no longer involved, this step would probably have led to the illegal advice being uncovered and the transfer and/or investments being aborted.

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

Essentially, I think both Zurich and Mr S 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 S'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 S. In accordance with its duty under PRIN 6 and COBS 2.1.1R, Zurich should (as I have found above) have given specific warning about the likelihood Mr S had already been drawn into a scam. So, I think its failings were worse than those of Mr S. While this isn't an exact science, in the circumstances of this complaint, I propose to reduce Mr S's compensation by 30%. I think this is a fair way to account for Mr S's own contribution to the loss he's suffered.

Responses to my provisional decision

I gave both parties an opportunity to make further comments or send further information before I reached my final decision.

Mr S said he had no further comments for me to consider.

Zurich disagreed with my findings. It said it didn't agree that additional warnings would have made a difference as Mr S had not acted on the warnings it did provide. It also said, in reference to my finding that it should not have relied on CGL to provide scam warnings, there was no requirement for CGL to be FCA regulated. Zurich said it didn't think the SSAS was a scam and it didn't think it was reasonable for it to be held responsible for the 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.

I've taken account of what Zurich has said. But it hasn't presented any new arguments that were not covered in my provisional findings. So, although it disagrees with me, I'm not inclined to change my opinion.

Zurich is correct that CGL was not required to be FCA regulated to act as the operator of the SSAS. But the fact that it wasn't FCA regulated means I see no reason why it would have operated with FCA regulations and Principles in mind. The Scorpion guidance gave ceding schemes an important role to play in protecting customers wanting to transfer a pension. And the purpose of issuing the Scorpion materials was so that consumers could see, for themselves, the risks involved with such transfers. As I've explained, I think on balance CGL likely did share the February 2013 Scorpion information with Mr S, although this was not the updated version at the time of the transfer. But that doesn't change my opinion that Zurich relying on a party who might have a vested interest in not passing the information on to Mr S to share those warnings with him was not pragmatic.

As I explained in my provisional findings, I think Mr S did receive information during the application process which I think he reasonably should have acted on. So, I think he could've done more, and has some responsibility for the loss incurred. And this is reflected in the redress I proposed. But again, Zurich was the professional party here. I think it ought to have done more than it did. And I think in particular it should've provided more specific warnings to him about the adviser he was using and the risk that it was acting in breach of FSMA. The information that Mr S was given didn't make the significance of that as clear as it should have. And, while Zurich may not agree, I remain of the opinion that, had Mr S been told that the party advising him was potentially acting illegally by recommending that he transfer – which again I don't think would've been disproportionate for Zurich to explain – this would've given him more cause to lose confidence in his adviser than what he was told. And, as a result, I think would've resulted in him not transferring.

Zurich has also said that it didn't think the SSAS was a 'scam'. I agree that the SSAS itself, which was simply a vehicle to contain investments, was not of itself a 'scam'. But, as I said in my provisional decision, the significance of Mr S transferring to a SSAS was that SSAS's do not attract the same level of regulation as other pensions. They are not registered with TPR and do not fall under FCA regulation. And the FCA had issued specific warnings about the use of SSAS's for facilitating scams around the time that Zurich was considering the transfer. So, while the SSAS itself might not have been a scam, it could have been indicative that Mr S's use of it was putting himself at risk of scam like activity. And the Scorpion materials highlighted other concerns, as I referred to in my provisional decision such as the recent registration of the scheme, that ceding schemes like Zurich should be on the look-out for. So, while I agree that the SSAS itself wasn't necessarily a scam I do not think that this meant that Zurich should not have done additional due diligence.

Further Zurich said it shouldn't be held responsible for the 'failed investment'. However, while Zurich is not responsible for the illiquid nature of the TRG investment, as I've described above, had it done the further due diligence I described I think it's more likely than not that Mr S would not ever have made the TRG investment. So, he wouldn't have been in the position to suffer the losses because of its failure. As a result, contrary to Zurich's opinion, I think it is fair to hold it responsible, in part, for the investment losses Mr S has incurred.

Putting things right

Fair compensation

My aim is that Mr S 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 S shares responsibility for his loss.

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

To compensate Mr S fairly, Zurich must subtract the actual value of the 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 SSAS value at the date of my Final Decision. To arrive at this value, any amount in the SSAS bank account is to be included, but any overdue administration charges yet to be applied to the SSAS should be deducted. Mr S 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 S 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 TRG investment as there is no recognised secondary re-sale market. And I don't think it's realistically possible for Zurich to only acquire a part of the investment from the SSAS as I'm only holding it responsible for 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 S 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 SSAS. Zurich will need to meet any costs in drawing up the undertaking. If Zurich asks Mr S to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

- It's also fair that Mr S should not be disadvantaged while he is unable to close down the SSAS. So to provide certainty to all parties, if these illiquid investment(s) remain in the scheme, I think it's fair that Zurich must pay an upfront sum to Mr S equivalent to 70% of five years' worth of future administration fees at the current tariff for the SSAS, to allow a reasonable period of time for the SSAS to be closed.

Notional value

This is the value of Mr S'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 S received from the SSAS are treated as notional withdrawals from Zurich on the date(s) they were paid, so that they cease to take part in the calculation of notional value from those point(s) onwards.

Payment of compensation

I don't think it's appropriate for further compensation to be paid into the SSAS given Mr S's dissatisfaction with the outcome of the investment it facilitated.

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

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

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 S. 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 S is retired. (This is an adjustment to ensure that Mr S isn't overcompensated – it's not an actual payment of tax to HMRC.)

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

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

My final decision

For the reasons given above, I uphold this complaint. Zurich Assurance Ltd must now put things right in line with the approach set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 16 April 2025.

Ben Stoker
Ombudsman