DRN-5529124

The complaint

Mr H has complained, through his representatives, about a transfer of his Aviva Life & Pensions UK Limited ('Aviva') personal pension to a small self-administered scheme ('SSAS') in May 2015. Mr H's SSAS was subsequently used to invest in Dolphin Capital ('Dolphin'), a loan note investment in property in Germany. The investment now appears to have little value. Mr H says he has lost out financially as a result.

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

What happened

Mr H says he received a cold call from an individual who offered to provide him with a free review of his pensions. He's said that he was then visited at his home by an individual who I'll refer to as Mr D, offering him a review of his pensions. He has said this individual was from the Rownamoor Group plc. He said Mr D proceeded to present him with a number of investment opportunities that attracted him to transferring his pensions, and Mr D went on to obtain information about his existing pensions.

On 1 April 2015, Mr H signed documents to open a SSAS with Rowanmoor Group plc ('Rowanmoor'). A company Mr H had set up in October 2014 which I'll refer to as 'Business W', was recorded as the SSAS's principal employer, and Roseland Mills Limited (Roseland) was recorded as the Trustee Adviser.

On 5 May 2015, Rowanmoor sent a transfer request to Aviva via the Origo Options platform. Origo is an electronic transfer system that allows paperless execution of transfers amongst firms that have signed up to the service. The request recorded the details of the Rowanmoor SSAS in the space for the receiving scheme information, and the space for adviser details was left blank.

Mr H's pension was transferred on 9 May 2015. His transfer value was around £82,000. He was 45 years old at the time of the transfer.

Later in May 2015, Mr H also transferred two pensions he had with a business I will refer to as Firm G worth around £53,400 in total, and two pensions he had with a different business that I will refer to as Firm S worth around £70,200. Mr H referred a complaint to this service about Firm G's decision to allow the transfer which was upheld. I've taken all the information provided in that complaint into account in this decision. Mr H has not raised a complaint with Firm S about its decision to allow the transfer. However I have received information from Firm S about the transfer in 2015 along with any information and/or documents that it sent to Mr H at the time.

In June 2015, Mr H invested £100,000 from his SSAS fund in a Dolphin loan note. The note had a five-year term and an average interest rate of 12% that was paid at maturity. And in November 2015, Mr H invested a further £50,000 from his SSAS fund in another Dolphin loan note. This note had a five-year term and a fixed interest rate of 10% that was paid at maturity.

In May 2016, Business W made a contribution of £21,000 into Mr H's SSAS. Then in June 2016, Mr H invested a further £70,000 from his SSAS fund in another Dolphin loan note. This note also had a five-year term and received a fixed interest rate of 10% that was paid at maturity.

In November 2017, Mr H transferred the Rowanmoor SSAS to Oakleaf Pensions Limited ('Oakleaf') on the advice of Mr D, and his Dolphin loan notes were re-registered. Dolphin entered into preliminary bankruptcy proceedings in Germany in October 2020. Investors are very unlikely to receive any of their investment back, and as such, Mr H's Dolphin investments have no realisable value.

In July 2022, Mr H's representatives wrote to Aviva setting out his complaint. Briefly, his argument is that Aviva failed to conduct adequate due diligence checks on his transfer and provide him with information about pension scams. It ought to have spotted, and told him about, a number of warning signs in relation to the transfer, including: the catalyst for the transfer was an unsolicited call, he had been advised by an unregulated business, and he was intending to make a high risk illiquid investment from which he was expecting unrealistic returns.

Aviva didn't uphold the complaint. It said Mr H had a legal right to transfer, and that Rowanmoor would have been granted regulatory approval to operate and request transfers via Origo. It was therefore satisfied that no due diligence would be required on the transfer. Our Investigator thought the complaint should be upheld. Aviva disagreed, so the matter was passed to me to decide.

I issued a provisional decision in April 2025 where I set out why I fel the complant should be upheld. An extract of this decision is set out below and forms part of this final decision:

The relevant rules and guidance

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 Aviva 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 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.*

The March 2015 Scorpion guidance

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.

The PSIG Code of Good Practice

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 scheme 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 H has said that he was initially cold called and offered a free review of his pensions. He's said this was then followed up by a visit from Mr D who Mr H thought was from Rownamoor Trustees. He said Mr D looked through what Mr H held and then approached his pension providers to get the values of the policies. Then when Mr D had all the information Mr H said they discussed the options and what would become available if the policies were combined into a SSAS. He was told the SSAS would be handled by Rowanmoor.

Mr H said that once the SSAS was set up and the monies transferred over Mr D then started discussing the investment opportunity. He's said Mr D brought along some which Mr H thought were very risky such as investing in hotels in Turkey. But Dolphin was proposed as being a secure safe investment as all of the funds were being held by a German law firm. Mr H said he was encouraged to put the first sum into Dolphin and then later sums over the next few months. The impression he was given all along was that Mr D was a representative of Rowanmoor and that everything he was proposing was supported by them.

In relation to the other pensions he transferred into the same SSAS Mr H told us that he didn't receive any communication from Firm G or Firm S and had never seen any of the Scorpion materials before he was shown them during the process of making this complaint. After being shown the Scorpion materials Mr H said the first insert he was shown was about releasing funds before 55 and so was not directly related to him as that was not what he was offered. However the second insert highlighted elements which were present within his circumstances such as setting up a SSAS where the member is a trustee, the promotional material alluding to overseas investments and the scheme member being contacted by an introducer and a non-regulated adviser – although he states he didn't know this is what Mr D was. He said having now seen the leaflet he feels foolish for not spotting some of these *things.*

In terms of Business W Mr H explained that he set it up in October 2014 because he wanted to start working for himself as an IT consultant.

While I appreciate what Mr H has said about being visited at his home by Mr D from Rowanmoor, I think this is unlikely. Rowanmoor wasn't able to provide advice on pension transfers and from what I know about these transfers its more likely that Rowanmoor used an introducer firm to reach out to potential clients and conduct the meetings. I don't think Mr H has purposely provided incorrect information. Its possible Mr H just didn't understand what he had been told by Mr D about which business he was representing or Mr D may not have made it clear.

I do think however that Mr H was directed to invest in the SSAS and was encouraged to transfer his pension and invest into Dolphin. And given he has only mentioned Rowanmoor and Roseland in making his complaint I think the advice came from one of these firms who were both unregulated to provide pension transfer advice.

<u>What did Aviva 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.

In this case the insert sent to Mr H should have been the one that had been updated in March 2015.

Aviva has confirmed it didn't send the insert to Mr H explaining that it hadn't been contacted by any third parties in relation to Mr H. Aviva also said that although Mr H had contacted Aviva by telephone on 5 May 2015 and had asked for the pension transfer forms, before it was able to send those forms out (or anything else) the transfer request through Origo was received. So Aviva effectively had no chance to send Mr H the insert before proceeding with the transfer.

While I appreciate this, in my view it isn't a good enough reason for Aviva not to do as TPR had set out it expected its pension providers to do. The insert had to be sent in all transfers a stated in the 2015 Action Pack which Aviva should have been aware of. So while the request for the transfer came in quicker than expected Aviva didn't have to process it immediately. It did have to complete a transfer request within six months, but it could have taken some time to fulfil its obligations and ensure Mr H was duly informed of all he had to be. And still have processed the transfer within a good amount of time.

So in not sending the Scorpion insert to Mr H despite its reasons I think Aviva has failed in this respect.

In addition, having looked at the information provided on the pensions that Mr H transferred from his other providers I can see that the Scorpion insert wasn't sent by them either so I am satisfied Mr H didn't have access to the information in the insert by any other means.

<u>Due diligence:</u>

Aviva has said that it didn't carry out any due diligence into Mr H's transfer and didn't make any contact with Mr H.

Its argued that it wasn't required to carry out any further checks or due diligence because Origo would already have completed due diligence checks on the receiving scheme's administrators therefore negating the need for it to do its own due diligence. However, Aviva hasn't provided any details on what exactly Origo did in this respect. And I think that points to the problem here, which is that Aviva relied on due diligence conducted by a third party even though it doesn't appear to have really known what that due diligence involved. I've taken into account what the due diligence in question was aimed at preventing – pension scams, the end result of which can often be the loss of entire pension funds – and the clear steps that were expected of ceding schemes to prevent this happening. Given also the duties of personal pension providers under PRIN and COBS 2.1.1R, I don't think Aviva's approach was good enough here.

Aviva has also argued that the involvement of Rowanmoor in this transfer was crucial in mitigating against the risk factors due to it being a long established SSAS provider with some repute in the industry. And that Rowanmoor Trustees Limited also had legal and fiduciary duties as a professional trustee. However, I don't think this was enough for Aviva to have taken comfort from this. 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. And TPR had specifically highlighted that scams were now focusing on single-member schemes in its 2015 update to the Scorpion action pack. In the absence of that oversight, Aviva 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 Aviva could, reasonably, have derived sufficient comfort about the Rowanmoor SSAS as a destination for Mr H's transfer.

I therefore think that in line with its duties under PRIN and COBS and the guidance from TPR I think Aviva should have looked further into Mr H's transfer to find out the circumstances surrounding it. Indeed, Aviva has stated that it didn't have any clarity about the transfer – where he was planning to invest and even if he had taken advice – so that alone in my view indicates it was even more important for Aviva to carry out further due diligence – so that it could gain that clarity and satisfy itself that Mr H wasn't putting his pension savings at risk.

As explained above, I consider the PSIG Code to have been a reasonable starting point for most ceding schemes. I've therefore considered Mr H'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 Aviva's actions using the Scorpion guidance as a benchmark instead. And even though Aviva feels that as the transfer request was made only seven weeks after the PSIG code was introduced so it therefore didn't have enough time to update and rearrange its internal processes, in my view the guidance didn't come out of the blue – it had built upon the Scorpion guidance which had been in place for over two years. And it was expected that ceding schemes would *start applying the guidance immediately. So I don't think its reasonable for Aviva to have had a "lead in" time to update its processes in line with the guidance.*

Aviva hasn't argued that there was any reason to fast track so the "accepted club" part of the "Initial analysis" section of the PSIG Code isn't applicable here. Neither could Aviva have considered the receiving scheme/administrator as being free of scam risk. So the initial triage process should have instead led to Aviva asking Mr H 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 or administrator operating from 'virtual' offices, or using PO Boxes for correspondence purposes.*

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 Aviva should have addressed all four sections of the SSAS due diligence process and contacted Mr H to help with that.

Had Aviva followed the process I have outlined above, as it should have, its reasonable that it wouldn't have had any concerns about the sponsoring employer of the SSAS and the employment link. Business W, the sponsoring employer, had been established around six months before Mr H had requested the transfer of his pension and if Aviva had looked further into this company it would have seen it was active and that Mr H had a clear and legitimate employment link to it. However, at the same time Aviva would also have found out that the SSAS was only recently registered, that Mr H had been cold called and as already stated the investments were to be overseas – all warnings signs detailed in the PSIG code and the Scorpion guidance.

As well as this, Aviva should have also asked Mr H about whether he had received any advice and if so by whom. The Origo transfer request didn't have any details of an adviser recorded so this in itself should have looked odd to Aviva. And I don't think the fact that Mr H *already had a limited company set up some months before, so seemingly set up for reasons unrelated to the transfer of his pension negates the need for Aviva to have looked into this further. Furthermore, in my view its very unlikely that Mr H would have decided on his own to undertake this process and use a SSAS for his pension investments given he didn't seem to have experience of investing or in pensions in general. So I think Aviva should have explored this further to get to the bottom of how Mr H came to decide he wanted to transfer his pension to this SSAS and invest especially into Dolphin.*

I appreciate Mr H has been quite vague about whether he was provided with advice and if so by whom. But as above I am satisfied he was. And while I think it's unlikely anyone from Rownamoor visited Mr H at his home or provided advice he has mentioned the involvement of Roseland and this firm was marked on the SSAS application form as the trustee advisers and was paid an adviser's fee agreement. So taking that into account it seems likely that it was presented to Mr H that Roseland or the firm which Mr D was representing was advising Mr H.

Whether Mr H would have said that to Aviva had it asked him, which it should have, I can't be certain. But I think it's more likely that whatever Mr H would have said in terms of advice he wouldn't have mentioned any firm that would have given Aviva some comfort – he hasn't mentioned any other regulated firm being involved in his transfer. And while Aviva has said there was a regulated adviser linked to Mr H on its systems I don't think this can be relied upon as Aviva had no way of knowing whether that firm was involved with Mr H at the time and its most likely they were only his servicing agents.

So in short Aviva should have asked Mr H about whether he received advice and explored this matter further. And had it done so it would have uncovered information that it should have been concerned about – basically that Mr H most likely was advised by an unregulated firm.

To be clear, I haven't assumed Aviva actually had evidence Mr H was being advised by Roseland or the firm Mr D represented. Rather, I've concluded this is what Aviva likely would have discovered if it had followed the PSIG Code/Scorpion checklist to find out more about how Mr H came to request the transfer.

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 Mr H would most likely have said he was being advised by Roseland and/or Mr D so Aviva should have been concerned by this because either way it pointed to a criminal breach of FSMA. On the balance of probabilities, I'm satisfied such a breach occurred here.

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

Had it done more thorough due diligence, there would have been a number of warnings Aviva could have given to Mr H in relation to a possible scam threat as identified by the PSIG Code (and the Scorpion action pack). Aviva should also have been aware of the close parallels between Mr H'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 Aviva's failure to uncover the threat *posed by a non-regulated adviser. Its failure to do so, and failure to warn Mr H 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 Aviva to have informed Mr H that the firm he had been advised by was unregulated and could put his pension at risk. Aviva 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 H was facing and Aviva's responsibilities under PRIN and COBS 2.1.1R. And I don't think any such warnings would reasonably have caused Aviva to think it was running the risk of advising Mr H, that it was replicating the responsibilities of the receiving scheme or that it was putting in place unnecessary barriers to exit.

This process of engaging with Mr H could have happened in real time, whilst Aviva was asking him questions about the investment and how he had come to make the transfer. That alone was in my view capable of causing him to change his mind. Or, if necessary, Aviva could have followed up its enquiries by making further contact with Mr H to set out its concerns. It could also have sent him the longer TPAS booklet or encouraged him to call TPAS's helpline.

I accept Aviva wasn't in a position to tell if this was actually a scam or not at the time. And I've set aside any questions of whether the investment involved the right level of risk for Mr H, because I accept it wasn't Aviva's role to assess this. But given the extent of the concerns it should in my view have had in this particular case, I don't think Aviva would have been able to discount the threat of a scam.

Yet Aviva did nothing at all here in terms of direct engagement with Mr H. Its failure to establish these risks and warn Mr H accordingly, meant it didn't meet its obligations under Principles 2, 6 & 7 and COBS 2.1.1R. I don't think giving such warnings would have been a disproportionate response to the information that Aviva should have gathered, had it acted correctly.

I'm satisfied any messages along these lines would have changed Mr H's mind about the transfer. The messages would have followed conversations with Mr H 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 Aviva raising concerns about the risk of losing pension monies as a result of untrustworthy advice. This would have made Mr H aware that there were serious risks in using an unregulated adviser. 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 H would have been any different. So, I consider that if Aviva had acted as it should, Mr H wouldn't have proceeded with the transfer out of his personal pension or suffered the investment losses that followed. Nor would he have transferred into Oakleaf in 2017 as this appears to be a continuation of the original advice.

I therefore uphold Mr H's complaint.

<u>What losses are Aviva responsible for?</u>

I consider that if Aviva had acted as it should, Mr H wouldn't have proceeded with the transfer out of his personal pension to make the investments into the SSAS and the subsequent investments.

I also think it's fair and reasonable to hold Aviva responsible for any losses caused by *the investments made by Mr H into his SSAS.*

I also have to decide whether it is fair Mr H be compensated by Aviva for those losses (see section 229(2)(a) of FSMA). In doing so I have given thought to whether Mr H should bear some responsibility for the losses he has incurred. I take into account that the courts are able to reduce a defendant's liability for negligence where the claimant shares responsibility for the damage they've suffered.

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

My view is that Mr H doesn't bear responsibility for the losses he suffered. He transferred his pension because he listened to unregulated parties promising significantly higher returns than he was achieving. And crucially, Aviva didn't provide Mr H with any of the warnings it should have done at the time of the transfer. Nor did it give him any indication of what further steps he could take to protect himself when I think Aviva ought to have had concerns about what Mr H was doing and who was advising him. Furthermore, I don't think Mr H, acting reasonably, would have got a sense from any other sources that there was a need to act with further caution when transferring his pension. In the circumstances, my view is that Mr H wouldn't reasonably have known about these risks. I therefore don't intend to reduce Mr H's compensation.

The CMC on behalf of Mr H accepted the findings of the provisional decision and didn't provide any further comments.

Aviva didn't respond to my provisional findings and didn't make any further comments.

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 into account relevant: law and regulations; regulatory rules; guidance and standards; codes of practice; and (where appropriate) what I consider to have been good industry practice at the relevant time.

As neither party made any further comments in response to the provisional decision I have no reason to depart from my provisional findings.

I therefore uphold this complaint.

Putting things right

Fair compensation

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

The SSAS only seems to have been used in order for Mr H to make an investment that I don't think he would have made from the proceeds of this pension transfer, but for Aviva's actions. So I think that Mr H would have remained in his pension plan with Aviva and wouldn't have transferred to the SSAS.

To compensate Mr H fairly, Aviva should subtract the proportion of the actual value of the SSAS which originates from the transfer of the Aviva pension, from the notional value if the funds had remained with Aviva. If the notional value is greater than the actual value, there is a loss.

Actual value

This means the proportion of the SSAS value originating from Mr H's Aviva transfer (the "relevant proportion") at the date of calculation. To arrive at this value, any amount in the SSAS bank account is to be included, but any overdue administration charges yet to be applied to the SSAS should be deducted. Mr H may be asked to give Aviva his authority to enable it to obtain this information to assist in assessing his loss, in which case I expect him to provide it promptly.

My aim is to return Mr H to the position he would have been in but for the actions of Aviva. 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 investment into Dolphin. This is because we know the investment has failed to the extent that it's reasonable to say at this point that investors – Mr H included – are unable to realise a value for them. And I don't think it's realistically possible for Aviva to only acquire a part of the investment from the SSAS as I'm only holding it responsible for the loss originating from a transfer in of the Aviva funds. Therefore as part of calculating compensation:

- Aviva should give the illiquid investment(s) a nil value as part of determining the actual value. In return Aviva may ask Mr H to provide an undertaking, to account to it for the relevant proportion of the net proceeds he may receive from those investments in future on withdrawing them from the SSAS. Aviva will need to meet any costs in drawing up the undertaking. If Aviva asks Mr H to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.
- It's also fair that Mr H should not be disadvantaged while he is unable to close down the SSAS. So to provide certainty to all parties, if these illiquid investment(s) remain in the scheme, I think it's fair that Aviva should pay an upfront sum to Mr H equivalent to the relevant proportion of five years' worth of future administration fees at the current tariff for the SSAS, to allow a reasonable period of time for the SSAS to be closed.

Notional value

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

Aviva should ensure that the relevant proportion of any pension commencement lump sum or gross income payments Mr H received from the SSAS are treated as notional withdrawals from Aviva on the date(s) they were paid, so that they cease to take part in the calculation of notional value from those point(s) onwards.

Payment of compensation

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

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

Aviva shouldn't reinstate Mr H's original plan if it would cause a breach of any HMRC pension protections or allowances – but my understanding is that it might be possible for it to reinstate a pension it formerly administered in order to rectify an administrative error that led to the transfer taking place. It is for Aviva to determine whether this is possible.

If Aviva is unable to reinstate Mr H's pension and it is open to new business, it should set up a new pension plan with a value equal to the amount of any loss on the date of calculation. The new plan should have features, costs and investment choices that are as close as possible to Mr H's original pension.

If Aviva considers that the amount it pays into a new plan is treated as a member contribution, its payment may be reduced to allow for any tax relief to which Mr H is entitled based on his annual allowance and income tax position. However, Aviva's systems will need to be capable of adding any compensation which doesn't qualify for tax relief to the plan on a gross basis, so that Mr H doesn't incur an annual allowance charge. If Aviva cannot do this, then it shouldn't set up a new plan for Mr H.

If it's not possible to set up a new pension plan, Aviva should pay the amount of any loss direct to Mr H. But if this money had been in a pension, it would have provided a taxable income during retirement. Therefore compensation paid in this way should be notionally reduced to allow for the marginal rate of income tax that would likely have been paid in future when Mr H is retired. (This is an adjustment to ensure that Mr H isn't overcompensated – it's not an actual payment of tax to HMRC.)

To make this reduction, it's reasonable to assume that Mr H is likely to be a basic rate taxpayer in retirement. So, if the loss represents further 'uncrystallised' funds from which Mr H was yet to take his 25% tax-free cash, then only the remaining 75% portion would be taxed at 20%. This results in an overall reduction of 15%, which should be applied to the compensation amount if it's paid direct to him in cash.

Alternatively, if the loss represents further 'crystallised' funds from which Mr H had already taken his 25% tax-free cash, the full 20% reduction should be applied to the compensation amount if it's paid direct to him in cash.

The date of this Final Decision will be 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, as set out below.

If payment of compensation is not made within 28 days of Aviva receiving Mr H'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 Aviva deducts income tax from the interest, it should tell Mr H how much has been taken off. Aviva should give Mr H a tax deduction certificate in respect of interest if Mr H asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

This interest is not required if Aviva is reinstating Mr H's plan for the amount of the loss – as the reinstated sum should, by definition, mirror the performance after the date of calculation of the funds in which Mr H was invested. However, I expect any such reinstatement to be achieved promptly.

Neither Mr H or Aviva have told us they dispute any of the following:

- the assumption that Mr H will be a basic rate taxpayer in retirement
- the assumption of nil value for Dolphin at the date of calculation

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

My final decision

For the reasons set out above my final decision is that I uphold this complaint. I direct Aviva Life & Pensions UK Limited to put things right in line with the approach detailed above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr H to accept or reject my decision before 30 May 2025.

Ayshea Khan
Ombudsman