DRN-3165138

The complaint

Through his Claims Management Company (CMC), Mr T has complained that Phoenix Life Limited (Phoenix Life) failed to carry out adequate due diligence before transferring his pension to a Small Self-Administered Scheme (SSAS) operated by Rowanmoor Group plc. The CMC has said Phoenix Life failed to follow the Financial Conduct Authority (FCA)'s Principles and Rules and should have contacted Mr T directly to find out more about his reasons to transfer. It also said it didn't send Mr T the information leaflet the Pensions Regulator (TPR) expected to be provided before such transfers.

What happened

The CMC says in early 2016 Mr T was cold called and was persuaded to allow a representative from Return on Capital UK Limited (ROC), and an unregulated firm, offering him a free review of his pensions. The CMC has said he was visited at his home and was recommended to transfer his pensions into a SSAS and invest via a loan note into the Dolphin Trust (which invested in German properties). Mr T has said he was told he would get better returns if he transferred away from Phoenix Life.

At the time Mr T held two personal pension plans with Phoenix Life. He was 54 years of age and earned a modest salary.

ROC liaised with Phoenix Life and the values of Mr T's pensions were provided to ROC on 9 February 2016.

On 5 February 2016 a new company was incorporated with Mr T as sole director and a registered address in Birmingham which matched ROC's address. Shortly after this time I assume the SSAS was established with Rowanmoor, using this company as the sponsoring employer.

Rowanmoor contacted Phoenix Life to request the transfer of the pensions and this was completed on 16 May 2016. Mr T also accessed his tax-free entitlement at the time of around £20,000.

The CMC has said Phoenix Life only corresponded only with ROC and Rowanmoor apart from when it provided the initial values of his pension directly to Mr T. Its also said Mr T didn't receive any warnings from Phoenix Life nor was he provided with the scorpion leaflet required by TPR.

The CMC complained to Phoenix Life on Mr T's behalf saying that Phoenix life failed to identify the warnings signs involved in this transfer – namely:

- the involvement of an unregulated introducer and adviser;
- the fact Mr T had been cold called;
- the lack of regulated advice;
- the fact the SSAS had only recently been registered with HMRC; and
- the fact the scheme was said to be an occupational pension scheme (OPS) so Phoenix Life should have obtained information about the employer from the receiving

scheme and made appropriate checks about the status of the employer and if Mr T was employed by that employer.

In response to the complaint Phoenix Life said that as the request from Rowanmoor came through the Origo ‘Options’ online transfer system, it had reason to think Rowanmoor had been subjected to ‘due diligence and comprehensive screening checks’ by Origo. It added that Mr T had a statutory right to transfer to his new SSAS. And it had no obligation to check that Mr T had taken regulated financial advice.

The complaint was assessed by one of our investigators who felt it should be upheld. He felt that while Phoenix Life had sent the scorpion leaflet to ROC it should have in fact sent the leaflet directly to Mr T. He also felt that despite the transfer coming via Origo he there were a number of warning signs obvious in the initial due diligence stage as set out by TPR for Phoenix Life to have looked further into this transfer. And he reasoned that had Phoenix Life done that its likely Mr T would have decided against the transfer.

Phoenix Life didn’t agree with the assessment and remained of the view that the transfer coming through Origo was enough of a check and that it was for the adviser to warn Mr T of the potential risks of the transfer.

As no agreement could be reached the complaint has been passed to me to decide.

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.

What rules or guidance was Phoenix Life expected to follow at the time of the transfer?

As Mr T’s policy was a personal pension, Phoenix Life was regulated by the Financial Conduct Authority (FCA) in its operation. TPR was a different regulator covering occupational schemes and published comprehensive guidance (the Scorpion campaign) in February 2013 - including an Action Pack for ceding schemes to carry out due diligence on pension transfers. Initially this aimed to prevent transfers being made to pension liberation schemes, but it widened in July 2014 more broadly to the risk of investment scams.

Although the FCA itself has not produced any rules or guidance specific to this type of due diligence, the Action Pack was endorsed by its predecessor the FSA. I’ve also kept in mind, as Mr T’s CMC has correctly said, that Phoenix Life was bound to follow the ever-present and broader Principles and Rules set out by the FCA, including the ‘client’s best interests’ rule at COBS 2.1.1R.

In March 2015 a broader piece of guidance initiated by the whole industry (both TPR and FCA regulated firms) was published: the PSIG Code of Practice (‘the Code’). TPR then began referring to the Code in its Action Pack and it was welcomed by FCA. So in this decision I will consider both sets of guidance alongside each other, as it was reasonable for Phoenix Life to do this at the time.

Where they overlap (which they do significantly) I would not expect Phoenix Life to repeat the same steps again. But some indications of what was expected could only be obtained from the Action Pack, such as how to engage with a consumer when warning signs of liberation or a scam were detected. And the Code gave greater detail on the specifics to look out for in a SSAS transfer, and the circumstances in which a transfer could be blocked (although as I’ll go on to explain, I haven’t needed to consider whether it would have been necessary for Phoenix Life to consider blocking the transfer in this case).

When the scope of the campaign broadened in July 2014, TPR said in a press release that scams involved *'…moving their retirement savings into unregulated high-risk or bogus investments that could result in them losing their entire pension pot…Home visits from 'introducers', offers of 'free pension reviews', claims about 'legal loopholes' and unusual investments like overseas property, storage units or biofuels are all used to fool members into thinking they're being offered a legitimate pension transfer.'*

Both the Action Pack and the Code said that the 2-page Scorpion leaflet should be sent directly to the policyholder's home address whenever a 'transfer pack' was requested, even by their representative. The March 2015 leaflet included a pictorial highlighting the risks of cold-calling, pension access before age 55, overseas transfer of funds, convincing marketing of returns over 8%pa, couriered paperwork and proposals for a single investment.

The Action Pack included a checklist of questions for businesses to follow if a policyholder was asking for a transfer. All the questions had equal prominence in the checklist, but I accept Phoenix Life had some discretion as to how much of it to complete before being satisfied that the scam risk was sufficiently low to proceed. To help with this, the Code contained an 'initial analysis' stage of what were, in effect, filter questions.

One way of 'fast tracking' a transfer in this initial stage was where it was to a member of an 'accepted club or group'. The other way was where there had been pre-vetting of the *'administrator/scheme as not presenting a risk of pension scam activity'*. Phoenix Life is in effect saying this took place because it relied on Origo's own due diligence.

What action should Phoenix Life have taken?

Phoenix Life has confirmed it sent the scorpion warning leaflet to ROC rather than directly to Mr T in response to the information request in February 2016. But as mentioned above TPR directed that the leaflet be sent directly to the member, Mr T in this case. There can be no reliance placed upon the adviser, which was more likely than not connected to the investments that had been recommended to Mr T, passing the leaflet on to Mr T or even engaging with him about the risks of transfer.

Furthermore, even though the transfer request was placed via Origo the leaflet should still have been sent directly to Mr T and in not doing so I don't think Phoenix Life treated Mr T in line with the FCA Principles as it was obliged to do.

In terms of the initial analysis stage of the PSIG Code, I'm not persuaded that Origo Options would count as an accepted club or group. The example given was the public sector transfer club – but that is not a group of schemes, not providers. In my view with a transfer to a SSAS the risk was with what investments the individual *scheme* contained, not the provider. PSIG's likely view of this at this time can be seen from the following comment made in the June 2018 update to the Code:

'*…the Industry Group continues to recommend that appropriate due diligence is carried out on transfers where companies use "practitioner-only" services for SSAS or are transacted using automated systems, such as Origo'*.

I think Phoenix Life should also have done its own due diligence into Rowanmoor rather than relying on Origo, although I accept that this is unlikely to have raised concerns about Rowanmoor's legitimacy as a provider. Rowanmoor was arguably the best-known SSAS *administrator* in the industry at the time, but there is a similar problem here to that I set out above: I don't think that alone would have given Phoenix Life enough confidence that isolated *schemes* wouldn't be used (*e.g.* by third parties) as vehicles for scams.

This was the very model TPR was highlighting in the March 2015 update to the Action Pack, which said *'Pension scam models are also changing. Many scammers are directing members to transfer into single member occupational schemes in an attempt to escape scrutiny'*. The example of a scam given in this Action Pack was of a consumer unwittingly being made a director of a company and trustee of his SSAS in order to invest in an overseas hotel development.

I've taken into account that Rowanmoor acted as *professional trustee* of its scheme alongside Mr T as the member and lay-trustee. Nevertheless, the Code made clear 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 appears to have happened with the information request in February 2016, as ROC wasn't regulated. I haven't seen Phoenix Life provided a printout of the Origo request. That request would have been pre-filled with ROC's name in a box for the advising firm. ROC did not appear on the Financial Conduct Authority's register. So I consider Phoenix Life would already have been in possession of information that an unregulated advising firm was potentially involved in this transfer. So, this shouldn't have been ignored – especially at this point in time when the sophisticated nature of pension scams and fraud was widely known within the industry and all providers should have been alert to the signs.

So in the particular circumstances of this case, I couldn't fairly say that it would have been appropriate for Phoenix Life to look no further than the provider of the SSAS (Rowanmoor) being a long-established administrator and trustee. Its involvement with an unregulated introducer – which Phoenix Life should reasonably have been aware of – was also something that was a potential "red flag" under both the Code and the Scorpion guidance and not something Phoenix Life could reasonably have ignored.

If there were concerns at the initial analysis stage the PSIG Code recommended asking the policyholder a series of further questions. These addressed the risk of liberation as well as scams, so as there is no issue with Mr T receiving an incentive or accessing his pension before age 55, I've focused on the remaining ones (which were broadly the same in the Scorpion checklist):

- Did the consumer receive an unsolicited offer of a 'pension review' or investment opportunity by cold call, email or text?
- Were they told they could obtain a higher tax-free cash sum by transferring? (This question is only present in the Code)
- Were they promised a specific or guaranteed rate of return, particularly over 8%pa? (The Checklist also highlights where the marketing material alludes to new or unusual investment techniques)
- Did the investment's marketing or discussions they had involve transferring funds overseas?

If these questions flagged up further concerns, the Code expected full due diligence to be carried out into Mr T's transfer in any event - and that essentially meant completing broadly the same questions as the remainder of the Scorpion checklist. So I'll next address what would be the likely effect of Phoenix Life sending Mr T the Scorpion leaflet and asking at least these initial questions.

What would likely have happened if Phoenix Life had taken these steps?

Given a number of the initial warning signs of a scam as set out by TPR were present in Mr T's case it's likely the scorpion leaflet, if he had been provided with it by Phoenix Life, would have caused him to raise some questions about what he was about to do. He may have contacted the Pensions Advisory Service (TPAS) or sought further advice elsewhere.

Whether this would have led Mr T to change his mind about the transfer based on the leaflet alone I can't be sure of. However, I do think reading the leaflet *as well as* the further questioning and due diligence that should have taken place would have caused Mr T to think twice about transferring his pensions.

As stated above, I think that Phoenix Life should have proceeded further down the questioning process in the PSIG Code, and this in combination with this leaflet, would have made enough difference.

In response to the initial analysis questions I've bulleted above, Mr T would have answered "yes" to most of them. And as the PSIG Code makes clear, even answering "yes" to one of the questions would have made it necessary for Phoenix Life to proceed to carry out further due diligence of which it suggested other questions as examples. These covered Mr T's specific SSAS, the investments being made and whether he was getting regulated advice. That was consistent with TPR's expectation that where there were concerns the ceding scheme would need to progress through the questions in its checklist. And the questions in the checklist were broadly the same.

SSASs are often established in order to use existing pension funds as part of financial planning for a small business, so it wouldn't necessarily be unusual to see a SSAS being established using a transfer. But the name of the sponsoring employer was given in the SSAS's name, and Phoenix Life should have noticed that this was also a brand-new company. Also, its location at the same registered address as ROC would have been a giveaway. In any event, both the Action Pack and the Code suggested enquiries into whether there was an earnings link with that employer (*e.g.* by requesting a payslip). I don't think the fact that Mr T was a director of that employer would have alleviated any concerns, because that was precisely the situation in the example of the scam given in the Action Pack.

The likely result of any further enquiries to Mr T in this regard would have been him confirming that his SSAS was not intended to provide pension benefits for a trading company, but was solely in order to invest in overseas property on ROC's advice. Phoenix Life would have been able to establish and communicate its concerns to Mr T that ROC was unregulated. And I see no reason why Mr T wouldn't have discussed how he came about requesting the transfer with Phoenix Life had it approached him.

Whether or not Phoenix Life went much further into getting Mr T to send it specific information about the investments, I'm satisfied it would now have known enough about what he was doing to realise that he was at significant risk of a scam – in fact the very same scam being talked about in the Action Pack. In that event TPR expected Phoenix Life *to 'contact the member to establish whether they understand the type of scheme they'll be transferring to and send them the pension scams booklet'*.

In my view 'establishing Mr T's understanding' was an ongoing process which included the questions Phoenix Life would already have been asking him. Mr T could have changed his mind at any point as he learned more about the risks in what he was doing, and that was very much the aim of the regulator's campaign. So I think there's a significant likelihood that by the point Phoenix Life had got to identifying that Mr T's SSAS was not genuine and highlighting to him that he was getting unregulated advice, he would have been put off from continuing with the transfer.

However if that wasn't the immediate result, I think Phoenix Life should have sent him the booklet that TPR was suggesting. Or alternatively it would at least have needed to write to him in largely similar terms: to explain there was a risk of these types of arrangements being a scam, he could end up losing all of the money he invested, and he should take regulated financial advice or discuss what he was proposing with TPAS.

The booklet I'm referring to here was largely the same as the shorter leaflet but with the added specific example of a SSAS scam which I think would really have brought the risks of what Mr T was doing home to him. So if Phoenix Life hadn't yet sent Mr T the shorter leaflet, I think the booklet would have better served this purpose by this stage. And I'm persuaded on the balance of probabilities that by this point, if not earlier, Mr T would have changed his mind about making this transfer.

Putting things right

Fair compensation

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

The SSAS only seems to have been used in order for Mr T to make an investment that I don't think he would have made but for Phoenix Life's actions. So I think that Mr T would have remained in his pension plan with Phoenix Life and wouldn't have transferred to the SSAS.

To compensate Mr T fairly, Phoenix Life should compare the actual value of the SSAS with the notional value if it had remained with Phoenix Life. If the notional value is greater than the actual value, there is a loss.

Actual value

This means the actual amount payable from the SSAS at the date of my final decision.

My aim is to return Mr T to the position he would have been in but for the actions of Phoenix Life. 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. That may be the case with some of the investments in the SSAS. Therefore, as part of calculating compensation:

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

- Alternatively, if Phoenix Life is unable to buy those investments from SSAS it should give them a nil value as part of determining the actual value. It's also fair that Mr T should not be disadvantaged while he is unable to close down the SSAS and move to a potentially cheaper and more strongly regulated arrangement. So to provide certainty to all parties I think it's fair that Phoenix Life also covers five years' worth of future administration fees at the current tariff for the SSAS as part of the compensation, to allow a reasonable period of time for the SSAS to be closed.

Any outstanding administration charges yet to be applied to the SSAS should also be deducted from the actual value.

'Incentives'

An upward adjustment may be made to the actual value to allow for any **indirect** cash benefits (including 'loans') Mr T was paid as a result of the transfer and/or any payments the SSAS made to him before the age of 55 that it should not have been allowed to make (together, the ‘incentives’). Mr T is expected to evidence to Phoenix Life the total amount of any such incentives paid as soon as possible, **otherwise he will not be able to benefit** from any reimbursement or indemnity regarding unauthorised payment charges caused specifically by these incentives (covered below).

Where it applies, this adjustment for incentives involves calculating what larger, gross amount would ordinarily need to have been withdrawn from the pension over the course of Mr T’s retirement, to leave him a net amount equal to the total incentives. Here, it’s reasonable to assume that Mr T is likely to be a basic rate taxpayer at the selected retirement age, so a 75% portion of his pension would be taxed at 20% assuming he is entitled to take the remaining 25% portion tax-free. As a result his net benefits would equal 85% of the gross benefits. So the total incentives (if any) should therefore be ‘grossed-up’ by dividing them by 0.85, then they should be added to the actual value at the date of my final decision.

Notional value

This is the value of Mr T’s investment had it remained with Phoenix Life at the date of my final decision.

Any pension commencement lump sum or gross income payments Mr T received **directly** from the SSAS which would have been permitted under the tax rules (and are therefore not being treated as ‘incentives’ above), should be treated as notional withdrawals from Phoenix Life 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

There doesn’t appear to be any reason why Mr T needed a pension arrangement that wasn’t privately held, administered by an established insurance company and under FCA regulation. So I don’t think it’s appropriate for further compensation to be paid into the SSAS.

Phoenix Life should reinstate Mr T’s pension plan as if its value on the date of my final decision was equal to the amount of any loss (and it performs thereafter in line with the funds Mr T was invested in).

Phoenix Life shouldn’t reinstate Mr T’s plan if it would conflict with any existing protection or allowance – but my understanding is that it will 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. If Phoenix Life doesn’t consider this is possible, it must explain why.

If Phoenix Life is unable to reinstate Mr T’s pension and it is open to new business, it should set up a new plan for a value equal to the amount of any loss. The new plan should have features, costs and investment choices that are as close as possible to Mr T’s original pension. Its payment into the new plan should allow for the effect of charges and tax relief (if applicable). Phoenix Life shouldn’t set up a new plan if it considers that its payment will be treated as a member contribution in excess of Mr T’s annual allowance, and Phoenix Life is unable to process the amount in excess of the annual allowance.

If it’s not possible to set up a new plan either, Phoenix Life should pay the amount of any loss direct to Mr T. But if this money had been in a pension, it would have provided a taxable income. Therefore compensation paid in this way should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

To make this reduction, it's reasonable to assume that Mr T is likely to be a basic rate taxpayer at the selected retirement age, so a 75% portion of his pension would be taxed at 20% assuming he is entitled to take the remaining 25% portion tax-free. This results in an overall reduction of 15%, which should be applied to the compensation amount if it's paid direct to Mr T.

Reimbursement, indemnity and undertakings

In addition, Phoenix Life should reimburse Mr T for any unauthorised payment tax charges that have been levied against him personally by HMRC arising out of the funds transferred here. And it should also indemnify Mr T against any such charges arising in future as a result of unauthorised payments deemed to have been made before the date of my final decision.

The reimbursement or indemnity does not apply in respect of any incentives (as defined above) that Mr T does not promptly give details of (including their amounts) to Phoenix Life at the date of my final decision.

If illiquid investments are being left in the SSAS, Phoenix Life may ask Mr T to provide an undertaking in return, to account to it for the net amount of any payment he may receive from those investments in future. Phoenix Life will need to meet any costs in drawing up the undertaking. If Phoenix Life asks Mr T to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

If payment of compensation is not made within 28 days of Phoenix Life receiving Mr T's acceptance of my final decision, interest should be added to the compensation at the rate of 8% per year simple from the date of my final decision to the date of payment.

This interest is not required if Phoenix Life is reinstating Mr T'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 T was invested.

If either Mr T or Phoenix Life dispute that the assumption for tax that Mr T will pay at retirement is reasonable, they must let us know as soon as possible so that the assumption can be clarified and Mr T receives appropriate compensation. It won't be possible for us to amend this assumption if a final decision is issued on the complaint.

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

My final decision

My final decision I that I uphold Mr T's complaint.

Phoenix Life Limited must pay Mr T the redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 27 April 2022.

Ayshea Khan
Ombudsman