

The complaint

Ms S complains that Sun Life Assurance Company of Canada (U.K.) Limited (“Sun Life”) failed to carry out sufficient due diligence activities when she asked to transfer some pension savings to a Small Self-Administered Pension Scheme (“SSAS”) in September 2014.

What happened

Ms S has been assisted in making her complaint by a firm of solicitors. But, in this decision, I will largely refer to all communication as having been with, and from, Ms S herself.

Ms S held pension savings with Sun Life. She also held pension savings with another firm that I will call X.

Ms S says that in early 2014 she got in touch with a firm to seek some advice and support in consolidating her two pension arrangements into a new scheme – a SSAS. To facilitate that arrangement Ms S completed the paperwork the firm provided to create a new company that would employ her, and set up a SSAS to provide her with pension benefits after it received the transfers from Sun Life and/or X. Sun Life received a request for the transfer of Ms S’s pension savings on 17 September through the Origo Options system (an automated system for the transfer of pension savings between authorised providers). It completed the request later that month.

Ms S says that during the entire transfer process there was no effective communication from Sun Life to her. In particular she says that Sun Life should have warned her that her transfer request might be as a result of a scam, and warned her about the risks she was facing. Ms S says that those warnings would have resulted in her cancelling the transfer activity. She says that the other provider X did refuse her transfer request. So that part of her pension savings remained unaffected by this process.

When Ms S first complained to Sun Life it reviewed the checks it had done before completing her transfer. At the time of the transfer it had relied on the receiving scheme being a member of Origo. But it now accepts that reliance was insufficient and that it should have done more. So it asked Ms S for details of what had happened since the transfer so it could see whether she had lost out. The information Ms S provided didn’t allow Sun Life to determine whether it had caused any loss to her so she brought her complaint to us.

Ms S’s complaint has been assessed by one of our investigators. He noted that Sun Life agreed it should have done more in terms of its checks and communication with Ms S at the time of the transfer. But he didn’t think that further communication with Ms S would have resulted in her stopping the transfer. So he didn’t think the complaint should be upheld.

Ms S didn’t agree with that assessment. Although I am only briefly summarising here what she and her representatives have said, I want to reassure Ms S that I have read, and carefully considered, all the additional information that has been provided.

Ms S’s representatives say that Sun Life has already agreed that it didn’t do enough checks before the transfer was completed. They say that Ms S’s clear evidence is that, had she

received the proper warnings, she would have not made the transfer. They don't think sufficient importance has been given to Ms S's evidence when assessing the complaint.

So, as the complaint hasn't been resolved informally, it has been passed to me, an ombudsman, to decide. This is the last stage of our process.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

In deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time. I have also carefully considered the submissions that have been made by Ms S and by Sun Life. Where the evidence is unclear, or there are conflicts, I have made my decision based on the balance of probabilities. In other words I have looked at what evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

The Pension Regulator's (TPR) scorpion guidance

The scorpion guidance was issued on 14 February 2013 and updated the following year, in July 2014. Several bodies including the FSA (the Financial Services Authority which was succeeded by the Financial Conduct Authority, the FCA, shortly afterwards) were part of this initiative so it's a relevant consideration for personal pension providers like Sun Life which come under FSA/FCA regulation, rather than TPR regulation.

Briefly, the scorpion campaign involved an 'action pack' that highlighted the warning signs present in a number of transfer examples, specifically: being cold-called, money being transferred overseas, incentives to transfer, inadequate information about investments and pressure to complete a transfer quickly. It suggested transferring schemes should "look out for" these issues, as well as receiving occupational schemes that were newly registered or were suddenly involved in multiple transfer requests. The 2014 update replaced many of the 2013 warnings about pension liberation, with similar warnings about "scams".

If any of the warning signs applied, the action pack provided a checklist schemes could use which suggested asking the member for copies of promotional materials, emails or letters about the scheme and for further details about how they became aware of the receiving scheme and how it had been described to them. If those enquiries established the member had been advised, it went on to suggest checking whether the adviser had been registered with the FCA. Where transferring schemes had concerns, they were encouraged to consider delaying the transfer and to seek legal advice.

The scorpion campaign also included:

- An insert to issue to members when a transfer pack was requested. The insert warns about offers to cash-in pensions early, cash incentives, cold calling, being put under pressure to transfer and the potential tax consequences of accessing pensions early.
- A longer leaflet which gives more information, including 'real life' examples, about pension liberation. This was to be used in order to help raise awareness about pension liberation amongst pension scheme members.

In addition to endorsing this guidance, Sun Life's regulator, the FCA, had since its inception set out Principles and Rules for Sun Life to follow – including COBS 2.1.1R (the client's best interests rule) which Ms S's representative has highlighted. So I think it was also appropriate

for Sun Life to have regard for this TPR guidance in meeting its existing regulatory obligations. In light of this I'll consider what (if any) warning signs Sun Life ought reasonably to have noticed in Ms S's request to transfer to the SSAS.

Status of the receiving scheme

Every SSAS is specific to its members, and consideration will often be given to transfers from a member's existing pensions when a scheme is first set up. So it may not necessarily have been surprising that a transfer request was being received to a scheme Ms S had recently established as trustee, for what appeared to be a new employer she had incorporated as a director.

At the time, the actions being taken by TPR against suspected pension liberation schemes tended to involve larger multi-member schemes operated by unscrupulous trustees which were hurriedly set up and admitted members from all over the UK, with no connection to each other, over a short space of time. That wasn't strictly the form of arrangement Ms S was entering into, which was in fact a decision she entered into to form a pension scheme for her own company. It wasn't until a further March 2015 update to the action pack that TPR specifically highlighted that the focus of liberation or scam activity had now moved to single-member schemes.

And the SSAS administrator itself had been in existence for a number of years at the time of the transfer. So I don't consider it should have been regarded as a recently established operator in the market. And the administrator was a member of the Origo scheme. It does seem that Sun Life reasonably drew some comfort from that. I don't think its membership relieved Sun Life of its regulatory obligations – but I don't think it gave any cause for concerns either.

The transfer request provided Sun Life with little information about the ultimate investments Ms S intended. If Sun Life had suspected the investments Ms S was making might be a scam there were several options open to it under TPR's guidance. It's important to say here that this applies whether or not that suspicion was correct, so I'm making no judgement here about the status of Ms S's investments. Part of the problem is that investment scams are often outwardly indistinguishable from what might simply be a risky investment proposal that could lose all the investor's money.

The options Sun Life had were to investigate whether there were grounds to delay or refuse to transfer to the SSAS altogether; or and particularly if not, to engage further with Ms S by providing risk warnings and check she understood the implications of what she was doing.

Did Sun Life have a basis on which to delay or refuse the transfer?

The rules of Ms S's personal pension with Sun Life gave her a right to transfer her pension plan to any scheme capable (and willing) to accept a recognised transfer under Section 169 of the Finance Act 2004. The HMRC registration of the new scheme meant it fulfilled those criteria. Although it doesn't seem Sun Life made any further enquiries of HMRC here, I haven't seen anything to make me think additional enquiries would have raised any concerns..

A statutory right to transfer to a SSAS would also exist given that the sponsoring employer of the SSAS was Ms S's own company of which she was acting as a director. To ensure that, it would have been necessary for Sun Life to inspect the SSAS trust deed and rules – again it doesn't seem that was done. But it appears that Ms S was entitled to secure transfer credits as a member of that SSAS using her Sun Life personal pension, given she was clearly holding office as a director of that employer at the time.

I understand why Ms S's representative might think that the new employer she had set up wasn't genuine and therefore this wasn't a valid exercise of her statutory rights. But it's likely in my view that any attempt by Sun Life to say this to Ms S would have been met by the sort of complaint letter from Ms S about it delaying the transfer, that the wider evidence suggests customers were being asked to sign in advance.

Clearly the scheme was validly registered with HMRC, and there would have been nothing to suggest at the time that it was being used for pension liberation. The case law subsequently established in *Hughes v Royal London* [2016] EWHC 319 (Ch) indicates that as Ms S already had earnings from her main occupation, a lack of further earnings from the sponsoring employer, which she was a director of in this case, wouldn't have invalidated her statutory right to transfer.

I'm not saying that Sun Life should have anticipated the outcome of a court case that hadn't yet happened – if it had suspicions at the time, it should have communicated what those suspicions were, as I'll explain later below. But I think it's important to recognise what it's now been established the law actually meant for this sort of transfer.

Having considered all of this I think Sun Life's prospects were limited, for delaying or blocking Ms S's transfer out of a suspicion that the sponsoring employer wasn't genuine - and could ultimately have been unsuccessful. But more importantly than this, I don't consider I could reasonably expect Sun Life to go to these lengths in the particular circumstances of this case given the apparent outcome of similar enquiries with HMRC in the past.

In the case of an actual investment scam, it might be expected that engaging further with the member about the potential risks they were taking might lead to the member reconsidering whether they wanted to transfer in any event – and therefore was a more constructive way for Sun Life to proceed in the particular circumstances of this case. So I've next considered the possibility that Ms S might have changed her mind about transferring if Sun Life had got directly in touch with her to explain its concerns.

Risk warnings

At a time when the TPR guidance was less prescriptive than it, and other industry codes, now are on the degree of contact a transferring scheme should have with the customer, a key method of passing on these risk warnings was to issue the scorpion leaflet. Since February 2013 TPR had been saying on its website that it would like to see the use of this insert in transfer packs for members becoming best practice.

Sun Life seems to have taken the view at the time of the transfer that this wasn't a necessary step given that the receiving scheme was a member of Origo. However I do acknowledge that Sun Life now appears to accept that approach was incorrect. So I think Sun Life should have sent the scorpion leaflet to Ms S, both to ensure that it could demonstrate it followed the TPR guidance, and to provide her with the opportunity to consider whether to proceed with the transfer and the risks it entailed. I accept it's possible Ms S wouldn't have read the leaflet had Sun Life provided it. There isn't a requirement in the guidance to check she had read and understood the leaflet. So later in this decision I will consider whether sending the leaflet to Ms S would have influenced her decision on the transfer.

The Action Pack suggested that if Sun Life had any concerns about the transfer it should:

- *Contact the member to establish whether they understand the type of scheme they'll be transferring to and send them the pension scams booklet available at www.pension-scams.com*
- *Speak to the member at risk – over the phone, via email or letter. It could help you establish answers to more of the questions in the checklist, where you've been unable to answer them with the information you have available*
- *Direct the member to Action Fraud if you think it is a scam, or The Pensions Advisory Service (TPAS) to discuss the potential consequences of the transfer, including tax repercussions, if any part of the arrangement is deemed as unauthorised*
- *If the member insists on proceeding with their transfer request, and your concerns remain, then you should alert Action Fraud yourself. There could still be time to protect this member, or others who follow in their footsteps.*

As I've noted earlier Sun Life's own investigations suggest that it failed to make any direct contact with Ms S when it received her transfer request. But I don't think I need to consider here whether or not that was a reasonable approach. As I will now go on to explain, I'm not persuaded that any further contact from Sun Life would have made a difference to Ms S's decision to transfer.

If Sun Life had gone further, would it have made a difference?

The Action Pack does suggest getting in touch with the member if any concerns were present but that is the only expectation – it doesn't specify how that contact should be made, and certainly not that the contact should be by telephone. This is left to the discretion of the provider and although I know some providers have tried engaging over the phone it is not without its difficulties, including the risk of it being wrongly perceived as a self-interested attempt to retain Ms S's business. Given that the staff involved in processing payments out of the transferring scheme are neither qualified nor authorised to provide financial advice, in reality such a conversation would also need to be heavily scripted – and might not end up being a lot more effective than a letter. So I couldn't fairly fault Sun Life had it decided that it was best to engage with Ms S by letter.

The main risk in Ms S's transfer was not one of liberation, but the potential for the subsequent investment to be either a scam or wholly unsuitable for her. However even if the Sun Life had been alerted to the possibility of a scam (when it discovered the nature of the proposed investments), that doesn't mean it was straightforward for Sun Life to tell Ms S directly that it thought they were unsuitable (or even likely to be unsuitable) for her. It would have been forming such a view based on insufficient information about Ms S's personal circumstances – and of course it was not qualified to formally provide such advice. If it had attempted to directly caution Ms S against making the investments it wasn't in a position to advise what she should invest in, which is a natural question to follow.

Ms S had already taken some significant steps here, not least the setting up of a limited company and the taking on of director duties for that company. There had been a lot of activity leading up to the transfer request with numerous points where someone less committed to changing their pension arrangements could easily have pulled out. Obviously, Ms S didn't do so which, to my mind, shows she had more than just a passing interest in the investment. And I think it is important to note that, unlike many complaints we are seeing of this nature, it was Ms S herself that asked for the SSAS to be set up – she wasn't cold called in the first instance.

So in that context, I don't think a statement from her old pension provider about regulated financial advice being a good idea, or her being sent the scorpion leaflet, would have

prompted Ms S to take independent advice or to pull out of the transfer. I think she would only have done so if she had doubts about her transfer and investments and was prepared to unwind the steps she had already taken. Taking everything into consideration, including listening to a call between Ms S and our investigator, I don't think this was likely.

I'm not satisfied that flagging up any of the other messages in the scorpion guidance – for example the availability of TPAS to discuss any concerns – would have fundamentally altered Ms S's decision to proceed in this case. I'm drawn to the regrettable conclusion that Ms S was already satisfied enough with the advice she was getting – whether that was from the SSAS administrator or another regulated firm that appeared to have been involved in the discussions – to have been willing to make the decisions she made at the time. I cannot reasonably say she would have been deterred from going ahead in response to any steps Sun Life might have taken to alert her in line with what I've set out above.

I think at this stage I should also touch on what happened with Ms S's other transfer request to the provider I've called X. The information I have about that transfer is naturally limited. But it appears to have been made around the same time as Ms S's request to Sun Life. Shortly after the transfer from Sun Life completed, X wrote to Ms S to tell her that it would not allow the transfer. So Ms S says that suggests Sun Life should have taken a similar view.

From the information I have seen I think there are some important differences in the two relationships. X told Ms S that the terms of its pension scheme meant that she didn't have a statutory right to transfer her pension savings – so any transfer was at the discretion of the scheme administrator. And it was on that basis that the transfer was refused. And it seems to have been almost a year before X provided Ms S with information about why it was refusing her transfer request. It is more than likely that response was informed by the evolving regulatory landscape – and based on information that wasn't available to Sun Life at the time it made its decision.

Ms S has told us that she appealed against the decision made by X to refuse the transfer. And I can see from the letters she received from X that is likely to have been the case. So I think that adds further weight to the likelihood that she wouldn't have been persuaded to cancel the transfer request had Sun Life sent her the scorpion leaflet, or made further contact with her.

I appreciate how disappointing my decision will be for Ms S. But I'm not persuaded that her complaint should be upheld.

My final decision

For the reasons given above, I don't uphold the complaint or make any award against Sun Life Assurance Company of Canada (U.K.) Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 21 March 2022.

Paul Reilly
Ombudsman