

The complaint

Mr K complains that Phoenix Life Limited failed to carry out sufficient due diligence activities when he asked to transfer some pension savings to a Small Self-Administered Pension Scheme ("SSAS") in September 2014.

What happened

Mr K has been assisted in making his complaint by a claims management company (CMC). But, in this decision, I will largely refer to all communication as having been with, and from, Mr K himself. At the time of the transfer Mr K's pension savings were held with Abbey Life. But Phoenix is now responsible for that firm, and so is dealing with the complaint. For ease, I will refer to Phoenix as the responsible business throughout.

Mr K held pension savings with Phoenix. He also held pension savings with another firm that I will refer to as A. Mr K has made an additional complaint against A on the same basis as his complaint against Phoenix. That complaint is being dealt with separately, but I have read some of the information it contains, and I will touch on what happened in Mr K's dealings with A later in this decision.

Mr K says that he was cold called by a firm offering him a free pension review. He found the proposals from the firm to be attractive and agreed to the transfer of his pension savings from Phoenix (and also from A). Mr K says he was told that by investing his pension savings in an overseas property scheme he would receive a better return on his investments..

Mr K completed the paperwork the firm provided that created a new company that would employ Mr K, and set up a SSAS to provide him with pension benefits after it received the transfers from Phoenix and from A. Phoenix received a request for the transfer of Mr K's pension savings in early September 2014. It completed the request later that month.

Mr K says that during the entire transfer process there was no effective communication from Phoenix to him. In particular he says that Phoenix should have warned him that his transfer request might be as a result of a scam, and warned him about the risks he was facing. Mr K says that those warnings would have resulted in him cancelling the transfer activity.

Mr K's complaint has been assessed by one of our investigators. He accepted that Phoenix might have been expected to do more in its communication with Mr K. But he didn't think that further communication with Mr K would have resulted in him stopping the transfer. So he didn't think the complaint should be upheld.

Mr K didn't agree with that assessment. Although I am only briefly summarising here what he and his CMC have said, I want to reassure Mr K that I have read, and carefully considered, all the representations that have been made.

Mr K's CMC says it is clear that Phoenix failed to do what it needed to in relation to the transfer, both in terms of its internal checks, and its communication with Mr K. It thinks that an appropriate level of due diligence by Phoenix would have identified the warning signs on

this transfer. And those should have led Phoenix to discuss the matter directly with Mr K. Had it done so, the CMC says that, Mr K wouldn't have completed the transfer.

It has also noted that there is no evidence that Mr K received any information from A in relation to his pension transfer that would have led him to become aware of the risks he was taking. So it doesn't think that Mr K completing that transfer too gives any indication that he wouldn't have taken on board the warnings Phoenix should have provided.

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 Mr K and by Phoenix. 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.

At the outset I think it is useful to reflect on the role of this service. This service isn't intended to regulate or punish businesses for their conduct – that is the role of the Financial Conduct Authority. Instead this service looks to resolve individual complaints between a consumer and a business. Should we decide that something has gone wrong we would ask the business to put things right by placing the consumer, as far as is possible, in the position they would have been if the problem hadn't occurred.

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 Phoenix 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, Phoenix's regulator, the FCA, had since its inception set out Principles and Rules for Phoenix to follow – including COBS 2.1.1R (the client's best interests rule) which Mr K's representative has highlighted. So I think it was also appropriate for Phoenix 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 Phoenix ought reasonably to have noticed in Mr K'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 Mr K had recently established as trustee, for what appeared to be a new employer he 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 the form of arrangement Mr K was entering into, which might have appeared a lot more like a decision he entered into to form a pension scheme for his 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. The transfer request that Phoenix received was made through the industry wide Origo Options scheme. That scheme allows for vetted members of the scheme to move pension monies quickly and with limited paperwork. But although the use of Origo might have given Phoenix some comfort, I don't think it absolved the firm from its responsibilities to conduct the appropriate due diligence on the transfer request.

Phoenix says the transfer request provided it with little information about the ultimate investment Mr K intended. If Phoenix had suspected the investment Mr K 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 Mr K's investment. 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 Phoenix 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 Mr K by providing risk warnings and check he understood the implications of what he was doing.

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

Phoenix has explained that the rules of its personal pension meant a customer had a right to transfer their 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 scheme meant it fulfilled those criteria. Although Phoenix hasn't been able to show us it made any further enquiries of HMRC here, I have no reason to think additional enquiries would have highlighted any problems.

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

I have considered whether Phoenix might have been concerned that the new employer Mr K had set up wasn't genuine and therefore this wasn't a valid exercise of his statutory rights. But it's likely in my view that any attempt by Phoenix to say this to Mr K would have been met by the sort of complaint letter from Mr K about it delaying the transfer, that the wider evidence suggests customers were being asked to sign in advance. Indeed it appears that Mr K made a complaint of this nature to A when it delayed part of his transfer of his pension savings with that firm.

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 Mr K already had earnings from his main occupation, a lack of further earnings from the sponsoring employer of which he was a director of in this case wouldn't have invalidated his statutory right to transfer.

I'm not saying that Phoenix 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 Phoenix's prospects were limited, for delaying or blocking Mr K'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 Phoenix 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 Phoenix to proceed in the particular circumstances of this case. So I've next considered the possibility that Mr K might have changed his mind about transferring if Phoenix had got directly in touch with him 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.

Phoenix seems to have taken the view that this wasn't a necessary step given that Mr K's request had been received through the Origo system. But the danger in taking that approach is that Phoenix is effectively relying on what might be a fraudulent party to protect its customer. So in my view Phoenix should have sent the leaflet to Mr K, both to provide him with information about the risks he might be facing, and to ensure that it could demonstrate it followed the TPR guidance.

I accept it's possible Mr K wouldn't have read the leaflet had Phoenix sent it to him. There isn't a requirement in the guidance for Phoenix to check he had read and understood the leaflet. But I have noted that A says it sent the scorpion leaflet to Mr K twice, in October and November 2014. I appreciate Mr K says that he doesn't recall receiving these leaflets. But on balance I have no reason to think they weren't sent. And although they were sent after the Phoenix transfer had been completed it does suggest that Mr K might have received the warnings those leaflets contained.

The Action Pack provided guidance to firms as to the steps they might take should they have concerns about a transfer. It suggested firms could:

- *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.'*

Phoenix's own investigations suggest that it decided not to make any direct contact with Mr K when it received his transfer request. But I don't think I need to consider here whether or not that was a reasonable approach. Even if I thought it should have seen some warning signs I'm not persuaded that any further contact from Phoenix would have made a difference to Mr K's decision to transfer.

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

The Action Pack does suggest getting in touch with the member 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. 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 Mr K'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 Phoenix had it decided that it was best to engage with Mr K by letter.

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

I have looked carefully at what happened with Mr K's transfer request to A that was made around the same time. He held six different policies with A. Four of those policies were transferred before he made his request to Phoenix. But A initially blocked the transfer of the final two policies citing concerns in line with the new guidance. I can see that the SSAS administrator, on behalf of Mr K, complained about A's actions. Ultimately those remaining plans were transferred in late 2014. So even in the face of resistance from the existing provider, Mr K still pressed ahead with the transfer request. I have no reason to doubt he'd have taken a similar approach if any contact had been made by Phoenix.

Mr K had already taken some significant steps here, not least the setting up of a limited company that bore the names of his children 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, Mr K didn't do so which, to my mind, shows he had more than just a passing interest in the investment.

So in that context, I don't think a statement from his old pension provider about regulated financial advice being a good idea would have prompted Mr K to take independent advice or to pull out of the transfer. I think he would only have done so if he had doubts about his investment and was prepared to unwind the steps he had already taken. Taking everything into consideration, including listening to two calls between Mr K 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 Mr K's decision to proceed in this case. I'm drawn to the regrettable conclusion that Mr K was already satisfied enough with the advice he was getting – whether that was from the SSAS administrator or another firm that appeared to have been involved in the discussions – to have been willing to make the decisions he made at the time. I cannot reasonably say he would have been deterred from going ahead in spite of any steps Phoenix might have taken to alert him in line with what I've set out above.

My final decision

For the reasons given above, I don't uphold the complaint or make any award against Phoenix Life Limited

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 24 March 2022.

Paul Reilly
Ombudsman