DRN-4672148

The complaint

Mr F complains about the way that The Royal London Mutual Insurance Society Limited (Royal London) dealt with his request to transfer his personal pension. Mr F explains that Royal London's failure to highlight the risks of pension liberation scams – unauthorised access of pension benefits, typically prior to age 55 – meant that he went ahead with a transfer and became victim of a pension scam.

What happened

Mr F had a pension with Royal London, that had originally been set up as a Scottish Life policy.

Mr F explains that he was cold-called at some point in 2013 by a company that told him that he could legally unlock funds held in his pension following a transfer. He says that he was experiencing financial difficulties at the time he was approached, so was interested in the idea of accessing pension savings to help him with his debts.

Mr F was not yet 55 years of age when he was approached regarding the transfer. Consumers were not in fact entitled to access funds in their pension prior to age 55 except in certain, limited, circumstances. The Pensions Regulator (TPR) identified the risk to individuals, of being contacted and persuaded to attempt to access their pensions before age 55. This is referred to as pension liberation. Which TPR sought to bring to more widespread industry attention from around 2012.

On 14 February 2013 TPR released guidance for pension providers to help prevent their members becoming victims of pension liberation fraud. I'll refer to this as the Scorpion Guidance. This guidance included an Action Pack for businesses. Which provided: example scenarios, warning signs, information on what businesses could do to reduce the risks, a checklist to help spot pension liberation, and help in educating customers. The Scorpion guidance also included a two page 'Scorpion insert' designed to be sent to members along with transfer packs, as well as a more detailed 10-page booklet to send to customers who wanted more information.

Towards the end of March 2013, Mr F signed a letter of authority for a company, Firm A, to request a valuation and transfer documentation from Royal London. The request was received by Royal London on 28 March 2013. On 3 April 2013 Royal London responded to Firm A's request.

On 19 April 2013 Royal London received a transfer request regarding Mr F's pension. The request came from Capita Oak Pension Scheme.

Royal London wrote to the Capita Oak Pension Scheme on 22 April 2013 to confirm that it had transferred Mr F's pension fund to it.

Following the transfer, Mr F describes having received around £4,800 through a loan related to his pension. The remainder of his pension fund was invested in unregulated investments within the Capita Oak Pension Scheme. The payment that he received following his pension transfer was an unauthorised payment, and HMRC required Mr F to pay a tax penalty of around £2,600 as a consequence.

Mr F complained to Royal London via a claims management company (CMC) on 30 December 2019. The CMC highlighted the TPR's guidance from February 2013. It considered that Royal London had failed to comply with the guidance outlined. Which disadvantaged Mr F, denying him the specific warnings about pension liberation that it says would have prevented him falling victim to this fraud.

Royal London looked into Mr F's complaint and didn't uphold it for the following reasons:

- The receiving scheme was registered with HMRC as of July 2012;
- The request for the transfer information from firm A may have been from an unregulated business, but it had a signed letter of authority from Mr F;
- The transfer request was received on 19 April 2013 and completed on 22 April 2013;
- The scam leaflet and action pack were only launched on 14 February 2014. It explained it hadn't yet had time to implement the TPR guidance;
- Occupational pension schemes, like the receiving scheme in this case, weren't required to be regulated by the Financial Conduct Authority at that time.

Mr F's complaint was brought to our service and an investigator considered the circumstances. He thought that Mr F's complaint should be upheld for the following reasons:

- The guidance when the transfer was requested meant that Royal London ought to have provided Mr F with the Scorpion insert;
- The warnings within that insert were relevant to the circumstances of Mr F's transfer;
- Mr F was shown a copy of the insert and confirmed that if he had seen that prior to the transfer he didn't think that he would have gone ahead with it.

Our investigator also referred to the fact that the complaint was made more than six years after the events complained about. But explained that he considered the complaint was still one we could look into as Mr F had no reason to believe he had grounds to complain more than three years before his complaint was made.

Royal London responded to explain why it disagreed with our investigator's opinion. In summary, Royal London disagreed on the following grounds:

On our jurisdiction it:

- Considered that this case would be better dealt with by the Pensions Ombudsman;
- Disputed timescales on the basis that, in 2015 the trustees of the Capita Oak pension went into liquidation following action from the Insolvency Service. And suggested that a member of the scheme ought to have known this and been aware of the issue;
- Said that from May 2015 complaints made to TPR were covered in the media so Mr F ought to have been aware of the issue.

On the complaint's merits it said:

- Our investigator's view didn't give enough weight to the fact that consumers had a statutory right to transfer and it had to balance that with the due diligence checks;
- The February 2013 scorpion guidance wasn't a mandatory requirement on businesses. It was only guidance so allowance needs to be given for discretion in its implementation;
- TPR's Website in 2013 was equivocal when addressing what was expected of

trustees. It simply stated that "you may want" to take steps to make members aware of the consequences of pension liberation fraud, going on to say that could include providing members with the leaflet. It said that it would like to see the use of the scorpion insert in transfer packs become best practice;

- The transfer request was made in March 2013 which was only one month after the release of the TPR's guidance. And the Pension Ombudsman has generally allowed between one and three months for providers to update internal procedures;
- Providing the scorpion insert or conducting due diligence checks wouldn't necessarily have prevented the transfer from happening;
- Mr F was attracted by the idea of taking cash from his pension because of financial difficulties. Which it says means that it was more likely than not, that he wouldn't have been dissuaded from making the transfer because he received a potential warning;
- Royal London ask that verbal evidence provided by Mr F should be treated with caution given the time the events occurred and the involvement of a claims management company.

Our investigator responded by issuing a more detailed view regarding our jurisdiction to investigate this complaint. In that view he considered the impact of the events that Royal London had highlighted. But he didn't agree that the scheme's trustees going into liquidation would have been an event that triggered awareness for Mr F that he could complain. Or that media coverage was sufficient to be able to say that Mr F ought to have known to complain. He identified a circular from March 2017 that was sent by the new trustees appointed to the Capita Oak Pension Scheme. It was likely this would have been received by Mr F and our investigator thought that this was the earliest point he could evidence that Mr F ought to have known to complain.

This case was referred for an ombudsman decision. I issued a provisional decision on this case to explain to both parties why I was of the opinion that Mr F's complaint should be upheld. And allowed both parties the opportunity to present further arguments or evidence regarding that outcome and my suggested compensation.

After further consideration I changed my provisional decision regarding how Mr F should be compensated. I wrote to both parties again setting out my new provisional decision on what I thought Royal London should do to put things rights. The compensation for financial loss was mostly unchanged, however I no longer thought it was appropriate to award additional compensation for distress and inconvenience.

I explained that, whilst I had no doubt that Mr F went through a great deal of distress and inconvenience as a result of what happened, the driving force behind his misfortune was the third party who cold called him and led him through a process that was not in his best interest. I therefore considered the cause of Mr F's distress and inconvenience as being primarily due to that third party. Royal London could have done more to prevent the extent of that distress and inconvenience, but it didn't *cause* it. I think the distinction is important. Therefore, whilst I considered it fair and reasonable for Royal London to compensate Mr F for his losses, I didn't think it fair and reasonable for Royal London to pay additional compensation for distress and inconvenience as well.

Mr F's CMC disagreed with my amended provisional decision not to award compensation for the distress and inconvenience. It argued that Royal London's failure to follow the guidance in place at the time meant that it was also responsible for the distress and inconvenience caused.

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.

My final decision is that Royal London didn't treat Mr F in line with the industry guidance and rules in place at the time it received his transfer request. I have reviewed all of the information in this case a final time and my reasons for reaching this finding are the same as I set out in my provisional decision. And I set out again in what follows.

Our jurisdiction to look into this complaint:

I'll start by explaining why I've decided that this complaint is one we can help with before I go on to explain my decision on the merits of this case.

The rules that our service operate under are the DISP rules, published in the FCA Handbook. These rules dictate what complaints we can help with – our jurisdiction rules.

The relevant rule in DISP is 2.8.2R which basically means that we can't consider a complaint if it's made more than:

- Six years after the event Mr F complained about (the six-year rule); or if later
- Three years after Mr F became aware, or ought reasonably to have become aware, that he had cause for complaint (the three-year rule).

The date of the event complained of is the transfer on 22 April 2013. Or more specifically the alleged failures of Royal London in the run up to that transfer. And Mr F made his complaint on 15 January 2020, which was more than six years later. So we don't have jurisdiction to look at this case under the six-year rule.

I need to consider whether the three-year rule gives us jurisdiction over this complaint. So I need to determine at what point Mr F ought reasonably to have become aware of a cause for complaint. Where 'complaint' is defined in DISP as:

> "*Any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service or a redress determination, which:*
>
> *(a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and*
>
> *(b) relates to an activity of that respondent or any other respondent with whom that respondent has some connection in marketing or providing financial services or products, which comes under the jurisdiction of the Financial Ombudsman Service*."

Mr F's testimony is that he received a payment from his pension following the transfer. Which happened in April 2013. Whilst unable to be specific now about the date, he explains that he received a release of funds, in the form of a pension loan, shortly after the transfer completed. And this looks consistent with the other cases involving transfers to the Capita Oak scheme.

Mr F also confirms that he was contacted by the HMRC and faced a tax penalty for, what amounted to, an unauthorised pension payment. Again, he wasn't specific about the date of the contact from HMRC. But he said it was about two and a half years after the event. Which would place Mr F's awareness of his being a victim of a pension liberation type scam around late 2015. This sounds about right given that by April 2015 media reports indicated that HMRC was already aware of the potential pension liberation issues with members of the Capita Oak scheme.

So, even without knowing the exact dates of the above events, I think that Mr F was aware of his being a victim of a pension scam of some form by late 2015. But I don't think that means Mr F ought to have known that he could complain to Royal London at that stage.

I refer to the definition for a 'complaint' above. Knowledge to bring a complaint requires the understanding of the provision of a service, or the failure to provide a service, which relates to the activity of that respondent. So to determine that Mr F ought to have been aware of a cause to complain requires more than just knowledge that something had gone wrong with his pension. It also requires that he was aware, or should have been aware, that there was a real possibility that his losses were attributable to the acts or omissions of Royal London.

Mr F explains that he blamed himself for becoming a victim of a scam. His transfer had been managed through an unregulated third party and the requested transfer made from the receiving scheme. The parts that these third parties played, in creating the position Mr F found himself in, were likely to be quite evident.

But consumers wouldn't have widely known that ceding schemes may have had responsibilities to provide information or conduct due diligence checks before the transfer went ahead. The guidance from TPR was industry guidance that placed responsibilities on ceding schemes in handling transfers. It varied over time. But it was targeted at the industry, with information that it should provide consumers. The information wasn't widely known by retail consumers.

Put simply, Mr F wasn't aware of the responsibilities Royal London had at the time he became aware that he'd been caught in the scam. So this wouldn't have been the point at which he ought to have known to complain to Royal London about its failure to follow TPR guidance.

Subsequent milestones, referred to by Royal London related to the replacement of the Capita Oak trustees with independent professional trustees – Firm D. There's no evidence that he'd have known about this without being directly informed in some way. This would have been following Firm D's first announcement in March 2017, which looks to be the first that was shared with members. As Mr F's complaint was made within three years of this event I haven't considered the impact of the information provided any further.

In a case like this, where knowledge of the activity of the respondent being complained of is likely to be obscure, that knowledge is sometimes only acquired when specifically informed. Mr F has said he was contacted by a CMC who highlighted the responsibilities that Royal London had. Which was the point at which Mr F ought to have known to complain to Royal London. And the CMC registered Mr F's complaint with Royal London within three years of being providing that knowledge. So this complaint is in our jurisdiction under the three-year rule.

The merits of the complaint

In assessing whether or not Royal London have done anything wrong, I've considered the rules in place at the time. The Financial Conduct Authority (FCA) rules didn't place specific requirements on firms regarding their responsibilities for pension transfers such as this. Royal London weren't responsible in this set of circumstances for assessing the suitability of Mr F's receiving scheme or the intended investments in that scheme.

But the FCA handbook sets out general principles of business (PRIN) as well as rules in its conduct of business sourcebook (COBS). I think that the key elements from them, of relevance to this case, are Royal London's need to pay regard to the interest of Mr F and to act with due care, skill, and diligence. Which meant that Royal London needed to have regard to the relevant industry guidance and best practice that was put in place to safeguard consumers best interests. Which included the Scorpion guidance, which was endorsed by the FCA (formerly FSA).

Royal London didn't send Mr F the Scorpion insert when it sent the transfer pack out. And other than being satisfied that the receiving scheme was an HMRC registered pension scheme did no other due diligence checks. Royal London says that was sufficient in this instance because the transfer request was made very shortly after the new guidance was published. But for the following reasons I don't think that is reasonable.

In considering this I think it's worth acknowledging that there was information about the risk of pension liberation scams prior to this. The FCA (formerly FSA) issued a number of warnings in June and July 2011. And in February 2012 TPR highlighted the issue on its website. The Scorpion campaign came on the back of this. I don't think it came out of the blue. So it was something that Royal London ought really to have been ready to respond to.

The Scorpion guidance was introduced in response to a current and ongoing problem – a problem that was causing potentially significant detriment to consumers and one I've said that Royal London ought to have already been alerted to. So this guidance ought to have been seen as pressing. And I also think that it was relatively simple to introduce. With the regulator's Principles in mind, I think that six weeks after the guidance was introduced, when Royal London received Mr F's request for a transfer pack, Royal London should have been implementing the Scorpion guidance or something very close to it.

The Scorpion campaign provided guidance and set out expectations on ceding schemes. It recognised that businesses couldn't typically refuse to allow transfers to go ahead. And it didn't require businesses to assess the suitability of the transfer. It required businesses to ensure that their customers were informed and were aware of the risks of pension liberation scams. And I've considered these facts in reaching my conclusion.

The Scorpion campaign highlighted an identified risk to Royal London regarding customers requesting pension transfers. But it also provided an accompanying way to address the risks. Following this guidance would have helped Royal London meet its obligations to Mr F under PRIN. I've considered that this was only guidance as Royal London explained. And accept that it could have chosen not to follow the guidance of course and instead put in place alternative safeguards or measures of its own. But I don't think it was fair or reasonable to fail to act on the highlighted risks at all. Royal London deprived Mr F of the knowledge or information that in his case was likely to be crucial.

The Scorpion insert was only two pages with the title page prominently warning "*companies are singling out savers like you and claiming they can help you cash in your pension early. If you agree to this you could face a tax bill of more than half your pension savings*". Which I think would have been quite impactive on Mr F at the time as it related directly to the position he was in. The second page of the insert provided a list of things to look out for, which was similarly relevant to the circumstances Mr F was in.

Mr F has told us that his financial circumstances at the time meant that he was motivated by releasing money from his pension. So I think that he would have needed a persuasive reason to change his mind. And I understand that it's difficult after the fact for Mr F to say with certainty how he'd have responded if he'd been sent the Scorpion insert. But he's told us that it would have made a difference. And the Scorpion insert would have warned him of the serious tax consequences of pension liberation. The warning signs on the leaflet were so relevant to his circumstances in this case that it's unreasonable to conclude that he wouldn't have been concerned by it. I think that it's more likely than not, that Mr F would have been suitably warned by the content of the insert to follow the steps it suggested to avoid becoming a victim.

For the above reasons, Royal London's failure to follow TPR guidance or put similar alternative measures in place, caused Mr F to be disadvantaged. I accept that Royal London could not have refused the transfer, but it should have provided the information that let Mr F know that he couldn't legally release cash from his pension. And given that Mr D tells us that this was the only reason that he was transferring, I think he would instead have left his pension with Royal London. And would not have suffered the subsequent losses that he did. So it follows that Royal London are responsible for putting Mr F back into the position he'd have been had he not transferred his pension.

Fair compensation

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

The Capita Oak Pension Scheme only seems to have been used in order for Mr F to make an investment that I don't think he would have made from the proceeds of this pension transfer but for Royal London's actions. So I think that Mr F would have remained in his pension plan with Royal London and wouldn't have transferred to the Capita Oak Pension Scheme.

To compensate Mr F fairly, Royal London must subtract the actual value of his entitlement under the Capita Oak Pension Scheme from the notional value if the funds had remained with Royal London. If the notional value is greater than the actual value, there is a loss.

Actual value

Royal London should ask the new trustees of the Capita Oak Pension Scheme whether Mr F's entitlement can be valued at the date of my Final Decision. If it can't, that's likely to be because the position of the investments made by the former trustees is uncertain. Until any value can be realised from all the scheme's investments, Mr F's entitlement can't be determined, and further costs are likely to be incurred from any liquid funds the scheme holds. So, if the new trustees cannot provide a value, I consider it appropriate to treat the actual value of Mr F's entitlement from the Capita Oak Pension Scheme as nil at the date of my Final Decision.

In return Royal London may ask Mr F to provide an undertaking. Royal London may ask Mr F to do either of the following, when the value of its entitlement under the Capita Oak Pension Scheme has been finalised:

- Make a full transfer of his entitlement back out of the Capita Oak Pension Scheme to Royal London's pension plan. Royal London may then recover that value from its pension plan so that Mr F isn't overcompensated. **Or,** if this isn't possible:

- Withdraw his entitlement from the Capita Oak Pension Scheme as tax-free cash and income payments over a period of time agreed between Royal London and Mr F, so that the net amount Mr F receives can be returned to Royal London and Mr F is not overcompensated.

Royal London will need to meet any costs in drawing up the undertaking. If Royal London asks Mr F to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

Mr F also received a financial incentive around £4,800 as a consequence of making the transfer and associated investments, which doesn't appear to have been treated as an authorised payment of tax-free cash or taxable income under the tax rules. As Mr F has had the benefit of this money, an upward adjustment should therefore be made to the actual value.

If Mr F had instead withdrawn this sum as a combination of tax-free cash and taxable income during retirement, it's reasonable to assume that 25% would have been tax-free and 75% subject to income tax at the basic rate of 20%. So, the amount he received would have amounted to 85% of what he withdrew overall. The incentive of £4,800 should therefore be 'grossed-up' by dividing it by 0.85, before adding the relevant proportion of this grossed up amount to the actual value at the date of my Final Decision.

However, Royal London must also reimburse Mr F for any unauthorised payment charges that have already been levied against him personally by HMRC. And it must also indemnify Mr F against any such charges arising in future. This may be made conditional on Mr F also returning any future refund from HMRC in respect of charges that Royal London has already reimbursed, in the event that HMRC's position changes.

For the avoidance of doubt, the requirement for Royal London to reimburse Mr F or provide this indemnity only applies in respect of tax charges triggered by the incentive of £4,800 disclosed during this service's investigation of the complaint.

Notional value

This is the value of Mr F's funds had they remained invested with Royal London up to the date of my Final Decision.

Royal London should ensure any pension commencement lump sum or gross income payments Mr F received from the Capita Oak Pension Scheme are treated as notional withdrawals from Royal London 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 Capita Oak Pension Scheme given its uncertain position. There also doesn't appear to be any reason why Mr F needed a pension arrangement that wasn't privately held, administered by an established provider and under FCA regulation.

So, Royal London should reinstate Mr F's original pension plan as if its value on the date of my Final Decision was equal to the amount of any loss established from the steps above (and it performs thereafter in line with the funds Mr F was invested in).

Royal London shouldn't reinstate Mr F's plan if it would cause a breach of any HMRC pension protections or allowances – 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 Royal London doesn't consider this is possible, it must explain why.

If Royal London is unable to reinstate Mr F'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 my Final Decision. The new plan should have features, costs and investment choices that are as close as possible to Mr F's original pension.

If Royal London 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 F is entitled based on his annual allowance and income tax position. However, Royal London'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 F doesn't incur an annual allowance charge. If Royal London cannot do this, then it shouldn't set up a new plan for Mr F.

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

To make this reduction, it's reasonable to assume that Mr F is likely to be a basic rate taxpayer in retirement. So, if Mr F has yet to take his 25% tax-free cash from the Capita Oak Pension Scheme, 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 Mr F in cash.

Alternatively, if Mr F has already taken his 25% tax-free cash from the Capita Oak Pension Scheme, the full 20% reduction should be applied to the compensation amount if it's paid direct to him in cash. (Except in relation to such amount as was previously added to the actual value to allow for the incentive Mr F received, for which it's appropriate for the 15% notional reduction to apply.)

If payment of compensation is not made within 28 days of Royal London receiving Mr F's acceptance of my Final Decision, interest must 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.

Income tax may be payable on any interest paid. If Royal London deducts income tax from the interest, it should tell Mr F how much has been taken off. Royal London should give Mr F a tax deduction certificate in respect of interest if he asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

This interest is not required if Royal London is reinstating Mr F'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 F was invested.

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

I have considered the distress and inconvenience that Mr F experienced in this case. But my final decision is that was not predominantly caused by Royal London's mistakes but by the actions of a third party. I think the distinction is important. Therefore, whilst I consider it fair and reasonable for Royal London to compensate Mr F for his financial losses, I don't think it fair and reasonable for it to pay distress and inconvenience as well.

My final decision

I am upholding Mr F's complaint for the above reasons.

I direct The Royal London Mutual Insurance Society Limited to compensate Mr F as set out above under the section headed ‘**Fair compensation**’.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr F to accept or reject my decision before 5 June 2024.

Gary Lane
Ombudsman