DRN-4700934

The complaint

Ms L has complained that Sun Life Assurance Company of Canada (U.K.) Limited undertook insufficient due diligence checks and failed to give appropriate warnings to her - before transferring her personal pensions to a Small Self-Administered Scheme (SSAS) invested in The Resort Group plc. This investment stopped providing returns several years ago and is believed to have little, if any value.

She says that such warnings been given and a proper dialogue taken place, she would have made sure that she sought proper independent financial advice from a regulated firm with no links to the receiving scheme, and would have decided not to transfer and suffer the consequent losses.

Ms L is represented in this complaint by a Claims Management Company (CMC), and for simplicity I'll refer to the CMC's submissions as being from Ms L.

What happened

In 2014 Ms L was aged 50. She was employed in secretarial work in the public sector earning about £15,000 a year. She held five deferred personal pension plans totalling about £90,000 with Sun Life (formerly Confederation Life).

On 23 September 2014, Ms L signed a form giving First Review Pension Services (FRPS) authority to obtain information about her pension. On 7 October 2014 FRPS faxed Sun Life asking for information that would typically be needed by a regulated adviser to recommend a pension transfer – such as transfer values, discharge paperwork, details of charges and any Guaranteed Annuity Rates. FRPS wasn't regulated by the Financial Conduct Authority (FCA).

Sun Life responded on 9 October 2014 giving projections of future benefits and enclosing transfer discharge forms. It says it treated the request as having come from a regulated firm, Moneywise Financial Advisors. Moneywise's name doesn't appear on the Letter of Authority (LOA) in this case, and Sun Life carried out a check of the LOA at the time which makes no reference to confidence being taken in Moneywise's regulated status. However Sun Life notes, *"In respect to First Review Pension Services, we received a considerable number of transfer requests from 2013 to 2015. On a majority of these, within the LOA's they confirmed they were part of Moneywise (FCA 587253) and collated the information for them".*

FRPS then arranged for Bespoke Pension Services Limited, an unregulated SSAS administrator, to set up a scheme for Ms L. A SSAS is a type of occupational pension, in which the members are also trustees and therefore take responsibility for operating the scheme. It's an arrangement typically marketed at companies and partnerships seeking to create an occupational pension for a small group of directors and/or senior executives, so it was an unusual arrangement for someone in Ms L's circumstances. SSASs aren't regulated in the same way as personal pensions, with far fewer protections. They can hold a wider range of investments and assets. As an occupational pension, a SSAS must be sponsored by an employer company. Normally (and logically) that business would then employ all the scheme members and provide them all with an income, although this will depend on the scheme rules and isn't a requirement under law.

Ms L opened the SSAS on 6 November 2014. She was the sole trustee and member. The sponsoring company for the SSAS didn't provide her with an income. It was a dormant company established just a fortnight earlier, registered at Ms L's home address, and she was its sole director and shareholder. It never traded. The company seems to have existed only to allow the SSAS to be opened.

DLW Company Formation Services Ltd (DLW) was an agent who, on 22 October 2014, set up the new limited company Ms L used to sponsor her SSAS. It also wasn't authorised by the FCA and was co-located with FRPS in the same commercial area (Pride Park, Derby). By 18 December 2014, DLW and FRPS also had a shared director who had links to The Resort Group (TRG).

A representative from FRPS witnessed Ms L's employment agreement with the sponsoring employer dated 23 October 2014 and the trust deed of the SSAS dated 6 November 2014. FRPS therefore likely met with Ms L at least once after 6 November 2014. I therefore think FRPS (along with DLW) likely had an interest in securing funds for TRG and that was the reason they were helping her to set up the sponsoring employer and SSAS.

In fact a different firm to Moneywise - Broadwood Assets Limited, which was unregulated - was engaged to provide Ms L with advice. Sun Life wasn't informed of this firm's involvement at the time, and my understanding is that it wasn't mentioned in Ms L's complaint either. Her CMC has only recently obtained confirmation of who advised Ms L in a Subject Access Request from Bespoke, following an enquiry by the ombudsman service.

In summary, Broadwood said it was giving Ms L advice under section 36 of the Pensions Act 1995: a provision which requires a SSAS trustee to take and consider appropriate advice on whether a proposed investment is satisfactory for the aims of the scheme. Broadwood's letter explained that the scope of its advice was limited to the trustee's investment aims and that it hadn't advised her on the establishment of her SSAS. It said the nature of the advice it did provide wasn't regulated under the Financial Services and Markets Act 2000 (FSMA), because advice on investing in commercial property though a SSAS wasn't regulated.

Ms L signed at the bottom of this letter to confirm she'd read and understood Broadwood's advice on 18 November 2014 – before Bespoke requested the transfer from Sun Life.

FRPS called Sun Life on 26 November to find out what identification documents Sun Life would need to accept a request to transfer all Ms L's pension funds to a third party. On 1 December Sun Life then received a letter from Bespoke (dated 24 November) requesting a transfer of the five plans.

The sum of £90,104 was subsequently paid by Sun Life into Ms L's SSAS on 4 December 2014. £82,604 of this was invested in fractional membership of a UK company limited by guarantee, which owned a hotel investment operated by The Resort Group (TRG) in Cape Verde. This investment was unregulated and high risk. Ms L wouldn't have been allowed to hold this in her personal pension, but it was permitted in the SSAS. The balance of Ms L's funds was held in cash.

As at April 2018, the TRG investment was still valued in Bespoke's reports to Ms L at its book cost of £82,604, plus £11,050 (including the proceeds of interest and rental income but net of charges) held in the SSAS bank account. The SSAS had been paying Bespoke £918pa for administration services. The TRG investment provided quarterly returns into the SSAS bank account – initially based on guaranteed interest payments whilst the resort was being built, and then dependent on rental income. From what I know of other complaints, those payments would have dried up in around 2019.

The TRG investment has proven to be illiquid and incapable of sale on the open market. Ms L thinks the money she invested is now lost.

<u>The content of Bespoke's transfer request to Sun Life</u>

As I've mentioned, on 1 December 2014 Sun Life received a letter from Bespoke (dated 24 November) requesting a transfer of Ms L's five pension plans. The letter didn't mention what investment Ms L was making within the SSAS or that she'd received advice from Broadwood. It enclosed the following items:

- HMRC's registration letter for the scheme dated 14 November 2014;
- Sun Life's discharge forms signed by Ms L and Bespoke on 26 November 2014;
- A copy of the July 2014 seven-page booklet produced by The Pensions Advisory Service (TPAS) to warn about the risks of pension liberation and scams; known as a "Scorpion" booklet because of the imagery used. The first page was signed by Ms L on 14 November 2014 below a printed statement, *"I can confirm I have read this document. I am not party to any such pensions liberation activity in anyway whatsoever."* ("Pension liberation" refers to accessing pension funds in a manner that isn't authorised under the tax rules – such as before normal minimum pension age);
- An agreement under which Ms L agreed to act as the managing director of the sponsoring employer of the SSAS, which agreed to appoint her as such;
- The SSAS trust deed and rules, which had been drafted by a large London law firm;
- A copy of Bespoke's 'pension liberation policy' which, amongst other things, details that it administers around 700 SSASs and its staff have extensive industry experience.
- A pro forma letter from Ms L with scheme-specific information added by hand and then signed by her on 14 November 2014. The key part of this reads as follows:

  "The purpose of this letter is to provide you with additional confirmation of the basis upon which I have made this request and to seek to provide a record of the fact that I am aware of the issues relating to pensions liberation. Indeed I have carefully considered my decision to request a transfer to the scheme and have not made it lightly.

  I confirm that the scheme is a registered pension for HMRC purposes [reference number given] *and that the trust deed and rules governing it only allow standard benefit options such as annuities and drawdown in accordance with the applicable legal requirements.*

  From guidance and information I have received in connection with this decision I appreciate that there has recently been a significant rise in cases of 'pensions liberation' fraud. As a result there is increased concern and scrutiny around transfer requests being made, to ensure members fully understand the implications of making a transfer.

  I therefore wish to confirm that the transfer request is being made in order that I can take advantage of investment opportunities available under the scheme, none of which are in any way connected with pension liberation. I have received detailed information about the Scheme, how it operates, who administers it and the risks associated with making a transfer out of my existing pension arrangement.

  In making this transfer I am not seeking to access my pension benefits before age 55 and I am aware of the potentially significant tax liabilities that would arise were I to attempt to do so…I also confirm that I have not been offered any cash or other incentive by any person as part of my decision to transfer my pension to the Scheme."

<u>Ms L's complaint – December 2019</u>

Ms L alleges that Sun Life fell short in failing to establish the risks of a scam in her transfer and warn her of those risks, in a manner consistent with TPR's Scorpion guidance to ceding schemes making such transfers at the time. The matters she says Sun Life should have identified as warning signs included that she'd been cold called by an unregulated firm; she'd recently established a new (dormant) employer and scheme that was taking her pension out of the regulated sphere; and was making an unregulated and undiversified investment.

Ms L asserts that Sun Life should have sent her a Scorpion leaflet (also known as an 'insert', as it was designed to be inserted into transfer packs), and it should have engaged directly with her to establish any details it didn't know about her transfer and her understanding of it. Had such warnings been given and a dialogue taken place, she said she would have made sure that she sought proper independent financial advice from a regulated firm with no links to the receiving scheme, and following this would have decided not to transfer.

Sun Life contends that it handled the transfer request appropriately. It says it undertook sufficient steps to establish that the SSAS was HMRC registered, with a valid sponsoring employer that employed Ms L. The scheme's trust deed and rules demonstrated that she was unlikely to be a victim of pension liberation. Sun Life noted *"It has never been a regulatory requirement to issue a Scorpion Warning leaflet with all transfer requests"*, but in any event Bespoke had given and discussed a longer Scorpion booklet (which was more extensive than the insert) with Ms L, who signed it on the first page. She'd also signed Sun Life's declaration that it hadn't provided her with financial advice about which options to choose. Sun Life was under no obligation to check she had received regulated advice, but it believed that she was receiving advice from Moneywise, a regulated adviser firm.

Ms L doesn't agree with Sun Life's position. In particular, she says that it had failed in its duty to act in her best interests (PRIN 6 and COBS 2.1.1R in the FCA's handbook). It was clearly the intention of the other parties at the time, by asking her to sign the Scorpion booklet and a letter, to divest Sun Life of its own responsibility to carry out due diligence. Templated documents that she was asked to sign should be discounted, as she was given so much paperwork she couldn't possibly read it all.

Ms L's CMC notes that the High Court challenge to the Pensions Ombudsman's decision of *Hughes v Royal London* involved a near-identical Bespoke SSAS transfer in September 2014. In that analogous case, Royal London *didn't* accept the same signed confirmation that the SSAS member had been provided with literature about the risks of liberation. Instead, it became concerned about its use. Although the issue for that case was that Royal London couldn't, ultimately, block the transfer (as it sought to), the Pensions Ombudsman had been clear that it should have explained to Miss Hughes *why* it had concerns. That same point applied to this case.

I issued a Provisional Decision on this complaint on 22 February 2024. As both parties accepted the main part of the Provisional Decision I'll mainly repeat my reasoning below. Although Ms L's CMC accepted that the principles of contributory negligence could be applied, and should depend on the circumstances of the case, it took issue with my conclusions in Ms L's circumstances part. In summary, it said:

- If the Scorpion booklet had been presented as a single document with a request from FRPS for Ms L to familiarise herself with it before signing, then it may be reasonable to conclude she ought to have read it. However, FRPS presented clients with very substantial paperwork for signature during the course of two meetings at their homes.
- The CMC provided FRPS' summary of documentation lists for the two meetings held at customers' homes, with the accompanying documentation being around 2cm thick. The Scorpion booklet was one of the later documents in a pack left with clients and one of numerous documents they were asked to sign at the second meeting. It wasn't reasonable to find Ms L to have been negligent, for failing to identify this particular document as being important to be read before signing.
- It would be strange in any context for a consumer with no legal or financial training to read a scam warning presented by FRPS as providing an effective warning about

that company's actions. That wouldn't have constituted negligence on Ms L's part.

- Similar points apply to Broadwood's advice letter: Ms L would never have met an adviser from Broadwood.
- The finding on contributory negligence *"…indicates that on every case involving a SSAS transfer to Bespoke (or a similar SSAS provider) for the purposes of investing in TRG investments (which will be hundreds of consumers), there will automatically be a deduction to reflect contributory negligence of 30%...had Ms L been trained as a lawyer, used to analysing large tracts of documentation, or had experience or qualifications in the financial services sector, so conversant with investment risk, then a failure to identify relevant risk warnings within the FRPS pack, or to read everything thoroughly may have been appropriate."*

I'll address the CMC's points in the "fair compensation" section of this decision – but I'll note here that if it has further evidence, on any case, of how the sales process was conducted then it should provide that information to investigators at the earliest opportunity. Sun Life didn't provide any further comments.

What I've decided – and why

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

I've taken into account relevant: law and regulations; regulatory rules; guidance and standards; codes of practice; and (where appropriate) what I consider to have been good industry practice at the relevant time. Where the evidence is incomplete or inconclusive I've reached my decision on the balance of probabilities – in other words, on what I think is more likely than not to have happened given the available evidence and wider circumstances.

<u>The relevant rules and guidance</u>

Before I explain my reasoning, it will be useful to set out the environment Sun Life was operating in at the time with regards to pension transfer requests, as well as any rules and guidance that were in place. Specifically, it's worth noting the following:

- The Pensions Schemes Act 1993 gives a member of a personal pension scheme the right to transfer the cash equivalent value of their accrued benefits to another personal or occupational pension scheme (in this case, a SSAS).
- On 10 June 2011 and 6 July 2011, the Financial Services Authority (FSA) issued two announcements in quick succession to consumers. The first was about the dangers of "pension unlocking" and specifically referred to consumers transferring to new occupational schemes in order to access cash via loans from their pension before age 55. The second was about "early pension release schemes" and appeared to be more concerned with transfers to overseas personal pension arrangements that the FSA didn't regulate: it said the lack of regulation exposed them to significant losses.
- The FSA said it was working closely with HMRC and TPR to find out more information and encouraged affected consumers to contact FSA, HMRC or TPR helplines. At around the same time TPR put up a notice on its website termed 'pension liberation', describing this in a similar way to the first FSA announcement above. The warnings highlighted referred to websites and cold callers that encouraged people to transfer in order to receive cash or access a loan.
- In February 2012 TPR added a press release to its website referring to the same initiative. It said it was working with HMRC and the FSA and gave details of some of the

schemes it had already closed that were used for liberation. The press release included quotes from the FSA, who supported the initiative. However it was designed to raise public awareness about pension liberation, and remind trustees of their duties to members, rather than introduce any specific new steps for transferring schemes to follow.

- This changed when TPR launched its Scorpion campaign on 14 February 2013. The aim of the campaign was to raise awareness of pension liberation activity and to provide specific guidance to scheme administrators on dealing with transfer requests, in order to help prevent this activity. The FSA endorsed the guidance, and it was updated in July 2014 to cover widening concerns into pension scams more generally. I cover the Scorpion campaign in more detail below.
- Personal pension providers such as Sun Life aren't regulated by TPR; they're regulated by the FCA (and FSA prior to April 2013). As such, they're subject to its Handbook and, under that, to the Principles for Businesses and to the Conduct of Business Sourcebook (COBS). There have never been any specific FSA/FCA rules governing pension transfers, but the following have particular relevance to transfer requests:
  – Principle 2 – A firm must conduct its business with due skill, care and diligence;
  – Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly;
  – Principle 7 – A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading;
  – COBS 2.1.1R (the "client's best interests rule"), which states that a firm must act honestly, fairly and professionally in accordance with the best interests of its client.
- Shortly before Sun Life processed Ms L's transfer, the FCA also expanded on the more specific warnings to consumers that the FSA had begun in 2011, as mentioned above. In an announcement entitled 'Protect Your Pension Pot' published in August 2014, the FCA highlighted the increase in the use of SIPPS and SSASs in pension scams, as well as an increase in the use of unregulated and/or illiquid investments.

<u>The Scorpion campaign</u>

Overview

The Scorpion campaign was launched on 14 February 2013, and was initially focused just on pension liberation. However, given that Ms L's transfer took place in December 2014, it's the update to that guidance on 24 July 2014 that's most relevant to this complaint. It widened the focus from *pension liberation* specifically, to *pension scams* – which it said were on the increase.

The action pack for trustees and administrators was now titled 'Pension Scams', whereas the same pack from 2013 had been entitled 'Pension Liberation Fraud'. And, on the front page of the 2014 Scorpion insert that was provided for issuing to members, it said *"Pension scams. Don't get stung"*. The 2014 update also referred to a member losing their lifetime savings as a result of being scammed, as opposed to the earlier warning about them being subject to potential tax charges which could occur as a result of liberating a pension. In announcing the new version, TPR said it wanted trustees, administrators and pension providers to ensure that members received regular and clear information about the risk of pension scams and how to spot a pension scam. In full, the materials in the Scorpion campaign comprised:

- **The two-page Scorpion 'insert'** (also referred to by Sun Life as the leaflet), which linked to more material on TPR's website. TPR had originally said in February 2013 that it wanted the use of this insert in transfer packs to become best practice. It added on its website in July 2014 that it was asking all trustees to include the insert in their annual benefit statements and when issuing transfer packs to members. And if they had been sending the Scorpion inserts to third parties, *"you should consider if they should now be sent direct to members"*.

The July 2014 version of this insert warns that the 'tricks' used by scammers include claiming that the pension pot can be accessed before age 55; approaching out of the blue by phone, text, email or door-to-door; enticing with upfront cash; offering a free 'pension review'; trying to lure the member in with so-called 'one-off' investment opportunities; or pretending the Government had asked them to make contact. It said the potential consequences were the member never seeing their pension pot again. It recommended members resist being rushed or pressured into making a decision, and contact TPAS's helpline (or Action Fraud if they've already moved their pension).

- **A seven-page Scorpion 'booklet'** (which is what Ms L signed and was then sent to Sun Life by Bespoke). This gives more information, including example scenarios, about pension scams. Guidance provided by TPR on its website said this longer booklet was intended to be sent to members who had queries about pension scams.

- **An 'action pack'** for scheme administrators which said transferring schemes should "look out for" the following common features of pension scams:

  - Phrases like 'one-off investment opportunities', 'free pension reviews', 'legal loopholes', 'cash bonus', 'government endorsement'
  - Victims being approached out of the blue over the phone, via text messages or in person door-to-door
  - Transfers of money or investments overseas, meaning the money is harder to recover
  - Access to pension pot before age 55
  - No member copy of documentation
  - Victims encouraged to speed up transfer of their money to the new scheme (such as being expected to sign documents brought to them by courier).

  Not all of these warning signs would have been apparent from the information the ceding scheme had at the outset. But if any already were, the action pack provided a checklist that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request. They could also request confirmation of the receiving scheme's status from HMRC.

  Where transferring schemes still had concerns, they were encouraged to contact members: to serve the dual purpose of establishing answers to more of the questions on the checklist and *"establish whether they understand the type of scheme they'll be transferring to"*. They could also send members the (longer) booklet; direct them to TPAS or Action Fraud; consider delaying the transfer or seeking legal advice; or alert Action Fraud where there were concerns that a member was insisting on a transfer.

  The 2014 action pack also included two examples of real-life scams where the individuals concerned lost most or all of their pension savings (which were replicated in the seven-page booklet). One concerned an individual under retirement age who had been approached out of the blue with a free pension review and who had been offered a "unique investment opportunity" specifically in a property development overseas.

The status of the Scorpion guidance

When it was launched in February 2013, the Scorpion guidance was described as a cross-government initiative by Action Fraud, The City of London Police, HMRC, TPAS, TPR, the SFO, and the FSA/FCA, all of which endorsed the action pack, allowing their names and logos to appear in the action pack and Scorpion insert.

So far as TPR itself was concerned, it issued the guidance under the powers at s.12 of the Pension Act 2004, which provides:

> *"12 Provision of information, education and assistance*
> *(1)* [TPR] *may provide such information, education and assistance as it considers appropriate to those involved in–*
> *(a) the administration of work-based pension schemes, or*
> *(b) advising the trustees or managers in relation to such schemes as to their operation."*

So, for the bodies regulated by TPR, the status of the guidance was that it provided them with information, education and/or assistance, as opposed to creating any new binding rule or legal duty.

Correspondingly, the communications about the launch of the guidance were predominantly expressed in terms that made its non-obligatory status clear. Likewise, by and large, the contents of the action pack are framed in a way that is consistent with its stated purpose, namely as points to note or suggested actions a firm might take. For example, rather than telling firms they are expected to spot the warning signs of pension scams, the action pack lists *"Types of scam to watch out for"*; and, rather than say that the presence of a warning sign requires the firm to run though the checklist, it states: *"If any of these features apply, then you can use the checklist …"*

The language arguably strays into the imperative under the heading *"Next steps if you have concerns"*, stating: *"Contact the member to establish whether they understand the type of scheme they'll be transferring to"*. Then: *"Speak to the member at risk".* But, overall, the tenor of the document is essentially a set of prompts and suggestions, not requirements.

Also, it would seem inconsistent to view the Scorpion guidance as representing a binding rule or legal duty on personal pension providers regulated by the FSA/FCA when such a duty didn't extend to those bodies that came under the regulator that drafted the guidance (TPR). Furthermore, the FSA's endorsement of the Scorpion guidance was relatively informal: it didn't take the form of Handbook Guidance, because it was not issued under s.139A of FSMA, which enabled the FSA to issue guidance provided it underwent a consultation process first. Nor did it constitute "confirmed industry guidance", as can be seen by consulting the list of all such FSA/FCA guidance on its website.

I take from all the above that the contents of the action pack were essentially informational and advisory in nature and that deviating from the action pack doesn't necessarily mean a firm has broken the Principles or COBS rules. Firms were able to take a proportionate approach to transfer requests, balancing consumer protection with the need to also execute a transfer promptly and in line with a member's statutory rights.

That said, the launch of the Scorpion guidance in February 2013 was an important moment insofar as it provided, for the first time, guidance for personal pension providers dealing with transfer requests – guidance that prompted providers to take a more active role in assessing transfer requests. And this remained the case with all its subsequent updates. The campaign and guidance were launched in response to widespread abuses that were causing pension scheme members to suffer significant losses. And the guidance's specific purpose was to inform and help ceding schemes when they dealt with transfer requests in order to prevent these abuses and save their members from falling victim to them. In those circumstances, I consider it to have been good practice for firms which received pension transfer requests to pay regard to the contents of the guidance.

So, taking all this into account, I do think it's fair and reasonable to conclude providers should have recognised once the Scorpion guidance was in place that the environment had changed and more was now expected of transferring schemes when dealing with transfer requests as a matter of fulfilling their duties under the regulator's Principles and COBS 2.1.1R.

Therefore, whilst I don't think personal pension providers had to follow all aspects of the Scorpion guidance in every transfer request, I do think they should have paid heed to the information it contained; and, where the recommendations in the guidance applied, absent a good reason to the contrary, it would normally have been reasonable to expect pension providers at least to follow the substance of those recommendations. I look at what this means in practice in the next section.

<u>What did personal pension providers like Sun Life need to do?</u>

Sun Life says that *"It has never been a regulatory requirement to issue a Scorpion Warning leaflet with all transfer requests"*. I agree that there wasn't a specific obligation for it to do that, but TPR had set a clear expectation as far back as February 2013 that it wanted this to become best practice. In my view sending the insert to members asking to transfer their pensions was a simple and inexpensive step for providers to take, and one that wouldn't have got in the way of efficiently dealing with transfer requests. I therefore think it reasonable for the Scorpion insert to have been sent to transferring members as a matter of good industry practice with transfer packs.

The contents of the Scorpion insert were directed towards consumers themselves and contained warnings about dishonest intermediaries who might be trying to scam them. It would have defeated the purpose of the insert if, instead of sending it to their member, a ceding scheme sent the insert to an intermediary in the hope that that intermediary would then share the insert with the member. I therefore consider it fair and reasonable to say the insert had to be sent direct to the member rather to an unregulated third party, as TPR was in fact highlighting when it issued its August 2014 update to the guidance.

Under the Scorpion action pack, providers were asked to look out for the tell-tale signs of pension scams, undertake further due diligence and take appropriate action where it was apparent their member might be at risk. The action pack points to the scam warning signs transferring schemes should have been looking out for and provides a framework for any due diligence and follow-up actions. Therefore, as above, whilst using the action pack wasn't an inflexible requirement, it did represent a reasonable benchmark for the level of care expected of a transferring scheme. It identified specific steps that would be appropriate for them to take, if the circumstances demanded.

In any event, the considerations of regulated firms didn't start and end with the Scorpion guidance. If a personal pension provider had good reason to think the transferring member was being scammed – even if the suspected scam didn't involve anything specifically referred to in the Scorpion guidance – then its general duties to its customer as an authorised financial services provider would come into play and it would have needed to act. Ignoring clear signs of a scam, if they came to a firm's attention, or should have done so, would almost certainly breach the regulator's principles and COBS 2.1.1R.

Before I consider what Sun Life did in this case and whether that was enough, I've looked at Ms L's recollections of what she was told at the time.

<u>Ms L's recollections about what happened</u>

In her complaint, Ms L says she had no savings or investments at the time, and wasn't sophisticated or experienced in pensions. Her attitude to investment risk was *"low at most"*. She received an unsolicited phone call from FRPS. The call offered her a free pension review and she met with someone she believed to represent either FRPS or Bespoke. She didn't realise neither of them were FCA authorised, or understand the significance of this.

Ms L was told that her Sun Life pension wasn't performing well and she could achieve better returns by transferring it to a new scheme and investing in a hotel room in a Cape Verde resort. She recalls that it was *"guaranteed that she was not at risk of sustaining any losses".* And she was told that transferring her pension was the *only* way she could access a tax-free cash sum at age 55, with which she had originally intended to pay a lump sum off her mortgage.

Our investigators also contacted Ms L and her CMC on various occasions for further information, and obtained the following additional recollections:

- She had just been through an acrimonious split with her long-term partner of 13 years, and looking back her head was probably not in the right place at the time.
- FRPS described her pension as 'frozen' and was offering to get her a 'better deal' which 'wouldn't cost anything'. The review took place in her home.
- She was attracted to the proposition of better returns, but realises now she didn't really understand how the investment worked, including setting up a company.
- She didn't know to check the FCA register of authorised firms and the salesman seemed very confident. So, after asking other family members she concluded the opportunity was genuine.
- She couldn't recall signing the letter Bespoke provided on 14 November 2014 for her to acknowledge that (amongst other things) she'd been provided with the Scorpion booklet, but it must have been amongst "a load of stuff" FRPS asked her to sign.
- She hadn't heard of Moneywise Financial Advisors, and didn't recall any other firm advising her on this matter.

<u>What steps did Sun Life take in this case?</u>

The Scorpion insert

Sun Life has explained to this service that:

> *"Our approach has always been to review transfers once we have identified the receiving scheme. If it is a known scheme on which we have previously investigated and approved, we will proceed with the transfer. If it is a scheme that we have not previously done due diligence on, we will investigate. If we have concerns we will then request further information from the scheme and the planholder; it is at this stage that we would issue a warning leaflet…*
>
> *We would normally request scheme information, i.e. scheme rules etc but this was all provided when the request was made."*

However, I think it would have been good practice for Sun Life to have sent the Scorpion insert to Ms L at the same time as it provided the transfer pack to FRPS originally – because one of the purposes of this insert was to alert members to warning signs with a view to deterring them from requesting transfers where any of these applied.

That said, I don't think it ultimately matters in this case that Sun Life didn't send the insert to Ms L originally. That's because Ms L signed a copy of an even more comprehensive version of the insert later on – the seven-page Scorpion booklet from July 2014 – confirming she had read it. Ms L has said that unscrupulous third parties whose interests weren't aligned with hers wouldn't want to issue these warnings. But I'm satisfied on the evidence here that

Bespoke and/or FRPS *did* show this booklet to Ms L and that she signed it.

So, I don't consider that a shorter version of the same document sent out at the time of the transfer pack would have taken on a fundamentally different significance for Ms L.

Due diligence

Sun Life told Ms L that it had a 'Transfer Scheme Reference Check' process in place at the time. This referenced all the valid pension schemes it knew of, but as Ms L's SSAS had been set up for the sole purpose of the transfer – it says *"…as is the case with most schemes of this type"* – it was not listed there. So, it had taken steps to further establish that:

- Bespoke had provided a valid HMRC registration letter for the scheme;
- The sponsoring employer had been validly incorporated at Companies House;
- The trust deed and rules for the SSAS showed that Ms L was the trustee of the SSAS and she could not access her pension before the normal minimum pension age of 55;
- The employment agreement evidenced that she had a right to transfer into the scheme as an employee of the sponsoring employer;
- It believed, as a result of a wider pattern of information requests it was getting on other cases, that she was receiving advice from Moneywise.

Sun Life has given us its completed 'final transfer payment' form – a process completed by hand which included the questions:

- "…*has the client signed the correct disclaimer which says that the Guaranteed Annuity Rate/Retirement bonus will be lost?"* **'Yes' was ticked**

- "*Is the scheme a known scheme?"* **'No' was ticked** – in which case the form said *"check companies house/FSA website/print copy & add to file for backscanning"*. No such copy was added to the file (but if it had checked, Sun Life would have found that the sponsoring employer was incorporated a little more than a month before the transfer request and was still showing as dormant at that time).

- "*Pension Scam Declaration: I have checked that the ASCON/SCON/ECON/PSTR number* [references used by HMRC] *is correct for the scheme*" **[signed, with name]**

- "*Is the receiving scheme on the approved schemes list?"* **'No' was ticked** – in which case the form said *"this transfer must be signed off by Technical"* **[signed, with name]**

Sun Life has also provided the following comments from its complaint investigation:

> *"…We received many requests to transfer to schemes set up with Bespoke Pensions. They followed a standard pattern, being transfers to recently set up SSAS schemes - the SSAS scheme name being the street/road name of the planholder and their date of birth…*[Sun Life] *Financial crime reviewed most of these transfers.*
>
> *In some instances…we actually obtained confirmation from HMRC that the scheme was not under investigation or subject to de-registration. However, in other cases - such as this one – we received confirmation of the date that the scheme was registered. Where this was within days of the transfer request, there was little point in going to HMRC as we had previously tested this with identical schemes (set up using the standard Bespoke rules etc) and there would have been no reason - or time - for the scheme to have been de-registered already.*
>
> *The references to Cantwell Grove are to another firm who operated on a similar model to Bespoke Pensions. In that case we challenged them but this resulted in complaints and considerable involvement across the business (customer services, fin crime, compliance, technical). Eventually, although we didn't 'like' the apparent business model of the receiving scheme, we had to concede that the transfers met all the necessary requirements and that the member had a right to transfer*

that we could not refuse…"

I don't think these comments are just being made with the benefit of hindsight. The contemporaneous evidence shows that there was an internal enquiry within Sun Life on 3 December 2014, after it received Ms L's transfer request. The discussion reads:

> *"**(Referral to Technical):** This scheme is not on our approved list - can you confirm if ok to proceed? Thanks*
> ***(Response from Technical):** We have previously transferred other plans to schemes of this model set up by Bespoke Pension Services. This scheme was only approved less than 3 weeks ago and as it is a one member scheme there seems little point in referring to HMRC. As* [Sun Life] *has previously approved transfers to this type of scheme run by this provider."*

From what I'm aware, the other transfer requests Sun Life is referring to were typically accompanied by a letter from the member (as with Ms L's here) informing it that the SSAS was being set up solely in order to take up investment opportunities. And according to Sun Life, many of these transfer requests – albeit not Ms L's – followed an LOA that suggested FRPS was "part" of Moneywise and performing a data collection role for this firm (which was authorised by the FCA to give advice on personal pensions).

Sun Life didn't know at the outset that Ms L was going to be investing in TRG specifically, as Bespoke didn't set this out in its letter (in the same way that the other SSAS provider Sun Life mentions, Cantwell Grove, did). However, I'm satisfied Sun Life likely knew, or should have suspected, that it would involve an unregulated or other more esoteric investment such as was permitted with SSASs but not in more strongly regulated schemes. Bespoke said itself in its 'pension liberation policy' document which accompanied the transfer request, on a page titled 'UCIS and UCIS like investments through SSAS':

> *"SSAS has in recent years been used as a pension for promotion of non-regulated investments by non-regulated agents in particular, due to the lighter touch regulatory requirements where all members are trustees.*
>
> *Our current policy evolves with best practice internally and reflects the guidelines set out by the Financial Conduct Authority and the Pensions Regulator. We have taken those requirements a step further by requiring that:*
>
> *• No SSAS is established for any customer where the purpose of the SSAS is for investment in a UCIS or UCIS substitute and has been recommended by a firm or person who is not regulated to undertake investment business and give investment advice.*
>
> *• This is also extended to investments which are pooled investments or 'funds' characterized by unusual, speculative or complex assets, product structures, investment strategies and or terms and features.*
>
> *• The UCIS operator must also have a proven track record in the field of business, proven returns to investors. Independent audited accounts must be available and the firm is not subject to any enquiry or notice warnings by the FCA.*
> *…*
> *• Any UCIS or UCIS close substitutes can only be held if the trustees have taken advice in accordance with Pensions Act 1995: irrespective of whether all members are trustees.*
>
> *• UCIS or UCIS like products have a position in the marketplace, but should only provided* [sic] *where regulated advice has been given on the investment."*

In this document Bespoke seems to have been aiming to pre-empt possible concerns at Sun Life arising from the fact that SSASs were being used by unregulated firms to promote the purchase of non-regulated investments. Thus, it acknowledged this problem and assured Sun Life that it operated internal policies to limit possible abuses. Against the concerning pattern Sun Life had observed, however, I don't think it would have been reasonable for it to rely on these self-serving assurances, coming as they did from Bespoke itself – given that Bespoke was an unregulated entity and that its business model was (or should have been) itself a subject of Sun Life's concerns.

Looking at the due diligence Sun Life performed, its checks did no more than confirm that Ms L's transfer request fitted the same pattern it had already seen in other cases involving Bespoke: a recently registered scheme with the same terms and similar name and sponsoring employer, which didn't appear to be a bona fide employer. It then relied on the assumption that there was no point asking HMRC if it had deregistered the scheme, because it had been set up so recently there wasn't likely to be any changes in HMRC's view of whether it was operating legitimately – and took no further steps to investigate. That wasn't a reasonable position to take. Even if checking with HMRC would have proved futile, that didn't mean Sun Life should have accepted the transfer request without further enquiry. As HMRC said on its website[1] at the time, checking if a scheme had been deregistered wasn't a substitute for ceding schemes carrying out their own due diligence.

There existed a pattern of transfer applications, including Ms L's application, which seemingly did cause Sun Life concern. It had only reluctantly complied with transfer requests made under similar arrangements by another SSAS provider (Cantwell Grove), and appeared to have reservations about Bespoke as well. Sun Life's documented concerns at the time show that it had recognised that the schemes were all SSASs with 'identikit' employers, appearing only to have been established to enable the schemes to operate. This should have alerted Sun Life to the risk that there was taking place some type of campaign to extract people's pension savings from conventional schemes and move them into less regulated SSASs, and was potentially an indicator of the promotion by unregulated firms of unregulated investments.

<u>What further steps should Sun Life have taken?</u>

In these circumstances I think Sun Life needed to look into the proposed transfer and what lay behind Ms L's request. And the most reasonable way of going about that would have been for it to turn to the checklist from the 2014 action pack to structure its due diligence into Ms L's transfer. The checklist provided a series of questions to help transferring schemes assess the potential threat of a scam by finding out more about the receiving scheme and how the consumer came to make the transfer request. Some items on the checklist could have been addressed by checking online resources such as Companies House and HMRC. Others would have required contacting the consumer.

The checklist is divided into three parts (which I've numbered for ease of reading and not because I think the checklist was designed to be followed in a particular order):

1. **The nature/status of the receiving scheme**

   Sample questions: Is the receiving scheme newly registered with HMRC, is it sponsored by a newly registered employer or a dormant employer, is that employer geographically distant from the transferring member and is the receiving scheme connected to an unregulated investment company?

2. **Description/promotion of the scheme**

   Sample questions: Do descriptions, promotional materials or adverts include the words 'loan', 'savings advance', 'cash incentive', 'bonus', 'loophole' or 'preference shares' 'one-off investments', 'free pension reviews' – or allude to overseas investments or unusual, creative or new investment techniques?

3. **The scheme member**

[1]https://webarchive.nationalarchives.gov.uk/ukgwa/20140731210525/http://www.hmrc.gov.uk//pensionschemes/transfersa.htm

> Sample questions: Has the transferring member been contacted by an 'introducer', been advised by a non-regulated adviser or taken no advice? Has the member decided to transfer after receiving cold calls, unsolicited emails or text messages about their pension?

Opposite each question, or group of questions, the checklist listed actions that should help the ceding scheme establish the facts.

I don't think it would always have been necessary to follow the checklist in its entirety. And I don't think an answer to any one single question on the checklist would usually be conclusive in itself. A transferring scheme would therefore typically need to conduct investigations across several parts of the checklist to establish whether liberation or scams were realistic threats. As a result of the warning signs that should have been apparent to Sun Life here, and the relatively limited information it had about the transfer, I think in this case Sun Life should reasonably have addressed all three parts of the checklist and contacted Ms L as part of its due diligence.

What would Sun Life reasonably have discovered?

Under **part 1** of the checklist, by referring to Companies House Sun Life could quickly have established that the sponsoring employer had been incorporated about a month before the transfer request, was dormant with Ms L as its only director, and the scheme itself was established even more recently. The employer's registered office was Ms L's home address. This fitted the pattern it had recognised from other applications it had received from the same source and which formed a concerning picture.

Notwithstanding the contract of employment that was provided, I therefore consider it was reasonable for Sun Life to have asked Ms L about why she had established such a scheme and entered into the employment contract. Had Sun Life done this, I can't see that she would have suggested anything other than this new company being part of the investment proposition (rather than being used to carry on a trade).

Enquiries under **Part 2** of the checklist would have revealed that Ms L had been cold-called. Although she hadn't been offered loans or other cash incentives for making the investment, she understood that transferring to the SSAS was the only way she could then access a lump sum from her pension (legitimately) to repay her mortgage. Also, even the most basic enquiry by Sun Life would have revealed that she was making an overseas investment in hotel accommodation. Fractional hotel ownership was a relatively new investment innovation, and fitted TPR's warning in relation to *"unusual, creative or new investment techniques"*. Indeed, one of the examples included in the action pack referred to a property development overseas. Sun Life should have recognised that this investment was therefore at risk of being a scam.

Under **part 3** of the checklist, Ms L says that she was cold called and advised to transfer her pension to the SSAS to facilitate the TRG investment. She remembers being told that the new SSAS would provide better returns than her existing pension, which is the very essence of being told that it was in her interests – i.e. being advised – to make the transfer. That allegation is relevant to how she would have explained the reasons and circumstances of her transfer request, if Sun Life had asked her about these at the time (as I think it should have done). So, I need to examine its plausibility against the surrounding circumstances.

Is it plausible that Ms L received advice, and if so from whom?

Ms L wasn't a sophisticated investor: she says she had no other investments than her Sun Life policies, which appear to be straightforward pension plans. She didn't work in a field that suggests particular knowledge or experience of SSASs, nor of setting up her own company, nor of how to invest in an overseas commercial property development. She told our investigator that she didn't really understand how the investment in TRG worked, or why she was setting up a company. These were complex and unusual arrangements for someone in her circumstances. I think it's unlikely she decided on her own to transfer out of her Sun Life policy and enter into these arrangements without having been advised to.

At first blush there are several parties that might have given Ms L advice. Most prominent amongst these is FRPS. I'm aware from other complaints received by the ombudsman service that FRPS was routinely involved in pension transfers that resulted in buying into the TRG investment. As I've noted above, a direct directorship link between TRG and FRPS was formed very shortly after Ms L's pension transfer. FRPS witnessed the documents in Ms L's home which led her to setting up the sponsoring employer and SSAS.

Broadwood Assets was also selected to provide advice on the investments *within* the SSAS for a number of transferees, including Ms L. So it also requires consideration.

Sun Life also assumed, based on what had happened in some other cases, that FRPS was connected to Moneywise, a regulated firm. This raises the question of whether Moneywise was involved in this case. On that issue, FRPS wasn't recorded on the FCA register as an "introducer appointed representative" to Moneywise – i.e. a firm that can gather information for a regulated firm but not itself advise. I'm not aware of any statements at a corporate level that FRPS always acted on Moneywise's behalf. At no point did Sun Life check that Moneywise was advising Ms L and, given the lack of any contemporaneous documentation suggesting otherwise, I'm satisfied that Moneywise wasn't involved in this case.

As regards the question of whether transfer advice was given by FRPS or Broadwood, both FRPS and Broadwood are likely to have set out to limit their roles in writing. I'm aware that FRPS had produced terms of business which some other clients received (albeit Ms L hasn't provided them in her case). These described FRPS' role as 'helping' the SSAS to receive transfers and then 'introducing' the trustee to potential investment opportunities. They went on to say:

> *"We can only provide you with information about transferring your current pension funds to a SSAS that provides Defined Contribution benefits. We are not authorised to provide information or give advice in relation to transferring your pension funds to a Personal Pension Scheme or any other kinds of pension arrangement or a pension scheme that provides defined benefits."*

Broadwood's advice was also clear in saying that it was limited to Ms L's role as trustee in selecting an investment to be held within the SSAS. It wasn't advising her on establishing the SSAS and therefore, the suitability of making the pension transfer itself. A copy of Broadwood's terms of business was attached to the advice letter and signed by Ms L on the same date (18 November 2014). These confirm the same basis of advice as set out in the advice letter (*"We do not advise on the merits of establishing a SSAS"*).

So, on their face, both FRPS and Broadwood's terms of business seem to be saying that they do not advise on transfers to a SSAS. However, there are two plausible reasons suggesting that Broadwood's role was indeed limited in this way: first, there was a legal requirement for Ms L, as trustee of the SSAS, to obtain and consider the advice Broadwood was providing. There was no such legal requirement for her to obtain the advice on the transfer itself. Second, Broadwood's advice post-dated the establishment of the SSAS to which it related and is contained in a letter. There is no reason to think it had also given earlier, oral advice to make the transfer into the SSAS.

However, FRPS's involvement can be dated from the documentation to earlier in the transfer process – to the establishment of the sponsoring employer and SSAS. And it's clear that the reason for taking those steps was because Ms L had been encouraged to invest in TRG.

FRPS went as far as saying in its terms that it would provide 'information' to help the client decide whether to transfer to the SSAS. That confirms it was in a position to use that information to influence Ms L's decision to transfer. It seems to have been the party that persuaded Ms L of the advantages of investing in TRG, an investment with which it was obviously connected. To my mind, it's difficult to conceive how FRPS could 'help' the SSAS to receive transfers (in the language of its terms of business), whilst at the same time promoting the TRG, without expressly or implicitly recommending a transfer to the SSAS. The purpose of FRPS's involvement, by its very nature, posed an acute risk that it would give Ms L either express or implied advice to transfer her pension.

FRPS seems to have been part of an orchestrated effort to obtain pension investments from members of the public into TRG – even though I think FRPS ought to have known that these investments were risky and inappropriate as the main investment in a pension. This informs my judgement as to how FRPS was likely acting when dealing with Ms L.

So, even before looking at Ms L's testimony, the surrounding circumstances seem to me to be consistent with FRPS having recommended to Ms L that she transfer her pension for the purpose of making an investment in TRG through a SSAS.

The content of Ms L's evidence fits well with that conclusion. Several of the features of the discussion Ms L recalled having in the cold call and subsequent meeting at her home amount to advice to transfer: such as being told that the SSAS would perform better than her existing plan and that a transfer would form part of a strategy to access a cash sum to repay her mortgage. I think Ms L's testimony is plausible and supports the contention that FRPS informed her about the features of the SSAS (and the TRG investment) in a way which compared them to, and denigrated, her existing arrangements – and at least implicitly advised her to transfer out of her personal pensions. Whilst she wasn't sure in her recollections whether the person she met was from FRPS or Bespoke, the FRPS signature on the documents completed in her home strongly indicates it was FRPS.

So in conclusion, I'm firstly persuaded on the evidence that Ms L was cold-called and advised to transfer and invest in TRG by FRPS. Secondly, I'm persuaded that if Sun Life had asked Ms L about how or why she came to be transferring her pension, as it should, she would have told it the same things as she's told our service. Sun Life would reasonably have understood as a result that she was getting advice to transfer, and concluded from what she said and/or from the documentation it held that the advice was likely coming from FRPS.

<u>What should Sun Life have done with the information it discovered?</u>

All of this information gathered, when taken together, should have reinforced Sun Life's existing concerns about Bespoke's business model – including the pattern it says it was seeing in transfer requests – and prompted it to investigate further.

The Scorpion checklist recommends that in order to establish whether a member has been advised by a non-regulated adviser, the transferring firm should consult the FCA's online register of authorised firms. Sun Life should have taken that step, which is not difficult, having learned that Ms L was advised by FRPS. It would quickly have discovered the likelihood that Ms L had received unregulated advice to transfer out of her personal pension. (Indeed, even if Sun Life had formed the impression that Broadwood Assets had given Ms L the transfer advice, which I don't think would have occurred, Sun Life should have reached the same conclusion, as Broadwood too was unregulated.)

This is relevant because being *advised* to transfer benefits from a personal pension plan by a firm which lacked authorisation (or any relevant exemption) would have been a breach of the general prohibition imposed under FSMA, which states no one can carry out regulated activities unless they're authorised or exempt. Anyone working in this field should have been aware of this.

My view is that Sun Life should have been particularly concerned by the involvement of an unregulated adviser, because it pointed to a criminal breach of FSMA and was in fact the likely reason for the pattern of transactions it had identified being requested by Bespoke. On the balance of probabilities, I'm satisfied such a breach occurred here.

With its obligations under the regulator's Principles and COBS 2.1.1R in mind, it would have been appropriate for Sun Life to have informed Ms L that the firm she'd been speaking to was unregulated and could put her pension at risk. It should also have explained to her that being cold-called and getting unregulated advice to make an overseas property investment were the same potential signs of a scam that TPR was highlighting in its Scorpion guidance. It should further have told her that only authorised financial advisers were allowed to give advice on personal pension transfers, so she risked falling victim to illegal activity.

Merely by providing factual information to Ms L, Sun Life also ought to have been able to correct the misimpression she'd been given that transferring to the SSAS was the only way she could legitimately release a tax-free cash sum to repay her mortgage. It should have told her that any personal pension would permit the release of tax-free cash from the age of 55.

This process of engaging with Ms L could have happened in real time, whilst Sun Life was asking her the questions about the investment and how she had come to make the transfer. Or, if necessary, Sun Life could have referred Ms L to seek guidance from a relevant body such as TPAS.

Yet Sun Life did nothing at all here and proceeded to make the transfer, seemingly resigned to the fact that it wasn't in a position to prevent transfers to Bespoke despite its concerns about the business model. Sun Life's submission to this service suggests it might not have wanted to intervene to give Ms L a warning because of the resulting resources in dealing with a potential complaint from Ms L. It refers to other people, who had been clients of FRPS and Cantwell Grove (a different SSAS provider) and had made such complaints. However, that is putting the cart before the horse. It didn't know Ms L would complain, and it wasn't acting in her best interests or treating her fairly to make presumptions about how she might behave in response to its warning.

So, I think Sun Life's conduct in failing to take the steps I've described fell significantly short of what the FCA's regulations under COBS and PRIN required. I think Sun Life should have provided more specific information about the risks of the transfer to Ms L, along the lines of what I've set out above. I've therefore gone on to consider whether this failing caused Ms L harm or loss.

<u>Would it have made a difference if Sun Life had acted as it should have done?</u>

An issue that I must decide, however, is whether Ms L would have gone ahead with the transfer even if Sun Life had done all it should have. In that respect, it is relevant that Ms L had been shown the July 2014 version of the longer Scorpion booklet, which she signed on its front page to confirm she'd read. The booklet listed the warning signs of scams – including being cold called to have a pension review and offered one-off investment opportunities which are often overseas.
It also contains a case study of 'Henry', who was cold called and promised higher returns (rather than any other immediate incentive) from investing in property developments overseas, in a rather similar way to how Ms L describes. 'Henry', who unwittingly signed up to becoming a company director, lost all the money in his investment. The booklet concludes by warning people in Ms L's position to *"Make sure the adviser is authorised by the FCA"*, gives the website address for the FCA register and the phone number for the TPAS helpline.

Ms L doesn't have a firm recollection of the letter she signed for Bespoke, referring to the Scorpion booklet (which she also signed). Her account and that of her representative is that she likely dismissed it as one of a number of documents she was asked to sign in quick succession. I think it's reasonable to conclude from this account that Ms L didn't actually read the Scorpion booklet when Bespoke and/or FRPS showed it to her.

Ms L didn't therefore take the suggested steps in the Scorpion booklet of checking the register or phoning TPAS at the time. But she says that the salesman seemed very confident – and other family members she asked didn't give her reason to be concerned. The fact that, as she says, she had other stresses in her life at the time may have had an impact on this.

On balance I'm therefore satisfied that Ms L didn't read the booklet and conclude from it that, despite the apparent similarities to her transfer, she wasn't at risk of a scam. Rather, she didn't read it at all. And her reasons for not reading it were *not* that she was determined to make the transfer, come what may. Rather, that she had confidence in the way the adviser had presented the transfer proposition and didn't give the paperwork the close attention that, with hindsight, she would wish she had.

I'm not considering here whether it would have been *reasonable* for Ms L to take the precaution of reading the booklet (which I'll return to later) – only whether there's a plausible explanation for why she didn't. That's because I need to determine here whether – if Sun Life had alerted her to the risks of a scam, as I consider it should have done – that intervention would then have made a difference. And when I take everything into consideration, I'm persuaded that Sun Life engaging *directly* with Ms L would have made the difference in this particular case.

Sun Life's warning should have followed its conversations with Ms L, so it would have seemed to her (and indeed would have been) specific to her individual circumstances. It would have been given to her in the context of Sun Life raising concerns about the risk of her losing her pension monies as a result of untrustworthy advice. This would have made her aware that there were serious risks with using an unregulated adviser. In my view, she would then have realised that the confidence she had placed in the adviser was misplaced, and she hadn't taken sufficient precautions merely by running the investment proposal past other family members.

Of course, deciding not to go ahead with this type of transfer wasn't entirely straightforward, because it would mean Ms L no longer had any need for the SSAS and would need to close that and the sponsoring employer down. But there is only a relatively small charge for doing so, and I highly doubt Ms L would have been put off by that, as against potentially losing over £80,000 of pension benefits from untrustworthy advice. And I'm fortified in this conclusion by reading in FRPS's terms of business that it was required to assist her in doing so:

> *"if you decide not to proceed with a SSAS after a new Company has been set up for you, [we] help you complete the necessary forms to apply for your new Company to be struck off from the register maintained by Companies House and dissolved."*

I'm therefore persuaded that Ms L wouldn't have transferred her pension or lost out financially but for failings on Sun Life's part. I've now gone on to consider what is fair compensation in the circumstances here.

<u>Fair compensation</u>

The Law Reform (Contributory Negligence) Act 1945 is relevant for me to take into account in this complaint. It allows for the apportionment of liability in the case of contributory negligence. It says that where any person suffers damage as the result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. I've taken this into consideration when looking at the actions taken by Ms L. I do so, not because the Act directly applies to complaints to our service (it applies only to legal claims based on the breach of a tortious or contractual duty of care), but because I consider this complaint raises similar issues to a legal claim in negligence.

There are three questions I need to think about here. Firstly, if Ms L had acted as a reasonable person by taking heed of the obvious risks, reading what she should have read, and looking after her own interests in a reasonable way, would this have prevented the transfer from going ahead? Secondly, in the event that there were errors by both Ms L and Sun Life that led to the transfer going ahead, can it be said that one party's fault was a more potent cause than the other? And thirdly, what was the relative degree of fault, if any failure by Ms L to take the steps she should reasonably have taken is compared with Sun Life's failure to take the steps it should have taken?

On the first question, Ms L was contacted out of the blue to discuss her pension. There were warnings about doing this in the Scorpion booklet, which Ms L signed to say she had read. Moreover, the version of that booklet given to Ms L by Bespoke and/or FRPS was directly relevant to the circumstances of her transfer.

Ms L's CMC says that, in effect, Ms L was bombarded with so much paperwork that it isn't reasonable to expect her to have read this booklet. I've already accepted in my earlier findings that this is a plausible reason why Ms L didn't, in fact, read the booklet. But what I'm considering when applying the test for contributory negligence, is whether a reasonable person in Ms L's circumstances would have acted as she would have done.

We've been provided with two checklists of documentation the FRPS agent would have brought to two different meetings. It's reasonably clear from these that the Scorpion booklet would have been left with Ms L at the first meeting and the two copies Ms L signed were separately brought to the second meeting. I appreciate it's not clear from the checklist whether Ms L would have been told she would then be signing these at the second meeting to confirm she'd read them. But I don't think this matters.

Even if being asked the sign the booklet had caught Ms L by surprise as she hadn't (yet) read it, I think a reasonable person in her position, despite their lack of specific legal or financial training, would at least have already familiarised themselves with the significance of the documents that had been left in their home before the second meeting happened. And then taken the time to read what they were being asked to sign before declaring that they had. Or, if necessary, read the separate copy they'd already been given after the meeting – in the knowledge that having signed to say that they'd read it, this is what they ought reasonably to do, rather than making a false declaration.

So I think, acting reasonably, Ms L wouldn't have seen the example of 'Henry' transferring to make an overseas hotel investment and becoming a company director in the process, which was strikingly similar to her case. So having read the booklet, I think she ought to have become concerned about this similarity. The leaflet told her to check her adviser was authorised by the regulator, given the web address of the register for doing this. I'm persuaded as a result that Ms L, acting reasonably, would have had a similar opportunity to change her mind about transferring to that which Sun Life failed to highlight to her and would have changed her mind, if she'd read the booklet.

A further but similar point would apply in respect of the warnings Broadwood gave Ms L in its letter that the proposed transfer involved risky investments that were highly illiquid, with no UK regulatory or compensatory protection and which were unsuitable for a cautious investor.

Broadwood had added that it wasn't a regulated adviser, and that if Ms L preferred advice on the suitability of the investment for her personally then she should seek regulated financial advice.

Ms L signed a similar statement that she'd read Broadwood's letter – indeed the statement went further to say that she'd understood the letter. In her complaint she recalls being told that she was guaranteed not to be at risk of sustaining losses. So, again I think it would have been reasonable for her to read Broadwood's letter in detail before signing. And if she had read and considered it carefully, alongside the Scorpion booklet and the contained warning signs within it, it's also likely when taking both documents together she would not have proceeded with the transfer.

In terms of the second question I set out above, I'm therefore satisfied that there were errors by both Ms L and Sun Life that led to the transfer going ahead. But on balance, I'm not satisfied that one party's fault was a significantly more potent cause than the other. In my view this is more a matter of the third question: the relative degree of fault when comparing Ms L's failure to take the steps she should reasonably have taken, with Sun Life's failure to take the steps it should have taken.

I also don't accept the premise that a reasonable person wouldn't have reacted *at all* to the warnings in the Scorpion booklet or Broadwood letter, because they were provided by the very companies acting to make their pension transfer and/or investment. I say this particularly because Ms L was being asked to sign to acknowledge that she'd been given these warnings, so they were clearly of some significance. As I've said, that should reasonably have led to her reading what she was signing – and in turn highlighting that a number of aspects of what she was doing were concerning, or at odds with her understanding that no risks were involved.

Nevertheless in terms of Ms L's level of blameworthiness, it is appropriate for me to take into account that the likely intention of those showing her the Scorpion booklet was to demonstrate that the investment she was making *wasn't* the type of scam being highlighted. There was also a significant emphasis in both the letter from Bespoke and declaration on the booklet Ms L was asked to sign, that she wasn't getting involved in pension liberation. They focused on features of a transfer (such as accessing the pension early and receiving incentives) that amounted to liberation, but which Ms L would have known she wasn't doing. The context in which Ms L was presented with the booklet was likely designed to reduce its impact, so that she would sign the confirmation on the front, which would then be deployed to show to Sun Life, entirely contrary to her interests. So I am going to take that reduced impact into account, in terms of Ms L's blameworthiness.

Turning to Broadwood's letter, I think it's reasonable to conclude that a lay person like Ms L wouldn't have viewed this letter in isolation. She would have seen it as part of the overall advice process (which included advice from FRPS) on making the transfer and investment. And the same letter also contained assurances that the TRG investment was legitimate and well-resourced (and repeated a message that it wouldn't facilitate pension liberation). So, to a person lacking in financial acumen or experience, and despite the warnings of risk involved (which I don't think ought to have gone unnoticed), it still sent somewhat mixed messages overall.

In reality, Ms L had fallen victim to a well-organised operation which persuaded her to transfer from a relatively safe, conventional pension into a speculative, overseas property development. The high likelihood of its unsuitability for a person of her limited means and experience suggest to me that it can only have been recommended to her in bad faith. So, I accept the premise that her unregulated adviser, who was breaking the law by making the transfer recommendation at all, would have been likely to give her the wider assurance she recalls getting about the security of the intended investment.

It's inherently unlikely that Ms L – a person of limited means – would have asked for the transfer if she'd truly understood the risk to which it exposed a large portion of her pension provision, which in part she needed to repay her mortgage. I say this noting that she was on a salary of £15,000 with no other savings or investments, consistent with the low attitude to risk she says she had 'at most'. I consider it likely on balance that the risks of the investment were orally downplayed, as Ms L says they were – to the extent that she either missed them completely or dismissed them as an unlikely scenario.

So in my view, the impact of both of the warnings Ms L received via the Scorpion booklet, declaration and Broadwood letter were diminished by virtue of the 'spin' put on them by the self-interested parties promoting and facilitating the transfer and TRG investment. Nevertheless, these mitigating factors don't entirely justify why Ms L signed documents confirming she had read (or understood) them – which I think a reasonable person should have done – in all the circumstances of this case. I note in particular that the Scorpion booklet was directed at and designed to be understood by a layperson like Ms L. But these same mitigating factors do in my view reduce her blameworthiness.

Turning to Sun Life's blameworthiness, there was a total failure to make any contact directly with Ms L at all and warn her of the significant risk of a scam emanating from the information it should have found out about her transfer. Sun Life was the professional party, operating a regulated pensions business in which dealing with members' transfer requests was an inherent feature; so it should have been more familiar with the risks than Ms L. In accordance with its duty under PRIN 6 and COBS 2.1.1R, Sun Life should (as I have found above) have given specific warning about the likelihood Ms L had already been drawn into a scam.

Coming from the provider with which she had an established relationship, this warning would undoubtedly in my view have had more significance for her, for many of the same reasons I've already argued previously. Sun Life's warning would have been specific to what it had learned about FRPS' involvement, and included a matter of significant concern in terms of the unlawful advice she was receiving.

Looking at everything together, not least Sun Life's breaches of regulatory rules but also Ms L's mitigation in terms of her inexperience and manipulation by FRPS, I'm satisfied that there was a greater degree of fault on Sun Life's part in the circumstances of this case. So I consider it appropriate to attribute greater relative responsibility to Sun Life than Ms L for the loss she has suffered. While this isn't an exact science, in the circumstances of this complaint, I propose to reduce Ms L's compensation by 30%. I think this is a fair way to account for Ms L's own contribution to the loss she's suffered.

Ms L's CMC says that by reaching this finding on contributory negligence, it will automatically apply to every other transfer to a SSAS with Bespoke, or providers that operate similarly to Bespoke. But DISP 3.6.4R requires me to consider *"what is fair and reasonable in all the circumstances of the case".* I can't comment what the outcome on other cases might be, as I have only considered the individual circumstances in Mrs L's complaint and that includes her level of legal or financial understanding. The circumstances of each case typically differ and I consider each case on its own merits, so I haven't been persuaded that what the CMC has said makes the conclusions I've reached here unfair or unreasonable.

Putting things right

My aim is that Ms L should be put as closely as possible into the position she would probably now be in if Sun Life had treated her fairly, taking into account that she shares responsibility for her loss.

The SSAS only seems to have been used in order for Ms L to make an investment that I don't think she would have made but for Sun Life's actions. So I think that Ms L would have remained in her pension plans with Sun Life and wouldn't have transferred to the SSAS. To compensate Ms L fairly, Sun Life should subtract the actual value of Ms L's SSAS from the combined notional values of her personal pensions if they had remained with Sun Life. If the combined notional values are greater than the actual value, there is a loss.

Actual value

This means the actual amount payable from the Bespoke SSAS at the date of my Final Decision, including any amount in the SSAS bank account. As a condition of accepting this decision, Ms L will need to give Sun Life her authority to obtain this value from Bespoke. Any overdue administration charges yet to be applied by Bespoke to the SSAS should also be deducted from the actual value.

My aim is to return Ms L to the position she would have been in but for the actions of Sun 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. I consider that is the case with the TRG investment as it's well known that there is no current market for the fractional ownership and rental income has dried up. And I don't think it's realistically possible for Sun Life to acquire the investment from the SSAS when I'm only holding it responsible for 70% of the losses. Therefore as part of calculating compensation Sun Life must give the TRG investment a nil value as part of determining the actual value.

It's also fair that Ms L should not be disadvantaged while she's 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 Sun Life also pays Ms L an upfront sum equivalent to 70% of five years' worth of future administration fees at the current tariff for the SSAS, to allow a reasonable period of time for the scheme to be closed.

Sun Life may ask Ms L to provide an undertaking to account to it for 70% of the net amount of any payments she may receive from the TRG investment in future by withdrawing these from the SSAS. Sun Life will need to meet any costs in drawing up the undertaking. If Sun Life asks Ms L to provide this undertaking, payment of the compensation awarded will be dependent upon provision of that undertaking.

Combined notional value

This is the value of Ms L's pensions if they had remained with Sun Life at the date of my Final Decision. Ms L is now aged 59 and she is still working. So, if she hadn't transferred from the Sun Life plans I consider they would likely have remained intact.

Two of the plans had Guaranteed Annuity Rates (GARs) starting at 6.46% from age 55 onwards (7.13% from age 60) on a single-life, level basis (five years guaranteed) in payment, and two others had GARs starting out at 4.95% from age 60 onwards on a 50% joint-life basis with 3%pa escalation (five years guaranteed) in payment. The remaining £50,000 of Ms L's plans didn't have GARs. The GARs would still appear to have some value based on current market annuity rates, should Ms L take up the option to use them. I consider that option should be restored as part of redressing this complaint, as Ms L would not have lost the GAR option at all if she hadn't transferred the policies. Ms L's CMC has confirmed that she has not withdrawn any tax-free cash or income from the SSAS that would affect this conclusion.

Payment of compensation

There doesn't appear to be any reason why Ms L 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. However, in a case such as this where I've concluded there is contributory negligence, I can't expect Sun Life to reinstate Ms L's policies entirely as if they had never been transferred.

Because of the practicalities of restoring Ms L's ability to exercise a GAR, I'm nevertheless giving Sun Life the option of reinstating a proportionate amount of each of Ms L's former pension policies as if their combined value on the date of my Final Decision was equal to the amount of 70% any loss she has suffered (and those policies perform thereafter in line with the funds Ms L was invested in). Sun Life should also include the relevant GAR options as they apply to the reinstated policies.

Sun Life shouldn't reinstate the plans 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 policies it formerly administered in order to rectify an administrative error that led to the transfer taking place. If Sun Life doesn't consider this is possible, it must explain why in response to this provisional decision.

If Sun Life is unable to reinstate Ms L's pensions and it is open to new business, it should set up a **new** pension plan or plans for a total value equal to 70% of any loss on the date of my Final Decision. The new plan(s) should have features, costs and investment choices that are as close as possible to Ms L's original pensions. If the new plan(s) cannot provide GARs on the same basis as Ms L's former policies where relevant, then the value of the relevant plan(s) will have to be artificially adjusted upwards to account for the loss of the GAR. The adjustment is made by multiplying that part of the total loss relating to the loss of the relevant GAR by the ratio of G divided by C, where:

> G = the GAR as a percentage applying to Ms L's former policy at age 60; and
>
> C = the best annuity rate available on the open market at age 60 on the date of my Final Decision, for an annuity with the same basis in payment (such as spouse's proportion, escalation and guarantee period) as the GAR on Ms L's former policy.

If Sun Life 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 Ms L is entitled based on her annual allowance and income tax position. However, Sun Life'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 Ms L doesn't incur an annual allowance charge. If Sun Life cannot do this, then it shouldn't set up a new plan for Ms L.

If it's not possible to set up a new plan either, Sun Life should pay 70% of any loss, with the same upward adjustment for the loss of GARs above, direct to Ms L. 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 Ms L is likely to be a basic rate taxpayer at the selected retirement age, so a 75% portion of her pension would be taxed at 20% assuming she is entitled to take the remaining 25% portion tax-free. This results in an overall reduction of 15%, which should be applied to the loss amount after the adjustment above and then paid directly to Ms L.

I acknowledge that it may be arguable there has been a potential contribution by Bespoke to Ms L's losses. The 'pension liberation policy' document it sent to Sun Life indicates it would expect the 's.36 advice' to be given by an FCA-regulated firm where pooled and 'UCIS-like' investments were involved. Such a description fits the TRG investment in this case, so there is at least a possibility of saying that Bespoke didn't act in line with those expectations. That might separately suggest Ms L has grounds to raise concerns against Bespoke.

Under our scheme (or in law) there is no requirement for Ms L to have complained to *all* the potential parties that have caused her loss – and I'm satisfied that but for Sun Life's actions Ms L would not have left the regulated environment of her personal pensions and suffered the considerable losses she expects to under the SSAS and TRG investment. In these circumstances I'm satisfied that I can fairly make the award I have above against Sun Life. But I do intend to allow Sun Life, as a condition of paying compensation, to take an assignment of any rights Ms L may have against Bespoke or any other advising firm if it wishes to do so.

If payment of compensation is not made within 28 days of Sun Life receiving Ms L'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.

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

This interest is not required if Sun Life is reinstating Ms L's previous pensions for the amount of the loss as adjusted above – as the reinstated sums should, by definition, mirror the performance after the date of my Final Decision of the funds in which Ms L was invested.

Details of the calculation should be provided to Ms L in a clear, simple format.

My final decision

I uphold Ms L's complaint and require Sun Life Assurance Ltd to compensate Ms L in line with the approach outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms L to accept or reject my decision before 18 April 2024.

Gideon Moore
Ombudsman