

## The complaint

Mr J has complained about a transfer of his Aviva Life and Pensions UK Limited (Aviva) personal pension to a small self-administered scheme (SSAS) in September 2014. Mr J's SSAS was subsequently used to invest in a fractional ownership of overseas hotel property with The Resort Group (TRG). The investment now appears to have little value. Mr J says he has lost out financially as a result.

Mr J says Aviva failed in its responsibilities when dealing with the transfer request. He says that it should have done more to warn him of the potential dangers of transferring, and undertaken greater due diligence on the transfer, in line with the guidance he says was required of transferring schemes at the time. Mr J says he wouldn't have transferred, and therefore wouldn't have put his pension savings at risk, if Aviva had acted as it should have done.

## What happened

On 23 April 2014, Mr J signed a letter of authority allowing Moneywise Financial Advisers Ltd (Moneywise) to obtain details, and transfer documents, in relation to his pension. On 2 May 2014, Moneywise wrote to Aviva, enclosing Mr J's letter of authority and information request. The letter of authority authorised the sending of information to both Moneywise and to First Review Pension Services Ltd (FRPS).

Aviva sent Moneywise the requested information on 8 May 2014. Aviva also wrote directly to Mr J on 8 May 2014 to explain that the letter of authority only allowed it to share information, not to take instructions from either third party. The letter also said,

*"Thinking of transferring your pension?"*

*Most pension transfers are problem-free. However, there are a number of companies who are seeking to persuade pension holders to access their pension funds early – also known as 'pension liberation'. We enclose a leaflet produced by The Pensions Regulator designed to give you some important information about the potential risks to your pension fund from pension liberation."*

Mr J says his interest in the transfer followed an unsolicited approach. He says he was attracted by the prospect of better investment returns by investing in TRG.

In June 2014, a company was incorporated with Mr J as director. I'll refer to this company as Firm A. Mr J subsequently opened a SSAS with Cantwell Grove Ltd. Firm A was recorded as the SSAS's principal employer.

On 9 July 2014 Mr J's transfer papers were sent to Aviva. These were sent in by Cantwell Grove Limited. Included in the transfer papers were:

- completed and signed transfer forms,
- a copy of the Firm A SSAS Trust Deeds and Rules (dated 27 June 2014),
- HMRC registration confirmation for the Firm A SSAS (dated 1 July 2014),

- key information about the scheme (including information that the intention was to invest in TRG and a discretionary fund management (DFM) service, taking advice from Sequence Financial Management Limited),
- a letter signed by Mr N on 9 July 2014 declaring, amongst other things, that he was aware of the dangers of pensions liberation fraud and that he didn't want to access benefits prior to age 55.

Mr J's pension was transferred on 29 September 2014. His transfer value was around £10,600. He was 54 years old at the time of the transfer.

Mr J has explained that he also transferred around £20,000 from a second ceding pension scheme on 18 September 2014.

A total investment in TRG was made by the Firm A SSAS for £21,875, made in two tranches on 19 and 30 September 2014. This investment is described by Mr J as being illiquid and likely to have no actual value. In October 2014 Mr J gave an instruction to invest around £6,700 with a DFM.

In July 2021, Mr J complained to Aviva. Briefly, his argument is that Aviva ought to have spotted, and told him about, a number of warning signs in relation to the transfer, including (but not limited to) the following: the SSAS was newly registered, there wasn't a genuine employment link to the sponsoring employer, the proposed investment was in an unregulated, overseas, high risk investment, the catalyst for the transfer was an unsolicited call and he had been advised by an unregulated business.

Aviva didn't uphold the complaint. It said Mr J had a legal right to transfer and it was satisfied it had conducted an appropriate level of due diligence given the requirements of the time. And that it provided Mr J with suitable warnings about his transfer and required him to sign a declaration prior to agreeing to proceed.

Our investigator was unable to resolve the dispute informally, so the matter was passed to me to decide.

### **What I've decided – and why**

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

I will start by acknowledging that Aviva have given our service consent to look into this complaint so I have not considered whether Mr J made his complaint in time. I am satisfied that there are no other reasons that this complaint is not in our jurisdiction.

### The relevant rules and guidance

Before I explain my reasoning, it will be useful to set out the environment Aviva 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 if certain conditions are satisfied (and a member may also have a right to transfer under the terms of the contract). This came to be exploited, with people encouraged to transfer to fraudulent schemes in the expectation of receiving payments from their pension that they weren't entitled to – for instance, because they were below minimum retirement age.

- On 10 June 2011, the Financial Services Authority (FSA) issued a warning about the dangers of “pension unlocking” and specifically referred to consumers transferring to access cash from their pension before age 55. (As background to this, the normal minimum pension age had increased to 55 in April 2010.) The FSA said that receiving occupational pension schemes were facilitating this. It encouraged consumers to take independent advice. The announcement acknowledges that some advisers promoting these schemes were FSA authorised.
- At around the same time, TPR published information on its website about pension liberation, designed to raise public awareness and remind scheme operators to be vigilant of transfer requests. The warnings highlighted that websites and cold callers were encouraging people to transfer in order to receive cash or access a loan.
- 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 guidance to scheme administrators on dealing with transfer requests in order to help prevent liberation activity happening. The FSA, and the Financial Conduct Authority (FCA) which had succeeded the FSA, endorsed the guidance. The guidance was subsequently updated, including in July 2014. I cover the Scorpion campaign in more detail below.
- In August 2014 the FCA started to voice concerns about the different types of pension arrangements that were being used to facilitate pensions scams. In an announcement to consumers entitled “Protect Your Pension Pot” the increase in the use of SIPP and SSASs in pensions scams was highlighted, as was an increase in the use of unregulated and/or illiquid investments. The FCA highlighted the announcement to insurers and advisers in a regulatory round-up published on its website in September 2014.
- Aviva was subject to the FCA Handbook and under that to the Principles for Businesses (PRIN) and to the Conduct of Business Sourcebook (COBS). There have never been any specific FSA/FCA rules governing pension transfer requests, but the following have particular relevance:
  - 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; and
  - 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.

### The Scorpion guidance

The Scorpion campaign was launched on 14 February 2013, and was initially focused just on pension liberation – namely, the access to pension funds in an unauthorised manner (such as before normal minimum pension age). It is this guidance that would have been relevant when Aviva received the request for information in May 2014 and the transfer request on 9 July 2014.

However, the guidance was updated on 24 July 2014. And this will also be relevant in this case as the transfer was still being processed and then completed after this guidance was published. It widened the focus from pension liberation specifically, to pension scams – which it said were on the increase.

The materials in the Scorpion campaign comprised:

- An insert to be included in transfer packs (the ‘Scorpion insert’). The insert warns readers about the dangers of pension scams and identifies a number of warning signs to look out for. The insert was revised on 24 July 2014 to focus more generally on pension scams.
- A longer booklet issued by TPAS which gives more information, including example scenarios, about pension scams. Guidance provided by TPR said this longer leaflet was intended to be used in ongoing communications with members so that they could become aware of the scam risks they were facing. This was also revised on 24 July 2014 in line with the evolving understanding in the industry of pension scams.
- An ‘action pack’ for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should “watch out for” various warning signs of a scam. If any of the warning signs applied, the action pack provided a check list that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request. Where a transferring scheme still had concerns, they were encouraged (amongst other things) to contact the member to establish whether they understood the type of scheme they were transferring to and – where a member insisted on transferring – directing the member to Action Fraud or TPAS.

In deciding on the appropriate actions to take when dealing with a transfer request, a ceding scheme needed to be mindful of the material in the Scorpion guidance in its entirety rather than treating the guidance as a series of discrete steps to be worked through in isolation. TPR issued the guidance under the powers at s.12 of the Pension Act 2004. Thus, 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. So, the tenor of the guidance is essentially a set of prompts and suggestions, not requirements.

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 the Financial Services and Markets Act (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 the above that the contents of the Scorpion guidance was essentially informational and advisory in nature and that deviating from it 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 was an important moment in so far 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. The guidance was 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 firms when they dealt with transfer requests in order to prevent these abuses and save their customers from falling victim to them.

In those circumstances, I consider firms which received pension transfer requests needed to pay regard to the contents of the Scorpion guidance as a matter of good industry practice. It means February 2013 marks an inflection point in terms of what was expected of personal pension providers dealing with transfer requests as a matter of fulfilling their duties under the regulator's Principles and COBS 2.1.1R.

#### What did personal pension providers need to do?

For the reasons given above, I don't think personal pension providers necessarily had to follow all aspects of the Scorpion guidance in every transfer request. However, 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, and in my view good industry practice, for pension providers at least to follow the substance of those recommendations. With that in mind, I take the view that personal pension providers dealing with transfer requests needed to heed the following:

1. As a first step, a ceding scheme needed to check whether the receiving scheme was validly registered.
2. The Scorpion insert provided an important safeguard for transferring members, allowing them to consider *for themselves* the scam threat they were facing. Sending it to customers asking to transfer their pensions was also a simple and inexpensive step for pension firms to take and one that wouldn't have got in the way of efficiently dealing with transfer requests. So, all things considered, I think the Scorpion insert should have been sent as a matter of good industry practice with transfer packs and direct to the transferring member when the request for the transfer pack had come from a different party.
3. I also think it would be fair and reasonable for personal pension providers – operating with the regulator's Principles and COBS 2.1.1R in mind – to ensure the warnings contained in the Scorpion insert were provided in some form to a member before a transfer even if the transfer process *didn't* involve the sending of transfer packs.
4. The Scorpion guidance asked firms to look out for the tell-tale signs of scams and undertake further due diligence and take appropriate action where it was apparent their client might be at risk. The guidance points to the warning signs transferring schemes should have been looking out for and provides a framework for any due diligence and follow-up actions. Therefore, whilst using the action pack wasn't an inflexible requirement, it did represent a reasonable benchmark for the level of care expected of transferring schemes and identified specific steps that would be appropriate for them to take, if the circumstances demanded.
5. 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.

#### The circumstances surrounding the transfer and Mr J's recollections

In Mr J's complaint he has explained that he was cold-called and offered a free pension review. He explains that this was with a view to getting better returns on his pension.

Mr J signed a letter of authority that gave permission to his pension providers to disclose information to Moneywise and FRPS. I understand that his testimony is that he only recalls speaking with representatives from FRPS. But both firms were clearly listed on the authorisation that he signed. So I think that he most likely had an awareness of both businesses. No other corroboration has been provided by Mr J in relation to who he personally corresponded with in the course of the actions he took leading to his transfer. Based on what I've seen, I accept that Mr J, more likely than not, had most of his interactions with FRPS on a face to face basis. They had his authority and this service have received consistent evidence on many complaints, including from speaking to individuals directly, that FRPS conducted meetings with them prior to the transfers taking place.

Mr J appears to have been aware of the intended investment in TRG. Including the details that it involved investing in a fractional property in a holiday development in Cape Verde. He explains that he was promised good returns. So I think that Mr J had a basic understanding of what the investment was and that he was being led to believe that it could produce better investment returns than his existing pension schemes.

The wording of Mr J's complaint suggests that Aviva corresponded directly with Moneywise, FRPS and Cantwell Grove and did not correspond directly with him. In contradiction of Aviva's position, he said that he did not receive a copy of the Scorpion insert and he was not presented with any warnings about the transfer.

What did Aviva do and was it enough?

*The Scorpion insert:*

For the reasons given above, my view is that personal pension providers should, as a matter of course, have sent transferring members the Scorpion insert or given them substantially the same information.

I have considered the written testimony that has been provided to us for Mr J. It would suggest that he wasn't provided with the information that I've referred to above as being an expected part of the transfer process at the time this happened. But I have also weighed that testimony against the documentary evidence that Aviva have provided.

Aviva have shown us that, in addition to responding to Moneywise on 8 May 2014, it wrote a letter directly to Mr J. It was correctly addressed to Mr J's address. Most correctly addressed post is delivered, so I think that, on a balance of probabilities, Mr J received this letter. It was from his pension provider and related directly to the matter of his pension transfers. So I think that he would also, most likely, have read it. I referred earlier to a passage of text in this letter where Aviva referred to what I've called the Scorpion insert. So I think that it was most likely included in this letter to Mr J. Given the timing of the request and correspondence it would, most likely, have been the Scorpion insert produced as part of the February 2013 campaign. On balance, I think that Aviva acted appropriately in writing directly to Mr J and that it did send him the Scorpion insert.

That Scorpion insert was focussed on warning consumers against falling victim to scams claiming that cash could be accessed from pensions early. This doesn't seem to have been a feature of what Mr J was being recommended, but the insert did provide four warnings about what to watch out for. That included being cold called which is something that Mr J said was a feature of his circumstances. And the insert listed steps that he could take to

avoid becoming a victim, which included checking that an adviser was regulated and speaking to an adviser not associated with the proposal.

#### *Due diligence:*

I explained earlier why I think that firms needed to be on the lookout for signs of scams and to take appropriate action where they were aware of such risks.

The transfer request that Aviva received contained quite a bit of information. It meant that Aviva were aware that the firm A SSAS was newly established and it was aware that there appeared to be an intention to use the transferred funds to invest in TRG and a DFM arrangement. The key information that Aviva had been sent indicated that it was also provided with a leaflet for the TRG investment.

It does not appear that Aviva contacted Mr J to ask him for further information about this transfer. But I think that wasn't unreasonable given the fact that it appears to have concluded that there were warning signs present in this case, and in others where transfers were being made to Cantwell Grove. I say that because later on in July 2014, Aviva wrote to HMRC's Pension Schemes Service, listing five Cantwell Grove SSASs including his, and asking HMRC to confirm whether it had information to suggest the schemes were being used for pension liberation.

In advance of that, Aviva wrote to Mr J to set out its concerns on 16 July 2014. I again acknowledge that Mr J's testimony is that he did not receive correspondence from Aviva. But this letter was also correctly addressed to him. And it included a declaration that it required him to sign before it would proceed with the transfer. And I have seen evidence that he signed that form on 4 August 2014 to acknowledge the warnings in the letter. So I think that Mr J, more likely than not, did receive this letter from Aviva. And I also think he ought reasonably to have read it in order to have signed the declaration.

The letter set out the following concerns:

#### **Cold calling**

Aviva said that it understood that the transfer may have been prompted by an unsolicited phone call from an introducer company. It explained in a clear way that this was not the way most pension transfers happened. And it clearly recommended that Mr J take regulated financial advice and how he could check that an adviser was regulated. And it included a leaflet for The Pension Advisory Service. I think that this represented a warning that ought to have appeared relevant to Mr J's circumstances.

#### **Mr J's responsibilities**

In this section Aviva clearly highlighted the issues with the Firm A SSAS, including the costs associated with having his own limited company. It explained that he would be a trustee of the SSAS and briefly what that would entail as well as indicating where to go for more information. I think that this ought to have made Mr J aware that this transfer was not a normal pension transfer.

#### **Charges**

Aviva demonstrated a more in depth knowledge of Cantwell Grove here as it was aware that Mr J was likely to have to pay an upfront charge of at least £1,500 and ongoing fees of £600 a year.

## Investments

Lastly it referred to the intended property investment in Cape Verde. It did not comment on the suitability of the scheme. But it provided a link to the Foreign and Commonwealth Office to find out more about the risks inherent in investing in Cape Verde. And quoted an extract from that site that suggested British nationals had experienced serious problems buying property in Cape Verde.

I think this was a very fair way to draw Mr J's attention to potential concerns with this given the fact that Aviva was not able to provide any specific financial advice on investment choices.

The Scorpion guidance included an Action Pack. It wasn't a mandatory document but provided a reasonable way for firms to put in place adequate measures to protect customers. And, given the additional information that Aviva sent Mr J, I think that Aviva demonstrated that it was aware of the potential risks of this transfer.

Given the overall purpose of the Scorpion guidance and the Action Pack I think that Aviva took reasonable steps to inform Mr J of the risks it had identified. I think it was incumbent on Aviva to highlight those concerns and provide Mr J with the information necessary to be able to avoid becoming a victim of a scam.

The biggest risk to him was of his being advised by an unregulated party. And whilst Aviva may not have gotten as far as determining who Mr J considered was advising him (likely FRPS in this case) and whether they were regulated, it provided clear guidance on the importance of that and how Mr J could check for himself. This gave rise to the potential for unsuitable investment advice, linked to an investment Aviva was warning him could cause him significant problems and cost. And I think Aviva's reaction to its knowledge of the intended overseas investment was also reasonable. It clearly flagged its concerns and signposted how Mr J could find out more information about that.

On the list of declarations that Mr J signed was the following:

*"I understand that my pension fund is currently protected by the UK's Financial Services Compensation Scheme, so that in the event of the failure of Aviva to meet its obligations I would still receive at least 90% of my benefits. I realise that if I proceed with my transfer to my SSAS administered by Cantwell Grove and I invest in overseas property, then my pension fund will not be protected by the Financial Services Compensation Scheme, and so by agreeing to proceed with the transfer, I accept the risk that if anything was to go wrong, I could lose part or all of my pension fund in the future"*

Given all of the information Mr J received, and the declaration he'd been asked to sign, it ought to have been very clear to Mr J that there were potential risks with this pension transfer. I think Aviva had taken reasonable steps to highlight those and to make Mr J aware of where to find out more information. It had provided the Scorpion insert that provided the link to contact Action Fraud in response to concerns. So I think that Aviva's actions were broadly sufficient given the guidance in place at that time.

Even if I did consider that Aviva should have made further enquiries of Mr J including about who was advising him, I'm not persuaded that the subsequent course of events would have differed. Aviva might have been able to identify that Mr J considered FRPS (rather than Sequence or Moneywise) was advising him to make the transfer, and that this was an unregulated firm. It could then have warned him that it was an offence under the law for an



unregulated firm to provide advice on regulated products such as transferring a personal pension.

However, the best evidence I have as to how Mr J would have reacted is how he did react to the specific information Aviva told him about the investment he was making lacking regulatory protection and being at risk of significant charges and/or loss. Mr J had been told that as a result of his investment being unregulated, he could lose everything and not be able to claim from a compensation scheme for the loss of that investment. He'd been told that it was also important to check that his adviser was regulated, and how to do so. So in that context I think Mr J ought to have been aware of the consequences of dealing with FRPS without checking it was regulated (which had he done so, it was not).

I'm also concerned that Mr J does recall some of the events, including signing the letter of authority to contact Aviva and speaking to someone in his home, but has no recollection of receiving not one, but two, letters from Aviva giving him these warnings and requiring him to sign the disclaimer. As I consider the letters were highly likely to have been received that suggests to me that Mr J didn't pay the attention he should have done to these letters at the time.

I have seen that Mr J has told us that he was unemployed at the time. And that the relevance of that is that he did not in fact have a statutory right to transfer. This is because, as was subsequently confirmed by the High Court in February 2016, someone without earnings from any source whatsoever has no such right. It's interesting that Mr J has referred to this point because it somewhat suggests that rather than Aviva being able to talk him out of transferring, it would've had to decline his right to do so. This somewhat supports the position I've taken above. But in any case, I don't think Aviva's enquiries would reasonably have got as far as establishing that Mr J had no other earnings in addition to being a director of Firm A.

Aviva had already identified, from what it knew about this and likely other transfers to Cantwell Grove, that Firm A was simply set up in order for Mr J to establish a SSAS, and negated the purpose of it asking him for any further information on the nature of his employment, along the lines of the action pack. In my view Aviva provided warnings to Mr J which it would reasonably have expected would lead to him changing his mind if he wasn't willing to take the risks that it and other parties, such as TPAS, detailed to him.

Mr J made a reasonably informed decision to transfer in light of the risks Aviva outlined to him, and in the circumstances of this case I consider it would have gone beyond what was reasonably expected of Aviva at that time to attempt to find further ways in which it could try to block his transfer.

For the above reasons I think that Aviva has demonstrated that its engagement with the Scorpion guidance meant it broadly complied with principles 2,6,7 and COBS 2.1.1R. It directly engaged with Mr J in a clear way. The information that it sent him ought to have seemed relevant to the specific circumstances of his transfer request and ought to have highlighted concerns that I think it would be reasonable to expect him to have acted upon. Anything further Aviva might have done to caution Mr J is unlikely, on the balance of probabilities, to have altered his decision to transfer.

**My final decision**

For the reasons given above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 16 July 2024.

Gary Lane  
**Ombudsman**